Hassan Vakilian

Constitutional Utopianism: a Case Study of the Constitution of the Islamic Republic of Iran

Hassan Vakilian

Hassan Vakilian is assistant professor of public law at Allameh Tabataba'i University (ATU), Tehran, Iran. He received his PhD degree in legislative studies from Hull University in UK in 2008.

✉ h.vakilian@atu.ac.ir

https://orcid.org/0000-0003-3453-8354

This paper will examine constitutional utopianism in the specific case of the Constitution of the Islamic Republic of Iran. Given that utopianism in constitution-making is inevitable, some constitutionalists place an emphasis on pragmatic utopianism as the acceptable approach towards constitutional utopia. Also, it is stated that the consistency of constitutional values and principles, mostly derived from constitutionalism, is a necessary element for a possible constitutional utopia. Based on this theoretical framework, the Constitution of the Islamic Republic of Iran is examined as a case study. It is demonstrated that, instead of one constitutional utopia, we can find three inconsistent utopias intertwined in a single constitutional text: a constitutional utopia based on Western Constitutionalism, an Islamic utopia and a leftist utopia. Through examples taken from the preamble and articles of the Constitution, the inconsistency of these utopian worlds is demonstrated. Finally it is concluded that Iranian Constitution of 1979, and its amendments in 1989, may be categorized as failed constitutional utopianism.

1. Introduction

Human beings have sought a better life since ancient times. Despite all differences, Plato's *Republic*, St Augustine's *The City of God*, More's *Utopia* and Al-Farabi's *Al-Madina al-Fadila* (The Virtuous City) and the like, are the best examples of this innate and perennial tendency. This desire towards a better society has inspired many thinkers, philosophers, poets, artists and scientists to appeal to the imagination for creating their preferred and perfect world in their minds. Dissatisfaction with present conditions of life and hope for making life better in the future have led to various kinds of utopianism insofar as changing human nature and the entire world were demanded, at times, by some utopians. For example Hafez Shirazi, a major 14th century Persian poet, in one of his well-known poems wished for such a world:

My heart is full of pain, alas, a remedy!
My heart is dying of loneliness; for God's sake send
me a companion!
Whose eyes get rest of this fast-moving world?
O, cup-bearer, give me a glass of wine, so that I may
rest a moment!
I said to a wise one, look at these conditions! He
laughed and said
A difficult day, a strange affair, a perplexing world!

In the world of dust, no human being comes to hand
It is necessary to build another world and to make
Adam anew

This is an example of a desire to change humanity and the world at the macro level, regardless of human limitations. But for the purpose of this paper, we are not considering this type of utopianism which is prevalent in certain genres of literature or art. To put it in another way, those types of utopianism which do not go beyond mere speculation about and the depiction of a better life and society, regardless of natural human limitations, are factored out in constitutional theories. Solum describes those ideal constitutional theories that 'rely on false assumptions about human nature or institutional capacities in order to argue for constitutional arrangement that exist only in nomologically inaccessible worlds' as bad utopianism.[1] Therefore, we are talking here about utopia as a good place.

This type of utopianism is 'human centered, not relying on chance or on intervention of external, divine forces in order to impose order on society'.[2] So, the heaven or paradise which is promised by the most religions to their believers and followers is not addressed here either.

Among these different versions of utopias, we are considering possible alternatives for the present life which might be created by human reason and not just an abstract, fictional, dreamlike and impossible world which is not even partially achievable. As Loughlin mentioned, the role of the utopia 'is to highlight contingency of the existing order by offering a vision of what might be. But a utopia is not a mere dream'.[3] In this sense, although the main function of utopia is to provide criteria for evaluating and criticizing the status quo, but this is not the only function. This understanding of utopia guides people to reorganize and recreate the order of their life and society. In this regard, one can think about utopianism as a program for social change and political reform. Vieira called this kind of utopia a 'pragmatic utopia'[4], while Sargent called it a 'concrete utopia'.[5] Sargent explained his idea as follows:

> *Bloch says that 'we never tire of wanting things to improve' and that 'the pull towards what is lacking never ends', but such wanting lacks direction, it must become a drive or a need. It must move from what Bloch calls 'abstract utopia' to 'concert utopia' between utopias disconnected from and connected with human reality.*

In sum, according to what is said, utopianism in a broad sense, is a label for those types of thoughts that intend to bring about a better society while utopia is an imaginary society based on specific types of ideals which not only can be used for criticizing real and present life but which also causes certain actions that encourage sudden, or gradual, changes towards a better life. According to this understanding of utopianism, ideal constitutional theory is inevitably utopian but it would not be careless of creating a possible better life for the citizens. Therefore, we are considering concrete or pragmatic utopianism as appropriate type of utopianism in constitutional thinking.

2. *Constitutional utopianism*

Constitutions are ubiquitous phenomena in our world and most countries around the world, with

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1 Lawrence B Solum, "Constitutional Possibilities," *Illinois Public Law and Legal Theory. Research Paper*, no. 06–15, 2007, 20.

2 Fabio Vieira, "The Concept of Utopia," in *The Cambridge Companion to Utopian Literature*, ed. Gregory Claeys (Cambridge: Cambridge University Press, 2010), 7.

3 Martin Loughlin, "The Constitutional Imagination," *The Modern Law Review*, vol. 78, issue 1 (2015), 13.

4 Vieira, "The Concept of Utopia", 22.

5 Lyman Tower Sargent, *Utopianism: A Very Short Introduction* (New York: Oxford University Press, 2010), 97–98.

different political regimes, have either a written or unwritten constitution. As Parpworth puts it 'a constitution can be defined as being a body of rules which regulates the system of government within the state'.[6] In most constitutional law textbooks similar definitions are repeated in one way or another. But the story of the constitution is more complex than this. It might be said constitutional rules can be categorized into

be realized if these fundamental values and principles interact consistently.

