فصلنامه علمی پژوهشی مدیریت شهری و روستایی
(ویژه نامه لاتین ضمیمه شماره ۵۷)
Urban managment
No.57 Winter 2020
63 - 73
تاریخ دریافت ۱۳۹۸/۱۰/۳۰ – تاریخ پذیرش ۱۳۹۸/۱۲/۲۷

The role of Rule of law as one of the elements of good governance in Islamic state

Hoda Ghaffari[1]**-** Asistant professor of Faculty of law, Allameh Tabatabai University, Tehran, Iran

Abstract: Rule of law is a multi aspect, complex and developing theory that during the fluctuation of history from ancient Greece until today have been exposed with variety concept and conceptions. Once it has been defined as the equity before the law and also sometimes it has been introduced against the monarchy.

In concept analysis of rule of law the best situation that can be imagined is "achieving to get lowest level of agreement on initial meaning of this term (rule of law instead of monarchy)", but the conception of this term is more comprehensive and the opportunity of proposing the variety political, philosophy and legal theories by the other components is provided.

Totally the conception of rule of law can be divided in formal conception and substantive conception.

The most important specialty of formal conception of rule of law is the restricting the authorities of rulers by the law and applying the legality, though the substantive conception of rule of law in addition to above restrictions, requires the law to consider about some substantive specialties. Emphasis on moralities and adjusting the laws with the values such as justice, liberty and democracy is completely obvious in this conception.

In this paper with the brief explanation about the history and concept of rule of law we intend to do more precise investigation about the elements of formal conception and substantive conception and what are the differences between these elements.

Sovereignty of religious law also means the sovereignty of divine law over the people. This paper intends to survey the relationship between Sovereignty of religious law and rule of law in Islamic state.

Keywords: Islamic State; Formal Conception; the Rule of Law; Substantial Conception,

1 Corresponding Author; H.ghafari@atu.ac.ir Phone number: +989122722176

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Introduction

The relationship between rule of law and sovereignty of religious law has ever been an arguable topic. Rule of law is a multi aspect, complex and developing theory that during the fluctuation of history from ancient Greece until today have been exposed with variety concept and conceptions. Once it has been defined as the equity before the law and also sometimes it has been introduced against the monarchy.

In concept analysis of rule of law the best situation that can be imagined is "achieving to get lowest level of agreement on initial meaning of this term (rule of law instead of monarchy)", but the conception of this term is more comprehensive and the opportunity of proposing the variety political, philosophy and legal theories by the other components is provided.

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The sovereignty of religious law means the sovereignty of divine laws which are used to regulate the people life's aspects. The conception of sovereignty of religious has been interpreted from variety points of views during different periods where as sometimes it has been interpreted as mere divine law making jurisdiction which resulted in ambiguities about enough power of mankind thinking to govern and law making in order to control the social life. Also other interpretation about sovereignty of religious refers to divine-public jurisdiction which allows to mankind to interfere in law making procedure under the god sovereignty and just in faragh area (mantaghat-al-faragh) limitations. Besides ejtehad has its special role in this theory because of time and place requirements in law making.

On the other hand according to mankind jurisdiction theory law making to manage the mankind daily affairs needs to have continuous relationship with social and individual mankind life's realities. Obviously the mentioned relationship could not be existed except via the humankind. The role of religious law in this theory is a guide principle which mostly consider about individual human life aspects rather than its social aspects.

Now the main question here is: "where is the intersection point of two rule of law and sovereignty of religious law principles?" laws always try to control the uncontrolled power and substitute it by sovereignty of law, besides the history studies certify the continuous tight relationship between government and law, therefore the intersection point of two sovereignty of law and sovereignty of religious law principles should be surveyed through the theories which believe in sovereignty of divine laws instead of sovereignty of mankind thinking to regulating and governing the social life.

Therefore the compatibility between rule of law which is based on acceptance of sovereignty of public (democracy) theories and sovereignty of religious law is propounded. Now it is obvious that formal conception and substantial conception of each of mere divine jurisdiction, public-divine jurisdiction, and public jurisdiction in law making plays its important role to interpreter the relationship between rule of law and sovereignty of religious law.

