

# LEGAL POSITIVISM IN THE PRE-CONSTITUTIONAL ERA OF LATE NINETEENTH-CENTURY IRAN

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## I. INTRODUCTION

The Iranian constitutional movement (1906–1911) occurred at a time when revolution was in the air in a number of peripheral nations. In that period of the early twentieth century, a series of uprisings occurred in the third world countries including the Indian nationalist movement of 1905–1908 against the British, the Maji Maji uprising in Tanganyika in 1905–1907 against German rule, the Bambata (Zulu) Rebellion of 1906 in South Africa against the British, the Young Turks Revolution of 1908, the Mexican Revolution of 1910 and the Chinese Revolution of 1911–1912.<sup>1</sup> While the essence of the Indian and African movements was anti-colonial, pro-democracy ideas were dominant in the latter three (Ottoman Empire, Mexico and China) alongside the Russian (1905), Iranian (1906) and the Portuguese (1910) movements/revolutions.<sup>2</sup> A satirical Iranian journal (*Journal of Despotism*) at the time remarkably referred to these democratic movements around the world as “siblings”.<sup>3</sup>

In Iran, the so-called tobacco movement of 1890–1891, which is recognised as a precursor of the constitutional movement, did carry a spirit of anti-colonialism. It resulted in the annulment of the monarch’s concession to a British citizen regarding production, sales and marketing of tobacco in Iran.<sup>4</sup> The Iranian constitutional movement of 1906, however, centered on a national quest for positivist rule of law – an inclination that was largely due to the intellectual efforts of the so-called enlightened thinkers of the late nineteenth-century Iran. This handful of intellectuals was influenced by the liberal positivist discourse of nineteenth-century Europe. On the one hand, due to the natural appeal of liberal philosophy for those living under tyranny, the pioneers of the constitutional movement in Iran were undoubtedly inspired by the enlightenment principles embodied in the United States Declaration of Independence and the [French] Declaration of the Rights of Man and of the Citizen. The *Resaleye Yek Kalameh* (The Book of One Word), written in 1870, is

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1 Janet Afary *The Iranian Constitutional Revolution, 1906-1911* (Columbia University Press, New York, 1996) at 37.

2 Charles Kurzman *Democracy Denied, 1905-1915: Intellectuals and the Fate of Democracy* (Harvard University Press, Cambridge, 2008) at 5.

3 *Ibid.*, at 6.

4 For a brief account of the tobacco movement see Nikki Keddie *Roots of Revolution: An Interpretation of History of Modern Iran* (Yale University Press, New Haven, 1981) at 67. For the role of merchants in the tobacco movement see Afary, above n 1, at 29.

an example in point where the author has made the first theoretical attempt in history to trace the principles of the Declaration of the Rights of Man and of the Citizen in the *Quran*.<sup>5</sup>

Yet, on the other hand, legal positivism was dominant in the consciousness of prominent Iranian intelligentsia. This was not only because of the emergence of this political and legal philosophy throughout the nineteenth century, but also because of what legal positivism had to offer to the lawless society of Iran at the time. This claim goes hand in hand with the understandings of British positivists in early twentieth century who noted that “positivism” played “so great a part” in the democratic movements across the world.<sup>6</sup>

The paper seeks to trace elements of legal positivism in a chapter of Iranian intellectual history during the years preceding the constitutional movement. Mirza Malkum Khan (1833–1908) and Talebov (1832–1910) are among the most influential thinkers of the pre-constitutional era who have specifically written on modern law concepts and whose ideas reflect the positivist line of thinking. While Mirza Malkum Khan is widely acknowledged among historians as a liberal positivist, Talebov is depicted as a rather socially oriented intellectual.<sup>7</sup> Without denying other strands of thought, including Marxism in Talebov’s writings, this paper contests this view by highlighting his classical positivist writings. In demonstrating this point, the principle methodology used throughout this paper is to present traces of legal positivist ideas primarily through translations of block quotes selected from both authors’ own writings. Commentaries of prominent Iranian historians have also been drawn upon to provide context. Most of the translations provided in this paper are presented for the first time. In particular, in the case of Talebov, some of the translated texts provided in this paper have remained unexplored even in the Farsi literature.

## II. MIRZA MALKUM KHAN: A HARD-CORE LEGAL POSITIVIST

Mirza Malkum Khan (Malkum)<sup>8</sup> is cited as the most influential figure among his peers in Iran’s pre-constitutional era.<sup>9</sup> His personal character and his political career are both clouded with enormous controversy, attracting admiration as well as hostile accounts. There is no doubt, however, that his ideas, including most notably the quest for the rule of law, form an indispensable part of modern Iranian legal thought. Malkum’s thoughts had a significant influence on the legal consciousness of the Iranian early constitutionalists.

5 See Mirza Yousef Khan Mostashar al-Dowleh *Yek Kalameh (the Book of One Word)* (first pub. 1870), in Mohammad Sadeq Feiz (ed) (Sabah, Tehran, 2003).

6 Kurzman, above n 2, at 6.

7 Fereydoon Adamiyat *Fekre Azadi va Moqadameye Nehzate Mashrootiyat* (The Idea of Liberty and the Interlude of the Constitutional Movement) (Sokhan, Tehran, 1961) at 98.

8 For a short biography see Farzin Vahdat *God and Juggernaut: Iran’s Intellectual Encounter with Modernity* (Syracuse University Press, New York, 2002) at 30, 94–98.