So, what are these constitutional ideals? What are the characteristics of the imaginary constitutional society? A comparison of the constitutions of different countries shows that they are permeated by ideas, ideals and ideologies. Regarding ideals Frankenberg explains:

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two broad norms: first, those norms that establish governmental organizations and bodies and, second, those that recognize fundamental rights and guarantee them. These two types of rules are based on certain values and principles that interact with each other in a particular way for the achievement of an ideal society. As Sartori puts it:

> all over the Western area, people requested or cherished the constitution because this term meant to them a fundamental law, or fundamental set of principles and correlative institutional arrangement which would be restrict arbitrary power and ensure a limited government.[7]

However, constitutional ideals are not only negative in that limiting and controlling power of the state, as Sartori puts it, but they are positive too. It means that the state has duty to advance the well-being of its members and to provide positive conditions for people that enable them to pursue their private ends. In fact, constitutional ideals whether positive or negative may

> ideals capture the programmatic, utopian or at any rate speculative vision believed to be enshrined in a constitutional document. They signify collective goals to be pursued like maximum individual freedom or high standard of equality, a government of laws and not men or a people's democracy...[8]

As Viera expresses this, 'utopia belongs to the realm of the ideal'[9] and this idealistic aspect of constitutions might be called constitutional utopianism. Apparently, utopianism in this sense is inevitable in constitution laws because most of them, to some degree or other, promise a better society within which freedom, equality, prosperity, the rule of law, respect for human rights, accountability and the responsibility of holders of power are guaranteed. Herman in his article on Constitutional Utopianism, an exercise in law and literature, wrote that a constitution contains the preferred ideals of a given society along with a government organized in such a way as to reach to these chosen

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6 Neil Parpworth, *Constitutional and Administrative Law* (Oxford: Oxford University Press, 2012), 3.

7 Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *The American Political Science Review*, vol.56, no. 4, (1962), 855.

8 Gunter Frankenberg, "Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative," *International Journal of Constitutional Law*, vol.4, iss. 3, (2006), 440–441.

9 Vieira, "*The Concept of Utopia*," 19.

ideals.[10] He believes that 'this is what More was offering in Utopia too: the construction of a society—albeit an imaginary society—built on a choice of ideals.' It seems this is exactly what designers of constitutions do: They select ideals and provide the appropriate institutions for attaining these ideals. However, it does not mean that the founders and designers of constitutional laws necessarily chose reasonable, consistent and achievable ideals.

tain an abstract vision of utopia instead of a concrete or pragmatic utopia.

Therefore, it is better to ask: What are these consistent and possible constitutional ideals? What does consistency mean in constitutional context? It seems that constitutional ideals comprise constitutional values and principles and, together, they make up an imaginary society, namely a constitutional utopia. Then, for understanding a constitutional utopia we need at

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Distinguishing theoretical from obtainable ideals, Barber stresses those constitutional ideals that are actually achievable:

> they are ideals that have been shaped by the limitations of human nature and society. It is at least possible that a state could successfully realize all of the [constitutional] principles, and that an ideal constitution could be created.[11]

When Barber states that constitutional ideals are achievable this implies that they *should be* achievable. Hence, it is apparently possible to design a constitution full of impossible or even rival ideals. In other words, in one way or another, a given constitution may con-

first to understand the nature and characteristics of the constitutional values and principles which were gradually formed during the age of Enlightenment under the rubric of constitutionalism.

3. Constitutional Utopia and Constitutionalism

As has been mentioned, constitutions are familiar phenomena in our world and every country has either a written or an unwritten constitution. However, one cannot claim that these countries are necessarily constitutional. As Sartori puts it, every state has constitution but only some states are constitutional.[12] This means that we should distinguish between constitutions as they are and constitutions as they ought to be. In order to understand this difference, one needs to be able to identify the fundamental values, principles and institutional structures which have been created during the process of constitutionalism. For better

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10 Susan N. Herman, "Constitutional utopianism," *Utopia500* (December 2016), 93–94.

11 Nick W. Barber, *The Principle of Constitutionalism* (Oxford: Oxford University Press, 2018), 231.

12 Sartori, "Constitutionalism", 856.

understanding of these values and principles some points are noteworthy:

First, like utopianism, constitutionalism in the modern sense is also an offspring of the Enlightenment that was introduced into Western Europe. Consequently, the main features of the Enlightenment movement of the 18th century which was secular, scientific and rational, were also reflected in constitutional values and principles. As Adler has pointed out:

> Enlightenment or 'modernist' thinking places the individual at the center of the political process and regards reason as the key to human happiness. One task of the Enlightenment was to justify state power by reason. As an impersonal and neutral form of organization, the state, in its ideal form, treat all person equally and release the individual from dependence upon customary, religious and traditional ties.[13]

ideal, yet women did not obtain the right to vote till 1920 in United States and till 1944 in France.[14]

Even today in the twenty-first century, some constitutional ideals still remain unachievable in democratic countries, let alone in those that are not democratic. Dahl rightly mentioned that, though the expansion of democratic ideas since the eighteenth century, 'the gap between the goal of political equality and its actual achievement is huge[15]' even in democratic countries.

