CHAPTER – V

CONSTITUTIONAL REVIEW
OF THE ACTS OF
LEGISLATURE
IN IRAN
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Introduction

“The Islamic Republic of Iran is a regime based on faith in the One and Only God [There is no God but Allah], His exclusive Sovereignty and Legislation and the necessity of submission to His command.”929 In other words, “the Islamic Republic is based on faith in … the Divine Revelation and its basic role in the exposition of laws.”930 Moreover, “the official religion of Iran shall be Islam and the faith Twelver Shiism.”931 The consequence of these principles is the sovereignty of Shiite jurisprudence (Fiqh) over all the social affairs, and relations as well as institutions and actions of statesmanship.

According to Article 72 of the 1979 Constitution of Iran, “the Islamic Consultative Assembly (the Majlis) may not enact laws contrary to the principles and rules of the country or the Constitution …” In this legal system, too, even Articles of the Constitution should not contradict the Islamic standards. Regarding this, Article 4 of the Constitution states, “All laws and regulations including civil, criminal, financial, economic, administrative, military, political or otherwise, shall be based on Islamic principles. This Article shall apply generally on all Articles of the Constitution and other laws and regulations …”

By virtue of the aforementioned facts, the Islamic rules or Shariah appears necessarily as the base and infrastructure of the Iranian Constitution. In other words, the Iranian Constitution relies on a wider ground called “Shariah.” Therefore, the institution which is responsible for the supervision of the Constitution in the Islamic Republic of Iran must take a lot of care in order that the laws and regulations will not contradict both the Constitution and Shariah. In fact, “in ordinary laws, two directions must be taken into account the first of which is their conformity with the Constitution and the second one that concerns their conformity with the Islamic standards.”932

930 Ibid., Clause 2.
931 Ibid., Art. 12.
Nevertheless, this dual characteristic of constitutional review in Iran has caused some significant issues that are thoroughly discussed in this Chapter. The Chapter is organized in three parts. The first part concerns the historical background of the constitutional review of the Acts of Legislature in Iran. The second part deals with the Guardian Council and its role and performance in the Iranian constitutional review system. Finally, the last part scrutinizes the Expediency Discretion Council of the Regime, its role and position, and the issues related to it in the system.

Part One

Historical Background of the Iranian Constitutional Review System

1. Oppositeness of Shariah and Law
The hot dispute between traditionalism and modernism that started in early kingdom of Naser al-Din Shah (1848-1896), one of the most powerful kings of Qajar dynasty, in the mid-nineteenth century is mulled over as a characteristic feature of Iran’s recent 150-year history. This dispute from the very beginning brought about a great victim: Amir Kabir, the intellectual and elite grand vizier of the Shah. Thanks to his reforms such as developing and modernizing the Judiciary and the education system, the courtiers and some of the at-court-influential clergymen who were not in high spirits with these reformist measures conspired against him. As a result, he was dismissed from his position and was exiled to a secluded vicinity where he was brutally murdered. This clash, which has been high up in all squares of Iranian society from education to arts like cinema and music, has aroused many serious political and legal quarrels whose peak was in the Constitutional Revolution of Iran in 1906.

“In the Constitutional Revolution where neither did the political parties exist, nor could they come into existence, and where there were no conditions for them to develop, the clergymen who had gained an unreserved and
unconditional penetration and authority during the Qajar dynasty could in practice as an only cause constitute an opposition against the government."933