9 Fereydoon Adamiyat *Ideologiyeh Nehzate Mashrootiyat* (The Ideology of Constitutional Movement) (Roshangaran, Tehran, 1971); Fereydoon Adamiyat *Andishehaye Miraza Aqa Khan Kermani* (The Thoughts of Mirza Agha Khan Kermani) (Payam, Tehran, 1978); Hasan Ghazi-Moradi *Nazariyeh Pardaze Nosaziye Siyasi dar Sadre Mashrooteh* (The Theoretician of Political Modernization in Early Era of the Constitutional Revolution) (Tehran, 2008); Hamid Algar *Mirza Malkum Khan; A Study in the History of Iranian Modernism* (University of California Press, Berkeley, 1973); Homa Nategh *Ma va Mirza Malkum Khanhaye Ma* (We and our Mirza Malkum Khan) (Tehran, 1975); Mashallah Ajoudani *Mashrouteye Irani va pishzaminehay nazariye-ye Velayate Faqih* (Iranian Constitutional Monarchy and the Backgrounds for the Theory of the Guardianship of Islamic Jurists) (Fasle Ketab, London, 1997); Abdol-hari Haeri *Tashayo’ va Mashroutiyat Dar Iran* (Shi’ism and Constitutional Monarchy in Iran) (Amir Kabir, Tehran, 1981).

Mirza Malkhum Khan Nazem al-Dowleh (1833–1908) was born into an Armenian family in Esfahan. He was sent to Paris to study engineering where he developed an interest in the works of Saint-Simon and Comte. He converted to Islam upon his arrival and created a campaign (through a secret association based on the Freemasonry model called *Faramoush-Khane* (oblivion houses)) to persuade Naser al-Din Shah to initiate modernisation reforms, mainly based on the Ottoman model of *Tanzimat* (re-organisation). The Shah eventually became suspicious of his activities and exiled him to Baghdad, and from there to Istanbul. Through mediation of Shah's ambassador to Istanbul (Moshir ad-Dowleh), the young Malkum returned to Iran. After a period of ups and downs in his political career, and as a result of his friendship with Moshir ad-Dowleh who had become Iran's chancellor, in around 1873 Malkum was sent to London as Iran's ambassador. At the outset, Malkum was commended due to his success and was even awarded a royal title (prince). Later, however, after the Shah failed to live up to his promises made during his London visit, to grant Malkum certain trade concessions, they fell apart. Malkum was discharged from all his duties and put on trial. After being humiliated, he rebelled against Naser al-Din Shah and moved ahead with the publication of his influential London-based newspaper "the *Qanun*" (law) in the 1890s. The *Qanun* was published between 1890 (coinciding with the Iranian anti-colonial tobacco movement) and 1898 (eight years before the constitutional revolution). There was little doubt that it had a significant role in Iran's awakening and the nation's quest for the rule of law. After the assassination of Naser ad-Din Shah and the coronation of his successor Mozafar ad-Din Shah, Malkum was again appointed as ambassador, this time in Rome, a position he held for ten years. He passed away in Switzerland in 1908, at the age of 77, and his body was cremated as he had requested.

In terms of political philosophy, it is hardly contested that Malkum was a vehement positivist. In particular, Auguste Comte, whose books he read while he was in Paris, had a great influence on Malkum's thinking.<sup>10</sup> Later, in London, as Iran's ambassador, he became fascinated by John Stewart Mill and translated parts of *On Liberty*<sup>11</sup> into Persian. Malkum was also a staunch believer in liberal economics. Key to his reform ideas was full respect for individual property, private entrepreneurship and free trade. In the same vein, in Malkum's writings the role of a government in the economy is restricted to the provision of security and infrastructure so that private investment could be attracted and flourish.<sup>12</sup> As will be seen, Malkum's thinking goes hand in hand with JS Mill's political philosophy discourse. Malkum notes:<sup>13</sup>

Almost every branch of science has left a trace in Iran except for political economy that is a modern science and is completely ignored here...

Also that:<sup>14</sup>

Political economy is the most inclusive field of science and if its principles were to be adopted in Iran, tax income would increase to twenty million [units of currency] in less than two years with no subjugation or violation of Sharia.

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10 Adamiyat, above n 7, at 98.

11 John Stuart Mill *On Liberty* (Longman, Roberts and Green, London, 1859).

12 Fereshteh Nourani *Malkhum Khan Nazem al-Doleh* (Jiibec, Tehran, 1973) at 82.

13 Malkum's letter to the Foreign Ministry in Adamiyat, above n 7, at 114 (Idiomatic translation).

14 Hojatollah Asil *Resalehay Mirza Malkum Khan Nazem al-Dowleh* (The Essays of Mirza Malkum Khan Nazem al-Dowle) (Nci, Tehran, 2002).

One difficulty with putting Malkum in a box is that he frequently adjusted his approach to political circumstances for over more than fifty years of his active life. Ghazi-Moradi explains how Malkum oscillated between advocating top-down and bottom-up policy approaches in accordance with his relationship with in Iran's political apparatus.<sup>15</sup> Others have explained his change of approach to be driven solely by his personal interests.<sup>16</sup> It seems however, as a politician, so long as he was part of the government apparatus, he strived to influence the Shah's mind through proposing top-down reforms. He wrote *Daftar-e-Tanzimat* (On Re-organisation) in 1860 to encourage Naser ad-Din Shah to adopt such reforms. When he fell out of favour completely with Naser ad-Din Shah, he took an opposite approach by publishing the *Qanun*, advocating his ideas at the grass roots level and criticising (though mostly indirectly) the Shah's governance. After Naser ad-Din Shah's assassination and Mozafar ad-Din Shah's coronation, Malkum returned to politics and hence top-down reform became appealing once again. During this period, Malkum wrote *Nedaye-Edalat* (Voice of Justice) for the newly-crowned Shah after he took his new position as an ambassador to Rome.