Second, although the constitutional movement developed in Western Europe and North America, it was not limited to those regions and, now, most countries in the world have different kinds of constitutions through which these universal values and principles are recognized in addition to their national values, identity and history. In fact, constitutions are not purely a national or domestic matter and they no

> **It is very important to know that there would be consistent interactions between the values and principles enshrined in constitutionalism.**

These, then, are a set of ideals which gradually developed during the age of the Enlightenment and, obviously, at the beginning they appeared utopian and the realization of these ideals took a long time. Even now they remain impossible to achieve in some parts of the world. Therefore, when we think about the constitutional utopia, we should consider its relativity. As Rosenfeld noted, although some of these ideals were mentioned in United States and French constitutions, for long time they were not realized:

> to take but one example, equality between men and women is clearly prescribed by the Enlightenment

longer simply represent national identities and distinct events of their own nations. As expressed by Backer constitutions do not merely represent the individual will of a political society but, under the influence of natural constitutionalism, there are universal values and principles that are common features of the constitutions around the world. Similarly, Venter noted that:

> the history of modern constitutionalism has reached a global fullness of development, from which emanates a distinct set of commonalities, principles, standards

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13 Jonathan M Adler, *General Principles of Constitutional and Administrative Law* (Hampshire: Palgrave Macmillan, Hampshire, 2002), 17.

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14 Michel Rosenfeld, "Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religion Revival?" *Cardozo Law Review*, (2009), 23334.

15 Robert A Dahl, *On the Political Equality* (Yale University, 2006), 1.

and values that have gained currency in constitutional dialogue all over the world.[16]

Some writers refer to the global convergence of constitutions in terms of these values and principles[17]. Backer mentioned that constitutional values provide the criteria for judging constitutions as legitimate or illegitimate and serve as the foundation of constitutionalism.[18]

Third, it is very important to know that there would be consistent interactions between the values and principles enshrined in constitutionalism. It seems that, within the context of constitutionalism, the ultimate purpose of government is the well-being of people and those values and principles are intended to advance this ultimate purpose. As will be discussed below, there would be consistency between constitutional values and principles and also among the constitutional principles. In fact, consistent interactions of values and principles among other things can guarantee the desired outcomes of constitutional laws. As Barber states: '[t]he interconnectedness of the principles entails that no single principle can be fully realized without the demand of the others also having been satisfied: the principles come as a package'.[19] This implies that not every constitutional order will be conducive to the desirable outcomes of constitutionalism such as democracy, observing human rights, social and economic rights, labor rights, religious liberty, secularism, combatting corruption and the like. Therefore, consistency matters.

3.1. *Values of Constitutionalism*

It was mentioned that Constitutionalism as one of the main important products of the Enlightenment and, in turn, is based on those philosophical doctrines (*jus naturale*, contractarianism and liberalism) that mostly had deep roots in this age. Also the Enlightenment was a human-centered movement and modern constitutionalism, which was created during this period, consequently deems human dignity to be a fundamental value. Worthy of note is that these values bring about at least three functions: 'they regulate by directing human action at a desired target, they enable legitimation and justification of actions in their relief function and they simplify decision making.[20]

Scholars like Murphy[21] introduce human dignity as fundamental value of constitutionalism. He believes that both democracy and constitutionalism are based on human dignity while Nishihara[22] according to the venter's hierarchical systems of values considers human dignity to be a primary value of constitutionalism and equality and freedom as supporting values. He deems democracy and rule of law as the structural values.[23] Backer considers protections of the individual as a substantive value of constitutionalism.[24]

Loughlin stated that 'utopianism seeks realization today mainly through the claims of cosmopolitanism and universal human rights[25]' Through studying constitutional values in a few constitutions around world, Venter concluded that human dignity, human rights, popular sovereignty, democracy, justice and equality frequently appeared in constitutions as common values[26]. Therefore, it might be said that these are values that modern constitutions should be based upon from a normative point of view.

16 Francois Venter, "Utilizing Constitutional Values in Constitutional Comparison," *Potchefstroom Electronic Law Journal*. no. 4 (1), 2001, 1.

17 Jiunn Ron Yeh and Wen Chen Chang, "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions," *Penn State International Law Review*, vol. 27:1, (2011), 197.

18 Larry Catá Backer, "From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems," *Indiana Journal of Global Legal Studies*, vol. 16, iss. 1, Article 5 (2009), 676.

19 Barber, *Principle*, 219.

20 Christian A. Bauer and Harald Bolsinger, "The Value of Constitutional Values: With Examples of The Bavarian and Indian Constitution," *Tattva—Journal of Philosophy*. no. 6. (February 2014), 66–67.

21 W. F Murphy, "Constitutions, Constitutionalism And Democracy," in *Constitutionalism and Democracy: Transitions in the Contemporary World*, eds. D. Greenberg et al. (Oxford: Oxford University Press, 1993), 3.

22 Hiroshi Nishihara, "The Significance of Constitutional Values," *Potchefstroom Electronic Law Journal*, no. 4. (2001), 5.

23 Nishihara, "Significance of Constitutional," 2.

24 Backer, "From Constitution to Constitutionalism," 693.

25 Loughlin, "The Constitutional Imagination," 24.

26 Francois Venter, "Utilizing Constitutional Values in Constitutional Comparison," *Potchefstroom Electronic Law Journal*, no. 4 (1), (2001), 33–44.

3.2. *Principles of Constitutionalism*

Constitutionalists rarely define the principles of constitutionalism as a separate concept distinguished from values. They usually use it interchangeably such terms as 'values', 'characteristics', 'dimensions', 'elements' and the like.