The impingement of the clergymen upon the government, and their frequent interferences, structurally induced and justified further by their acquired role of mediation and intercession in political conflicts,934 naturally brought resentment among the government officials. The latter would resist the former’s demands whenever possible. The opposition between the clergymen and the government later turned into the opposition between Shariah and law, which was in fact a sort of the opposition between traditionalism and modernism. They allocated an explicit privilege to Shariah, i.e., the Islamic rules and standards, and considered themselves as the monopolist scientists of Islamic knowledge and compelled these standards into the interpretation of religion texts, implementation of public affairs and the governmental affairs, and no inconsistency with the Islamic rules was acknowledged. For example, from the Safavids’ Shiite dynasty in the 16th and 17th centuries to the time when the modern Justice Administration in Iran was established synchronized with the Constitutional Revolution in 1906, the affairs of the public disputes were judged and attended only by the clergymen and they were the only authorities to be consulted.935 Therefore, in Iran of the nineteenth century, the religious courts of the Mojtahedin, enjoyed unprecedented reception and reaching a level of activity that brought forth “the peak of their importance in Iran’s Judiciary organization.”936

After the Constitutional Revolution and the establishment of the first Parliament, a commission including the religious scientists to organize the courts’ affairs was constituted. “In the previous periods [when there were no Parliament and law in their modern sense] the claimants had many religious, common, abolishing, and abolished orders which in turn made the court’s work … more difficult. Since there was no fixed jurisprudence approach, a board of

935 Ajodani, supra note 933, p. 102.
religious scientists was assigned to investigate those orders, determine the right and wrong, and enforce the orders which were confirmed wherein they could determine the abolishing and abolished orders.‖ The incident of Sayed Abdullah Behbahani’s fight, one the most influential clergymen of the Constitutional Revolution who had hard tried to stabilize the concept of constitutionalism in Iran, with Ehtesham ol-Saltaneh, the spokesman of the first Parliament, is a vivid example of clergymen’s chaotic interference in the governmental affairs. It appeared important because it was put into open discussion as a parliamentary dispute in the open session of the Parliament. The quarrel began when the people of Zanjan district had been put out of patience and serenity by one of the Khans’ of Khamseh area, Jahan Shah Khan, harassment and cruelty. In this ordinary legal claim, a claimant lodges a complaint before the court saying that Jahan Shah Khan has forcibly possessed his property. While the case was on the desk at court, Jahan Shah Khan resorted to Ayatollah Behbahani who, then, sent a telegraph to the judge stating that the claimant’s claim should be void and no one had the right to interfere with Jahan Shah Khan’s forcibly possessed property. However, the Khamseh ruling system seeks the proper course to pursue and Ehtesham ol-Saltaneh replies, “Mr. Behbahani is never allowed to interfere in the judiciary affairs, nor is he allowed to get involved in or issue orders for the Executive. A claimant had lodged the complaint before the court and you are required to enforce the judiciary orders. His order is never valid and must be discounted and taken no notice of.” In fact, the Parliament has acted upon the Act of Rulers’ Directions approved on Sep. 11, 1907, which stipulated, “Since the rulers are not equipped with any executive force, they are never allowed to change the courts’ judgments, nor can they avoid enforcing the statutory laws.” Nevertheless, Ayatollah Behbahani got extremely exasperated at the Parliament spokesman and asked him to resign. Ehtesham ol-Saltaneh made the

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938 Ibid.
subject matter thrashed out in the open discussion of the Parliament and
censured Behbahani of interfering with the governmental affairs and
neglecting people’s rights.941

Behbahani’s interference in the judiciary affairs uncovered a more
fundamental inconsistency between Shariah and law; the constitutionalist
clergyman still had not utterly quit his religious power that a completely
religious clergyman can possess.942

One way the contradiction manifested itself during the newborn revolution
was in the debates that took place among the Shiite scholars who possess total
ideological power to interpret Islamic matters. The revolution, basically,
divided the Shiite scholars into two camps: constitutionalists, and anti-
constitutionalists; the latter intensely advocated the Shariah instead of
parliamentary legislation. Both groups shared the belief that sovereignty on
earth belonged only to God and His rightful representatives, i.e., the infallible
Imams. The anti-constitutionalists, however, saw many things wrong with the
proposed constitutional reforms. First of all, they believed that their judiciary
and financial powers were threatened by the new arrangements. They were also
alarmed by the secularizing implications of parliamentary legislation. The
constitutionalists, on the other hand, argued that the Islamic nation would be far
better off with a Constitution, a parliament, and the rule of law than under the
unconditional power of the king. They reasoned that with constitutionalism,
rather than arbitrary rule, the Islamists would in fact have a much better chance
of safeguarding Islam.943