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In this paper formal conception of sovereignty of law regarding the public- divine jurisdiction in sovereignty of religious law territory is considered as the parameter (measure) of survey the relationship between rule of law and sovereignty of religious law in Imam Ali Government and ISLAMIC Republic of Iran legal system. Totally the argues in formal conception of rule of law is less than substantial conception of that, because not only the substantial conception is beyond the formal rule of law and legality features, but also it requires the law to have substantial specialties. Emphasis on moralities and adjusting the laws with the values such as justice, liberty and democracy is completely obvious in substantial conception.

Discussion

Good governance requires fair legal frameworks that are enforced impartially. It also requires full protection of human rights, particularly those of minorities. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force. [1]

The rule of law is one of those broad principles that are so fundamental to good governance and a decent political society that it receives virtually unanimous approval in western countries. [2]

Definition of rule of law

The term" rule of law " was invented by Dicey the British constitutional scholar who first enunciated the modern definition of the rule of law in the same work in which he elaborated the theory of Parliamentary Sovereignty. [3] It is not easy to translate into foreign languages such as German or French inasmuch as it does not refer to a clearly identified legal institution such as the "hierarchy of norms" in the French "Etat de droit" or the German "Rechtssaat". [4]

The definition of Albert v.Dicey:

A.V. Dicey created a classical formulation of the rule of law in 1885. He stated that the rule of law has three meanings:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power... Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals. [5]

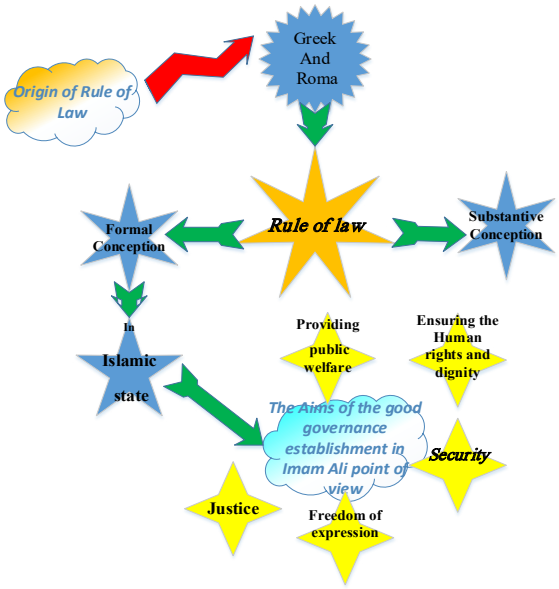
The conception of the rule of law explained by Dicey needs to be understood together with the doctrine of parliamentary sovereignty. This is because the related concept of the rule of law, in effect impose qualifications to what appears to be the unlimited nature of parliamentary sovereignty. [6]

The notion of the "rule of law" derived from many traditions and continents and is intertwined with the evolution of the history of law itself. The Code of Hammourabi, promulgated by the King of Babylon around 1760 BC, is one of the first examples of codification of law, presented to the public and applying to the acts of the ruler. In the Arab world, a rich tradition of Islamic law embraced the notion of the supremacy of law. Core principles of holding government authority to account and placing the wishes of the populace before the rulers can be found amid the main moral and philosophical traditions across the Asian continent, including in Confucianism. In the Anglo-American context, the Magna Carta of 1215 was a seminal document, emphasizing the importance of the independence

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of the judiciary and the role of judicial process as fundamental characteristics of the rule of law. In continental Europe notions of rule of law focused on the nature of the State, particularly on the role of constitutionalism. [7]

Schematic model of reasoning and conclusion



Origin of rule of law

Greek and Roma are origins of rule of law. In so far as it implies a power under law, the rule of law has very ancient origins. The ancient very early understood that possession by political authority of coercive powers that it may use for the best to guaranteed public peace and justice for all as well as for the worse to establish a vile tyranny, raised fundamental problems for political and legal theory.