As a partial and idealized model for the state, constitutional principles relate directly to the institutional structure of the state. For example, as a constitutional principle the separation of powers requires an independent judiciary. This structural principle ultimately provides autonomy for individuals and is, ostensibly, an important dimension of human dignity. The rule of law and judicial review also provide for the equality and liberty of citizens. According to McIlwain's normative conception of constitutionalism, Sturm[27] identifies five basic principles of constitutionalism, as follows: First, governing according to law or the rule of law and, second, democracy or popular consent; in other words, the fundamental law according to which people are governed should be based on the consent of the citizens. Third is the separation of the public and private spheres of life, which indicates that the realms of governmental authority or public power should be distinguished from the rights and liberties of citizens. Four, the rights and liberties of citizens should be protected by independent courts. And, five, government bears a responsibility towards its citizens and the people has the right to exercise control over the holders of power. According to these principles, the following represent the fundamental claims of constitutions: first, to guarantee the rights of men; second, to divide political power between different branches of government; third, to improve the social conditions of people; and, finally, to guarantee equality and right of all people to participate in political life. As Buratti mentioned, constitutions should provide these promises *consistently*.[28] Weale believes that the fusion of rule of law, protection of fundamental rights

and securing property rights are all principles of constitutional government, and that making public policy according to majority rule as a fourth principle turns it into a constitutional democracy. He notes that:

> [t]*he fusion of these doctrines in ideals and institutions on constitutional democracy would not be problematic if the theoretical assumptions and practical implications of the two sets of principles were consistent with one another.*[29]

Barber notes that, in addition to the interplay between constitutional values and principles, the principles themselves are coherent; this means that 'our understanding of any one of the principles, conditions, and is conditioned by our understanding of the others'.[30] Taking constitutional principles as a package, the function of the constitution is not simply to introduce an ideal society through the prescription of any principles regardless of their capacity for co-existence. So, it is irrational to prescribe values and principles that are irreconcilable. Moreover, it is unreasonable to celebrate values or principles in a constitution which are apparently in conflict with those values and principles that form core elements of constitutional thinking. For example, avoiding concentration of powers is an undeniable principle of constitutionalism and, clearly, is not compatible with absolutism. Waldron notes that:

> *the idea* [constitutionalism] *is that the concentration of power leads to its abuse and this is why the power-dispersing, the power-slowing, and the power-checking elements of constitutional structure are thought to be important.*[31]

To take another example, in the context of constitutionalism: As some writers have mentioned protection of the values of personal freedom and autonomy is paramount. Allied to this, the idea that everyone deserves

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27 Douglas Sturm, "Constitutionalism: A Critical Appreciation and an Extension of The Political Theory of C.H MaIlwain," *Minnesota Law Review*, no. 54, (1969), 228–239.

28 A Burrati, *Western Constitutionalism, History, Institutions, Comparative Law* (Springer Nature Switzerland AG & G.Giappichelli, 2019), 3.

29 Albert Weale, "Constitutional Design," in *Encyclopedia of Democratic Thought*, eds. Paul Barry Clarke, and Joe Foweraker, (London: Routledge, 2001), 116.

30 Barber, Principle, 116.

31 Jeremy Waldron, "The Rule of Law," *Stanford Encyclopedia*, 2016.

equal respect as an autonomous and thus free person is the most genuine form of morality which should be protected by the constitution and its concomitant rules and legislation.[32]

These are constitutional ideals and reasonable founders of any given constitution would not prescribe inequality either explicitly or implicitly by giving special privileges to a particular group of people because of their gender, ethnic, faith, color, social class, and so on. In other words, the equality of citizens based on human dignity is a universal constitutional principle and every constitution should explicitly acknowledge that.

4. Utopianism in the Constitution of the Islamic Republic of Iran

Utopianism has deep roots in Iranian political philosophy. Al-Farabi (872–950 CE) who is regarded as the founder of political philosophy in the Islamic world designed his ideal society (the 'Virtuous City') mostly inspired by Plato. Like Plato, the core element of this utopian city of Al-Farabi was justice; however, he added certain additional elements of Islamic political thought such as leadership or 'Imamate', and the concepts of goodness and perfection.[33]

The contemporary political system in Iran as it is articulated in the Constitution of the Islamic Republic is not far from Al-Farabi's ideal society since it aims to establish a virtuous society through which people can reach absolute goodness and happiness. However, from Al-Farabi's point of view he did not just consider happiness for the current life, but also for the afterlife as well. In his Virtuous City, people are under the leadership of an absolute spiritual leader and, under his direction, the aforementioned happiness can become realized[34]. This concept of the ideal state was clearly formulated in the Constitution of Islamic Revolution of 1979 and its amendment of 1989. An Islamic utopia or an Islamic community within which Islamic rules are rigorously implemented by political institutions under leadership of a spiritual man (not a woman) comprises the core element of the Iranian Constitution.