One manifest example regarding the rigorous and relentless disputes
between the constitutionalists and the anti-constitutionalists is the issue of
“Article of Equality of all People before the Law” which was, in turn, one of
the theoretical ideals and fundamental bases of the Iranian constitutionalism.
The anti-constitutionalists posed an essential question saying how it was

941 Mousavi, supra note 939.
942 Ajodani, supra note 933, pp. 104-5.
943 Arjomand, Said A. “The Ulama’s Traditionalist opposition to Parliamentarism: 1907-1909.” Middle Eastern
possible that the Zoroastrians, the Jews, the Christians, and all blasphemous people enjoy the same rights and equality that the Muslims had. They considered it as contradictory to the Islamic principles and standards. Sheikh Fazlollah Nouri, the most prominent anti-constitutionalist clergyman, started to quarrel and struggle with the newborn Parliament over the same Article and the Second Article of the Supplementary Constitution that will be discussed later. Eventually, on Jun. 19, 1907 when the approved Supplementary Constitution was submitted to the Parliament’s Gazette for public notice and information, supporters of Sheikh Fazlollah Nouri were all called for a congregation in Jom‘eh Mosque to mourn for the anniversary of the Prophet Mohammad’s daughter’s death.944 They stayed in the mosque for ten days, but their real intention was to arouse the people against the Parliament and its approvals that they thought contradicted the Islamic Rules.945 Their objection was that equality among all religions and faiths was something against the necessity of the holy Koran and was contrary to Prophet Mohammad’s message and rituals as well as all other conspicuous corruption and disadvantages.946 In fact, Sheikh Fazlollah Nouri objected to the foundation of the constitutionalism because he maintained that “an Islamic country would be impossible to be constitutional, because Islam would be impossible to be controlled with the equality.”947 In one of his debates with his constitutionalist colleagues, he said, “Our law[s] have been written and handed to us some 1300 years ago.”948 One of the discrepancies between the constitutionalists and anti-constitutionalists over equality was the belief that the anti-constitutionalists held and claimed that in Shariah equality before the law did not exist. For example, women and men’s rights in heir were quite different and those of Muslims and non-Muslims would never be equal.949 On the other hand, the constitutionalists assured the

945 Ajodani, supra note 933, pp. 144-45.
948 Ibid., p. 18.
949 Ajodani, supra note 933, p. 182.
anti-constitutionalists that their claims and desires would be guaranteed so that the government would not enact any law against Islamic principles and standards and interests of the Islamic nation. In other words, the Iranian constitutionalism would not be influenced by the foreign states and that there would not be any innovation in Shariah. Therefore, there would remain no squabble and difference of opinion between the two groups. In short, although Iranian Constitutional Revolution was supported by both religious and secular interests, it brought out in the open a basic incongruity between constitutionalism and parliamentary legislation on the one hand, and Islamic rules on the other.

Amid all these critical situations, Mozaffar al-Din Shah (1896-1907), on the one hand, showed a lot of interest in innovation and constitutionalism to modernize his country, and focused an original order in the affairs. On the other hand, he was thoughtfully concerned about the fact that even these very innovations and modernity would agitate the cruel courtiers and clergymen and make a chaos leading to his fall.