The Greek philosophers were the first to utilize to law to solve the dilemma and to clarify that the most important way to limit the powers of government over the governed was to subject it to legal rules. A government of law is better than a government of men. Aristotle gave a first phrase to this principle in the Politics, when he claimed that a free citizen is one who obeys laws, not men. [8]

Aristotle defends the rule of law against power because he distinguishes the dangers of overreaching of all kinds: whether on behalf of those who rule, The people, or the polity itself. Accordingly, he recognizes categorically between political or rotational rule, on the one hand, and mastery, on the other, calling mastery (or absolute rule) opposed to a political life. He is on the whole hostile to rule by the people, and particularly hostile to the sort of freedom as license he takes most forms of democracy to encourage.

Actually, Aristotle treats the rule of law as a constituent feature of any regime worthy of being called a regime. In Aristotle's view, however, law, too, must be moderated, for laws also, and all too often, aim at domination. It is for This reason that he insists, following in the footsteps of Socrates, those unjust laws must be disobeyed. [9] The idea was taken up and developed by the Roma jurists, especially Cicero, who insisted on the true duty of the magistrate, namely, that he represents the state and must respect the laws. [10]

Formal Conception of the Rule of Law

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorized person…); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective…). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond

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this. They accept that the rule of law has the formal attributes mentioned above, but They wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not. [11]

The nature of a formal theory of the rule of law is best understood by way of contrast with a substantive theory. A substantive theory is characterized mainly by the greater substantive content it incorporates. Thus it incorporates to some degree one or more of the following: rules securing minimum welfare…, rules securing some variety of the market economy, rules protecting at least some basic human rights, and rules institutionalizing democratic governance. Here, the contrast with formal theories of the rule of law is stark. [12]

According to Raz, Law should be promulgated in the correct manner. Law should be capable of guiding one's conduct. Raz followed Hayek when he recognized "the basic intuition" underlying the rule of law : the law must be capable of guiding the behavior of its subjects. He derived the elements of the rule of law from this idea. These elements include that the law must be prospective, general, clear, public, and relatively stable. To this list Raz attached several mechanisms he considered necessary to effectuate rules of this kind: an independent judiciary, open and fair hearings without bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law. [13] Raz agreed with Hayek that the rule of law furthers human autonomy and dignity by allowing people to plan their activities with advance knowledge of the circumstances under which they would be subject to legal interference by the government, and with knowledge of how the law would respond to their interactions with other individuals. Facilitating the capacity of individuals to plan in this manner, earlier labeled legal liberty enhances freedom. "But it has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights."13 "It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice." [14]

Although they focus on different aspects of the contrast, both accounts draw the same basic distinction which can be summarized thusly: formal theories focus exclusively on the form of legality, while substantive theories also include requirements that the content of the law be just in certain fundamental respects. [15]

Democracy and formal conception of rule of law like formal conception, democracy is substantively empty in that it says nothing about what the content of law must be. It is a decision procedure employed to determine the content of law. A theoretical argument about legitimacy ties formal legality to democracy.

The legitimacy of democracy obtains from its service to the political freedom of the individual. Freedom is to live under laws of one's own making, theorists from Rousseau to Kant have asserted. [16] As leading contemporary philosopher Jurgen Habermas put it, "the modern legal order can draw its legitimacy only from the idea of self-determination: Citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees. [17]

Substantive Conception of the Rule of Law

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All substantive versions of the rule of law incorporate the elements of the formal rule of law, and then go further, adding on content requirements in various combinations. That is what makes this category thicker than the formal. Among legal theorists the most renowned substantive account of the rule of law is Ronald Dworkin's, mentioned earlier, Which he set out by way of contrast to the formal ("rule-book") version: [18]

"I shall call the second conception of the rule of law the 'rights' conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and *political* rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights". [19]

Dworkin commanded that these rights, which he indicates are discernable by resort to political principles, are not themselves granted by the positive law, but are instead prior to and an integral aspect of the positive law.