Nevertheless, Islamic political thought is not the only source of inspiration of Iran's current political system. Modern Western political thinking has been combined with traditional beliefs regarding the desirable society since over a century ago when Iranians became aware of developments in the Western world. During the second half of the nineteenth century, a new middle class emerged in Iran who became familiar with new Western ideas through traveling to and education in Western countries. They introduced new ideas to Iranian society, such as the inalienable rights of people (instead of the divine rights of kings to govern), liberalism, secularism, nationalism and socialism. 'They venerated no the shadows of God on earth but the triumvirate of Equality, Liberty and fraternity[35].' These new ideas found their way into the first Iranian Constitution of 1906 and its Supplementary Constitution as a result of the Constitutional Movement. At the same time, under the influence of high-ranking clergy who represented the traditional tendency, Article 2 of the Supplementary Constitution of 1907 stipulated that a Supreme Committee of at least five *Mojtahids* (high-ranking clergy) must examine the enactments of the Parliament to ensure their consistency with Sharia laws. This Committee would remain in place until the appearance of the Hidden Imam or Imam Mahdi. Although this part of constitution of 1906 was never implemented due to subsequent political pressures, this duality of approach extended to Iran's Islamic Revolution of 1979. In fact, '[t]he traditional gospel of Shi'ism had been incorporated into a modern structure of government derived from Montesquieu'. After the Islamic Revolution of 1979, this duality rose again while religious and Western secular constitutional values and principles were simultaneously recognized in the Constitution. As a consequence, the political system of the Islamic Republic of Iran is neither purely Islamic nor is it a com-

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32 Maurice Adams, Ernst Ballin and Anne Meuwese, "The Ideal And The Real in The Realm of Constitutionalism And The Rule of Law: An Introduction," in *Constitutionalism and The Rule of Law, Bridging Idealism and Realism*, eds. Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballini (Cambride: Cambridge University Press 2017), 12.

33 Zahra Golnaz Manteghi Fasaei, *Taking a Look at The Concept of Utopia in the Political Philosophy of Plato and Farabi*, (2019), 7.

34 Hojatollah Asil, *Armanshahr Dar Andishe-e Irani* (Tehran: Nashr-e-Nay, Tehran, 2014), 212–213.

35 Ervan Abrahamian, *Iran. Between Two Revolutions* (Princeton: Princeton University Press, 1982), 50.

pletely modern because the political power behind the Islamic Revolution of 1979 comprised of many opposition groups from different strands, including liberals or constitutionalists, leftists, nationalists, secularists and Islamist groups who followed their own imaginary and ideal state and society. However, two of these groups—the Islamist and leftist groups—provided the main power of the revolutionary engine and, naturally, played more important role in establishing the new constitutional order. Due to the political dominance of these two prominent groups during the drafting and enactment of the post-revolutionary constitution, the complexity of the constitutional text should be understood in the light of those values and principles that are partly recognized in the Constitution.

The Islamists, led by Ayatollah Khomeini, emphasized an Islamic state. During the preparation of first draft of the Revolutionary Constitution he expressed that, from his point of view, the constitution of an Islamic Republic means Islamic law[36]. As Gheissari and Nasr have pointed out:

> rather than a modern theory of state or even an ideology, [Ayatollah] *Khomeini's approach amounted to a Shia version of Plato's Republic in which the Guardian Jurist would be the Philosopher king.*[37]

On the other hand, leftist groups, especially Marxist ones, supported the principles of egalitarianism, social justice and denouncing imperialism, capitalism and so on. Despite their irreconcilable differences, in the course of combating with the former regime the viewpoints of the Islamist and leftist groups gradually became closer. The best way to describe their partially common ideas regarding their ideal society is as follows: as a classless monotheistic society. Dabashi clearly explains the meaning of this well-known slogan of Revolutionaries in the following terms:

> in this utopia there is but one religion in which all hatred and inequalities are eliminated, all knowledge

is harmonious, nature is unified, classes are eliminated, the economy is monotheized, leadership is synchronized, leader and society are cross-identified, and perfect universal peace is attained.[38]

4.1. Three rival utopias in the constitutional text

To some extent, the pre-revolutionary movements' struggle over their ideal society is reflected in the Constitution of the Islamic Republic of Iran. Due to the inherent incompatibility of their values, the final draft of the Revolutionary Constitution contained some rival principles that have remained in perpetual tension for more than 40 years. Instead of one consistent utopian society, it seems that three contesting and inconsistent utopias are recognized in one single constitutional text: Firstly, a liberal democratic utopia that is evidently set out in Chapter Three under the title Rights of the Nation. In addition, major elected institutions such as the Parliament in Chapter Six, the Presidency in Chapter Nine and Councils in Article 7 represent liberal and democratic elements of the Iranian Constitution. Second, we find a leftist utopia that mostly reflects the egalitarian attitudes of the important section of revolutionaries. Due to their influence, the government's full responsibilities towards citizens are prescribed chiefly in Article 3, social security for all Iranians are set out in Article 27, free education and training up to end of high school and free higher education for all up to the level of self-sufficiency are provided for in Article 30, and a state-oriented economy is prescribed in Articles 43 and 44 of Chapter Four (entitled Economy and Financial Affairs). The content of these articles indicates that the concept of the ideal society mostly under the influence of Islamic leftist groups was also acknowledged. Finally, and above all, an Islamic utopia that forms the heart of Iran's Islamic Constitution and the most important articles of that which are dedicated to articulating the values, principles and institutions of an ideal Islamic society. The Islamic utopia is mostly mirrored in its preamble and in key words and statements, such as: to establish an 'ideal and modal society'; the 'righteous' responsibil-

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36 Ruhollah Khomeini, "Islamic Republic of Iran Constitution Means Islamic Law," *Keyhan Newspaper*, no. 10738 (1979), 3.

37 Ali Gheissari and Vali Nasr, *Democracy in Iran: History and Quest for Liberty* (2006), 87.

38 Hamid Dabashi, *Theology of Discontent* (London: Routledge 2017), 387.

ity for governing and administering the country; the formation of 'single world community' in accordance with the Quran; a governmental responsibility and aim 'to foster the growth of man' towards the divine order and God; the realization of a government of the 'oppressed upon the earth' according to the promise of Quran; 'extending the sovereignty of God's law [Sharia] throughout the world' as an aim of an ideological army; 'building an ideal Islamic society that can be a model for all people of the world' and other similar statements.