2. Second Article of the Supplementary Constitution and Considering of Shariah Review

On August 5, 1906, the ailing King, Mozaffar al-Din Shah, issued a decree in which his grand vizier was directed to set up a Parliament. Parliamentary elections began right away, and the very first Parliament in Iranian history opened in October of 1906. Writing up a Constitution for the newborn and peculiarly Iranian system of government was the first agenda for the delegates. It was completed and ratified by the expiring Shah on Dec. 30, 1906. In the Constitution, some issues had not been predicted. Therefore, its Supplement was compiled and approved in June 1907. In composing and compiling the Supplementary Constitution, challenges and disputes over the principles and

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951 Ajodani, supra note 933, p. 236.
952 Mozaffar al-Din Shah soon after issuing the order of Constitutionalism died of a serious illness and his son, Mohammad Ali Shah (1907-1909), acceded on the throne. He, from the very beginning, started to oppose the Constitutionalism.
fundamentals started in their most serious form. The advocates of *Shariah* ruggedly resisted that the Parliament that had been promised to be founded was the one that would be based on the Islamic rules. The supporters of law, however, reasoned that what the Parliament did was only to enact governmental Acts to make the kingdom feel bound and committed and to run the State affairs. That is to say, they did not interfere with Islam and would enact nothing against it as well. The advocates of *Shariah* said that with the Islamic laws, enacting other Acts to come into force would be innovations. All governmental laws must conform to *Shariah* and the discretion of their consistency would only be carried out by the *Mojtahedin*.\textsuperscript{953} Sheikh Fazlollah Nouri said, “Oh people I never deny the National Consultative Assembly … I want that National Consultative Assembly [the Parliament] which all Muslims want; that is, Muslims would like a kind of Assembly which is basically founded on Islamic rules and which does not enact any laws against the Koran, Mohammedan *Shariah*, and Shiite holy faith.”\textsuperscript{954} Therefore, the Assembly “must never approve an Act of freedom of faith, change of Islamic orders and principles, nor must it introduce and announce liquor bars, brothels, drugs and rendering indecent Acts lawful.”\textsuperscript{955}

With this view and the pressure on the side of Sheikh Fazlollah Nouri and his supporters, the Second Article of the Supplementary Constitution was approved by the Parliament. This Article, in turn, was the first pillar of reviewing and supervising the laws and regulations in Iran and it served as an introduction to the establishment of a council known as “the Guardian Council” after about 72 years later in 1979.\textsuperscript{956} The Second Article of the Supplementary Constitution states,

\begin{quote}
The Sacred National Consultative Assembly [the Parliament] … must never, at any time, approve the Acts that contradict the Islamic sacred rules … and it
\end{quote}

\textsuperscript{953} See Ajodani, \textit{supra} note 933, pp. 373-74.
\textsuperscript{955} See Rezvani, \textit{supra} note 946, pp. 11-12 & 43.
is clear that the discretion of the consistency or inconsistency of the enacted laws with the Islamic rules must be discharged only by the Islamic scientists. Therefore, it was officially regulated that, in any time, a board of at least five Mojtaheds aware of time requirements would be selected … to supervise the Acts … In case every Act was inconsistent with the sacred rules of Islam, it would be regarded invalid. The board’s vote and decision would be strictly obeyed and this Article would be valid until the appearance and revolution of Imam-e Zaman.\(^\text{957}\)

However, the aforementioned Article, known as the Asl-e Taraz, for any reason, was never acted upon in the Constitutionalism era and practically it was deserted and forgotten.\(^\text{958}\)

3. Lack of a Constitutional Review System in the Constitutionalism Era

Except for the Asl-e Taraz in which the Shariah review over the laws had been considered, the 1906 Constitution and its subsequent Amendments had not predicted any responsible body to discharge the significant task of protecting the Constitution. In spite of this fact, some of the Iranian eminent lawyers before the Iranian 1979 Revolution, including M. Farnia, N. Katuzian, and A. Azmayesh, maintained that the very Judiciary of the country was competent to control the constitutional validity of the statutory laws. They held that the ordinary judges should refrain from enforcing or implementing the unconstitutional laws. This opinion, however, was never followed by the then Judiciary.\(^\text{959}\) Accordingly, most of the Iranian legal writers, at that time, believed that the provisions of the Constitution, as the basic law of the land, in its most crucial part, that is, the necessity of obedience of the ordinary legislature to the Constitution makers had not any legal guarantee.\(^\text{960}\) As a

\(^{957}\) Imam-e Zaman is the last Imam of Shiite faith (12th one). He is considered to be absent from the world and would turn up when the cruelty and wrath exceed the normal and would change the entire world.