Formal Conception of Rule of Law in Islamic state

Traditional Islamic state

In the Islamic tradition, the source of law's legitimacy is entirely different from Western tradition. In the western tradition, law is regarded firstly as the product of human interaction in territorial jurisdictions. This idea is best captured by the idea of social contract. But in the Islamic view, the source of law's legitimacy is entirely different. It is founded in the revealed will of God, as asserted in the Quran and the teaching prophet. This text and teachings, in turn, is extended and given practical expression through the science of fiqh. [20]

This section applies to a brief survey about some of bases and components of formal conception of rule of law in Islamic state model in Imam Ali period; as his letter to his appointed governor for Egypt (malik al ashtar) is considered officially by the United Nations secretary as below: Kofi Annan, the UN secretary states: "The words of Ali ibn Abi Talib, 'O Malik! The people are either brothers in religion or your equal in creation' must be adhered to by all organizations and it is a statement that all humanity must embrace."

After a few months, Annan suggested that the document of Imam Ali to Malik al-Ashtar must be considered from the legal viewpoint, and after lengthy studies and considerations by the UN Legal Committee, member states voted that the document should be considered as one of the sources of International Law. [21]

An order to Maalik al-Ashtar: "Let it be known to you, Maalik, that I am sending you as a governor to a country which has seen many regimes before this. Some of them were benign, sympathetic and good, while others were tyrannical, oppressive and cruel. People will judge your regime as critically as you have studied the activities of other regimes and they will criticize you in the same way as you have censured or approved other rulers. You must know that a good and virtuous man is known and recognized by the good that is said about him and the praise which Allah has destined him to receive from others. Therefore, make your mind the source and foun-

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tain-head of good thoughts, good intentions and good deeds. This can only be attained by keeping a strict control on your desires and yearnings, however much they may try to incite and coerce you. Remember that the best way to do justice to your inner self and to keep it out of harm is to restrain it from vice and from things which the 'self' inordinately and irrationally desires.

Maalik! You must create in your mind kindness, compassion and love for your subjects. Do not behave towards them as if you are a voracious and ravenous beast and as if your success lies in devouring them.

Maalik! You must never forget that if you are a ruler over them than the caliph is the ruler over you and Allah is the Supreme Lord over the caliph. And the reality is that He has appointed you as the governor and tested you through the responsibility of this ruler ship over them.

Do not feel ashamed to forgive and forget. Do not hurry over punishments and do not be pleased and do not be proud of your power to punish. Do not get angry and lose your temper quickly over the mistakes and failures of those over whom you rule. On the contrary, be patient and sympathetic with them. Anger and desire of vengeance are not going to be of much help to you in your administration.

Never say to yourself, "I am their Lord, their ruler and all in all over them and that I must be obeyed submissively and humbly" because such a thought will unbalance your mind, will make you vain and arrogant, will weaken your faith in religion and will make you seek support of any power other than that of Allah .

You must always appreciate and adopt a policy which is neither too severe nor too lenient; a policy which is based upon equity will be largely appreciated. Remember that the displeasure of common men, the have-nots and the depressed persons more overbalances than the approval of important persons, while the displeasure of a few big people will be excused by the Lord if the general public and the masses of your subjects are happy with you."

The Aims of the good governance establishment in Imam Ali point of view

Justice

Imam Ali has considered the justice so firmly in his government period, for instance he has emphasized on justice in other part of his letter to Malik: "Do not give cause to the people to envy each other (man against man, tribe against tribe or one section of the society against the other). Try to alleviate and root out mutual distrust and enmity from amongst your subjects.

Be fair, impartial and just in your dealings with all, individually and collectively and be careful not to make your person, position and favors act as sources of malice. Do not let any such thing or such person come near to you who does not deserve your nearness and your favor. Never lower your dignity and prestige." [22]

Also when Imam Ali was spoken ill of for showing equality in the distribution (of shares from Bayt al-mal or the Muslim Public Treasury) he said: "Do you command me that I should seek support by oppressing those over whom I have been placed? By Allah, I won't do so as long as the world goes on, and as long as one star leads another in the sky. Even if it were my property, I would have distributed it equally among them, then why not when the property is that of Allah. Beware; certainly that giving of wealth without any right for it is wastefulness and lavishness. It raises its doer in this world, but lowers him in the next world. It honors him before people, but disgraces him with Allah. If a man gives his property to those who have no right for it or do not deserve it, Allah deprives him of

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their gratefulness, and their love too would be for others. Then if he falls on bad days and needs their help, they would prove the worst comrades and ignoble friends."