#### A. "Government According to Law"

There is little doubt that Malkum was a firm believer in a Westernisation project throughout his career. The foundations of Malkum's ideas on government are laid out in *Daftar-e-Tanzimat* (On Re-organisation), *Majlis-e-Tanzimat* (The Assembly of Re-organisation); and *Daftar-e-Qanun* (the Book of Law).<sup>17</sup> All three books, which were written in the period approximately between 1860–1862, fully represent Malkum's legal reform ideas in the pre-*Qanun* era. In these books, Malkum openly describes his project as "the adoption of Western civilization absent any Iranian intervention" by which he intends "a total submission to European civilization"<sup>18</sup> in all aspects of life in a complete one-size-fits-all fashion. The foundation of Malkum's Westernisation project emanates from his belief that the dissemination of Western civilisation across the world would not only be inevitable, but also desirable for the prosperity and evolution of human collectivity.<sup>19</sup> On the basis of that idea, Malkum viewed Iran's transformation as inevitable and the adoption of Western civilization as imperative:<sup>20</sup>

Iran's ministers assume that three thousand years of Iranian history would [simply] avert all trouble. European sciences are flooding the nations around the world and the more we give way to them, the better we can benefit from them.

Earlier in his career, the younger Malkum seemed to believe that the basic principles of European organisations could be borrowed in the same fashion that technology, such as the telegraph, first entered Tehran. He analogised any struggle to reinvent European principles of governance to an empty effort of reinventing the telegraph.<sup>21</sup> His explanation for such propositions is worth quoting:<sup>22</sup>

15 Ghazi-Moradi, above n 9.

16 Nategh, above n 9; Algar, above n 9.

17 Asil, above n 14.

18 Adamiyat, above n 7, at 114.

19 Ibid.

20 Malkum *Resaleye Dastgahe Divan* (The Essay on the Bureaucratic State) in Asil, above n 14.

21 Malkum *Daftar-e-Tanzimat* in Asil, above n 14, at 30.

22 Malkum *Resaleye Dastgahe Divan* (The Essay on Bureaucratic State) Translated by Vahdat, above n 8, at 32.

The government of Iran, in facing the encroachment of European hegemony, is no different from the Ottoman government... The point is that the surge of the European power has made the survival of barbarian governments impossible. From now on, all governments on earth must be organized in the same fashion as European governments, or they will be conquered and subjugated by them.

Malkum could also be considered as the founder of the idea of the establishment of the modern rule of law in Iran. It is striking that rule of law concerns loom larger in Malkum's mind than his Westernisation project throughout his career. In *Daftar-e- Tanzimat* where he elaborates on the notion of government, lawmaking and law enforcement, Malkum divides governments into two: republic and monarchy, the latter being subdivided into absolute and moderate monarchy. Moderate monarchy, in Malkum's terminology, mainly refers to the British and the French systems of governance at the time. He does not, however, see the system of moderate monarchy "where people are the lawmakers and the kings are the executor of the law" as suitable for Iran. Rather, he follows the Ottoman model of *Majles Tanzimat* (Re-organization Assembly. His own words are unequivocal, "the law should reflect the emperor's will and guarantee the public interest".<sup>23</sup>

Despite Malkum's advocacy for absolute monarchy, due to pragmatic concerns, he strived to uphold a notion of "government according to law" as opposed to "government according to the will of the sovereign". This is well reflected in the *Daftar-e-Qanun* where he defines the law as "any decision, which is issued in accordance with a specific arrangement by the legal apparatus".<sup>24</sup> He goes on to distinguish monarchic decrees, which may have been all well and good, but could not be called the "law" of the land – the law must necessarily be an outcome of a legal apparatus. Malkum does not seem to be concerned with the notion of representative democracy, or the issue of legitimacy of the government in any form, in any of his writings before the (1890–1899) period.

It was only after 1890 that Malkum, in one issue after another, gradually departed from the idea of absolute monarchy to the one of constitutional monarchy. The establishment of the *Qanun* in London was basically a result of Malkum's reaction to his dismissal from all his governmental duties after the dispute over the cancellation of his lottery concessions. Malkum, in grounding the *Qanun* (especially from the fourth issue onward) on the notion of "human conduct" is clearly influenced by Auguste Comte's *Religion of Humanity*.

Ghazi-Moradi presents a chronological narrative of the development of Malkum's agenda during the eight years of the *Qanun*. To restructure Ghazi-Moradi's construction briefly, in the first issue of the *Qanun*, Malkum presents a more balanced definition of law: "law consists of the solicitation of the power of a group of people in order to secure the rights of the public".<sup>25</sup> The obscure language used above seems to be akin to JS Mills' idea of disproportionate democracy, in which educated and more responsible persons would be made more influential by giving them more votes than the uneducated.<sup>26</sup> In the same issue Malkum reiterates his rule of law ideas paying, however, tribute to Sharia:<sup>27</sup>

Our claim is not to adopt Parisian, Russian or Indian laws. The principles of all the good laws are everywhere the same, the best of which are laid out in Allah's Sharia. Nonetheless, due to the lack of enforcement of these laws we have suffered too much and we desire the rule of law to the extent that we could

23 Malkum *Resaleye Dastgahe Divan* Translated by Vahdat, above n 8, at 36.

24 *Daftar-e-Qanun* in Asil, above n 14.

25 *Qanun*, No 1 in Homa Nategh *Rooznameye Qanune Mirza Malkum Khan* (Amir Kabir, Tehran, 1976).

26 John Stuart Mill *Stanford Encyclopedia of Philosophy* (2002, revised 2007), available at <<http://plato.stanford.edu/entries/mill/>>.

27 *Qanun*, No 1, above n 25.

settle on any law even if it comes from Turkmenistan. That is because the most mundane laws are better than lawlessness.