\(^{958}\) For a discussion in this regard, see Ajodani, supra note 933, pp. 376-9 & 405.


result, throughout the entire Constitutionalism era that lasted for seventy-two years, the constitutional provisions were constantly violated by the governing system especially during the Pahlavi’s dynasty (1925-1979).


With the fall of Mohammad Reza Shah Pahlavi’s Kingdom, the 2500-year kingdom in Iran got entirely defunct in Feb. 1979, and the Islamic Republic Regime was founded with the majority of people’s votes in April of the same year. The idea of compiling the Constitution before the Islamic Revolution victory while Imam Khomeini was living in Paris (Oct. 5, 1978 - Jan. 31, 1979) had already been developed, and its first draft was prepared there in Paris and was for several times reviewed in Iran later. After the 1979 Revolution victory, in addressing Imam’s order on May 25, 1979 to the Prime Minister of Provisional Government, Mahdi Bazargan, ‘The Legal Bill of the Election concerning the Assembly of Final Examination of the Constitution’ was approved by the Revolutionary Council on Jul. 5, 1979. This Constituent Assembly was composed of 73 representatives of the people among whom some political and legal experts as well as Islamic clergies and Faqihis officially started the work on Aug. 19, 1979 on Imam Khomeini’s message.\textsuperscript{961}

One of the points which was so prominent in this message was that all the Acts had to be hundred percent consistent with the Islam, and it was stipulated that in case one of the Articles was against the Islamic rules, it would be considered as an infraction of Islamic Republic and people’s votes. Therefore, any bill or vote given by one or more representatives to the \textit{Majlis} found to be against Islam would be regarded void as being in opposition with the true path of the people and the Islamic Republic.\textsuperscript{962}

The Constitution of the Islamic Republic, after many discussions and dialogues, was compiled on an Islamic foundation by the Iranian Constituent


Assembly (the Assembly of Final Examination of the Constitution). However, based on a legal bill approved by the Revolutionary Council on Nov. 11, 1979 where the final opinion on the text of the Constitution was totally assigned to the people to decide on through a referendum with ‘Yes’ or ‘No’ vote-survey instrument, the Constitution was approved on Dec. 3, 1979 by a majority of 99.5 percent of voters.963

By virtue of Article 91 of the Constitution, a political institution, called the Guardian Council, whose main job is to safeguard the Islamic rules and the Constitution in terms of the inconsistency of the approvals of the Majlis with them was established. This institution, thanks to its some similarities with the Constitutional Council of France, seems to be adopted from the French 1958 Constitution.964 Particularly, on the formation of the idea of compiling the Constitution, one of the members of the board of compiling the first draft of the Constitution, Dr. Habibi who later was the vice-president for three terms,965 prepared a rough translation of the French Constitution. He then, produced it to Imam Khomeini who asked him to go back to Iran and place the translated text of the French Constitution on the desk.966 Therefore, it is obvious that the Guardian Council in Iran was inspired by the French Constitutional Council and was formed with nearly similar duties and responsibilities.967 The Guardian Council of Iran first started to work on Jul. 17, 1979.

963 See Hashemi, supra note 961, p. 32.
965 In the two terms of Presidency of Hashemi Rafsanjani from 1989 to 1997 as well as in the first term of Presidency of Mohammad Khatami from 1997 to 2001.
Part Two
The Guardian Council and its Position and Role in the
Iranian Constitutional Review System

1. Generalities of the Guardian Council
In the Islamic Republic of Iran, the judicial authorities such as the Supreme Court are never allowed to supervise the Acts of the Majlis. They are only authorized to enforce the Acts already passed by the Majlis. The competency of constitutional review of the Acts has been provided in the Legislative branch itself.