Security

Another aims of Imam Ali government establishment refers to providing the security for all the people regardless their race, color, religion, and gender; for example he has said: "O' my Allah! Thou know that what we did was neither to seek power nor to acquire anything from the vanities of the world. We rather wanted to restore the signs of Thy religion and to usher prosperity into Thy cities so that the oppressed among Thy creatures might be safe and Thy forsaken commands might be established. O' my Allah! I am the first who leaned (towards Thee) and who heard and responded (to the call of Islam)." [23]

providing public welfare

Imam Ali also has emphasized on providing public welfare during his government period regardless their race, color, religion, and gender. One of his saying in this relation is as below: "Certainly, there is no obligation on the Imam except what has been devolved on him from Allah, namely to convey warnings, to exert in good advice, to revive the *sunnah*, to enforce penalties on those liable to them and to issue shares to the deserving. So hasten towards knowledge before its vegetation dries up and before you turn yourselves away from seeking knowledge from those who have it. Desist others from the unlawful and abstain from it yourself, because you have been commanded to abstain (yourself) before abstaining (others)."

Ensuring the Human rights and dignity

His has a famous saying in this regard as "don't be slave for anyone as God has created you for liberty"

Freedom of expression

One of the most considered component in Imam Ali government period refers to freedom of expression; he remarked so many times the people which nobody should talk with him like talking with oppressors and they shouldn't flatter him even he always emphasized on their right to criticize him freely.

The elements of formal conception of rule law in Imam Ali point of view

Public equality before law

Imam Ali has had special emphasis on equality of all of the people before the law regardless their religion, race, color, and gender. For example Imam ali's reaction to his poor and blind brother request to increase his salary if he can manage a small part of his serious problems, is very famous: " By Allah, I certainly saw (my brother) `Aqil fallen in destitution and he asked me a *sa`* (about three kilograms in weight) out of your (share of) wheat, and I also saw his children with disheveled hair and a dusty countenance due to starvation, as though their faces had been blackened by indigo. He came to me several times and repeated his request to me again and again. I heard him, and he thought I would sell my faith to him and follow his tread leaving my own way. Then I (just) heated a piece of iron and took it near his body so that he might take a lesson from it, then he cried as a person in protracted illness cries with pain and he was about to get burnt with its branding. Then I said to him, "Moaning women may moan over you, O' `Aqil. Do

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you cry on account of this (heated) iron which has been made by a man for fun while you are driving me towards the fire which Allah, the Powerful, has prepared for (a manifestation of) His wrath? Should you cry from pain, but I should not cry from the flames (of the hell)?" [24]

The principle of shame fullness of punishment without declaration of law (ghobh eghabe bela bayan)

The principle of legality of crimes and punishments has been firmly considered in Imam Ali government and all the offenders had been punished according to the divine law.

Devine-public jurisdiction in Imam Ali government

Imam Ali was supporting the Devine-public jurisdiction in sovereignty of religious law and the people role in government establishment under the allegiance system. Two of his official sayings on importance of people's consent are as below: "if people had not come to me and supporters had not exhausted the argument and if there had been no pledge of Allah with the learned to the effect that they should not acquiesce in the gluttony of the oppressor and the hunger of the oppressed I would have cast the rope of Caliphate on its own shoulders, and would have given the last one the same treatment as to the first one. Then you would have seen that in my view this world of yours is no better than the sneezing of a goat." [25]

"they (people) came to me of their own free-will, without hesitation, and with pleasure and joy" [26]

Formal Conception of Rule of law in Constitutional law of the Islamic Republic of Iran

According to the first article of Constitutional law of the Islamic Republic of Iran "the form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their long standing belief in the sovereignty of truth and Qur'anic justice", therefore this system is based on public- divine jurisdiction. Besides the greatness of human as one of the bases of sovereignty of law is considered in Constitutional law of the Islamic Republic of Iran; Also according to one part of its second article: The Islamic Republic is a system based on belief in the exalted dignity and value of man, and his freedom coupled with responsibility before God.