It is of profound importance to know that these are not simply empty slogans but are important articles within the Constitution which are aimed to be realized. For instance, according to Article 57, the main powers of government (Parliament, the executive branch and the judiciary) function under the supervision of the institution of the Leadership. Based on Article 110, the Supreme Leader has widespread duties and authorities such that he can control parliamentary and presidential elections (Article 99) and all enactments of Parliament through Guardian Council (Articles 93 and 94). It should be noted that the twelve members of Guardian Council are appointed directly or indirectly by the Supreme Leader. The Judiciary is also under full control of the Supreme Leader whose Head is appointed by him. It was believed that for realization of an ideal Islamic society all laws and regulations must be based on Islamic criteria. Therefore, the Guardian Council has the responsibility to control the compatibility of all laws and regulations with Islamic criteria. Other important and influential institutions, such as the Expediency Council (Article 112), Assembly of Experts for Leadership (Article 107 and 111), Armed Forces (paragraph 4 of article 110), Radio and Television (Article 175), and the Supreme Council for National Security (Article 176) are under the full control of the Supreme Leader. Despite the relative prevalence of unelected institutions as opposed to elected institutions, there has been a perpetual tension between two contested discourses since the creation of the Constitution of the Islamic Republic of Iran: On the one hand, an Islamic discourse in pursuit of the ideal Islamic society and, on the other, a constitutional discourse that seeks to create a constitutional utopia according the values and principles of constitutionalism. In order to gain a better understanding of their incompatibilities, some examples are examined in more detail below.

4.1.1. Descending thesis versus ascending thesis

The preamble of the Islamic Constitution of 1979 is clearly idealistic, emphasizing as it does the Islamic nature of revolution under the leadership of Ayatollah Khomeini and describing the features of the Islamic State. The nature of the Islamic State, depending on the viewpoints of different branches of Islam, is different. The Islamic State which is set out in the Iranian Constitution is based on the ideal state under the direction of Islamic jurists and is derived from Shia Islam. It is noteworthy that, in the context of the Revolutionary Constitution, Shia Islam should be interpreted according to Ayatollah Khomeini's understanding of it. According to his point of view, political power derives from God and this power, in turn, was transferred to the Prophet Mohammad and his successors (the Twelve Shia Imams and the Shia jurists or the Ulama). The most important characteristic of this doctrine is its appropriation of certain political authority for the figure of Shia jurist (*Faqih*) who, in turn, represents God's will. In Article 56 of the Constitution it is noted that '[a]bsolute sovereignty of universe and Man belongs to God…'

Obviously, this content of the Iranian Constitution also reflects a descending political theory of government which was prevailed in the mediaeval period. According to this theory:

> *original power was located in a supreme being which, because of the prevailing Christian ideas, came to be seen as divinity itself. St Augustine in the fifth century had said that God distributed the laws to mankind through the medium of kings. And in the thirteen century St, Thomas Aquinas expressed the same idea when he said that power descend from God.*[39] (Ullman 2010, p. 107)

Notwithstanding this, Article 6 of the Constitution articulates that the country's affairs in the Islamic

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39 Walter Ullman, "Ascending and Descending Theses of Government," in *The Political Theory Reader*, ed. P Schumaker (Wiley-Blackwell, West Sussex 2010), 107.

Republic of Iran must be managed on the basis of public opinion as expressed through elections, including the elections to the presidency, of the representatives of the Islamic Parliament and the Councils, or through referenda.

Obviously, Article 6 is based on an ascending political theory of government or democratic government. The main feature of the ascending thesis is that 'original power is located in the people or in the community itself[40]'. Although Katouzian, one of the most important and prominent writers of the first draft of the Revolutionary Constitution claimed that national sovereignty and sovereignty of God is combined in its best form in Article 56[41], more than forty years of the Islamic Republic hardly supports this claim. The (religious) descending scheme of government and the ascending (democratic) component of government enshrined in the Iranian Constitution 'have not been adapted to one another in harmonies way, but appear in one and the same text as elements that contradict and exclude one another[42]'. Milani believes that Ayatollah Khomeini's idea of Islamic government within which rule of the Jurist is the main source of legitimacy is irreconcilable with the modern idea of popular sovereignty[43]. Leadership by a spiritual jurist is one of the main elements of the Shia utopia while popular sovereignty is one of important principles of the constitutional utopia. Moreover, the descending thesis normally leads to absolutism whereas the ascending thesis recognizes the constitutive character of the popular will. Therefore, it is impossible to imagine that people are master of their own destiny and, at same time, they bind to the rules that directly or in directly originate from God's will. If we presume that such a constitutional system in reality is completely impossible, then we can categorize it as abstract utopianism.

As has been mentioned, the function of a constitution is to introduce a framework of an ideal and possible political society, not an exemplary society which is reasonably impossible to be achieved.