1.1. Legal Position of the Guardian Council
The Legislative of the Islamic Republic of Iran is based upon one-chamber system, that is, the Islamic Consultative Assembly (the Majlis) comprised of the representatives from different districts of the country according to the population size is the only institution that is assigned to legislate. In fact, the exclusive competency of legislation by virtue of the Constitution is assigned to the Majlis, and it has no rivalry. However, the Legislative of Iran is not so unitary because, as stipulated earlier, according to some Islamic and legal considerations, this branch along with the Majlis, possesses another body called the Guardian Council where without their cooperation legislation will not be possible. Confirming this, Article 93 of the Constitution stipulates, “Without the Guardian Council the Majlis shall have no legal validity …” This Article was approved so that the Guardian Council would not face the destiny of the Second Article of the Supplementary Constitution in the Constitutionalism Era. Nevertheless, it should not be interpreted that the Guardian Council itself serves as an independent authority to enact laws along with the Majlis. The Council cannot rectify the approvals of the Majlis. It can just control their

968 Mehrpour, supra note 932.
969 The Constitution of IRI, Art. 71.
970 Mehrpour, supra note 932.
consistency with the Islamic rules and the Constitution. In other words, neither the Guardian Council nor any other authority has the right to enact laws.

The Sixth Chapter of the Constitution of Iran deals with the Legislative Power, and includes two sections. In the first section titled “the Islamic Consultative Assembly,” Articles 62-70 are concerned with the formation, structure, and composition of the Majlis. In the second section named “the Authorities and Competencies of the Islamic Consultative Assembly,” Articles 71-99 deal with the hows and whats of the duties and responsibilities of the Majlis. The legal position, the authorities, the responsibilities of the Guardian Council, and the ways of performing them are included in the rest of this section. In other words, nowhere in the Constitution of Iran is any specifically separated section for the Guardian Council; only in the continuation of the second section, Articles 91-99, without assigning any specific heading to the Guardian Council, its duties and authorities are discussed. Most probably, it is thanks to the fact that the framers of the Constitution have tried to emphasize that the Guardian Council is an inseparable body of the Majlis in the Legislative branch of Iran.

1.2. Duties and Powers of the Guardian Council

The Guardian Council, in addition to supervising the Acts of the Majlis that will be thoroughly deliberated, has other various responsibilities of great importance, but because these duties are not directly related to the present study, they are only briefly mentioned in this section:

(1) The Guardian Council supervises the referendums, different elections such as the Parliamentary elections and Presidential elections.

(2) The Guardian Council interprets the Constitution; whenever there is an ambiguity or contradiction in understanding a phrase in the Constitution, this Council can, either directly or by asking the Administrative Board of the Majlis, the Head of the Judiciary or the President, remove the ambiguity with its interpretive opinion. The Guardian Council’s interpretation of the Constitution is constitutionally valid and enforceable, so its content should be announced to the people through the Official Gazette of the country.

(3) All members or only Faqih of the Guardian Council officially or honorarily can attend the Expediency Council, Constitutional Revising Council, and oath-taking ceremonies of the President in the Majlis.

(4) The Guardian Council’s Faqih can control the constitutional provisions so that they would not contradict the Islamic principles.

2. Structure and Organization of the Guardian Council
2.1. Composition of the Council and its Relevant Issues

The Iranian Constitution has specified two groups of members for the Guardian Council in Article 91: the Faqih and the jurists. This Article stipulates,
With a view to safeguarding the rules of Islam and the Constitution, and to see that the approvals of the *Majlis* are not inconsistent with them, a council known as the Guardian Council shall be established composed of the following: 1) Six *Faqihs* just and acquainted with the needs of the time and issues of the day …, 2) Six jurists, specialized in various branches of law … from among Muslim jurists …

The dual composition of the Guardian Council and separation of the *Faqihs* and the jurists are, as discussed earlier, thanks to the dual structure of authority in the Iranian society, and the Constitution, too, has adopted this situation for the Guardian Council’s composition.\(^981\) Moreover, based on the binary role of the Guardian Council in supervising the Acts of the *Majlis* both to safeguard the Islamic rules and to protect the Constitution, it seems that such a binary composition proved logical from the viewpoint of the framers of the Constitution.