In the third issue he still “encourages” the Shah to look up to the Russian Tsar:<sup>28</sup>

The utmost power is vested in the Russian Tsar. Yet, he is not able to mete out punishment on anyone without the order of the [judicial] bureaucracy. No one has placed any limitations on the Tsar’s power. The Tsar himself owing to his education and enlightened knowledge has willingly made the enactment of laws and observations thereof, the basis of his splendor. The Tsar has made himself, more than anyone else, obedient to the law because obeying the law has given him dominance over twenty “lawless” kings.

He criticises the “inefficiency” of the existing *Majlis-e-Shora-e-Melli* (Consultative Assembly) – a Qajar institution – and introduces, for the first time, the idea of a “National Consultative Assembly”. Such a national assembly would consist of a minimum of 100 eminent *Mojtaheds* (Islamic jurists) as well as well-known scholars and prominent intellectuals.

In the twelfth issue, Malkum finally denounces despotism. In the twenty-third issue, he even adopts a revolutionary tone:<sup>29</sup>

The world history has shown us that the awakening of governments has to begin with the awakening of nations. We have thus far struggled to make our voice heard to the government officials. Enough is enough! This is the time to bring our complaints to our own nation. [*Idiomatic translation*]

In the twenty fourth issue, Malkum elaborates on the three separated branches of government for the first time. He then notes that “the root cause of all our problems ... is that in our country, there has been no trace of the third condition of the [rule of] law, i.e. ensuring the enforcement of the law.”<sup>30</sup>

The *Qanun* was widely circulated across Iran through secret associations called *Majma-e-Adamiyat* (Humanity Leagues) whose articles of association and structural organisation were written by Malkum himself. These Leagues were institutionally modelled after European masonry lodges although the existence of any real connection between them and the European freemasonry is contested. The issue 25 of the *Qanun* is presented as a translation of a classified report of a foreign country’s ambassador regarding these associations. In this story, which may or may not be fabricated, the ambassador is astonished at these associations in Iranian society. The Ambassador notes that Iranian Humanity Leagues “have grounded the totality of the world’s advancement on Islamic principles ... instead of emulating the Europeans, they seek to extract all the principles of progress from Islam itself.”<sup>31</sup> After elaborating on the complex organisational structure of the Leagues throughout the country, this Ambassador coins the idea of bicameral legislative bodies (one elected by the people and the second consisting of the elite) from the perspective of the Humanity Leagues. This is the first time that Malkum pursued a version of popular sovereignty in his vision for an Iranian parliamentary system.

After Naser al-Din Shah’s assassination and upon the coronation of his more open-minded successor, Mozafar ad-Din Shah, Malkum restored confidence in a top-down reform.<sup>32</sup> In this late period of his political career, he dedicated a book titled *Nedaye-Edalat* (Voice of Justice) to the new Shah and later became ambassador to Rome. While Malkum remained faithful to legal positivism until the end of his career, he started to emphasise the importance of “rights”. In his

28 Malkum *Resaleye Dastgahe Divan* Translated by Vahdat, above n 8, at 33, modified by author.

29 *Qanun* No 23, above n 25.

30 *Qanun* No 24, above n 25.

31 *Qanun* No 25, above n 25.

32 Ghazi-Moradi, above n 9, at 183.

book, *Serat al-Mostaghim* (The Straight Path), Malkum maintains that individual rights are based on four pillars: security (including financial and personal security); [free] will or liberty (including personal freedom, freedom of expression, etc.); equality (including equality before law); and merit-based status, where knowledge should be the sole criterion for government recruitment.<sup>33</sup> On the limits of personal freedom, he reiterates that “there are no rights and duties in the world without delimitations and the limit of freedom is that no one should encroach on any one’s rights.”<sup>34</sup> Yet, Malkum does not hesitate to suggest that the rule of law is as important (and perhaps more important) than the content of the law, as he reiterates:<sup>35</sup>

Law consists of words without souls. If we adopt the most perfect laws existing in the world but fail to enforce them for a hundred years to come, there is no benefit to having such laws.

He also proposes the basic rule of law principle of no punishment without law.<sup>36</sup>

### B. *On Classical Economics*

Legal ideas are understood to have a dynamic, dialectical or constitutive relationship to economic activity.<sup>37</sup> In this vein, liberal economics may be seen as a corollary of legal positivism as a subset of nineteenth-century classical legal thought.<sup>38</sup> In this section, Malkum’s positivism is contrasted with his economic views to demonstrate his intellectual consistency. Malkum’s essay, *Osoule Taraqi* (The Principles of Progress),<sup>39</sup> appears to be the first treatise (a 40-page booklet) written in Farsi on basic economic theory. Written in approximately 1883, the booklet is probably Malkum’s most scholarly writing absent the use of academic language. In *The Principles of Progress*, Malkum presents real-life examples of basic economic concepts in a way understandable to the nineteenth-century Iranian elite. He stresses the notion of wealth maximisation as a fundamental means to European progress. The booklet includes a series of legal and economic policy recommendations for Iran’s development, including monetary policy, banking and finance (he proposed the establishment of a national bank), providing concessions to foreign companies to attract investment, public education as a means of economic growth, securing individual and property rights, setting up a modern police force, upholding the rule of law as a means of economic development, government investment in infrastructure, enhancing the competitiveness of the Iranian economy, abolishing internal customs duties, and the full scale liberalisation of trade and the financial market.<sup>40</sup> Malkum also envisages the principles of taxation, the law of provincial regulatory assemblies and ways to reduce poverty by building transportation infrastructure by which to enhance commodity exports.<sup>41</sup>

Malkum further stresses market competition as a means to push prices down. In an analysis of factors of production, he notes that Iranian economy, being rich in land and labour, suffers

33 Malkum *Serat al-Mostaghim* (The Straight Path) in Asil, above n 14.

34 Malkum *Nedaye Edalat* (The Voice of Justice) in Asil, above n 14.

35 See Malkum *Divan Khane* (The Law of Judicial Institutions) in Asil, above n 14.

36 *Ibid.*

37 Duncan Kennedy “Three Globalizations of Law and Legal Thought: 1850-2000” in *The New Law and Economic Development* David M Trubek and Alvaro Santos (eds) (Cambridge University Press, New York, 2006) at 19.