Religious beliefs always entail the respect to greatness and human dignity, because of that in Constitutional law of the Islamic Republic of Iran the "exalted dignity and value of man, and his freedom coupled with responsibility before God" such as other Islam and Shiite beliefs is one of the Islamic Republic of Iran bases.[27]

According to the explicit wording of the sixth article of Iran's Constitutional law "In the Islamic Republic of Iran, the affairs of the country must be administered on the basis of public opinion expressed by the means of elections, including the election of the President, the representatives of the Islamic Consultative Assembly, and the members of councils, or by means of referenda in matters specified in other articles of this Constitution".

The separation of powers (the executive or government, the legislature, and the judiciary) is accepted implicitly in 57th article of mentioned law. According to this article" The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute wilayat al-'amr and the leadership

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of the Iran, in accordance with the forthcoming articles of this Constitution. These powers are independent of each other."

Also based on 58th, 60th, and 61th article of the Constitutional law of the Islamic Republic: "Article (58), the function of the legislature is to be exercised through the Islamic Consultative Assembly, consisting of the elected representatives of the people. Legislation approved by this body, after going through the stages specified in the articles below, is communicated to the executive and the judiciary for implementation.

Article (60), the functions of the executive, except in the matters that are directly placed under the jurisdiction of the Leadership by the Constitution, are to be exercised by the president and the ministers.

Article (61), the function of the judiciary are to be performed by courts of justice, which are to be formed in accordance with the criteria of Islam, and are vested with the authority to examine and settle lawsuits, protect the rights of the public, dispense and enact justice, and implement the Divine limits [al-hudud al-Ilahiyyah]."

Although The separation of powers principle in this case in somehow is different from its classic model because of being under the supervision of the absolute wilayat al-'amr and the leadership of the Iran, but using the controlling methods to scrutinize and examine the wilayat al-'amr and the leadership function which is existed in 111th, 142th, and 107th articles of the Constitutional law of the Islamic Republic, the mentioned difference or ambiguity is removed.

Therefore separation of powers principle acceptance as one of the most important components of Constitutional law outline causes to recognize the political-legal system of the Islamic Republic of Iran as a sovereignty of law based legal system.

The Constitutional law of the Islamic Republic has considered "the equality principle before the law" as one of the main bases of sovereignty of law principle. According to 14th part of third article of Constitutional law of the Islamic Republic" In order to attain the objectives specified in Article 2, the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals: 14-securing the multifarious rights of all citizens, both women and men, and providing legal protection for all, as well as the equality of-all before the law".

Also according to 107th article of the Constitutional law of the Islamic Republic wilayat al-'amr and the leadership is equal to other people before the law; "107. ... The Leader is equal with the rest of the people of the country in the eyes of law". Therefore the sovereignty of law principle is required for all authorities and organizations.

In addition the duties and powers of all political authorities including the leadership, presidency, Islamic Consultative Assembly, the Guardian Council, judiciary power and other governmental organizations are determined in the Constitutional law of the Islamic Republic. Therefore triple powers and other governmental organizations should be used under the sovereignty of law principle.

Totally whatever is ordered in the Constitutional law of the Islamic Republic refers to peaceful coexistence between power and religion also Islamic law and Governmental law solidarity rather than their union. Essential law are moving and being changed through the religion's ideals; it is nourished from the jurisprudence, but it has its special function. In one word the competent sourc-

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es and authorities to law making religious law making are not the same and their goals are different too.

I. Conclusion:

Rule of law is a complex theory which has been interpreted from different point of views by the thinkers during the history and also it has two formal and substantial conceptions. The sovereignty of religious law means the sovereignty of divine laws which is divided to three interpretations as mere divine law making jurisdiction, divine-public jurisdiction, and mankind jurisdiction. This paper using formal conception of rule of law and divine-public jurisdiction as the accepted bases has proved the elements of formal conception of rule of law have been applied in both traditional Islamic state (Imam Ali's Government) and constitutional law Islamic Republic of Iran.

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