4.1.2. Political elitism versus political equality

It has been noted above that equality, including political equality, is one the main values of constitutionalism. By political equality we refer to the equal consideration of all citizens' interests and preferences. Obviously, political equality requires political participation. According to Dahl political equality is based on two important assumptions: 'the first is the moral judgment that all human beings are of equal intrinsic worth … and that the good or interests of each person must be given equal consideration[44]'. Accordingly, people should have an equal opportunity in political contests whether for electing public officials or be elected as a power holder. This fundamental right is acknowledged in the Iranian Constitution, as in many constitutional democracies. Different dimensions of equality are recognized in the Iranian Constitution too. For instance, in the final part of paragraph 14 of Article 3, government is recommended to direct all its resources for 'securing the multi-faceted rights of all citizens, men and women, and providing just legal security for all, and equality of all before law.' Also, based on Article 19 of the Constitution 'all people of Iran, regardless of ethnic group or tribe, enjoy equal rights, color, race, language and the like do not bestowed any privilege.' Even though some types of equality for all citizens are recognized in the aforementioned articles, other articles and some parts of the preamble to the Constitution recognized special right of particular groups of citizens to govern. For example in the preamble to the Constitution under the title Method of Governance in Islam, it is stipulated that:

> in creating the political infrastructures and institutions which make the foundation of society on the basis of an ideological outlook, the righteous assume the responsibility of governing and administering the country with the Qur'anic verse (verily, my righteous servants shall inherit the earth).

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40 Ulman, *Ascending*.

41 N Katouzaian, "Gozari Bar Tadvin-e Pish Nevis-e Ghanon Asasi," *Constitutional Law Quarterly*, no. 1 (2002), 122–123.

42 A Schirazi, *The Constitution of Iran: Politics and State in The Islamic Republic*, trans. John O'kane, I.B Tauris, London, 1997, 19.

43 Abbas Milani, "The three paradoxes of Islamic Revolution in Iran," in *The Middle East Institute. The Iranian Revolution at 30* (Washington DC, 2009), 26.

44 Dahl, *Political Equality*, 4.

The ambiguity of the term 'righteous' is clarified in the paragraphs that follow. For instance it is stated in the preamble (under the title of Guardianship of the Jurist) that, in keeping with the Islamic principle of governance and the perpetual necessity of leadership, the establishment of leadership by a qualified jurist (clergy) recognized by the people is necessary: '[T]his is in accordance with the Hadith: the direction of public affairs is in the hands of those who are learned concerning God and are trustworthy in matter pertaining to what he has made eligible and forbidden...' The same content is repeated in Article 5. In Article 109, three criteria are stipulated for the person who is to be elected by the Assembly of Experts for leadership as the Supreme Leader. The first is having the scholarship required for giving rulings (*Fatwa*) in various fields of Islamic law (*Faqih*). This means that it is only those persons who have a high degree in religious studies (high-ranking clergy) and no other citizens who are eligible to be nominated as the Leader. It should be noted that, according to Article 113, the Supreme Leader is the highest public official in Islamic Republic of Iran. Moreover, the Head of Judiciary whose functions and authority compared with those of his counterparts in other jurisdictions is extraordinary, should be nominated from among the high-ranking clergy too, based on Article 157, which provides that:

> for the purpose of carrying out the responsibilities of the judiciary in all judicial, administrative and executive matters, the Leader shall appoint for five years a doctor in religious studies (high rank clergy) who is just, has knowledge of judicial matters, is prudent and has magisterial skills, as Head of the Judiciary who shall be the highest authority of the judiciary.

The same qualification of being a member of the high-ranking clergy is also stipulated for the President of the Supreme Court and the Attorney General (Article 162). Moreover, six out of the twelve members of the Guardian Council must be appointed by the Supreme Leader from among the high-ranking clergy according to Article 91. It should be noted that, according to Article 96, determination of the compatibility of legislation passed by Parliament with Sharia law rests with only the majority of the aforesaid high-ranking clergy, while determination of its compatibility with the Constitution (not Sharia law) rests with the majority of all members (lawyers together with high-ranking clergy) of the Guardian Council.

Based on what has been reviewed above, despite an acceptance of political equality found in some articles of the Constitution, prominent political offices are reserved solely for high-ranking clergy. Therefore, the term *righteous* in the preamble is explicitly limited to a closed circle of such high-ranking clergy; this is obviously in conflict with political equality which is a fundamental value of constitutionalism.

4.1.3. The rule of man versus the rule of law

As it was mentioned above, some writers like Venter considers the rule of law as a structural value of the constitutionalism and others, like Waldron, refer to it as a prominent principle of liberal political morality. In a constitutional utopia according to Aristotle the rule of the best laws is preferred to rule of the best men[45]. Looking for good characteristics of law, Fuller identifies the following eight criteria as the internal morality of law that guarantee at least the formal aspect of the rule of law. Fuller illuminates the fact that a good law should be general, promulgated, clear, non-contradictory, not requiring the impossible and be consistent with the way they are implemented by officials[46]. As Waldron puts it:

> the most important demand of the rule of law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc or purely discretionary manner on the basis of their own preferences[47].

Although the preamble to the Iranian Constitution is mostly dedicated to the depiction of an Islamic utopia, the rule of law as a constitutional principle is recognized in different articles of the Constitution.

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45 Aristotle, *Politics* (Massachusetts: Harvard University Press, 1955), 255–256.

46 Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, New Haven, 1969), 33–91.