38 *Ibid.*

39 *Osoule Taraqi* (The Principles of Progress) in Asil, above n 14.

40 *Ibid.*, at 195.

41 Adamiyat, above n 7, at 144.

mainly from a shortage of capital, the analogy being blood for economic veins. Malkum was not an economist by education and should not be expected to have expounded on such concepts as Adam Smith's "invisible hand"<sup>42</sup> or David Ricardo's "free trade". He repeatedly suggests that these could only be studied at schools. In segments of the booklet however, he attempts to explain an overly simplified version of Ricardo's comparative advantage theory.<sup>43</sup> On free trade, Malkum follows Ricardo's footsteps when he postulates a direct relationship between trade openness and wealth maximisation. He thinks that the problem with Iranian people is that they do not understand that trade is not a zero-sum game.<sup>44</sup> He notes:<sup>45</sup>

In order for Iran's development with respect to its trade relationships [with the world] to become parallel with and to have a share in the world's prosperity, it is imperative to open all the ports and rivers. There should be no fear from foreign trade. All foreigners should be issued permits and encouraged to bring their money in and out of the country to the maximum extent possible.

Malkum further contends that the Asian elite do not comprehend the objective of European's colonialism which is solely to gain *trade* benefits. He reiterates that the British Treasury does not receive a penny from the Indians in the form of taxes.<sup>46</sup> A few pages later, he completes his views on colonialism by making a distinction between Western occupations for trade purposes (e.g. British occupation of Bangladesh) and those for political reasons (British occupation of Afghanistan).<sup>47</sup> Although Malkum's pro-colonialism may also be motivated by personal interest,<sup>48</sup> one should also note that it was simply beyond classical economics, let alone his own knowledge and expertise, to fully grasp the ramifications of such blunt advocacy for full liberalisation. Even a century after Malkum's death, when the pitfalls of hasty trade liberalisation for third-world economies were acknowledged in economics theories such as declining terms of trade for primary products – known as Prebisch-Singer theory – neoliberal economics of the 1980s and 1990s, reflected in the so-called Washington Consensus, drew heavily on classical theories of the nineteenth century.<sup>49</sup> In sum, Malkum Khan is the first Iranian who raised fundamental questions of modern economics and proposed a comprehensive economic development reform plan. In a letter to the foreign ministry where he laid out a detailed development plan similar to that described above, Naser ad-Din Shah's dismissive words read: "These are not comprehensible [here] in Iran".

### III. GENEALOGY OF TALEBOV'S LEGAL THOUGHT

Talebov's role in the formation of modern Iranian legal thought can hardly be overstated. His positivist legal writings, however, have remained unexplored in the literature on Iranian constitutional revolution. Adamiyat, a pre-eminent Iranian historian, stresses Talebov's natural law and

42 Adam Smith *The Wealth of Nations* (W Strahan and T Cadell, London, 1776).

43 David Ricardo *On the Principles of Political Economy and Taxation* (John Murray, London, 1817).

44 Malkum *Osoule Taraqi* (The Principles of Progress; idiomatic translation) in Asil, above n 14, at 191.

45 *Ibid.*, at 191.

46 *Ibid.*, at 189.

47 *Ibid.*, at 199.

48 Cf Javad Tabatabaei *Nazariye-e-Hokoumat-e-Qanun-dar Iran* (A Theory of the Rule of Law in Iran) (Sotoudeh, Tehran, 2008).

49 For more on the history of development economics see James M Cypher, James L Dietz *The Process of Economic Development* (Rutledge, New York, 2009).



socialist orientation and downplays traces of legal positivism in his thinking.<sup>50</sup> Indeed, Talebov was the first Iranian who advocated a systemic plan for dismantling the semi-feudal structure of Iran.<sup>51</sup> Yet, without denying other strands of thought in Talebov's writings, including socialism,<sup>52</sup> the thesis here is that nineteenth-century legal positivism was dominant in Talebov's consciousness. For instance, Talebov believed that an owner's "will" is essential for dispensing with property rights unless it clashes with the right of government to build a railroad or a tunnel through that property, in which case the owner is only entitled to compensation.<sup>53</sup> Talebov's classical view on "the will theory"<sup>54</sup> clearly sets him apart from outright Marxism.<sup>55</sup> A number of examples in support of this line of argument will be provided below.

Abd al-Rahim Talebov (1832–1910) was born into a middle-class family of artisans in Tabriz located in northwest Iran.<sup>56</sup> At the age of sixteen he left Iran for Tbilisi to study in modern schools of the Caucasus where he later became a successful businessman.<sup>57</sup> According to Afshar, Russian was the only foreign language Talebov knew,<sup>58</sup> through which he had access to French and English literature.<sup>59</sup> The philosophers whose ideas Talebov cites include Bentham, Voltaire, Rousseau, Renan, Kant and Nietzsche.<sup>60</sup> Talebov wrote his 11 books after the age of 55,<sup>61</sup> all of which had a direct impact on Iran's constitutional movement.<sup>62</sup> Talebov's books demonstrate his fascination with science as he dealt with basics of physics, chemistry and biology. He drew interesting analogies between molecular physics, spheres of liberty and rights in law. This, according to Roscoe Pound, is typical among the positivists of the nineteenth century whose books were full of analogies between science and law as an indication of their scientific approach to law.<sup>63</sup> The second generation of positivists was particularly influenced by Darwinian evolutionary thought.<sup>64</sup> Talebov was also a firm believer in the evolutionary theories of biology from which he also drew analogies to explain "the struggle for existence", following in Hobbes' footsteps, as a natural basis, for wars throughout history.<sup>65</sup> He also promoted the idea of social Darwinism in his writings.<sup>66</sup>

50 Fereydoon Adamiyat *Andishayeh Talebuf Tabrizi* (The Thoughts of Talebof Tabrizi) (Payam, Tehran, 1976) at 32. For argument in favour of Talebov's positivism see Vahdat, above n 8, at 48–54.