**2.1.1. Required Qualifications of the Guardian Council Members**  
**2.1.1.1. *Faqihs* and their Qualifications**  
The most precise and exact definition given by the Islamic scientists for the word “*Fiqh*” is to understand and to know the Islamic rules and orders through the Islamic elaborate reasons. This knowledge identifies and specifies the limit and level between religiously prohibited actions (*harams*) and lawful and permissible ones (*halals*). Therefore, it determines the responsibilities, duties, and mission of mankind.\(^982\) A *Faqih* is the one who has mastered this knowledge. He is an expert who, by understanding the concepts of Islamic rules in details, after reviewing and analyzing the problems, which the society is affected by, can issue the most appropriate order. The *Faqihs* of the Guardian Council, in their legal position and with their formal comments,

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\(^982\) Ibid.
transform the potential Islamic rules into actual practice and their views are decisive and enforceable.983

According to the first part of Article 91, the Faqihs of the Council shall enjoy the following requirements:

The Faqihs shall be just. In the Islamic jurisprudence, it is said that a just person is the one who only commits no deadly sins but he also does not commit any venial sins.984 Justice refers to the internal stamina and understanding that helps a person do what he should and refrain from doing what he should not.985 Because of the importance and sensitivity of their responsibilities, the Faqihs of the Council shall enjoy high justice and piety. They shall be completely free from any political and partial interests so that people may never doubt their truthfulness, honesty, and piety. The Faqihs shall also be conscious of the needs of the time and issues of the day, because living conditions are constantly changing and new social, economic, political, and cultural issues appear in the society over time.986

2.1.1.2. Jurists and their Qualifications

To preserve the achievements of the Constitution, the framers of the Constitution of Iran have assigned the Guardian Council to safeguard the Constitution as their very important obligation. Therefore, half of the Guardian Council members (six persons) are elected from among the different Muslim jurists majored in different law fields. According to the second part of Article 91 of the Constitution, the jurists of the Guardian Council shall have the following required qualifications:

The Constitution has emphatically requires that the jurists be Muslims. In justifying the provision, the lawyers and politicians in Iran have more or less concurrence and same opinion. It is said that since in the Islamic government all laws and regulations shall be just in the framework of Islamic standards, the

983 Hashemi, supra note 964, p. 224.
984 See Madani, supra note 971, p. 217.
985 Hashemi, supra note 964, p. 224.
986 Ibid.
Constitution has necessarily included the condition of being Muslim for the jurists.\textsuperscript{987} Therefore, “Without any faith in the Islamic belief system, their legal discretion of the constitutionality and unconstitutionality of the ordinary laws will not be valid and reliable.”\textsuperscript{988} It is also said that the Guardian Council in its supervisory position shall have to apply and seek for scientific, juristic and legal comments. On interpretation, the non-Muslim jurists might interpret the law that is not consistent with the Islamic standards. Therefore, it appears necessary that the Constitution require the jurists to be Muslim.\textsuperscript{989}

Since the Acts of the Majlis that are submitted to the Guardian Council to be reviewed are from different legal branches and the Guardian Council is a place where all legal issues are discussed, the composition of the six jurists shall be in such a way where each jurist has knowledge at least in one specific branch of law.\textsuperscript{990}

2.1.2. Manner of Appointing the Council Members and their Tenure

2.1.2.1. Manner of Appointing the Members

By virtue of the first part of Article 91 of the Constitution, six Faqihs of the Guardian Council shall be appointed by the Leader. The Leader has absolute power in appointing the Faqihs and he appoints whomever he feels qualified. Those who are recognized as the Faqihs by the Leader cannot be rejected or criticized by any other authority.\textsuperscript{991}