47 Waldron, *The Rule of Law.*

Various words for Sharia laws in Iranian Constitution	Preamble of the Constitution	Articles of the Constitution
Islamic principles	✓	
Islamic rules	✓	
Islamic standards	✓	26
Islamic program	✓	
Rules of Islamic codes	✓	
Islamic ordinances and regulations	✓	
Islamic criteria		110, 147, 151, 167, 171, 175 and 177
Islamic law		45
Islamic ordinances		91
Islamic regulations		107
Norms and principles of Islamic justice		14
Principles and commandments of official religion		85
Principles of Sharia		112
Criteria of Fiqh		163
Islamic sources and authentic fatwa		167

For example many of the articles contained in Chapter Three emphasise the importance of the rule of law, in particular Article 36 which states: '[a] sentence to punishment and its execution must only be by the decision of a competent court, and by virtue of law.' In addition, Article 22 sets out the inviolability of the dignity, life, property, rights, residence, and occupation of the Iranian citizens and Article 25 proscribes the inspection and interception of letters, recording and disclosure of telephone conversations, disclosure of telegraphic and telex communications, censorship, or willful failure to transmit them, as well as eavesdropping, and all forms of covert investigation except those provided by law. Other relevant articles include Article 32 which prohibits unlawful arrest and Article 38 that forbids torture and related actions.

At the same time, under the Iranian Constitution the rule of law is undermined in so far as it turns to the 'rule of men'. In the preamble and in several of its articles, one can find in the Constitution different articulations of Sharia laws using various words that is shown in below table:

Regarding the use of the abovementioned terms, the following important points should be considered:

First, these are different terms with similar connotations: this means that Sharia laws and principles must be considered as a main source of the legal order. Second, According to Article 4:

civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations…

This indicates that Sharia laws and principles are of a higher order than ordinary statutes and regulations that are normally issued by the democratic institutions of Parliament and Government. Third, only the six Islamic Jurists (not lawyers) out of twelve members of the Guardian Council who are appointed directly by Supreme Leader can judge in this matter. Therefore, the legal system inevitably depends on the interpretations of a limited number of Islamic jurists. It is believed that the Hidden Imam allocated the responsibility of Sharia solely to the religious authorities.[48] Essentially, both

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48 Abrahamian, *Between Two Revolutions*, 15–16.

in theory and practice, individual rights are restricted by the clergy's understanding of permeable rights, communal unity, and the elite's interests[49]. Fourth, in comparison with ordinary laws and regulations that can easily be found in the statute book, Sharia laws are scattered throughout a myriad of religious books and are subject to differing interpretations. As a result, they are mostly disputed and there is no consensus regarding their content. Moreover, they are mostly set out in Arabic which makes them inaccessible for most people. As was mentioned even in the official

stitution, did not fully know the content and extent of the Sharia laws and principles.[51] Therefore, the rule of law in such a political system may be reduced to rule by a closed circle of sovereign clergy; people who are authorized to interpret them officially.

5. Conclusion

Utopian thinking as the capacity to create and recreate an imaginary desirable society and the search for a better life is an intrinsic characteristic of human beings. According to the values and principles of the

> **Content analysis of the preamble and articles of the Iranian Constitution indicates that the Islamic utopia, as a core element of the Constitution, is substantially in conflict with the constitutional utopia that has deep roots in Western Constitutionalism. It seems that the Iranian Constitution might be categorized as failed constitutional utopianism as the consequence of choosing irreconcilable and inconsistent constitutional ideals.**

text of the Iranian Constitution, Sharia law has more than ten similar terms about whose meaning writers and commentators have no agreement.[50] Examining different usages of Sharia laws and principles in the Iranian Constitution, some writers, interestingly, conclude that both prominent Islamic jurists and the founding fathers of the Islamic Revolution, and even members of Assembly of Experts for the Islamic Con-

constitutionalism as it was explained in this paper, constitutions normally promise a desirable life for the people of a given society. In such a society, human dignity is recognized as central value and liberty, equality and individual autonomy are protected as supporting values. Constitutional principles such as popular sovereignty, separation of powers, rule of law and judicial review and the like guarantee the realization of this constitutional utopia. Although there are some ten-

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49 Mehran Tamadonfar, "Islam, Law and Political Control in Contemporary Iran,", *Journal for the Scientific Study of Religion*, vol. 40, iss. 2 (2001), 207.

50 Mahdi Kadivar, "Shara-e Shoraye Negahban Dar Barabre Ghanon-e Majles," *Baztabe Andishe*, no. 43 (2003).

51 Mohsen Esmaeli and Amini Hoissein, "The Semantics of Some of The Islamic Norms in The Constitution Based on The Concept of «Islamic Criteria»,". *Quarterly Journal of Public Law Knowledge* (2015), 3–5.

sions between these values and principles, for example between liberty and equality, popular sovereignty and judicial review and so on, more or less they constitute a relatively consistent whole. As a system of interrelated norms, it might be claimed that consistency of these norms within a given constitution, is a necessary (however not enough) condition of it realization. In such a situation we can categorize constitutional utopia as concrete or pragmatic utopia.

In the light of this understanding of constitutional utopia, the Constitution of the Islamic Republic of Iran is examined. It is shown that instead of one consistent utopia we can find three rival utopias that are interwoven with each other. Stressing on constitutional utopia and Islamic utopia, their inconsistency is demonstrated through three examples in section four. It might be said the Constitution of the Islamic Republic of Iran is a good example of attempts to recreate a utopian world through blending traditional beliefs and modern ideas. The founding fathers of the Constitution of the Islamic Republic of Iran completely ignored, or at least understated, the necessity for consistency among the values and principles of the desirable society which they depicted in the Islamic Constitution. Content analysis of the preamble and articles of the Iranian Constitution indicates that the Islamic utopia, as a core element of the Constitution, is substantially in conflict with the constitutional utopia that has deep roots in Western Constitutionalism. It seems that the Iranian Constitution might be categorized as failed constitutional utopianism as the consequence of choosing irreconcilable and inconsistent constitutional ideals.

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