51 Vahdat, above n 8, at 32.

52 Adamiyat traces Marxism in Talebov's writings; see Homa Nategh "Ostadam Fereydoone Adamiyat" <[www.homanategh.net/uploads/2/3/2/8/2328777/ostadam.pdf](http://www.homanategh.net/uploads/2/3/2/8/2328777/ostadam.pdf)>.

53 Adamiyat, above n 50, at 37.

54 Duncan Kennedy *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Forum'* (2000) 100 Colum L Rev 94, 106–108, 115–116.

55 For "the will theory" as a flagship idea of nineteenth century classical legal thought see Kennedy, above n 38, at 25–26.

56 *Ibid.*, at 1.

57 *Ibid.*

58 Iraj Afshar *Abd al-Rahim Talihuf Tabrizi: Azadi va Siasat* (Liberty and Politics) (Sahar, Tehran, 1978) at 14.

59 Adamiyat, above n 50, at 3.

60 Adamiyat, above n 50, at 8.

61 *Ibid.*, at 3. Also see Afshar, above n 58, at 14.

62 Vahdat, above n 8, at 48.

63 Roscoe Pound *The End of Law as Developed in Juristic Thought* (1917) 30 Harv L Rev 222.

64 *Ibid.*

65 Talebov *Masaal al-Hayat* (The Questions of Life) (Jibi, Tehran, 1967) at 56–61. Adamiyat criticises his Hobbesian views; see Adamiyat, above n 50, at 20.

66 Adamiyat, above n 50.

One of Talebov's most interesting books, *Ketab-e-Ahmad* (The Book of Ahmad) comes in three volumes. It is written in the style of a novel – clearly modelled on Rousseau's *Emile*<sup>67</sup> – to communicate with a wider range of readership. Malkum praises Talebov's accessible language by citing an Iranian poem: "In dealing with kids, speak children's language".<sup>68</sup>

#### A. 'Liberty' and "Rights"

Talebov, on different occasions, straightforwardly defined freedom as a "natural right", which could not be impeded or diminished otherwise. In *The Path of the Blessed*, Talebov makes a reference to Ernest Renan, his contemporary French philosopher, stating that humanity is based on a "natural" system of "equality, fraternity and liberty".<sup>69</sup> Talebov conceptualises freedom in absolute terms:<sup>70</sup>

The words *Huriyat* in Arabic, *Azadi* in Persian, or *Uzdenlek* in Turkish [liberty], constitute a "natural" freedom; [that is] human beings, by nature, are born free and have autonomy over all their words and deeds. Except for their commander, that is their [own] "will", there shall be no impediments in their deeds and words. God has not created any force external to man to impede him and no one has the power to manipulate our liberty, let alone give it or take it away from us.<sup>71</sup>

Yet, Talebov approaches the question of liberty through the lens of "delimiting spheres of personal inviolability" in much the same way as the father of utilitarianism, Jeremy Bentham did. For Bentham the law "provides the basic framework of social interaction by delimiting spheres of personal inviolability within which individuals can form and pursue their own conceptions of well-being".<sup>72</sup> The notion of power absolute within a sphere is a flagship idea of nineteenth-century European legal thought.<sup>73</sup> For instance, Spencer advances the idea of "the function of law in maintaining the limits within which the freedom of each is to find the widest possible development".<sup>74</sup> Similarly, Friedrich Carl von Savigny, the father of the Historical School, opines: "If free beings are to co-exist ... invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity".<sup>75</sup> In this vein, Talebov constantly attempts to delineate spheres within which individuals have absolute freedom. He notes:<sup>76</sup>

In the same way molecules, on the one hand, have absolute freedom (with no restriction and qualification) and on the other hand their freedom is nonetheless limited to the laws of connectivity, man's freedom is subject to Sharia and custom.

67 Jean-Jacques Rousseau *Emile, or, On Education* translated by Allan Bloom (Basic Books, New York, 1979). For analogy between the two see Adamiyat, above n 50. See also Vahdat, above n 8, at 48.

68 Cited in Ghazi-Moradi, above n 9, at 180.

69 Talebov *Masa'el al-Mohsenin* (The Path of the Blessed) (Jibi, Tehran, 1968) at 140–141.

70 Talebov *Izahat Dar Khosuse Azadi* (Reflections on Liberty) in Afshar, above n 58, at 88.

71 Ibid.

72 Paul Kelly *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford University Press, Oxford, 1990).

73 Kennedy, above n 38.

74 Herbert Spencer *First Principles* (D Appleton and Company, New York, 1898) at 223.

75 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Liberty Classics, Indianapolis, 1982).

76 Talebov, above n 70, at 96.

Further, in his division of freedom into the three categories of freedom of self, belief and expression, Talebov consistently takes a similar approach:<sup>77</sup>

Freedom of self implies that no one can unlawfully imprison anyone or enter his property. Moreover, everyone is free as regards their conduct for which no one shall hold them liable unless such acts result in someone's harm or loss [of property].

In a similar vein, Talebov cites defamation as a legitimate example of a limit to freedom of expression. The freedom of belief, in Talebov's view, could be restricted only if it led to anarchy or disturbed the peace among the people without clarifying what that might imply.<sup>78</sup> On the basis of the above, Talebov defines the law in natural law terms as follows:<sup>79</sup>

[A] systemic articulation of civil and political rights and restrictions [responsibilities] governing the affairs of individuals and society [as a whole], through which every person would be secure in property and life and equitably responsible for wrong acts.

Yet, in another essay he endorses the views of "those recent scholars" who opined that rights could only be considered law "if they are sanctioned by government force".<sup>80</sup> The following quote where Talebov cites and expounds the utilitarianism of Jeremy Bentham is most revealing:<sup>81</sup>

Bentham, an acclaimed philosopher, opines that humanity is by nature controlled by two prevailing powers: pleasure and pain. It is only under these two [qualities] that we could know what should be done, since good and evil or cause and deeds [effect] are undoubtedly determined by these two faculties.

After laying out this introduction, the [primary] conclusion we reach is that wherever there is no law, there is no principle of utility; and where there is no principle of utility, there is no civilisation; lack of civilisation brings fear; and wherever there is fear there is no prosperity. Hence the lack of law equals the lack of prosperity.

## B. Talebov on Constitutional Law

In *Masa'el al-Hayat* (The Questions of Life: the second volume of the *Ketabe – Ahmad*), Talebov draws comparisons among various constitutional architectures of the world. He finds that all constitutional monarchies are in principle founded on a system of a "delimitation of rights".<sup>82</sup> His particular interest in the Constitution of the Empire of Japan of 1890 ("Meiji Constitution") is such that he annexes a full Persian translation of that constitution at the end of his book. He notes:<sup>83</sup>

If we provide a brief on each of the [above-mentioned] constitutional laws, the reader will note that they are all similar despite difference in details. [Those differences however,] do not negate the main principle of constitutionality of the government with the exception of the Japanese constitutional law, ... in which some crucial rights are declared as prerogatives of the emperor of Japan.

He goes on to justify the Japanese system based on the fact that it is "related to the people and circumstances of Japan".<sup>84</sup> By doing so, he indirectly encourages the Iranian monarch to embrace

<sup>77</sup> Talebov, above n 70, at 97.

<sup>78</sup> Ibid.

<sup>79</sup> Talebov, above n 70, at 94. Vahdat's translation revised (see above n 8).

<sup>80</sup> Ibid, at 85.

<sup>81</sup> Talebov *Ketabe Ahmad* (The Book of Ahmad) (Jibi, Tehran, 1967) at 126, 127.

<sup>82</sup> Talebov, above n 70, at 102.

<sup>83</sup> Ibid.

<sup>84</sup> Talebov, above n 70, at 102.

constitutional governance by pointing out that “if the kings of other Asian countries [including Iran] take an initiative and follow the footsteps of Japan’s Mikado, they shall also be granted certain prerogatives”.<sup>85</sup> Hence Talebov, similarly to Malkum, seems to have held a pragmatic view that the Western constitutional models would not be fit for Iran’s context. The only difference between the two is that Talebov defends the Japanese constitution of 1889 (Meiji Constitution) while Malkum (before the *Qanun* era) recommended that the Shah look up to the Russian Tsar.

Yet Talebov’s full resentment of absolute monarchy is well reflected in the *Book of Ahmad* as well as his other books. Furthermore, Talebov is unequivocal in flagging the British constitutional system as the most advanced among other systems in ways which resemble Dicey, his contemporary English scholar.<sup>86</sup> He further notes:<sup>87</sup>

In other nations, liberty and the rule of law is a matter of legislation and is maintained through their constitution. In Britain however, constitutional law is being emerged and established out of people’s respect for the law throughout history. It is part of the inner nature of each and every single English citizen.

### C. *Talebov on International Law: A Pure Reflection of Classical Legal Consciousness*

Despite Talebov’s criticism of the West’s self-perceived mission of “civilizing” other nations, Talebov’s approach to sovereignty and international law remains consistent with his positivist line of thought:<sup>88</sup>

We explained in defining law that only those ones who appreciate the necessity of preserving the [rule of] law would benefit from its virtues. Otherwise it is generally accepted that anybody can appropriate an ownerless property ... Throughout the Asian history, the sons of the kings killed their fathers; brothers killed brothers [to gain power]. [Then] how can one expect foreigners (or powerful foreign States in present times) not to encroach upon other countries’ rights or occupy their land [in such circumstances] where the owners of such land are not aware of their right [let alone] deem necessary to preserve it.

He continues:<sup>89</sup>

A high-ranking British official has said in a speech that Morocco should be controlled by an organized government so that commercial interests of the civilized nations could be preserved. A German statesman has [also] said that the European states shall not respect the independence of lawless nations. Because where there is no law governing a land, it is an ownerless property and whoever possesses it and determines the rights and responsibilities of the residents therein would be its sharii [lawful] owner.

Talebov uses the term “Sharii” (according to Sharia) with respect to ownerless property by which he implies that even Sharia endorses this basic property rule of ownerless lands. Talebov’s analogy between Sharia property law and international law is striking since international law of Grotius’ times has roots in the private property rights of Roman law.<sup>90</sup> More importantly, Talebov’s view on sovereignty and international law is significant since it is a mirror reflection of international law theories of his time:<sup>91</sup>

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85 Ibid.

86 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1885, 1915).

87 Talebov, above n 65.

88 Talebov, above n 65.

89 Ibid.

90 Anthony Carty *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, Manchester, 1986) at 4.

91 Talebov, above n 65.

A French scholar opined that law making and its enforcement is to ensure the world order and the endurance of humanity. [In that sense] it is imperative [according to this scholar] for the wise people to occupy lawless lands. We reiterate the fact that a right only exists if it is conducive to prosperity and if the right holder appreciates it and consciously strives to maintain it. Otherwise there remains neither a right nor a right holder.

The doctrine of *terra nullius*, or the so-called empty land, that is so unmistakably noted by Talebov, was expounded by positivist international lawyers such as Wheaton,<sup>92</sup> Westlake<sup>93</sup> and Oppenheim,<sup>94</sup> among others. According to this doctrine, non-European states exercised no rights under international law over their own territory.<sup>95</sup> As Anghie suggests, the idea of the universality of international law applied in the *naturalist* discourse of sixteenth and seventeenth centuries gave way to *positivist* international law that distinguished between civilised states and non-civilised states.<sup>96</sup> Positivist international law of the nineteenth century developed an entire doctrine to justify the acquisition of territory by colonial powers.<sup>97</sup> It asserted that international law applied only to the “sovereign states” that composed the civilised “Family of Nations”.<sup>98</sup> Oppenheim, for instance, after pointing out that the law of nations was a product of Christian civilisation, suggests that despite the disappearance of perpetual enmity among groups of nations, especially among the Christian, Mohammedan and Buddhist states, in the nineteenth century, there is still a broad and deep gulf between Christian civilisation and others.<sup>99</sup> As a first condition for non-Christian nations to become part of the Family of Nations, Oppenheim opines that they should become “civilised”.<sup>100</sup> This distinction between civilised and uncivilised nations as an element of sovereignty is fully reflected in Talebov’s views.

Talebov’s knowledge about international law theories of his time puts him in an uncomfortable position — on the one hand, by praising international law as the field of law where “rights are used in their real sense”, and on the other hand by reiterating the doctrine of conquest, which at the time was openly used by Europeans as a basis for obtaining colonial title.<sup>101</sup> Talebov’s provocative views should also be seen in light of his extreme frustration with the sheer ignorance of Iranian officials who were “living in their fantasies bragging about the Russians and the British having no right” to interfere in Iran’s affair.<sup>102</sup> Talebov complains that Iranian rulers “have no idea

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92 Henry Wheaton *Elements of International Law* Edited by Wilson (1964), (Little, Brown and Company, Boston, 1866).

93 John Westlake *Chapters on the Principles of International Law* (Cambridge University Press, Cambridge, 1894).

94 Lassa Oppenheim *International Law; A Treatise, Vol I, Peace* (Longmans, Green, London, 1905–1906) at 30–31, 34, 218–219, 266, 267.

95 Antony Anghie “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 *Harv Int’l L J* 1.

96 *Ibid.*, at 4.

97 Jeffrey L Dunoff, Steven R Ratner and David Wippman *International Law, Norms, Actors, Process: A Problem Oriented Approach* (Aspen Publishers, Aspen, 2006) at 11.

98 Anghie, above n 96, at 4.

99 Oppenheim, above n 95, at 30–31.

100 *Ibid.*

101 Sharon Korman *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press, Oxford, 1996).

102 Talebov, above n 65, at 87.

that Russia and the Great Britain do not perceive Iran as sovereign. They are struggling over their own rights [vis-à-vis our country]”.<sup>103</sup>

Yet, Talebov is not naïve to the political implications of the nineteenth-century positivist theories of international law. He believes that Europeans are well aware of the ramifications of such theories too. He thinks they understand that there may come a day when the three hundred million Muslims from Istanbul to central Asia unite and rise against them to reclaim their rights:<sup>104</sup>

Thereafter [the Quran’s promise of] “everything will return to its origin” will transform the law of the conquest to the law of Islam and humanity. The respectful readership may think of me as a Pan-Islamist or one of those who fantasize in vain about the union of the feeble Islamic nations. This is not the case I swear to Allah. This is just a fate determined by God that shall come true. Europeans can use no tricks to prevent this from happening since eventually one will meet the consequences of one’s deeds. [This shall be the case] unless the nations who consider themselves as “civilized”... suddenly change course, refrain from their [colonial] ambitions of occupying the lands of the weak nations, reclaim their humanity and appreciate the true meaning of rights.

Talebov bases his critique mostly on moral grounds but remains faithful to the idea of the lack of sovereignty in the lawless nations:<sup>105</sup>

They should hold a big conference and build a new system for the totality of the Nations in the world ... to force lawless nations to adopt constitutions and collectively base their relationship with the Muslim and Asian countries on integrity, honesty, friendship and consent.

Talebov goes on to detail a few suggestions about the formation of a big world federation under the rubric of a “red republic”<sup>106</sup> – a socialist rhetoric of the time. In another instance, he reiterates the idea of establishing an “international community”,<sup>107</sup> which, despite the fact it “seemed preposterous to his readers”, he believes will someday come true.<sup>108</sup>

#### IV. CONCLUDING REMARKS

By the end of the nineteenth century, when the identity of “intellectuals” had gone global, the dominant ideology had shifted to a “positivist liberalism”.<sup>109</sup> This paper provides evidence as to how Iranian intellectuals were heavily influenced by the wave of legal positivist ideas that were globalised in the late nineteenth and early twentieth century.<sup>110</sup> As the paper demonstrates, legal positivism was dominant in the consciousness of Malkum Khan and Talebov, who were among the founding fathers of modern legal thought in nineteenth century Iran. Although each had distinct influences and personal motives, both Malkum, an influential politician and an activist, and Talebov, a middle-class businessman and an independent mind, adhered to state-centred notions of law and governance as well as concepts of civilisation and organisation as a basis for maintaining sovereignty in international law.

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103 Ibid.

104 Ibid, at 90.

105 Talebov, above n 65, at 91.

106 Ibid, at 91.

107 Ibid, at 75.

108 Ibid, at 91.

109 Kurzman, above n 2, at 13.

110 Kurzman, above n 2, at 24–52.