Furthermore, concerning the manner of appointing the jurists of the Guardian Council, the second part of Article 91 of the Constitution stipulates that this group is proposed by the Head of the Judiciary to the Majlis who are then elected by the votes taken in the Majlis. “The Judiciary possesses the most experienced judges … and the Constitution has accordingly assigned its Head

\textsuperscript{987} For instance, see Madani, supra note 971, p. 218.
\textsuperscript{989} Hashemi, supra note 964, pp. 225-26.
\textsuperscript{990} Amid Zanjani, supra note 988, p. 441.
\textsuperscript{991} Madani, supra note 971, p. 217.
to propose the same to the *Majlis*. Nevertheless, he can identify university law professors and choose from among them to introduce some to the *Majlis.* 992

The number of the individuals whom the Head of the Judiciary proposes is not limited. However, the Head of the Judiciary must propose double the number to-be-elected from whom the *Majlis* can elect the required number of the jurists. This manner that was devised for the first *Majlis* to elect the jurists has grown into a practice. 993 The jurists are elected by the representatives’ vote of confidence 994 with the absolute majority of the present representatives (half plus one). 995 It is vivid that if no proposed candidate can acquire the quorum of votes, the Head of the Judiciary shall have to introduce a new group until six can be elected.

2.1.2.2. Tenure of the Members

Members of the Guardian Council are appointed for a six-year renewable term. However, in each mid-term (three years) six members (three members from the jurist group and three from the *Faqihs*) are replaced by the new members. 996 This method of replacing the members proves very helpful in that never does the country lack the Guardian Council, and in each term where half of the members are replaced by the new members the Council possesses newly elected, vigorous, and active members with new ideas while the older members can share their experiences with the new comers.

According to Article 3 of the Rules of Procedure of the Guardian Council approved on Aug. 8, 1983, whenever a member dies or resigns during his membership in the Guardian Council, his replacement shall only fulfill the remaining period. That is to say, the membership of the new member shall not be for six years. Moreover, according to Article 6 of the aforementioned Rules of Procedure, “If any one of the members wants to resign, he should submit his resignation in written to the Secretary of the Guardian Council who will read it

993 Detailed Negotiations of the *Majlis*, sessions 17 & 18, 1980.
995 Ibid., Arts. 114 & 119.
996 The Constitution of IRI, Art. 92.
out in the first meeting afterward. In case, the resigned person does not like his resignation returned within a week, it will be submitted to the Leader if he is a Faqih and to the Head of the Judiciary and the Majlis if he is a jurist.”

2.1.3. A Critique on the Guardian Council’s Independence; Manner of Appointment and Tenure of the Members

As observed, the Faqihs are directly appointed by the Leader and their qualifications especially their scientific competency shall be approved by him only. Seemingly, this manner of appointment is flawless since the Leader is at the highest level of the Islamic jurisprudence. On the one hand, he enjoys a perfect understanding and mastery of Fiqh, and, on the other hand, he has known all the Faqihis for years thanks to his long working with them. Therefore, he can appoint those individuals who appear perfect to accomplish the Council’s affairs. However, with respect to the fact that the framers of the Iranian Constitution focus a more specific look at the Faqihs of the Council than at the jurists, and as it will be discussed later, the Faqihis have been granted more authorities, the manner of their appointment is legally under question. In fact, to assign the destiny of the important part of the Guardian Council to only one authority does not appear logical and acceptable. Although religiously, a Leader shall be from among the most competent individuals and enjoy the highest justness and piety, he is also a human being and possesses the right to have his own political beliefs and ideals so that they can be in line with the ideals of some political parties and wings. Therefore, the possibility that he might show inclination or interest in appointing those who enjoy identical political interests and dispositions can never be neglected.

On the other hand, the manner of appointing the jurists of the Guardian Council appears sounder and more solid since they assume their positions in the Council by the Judiciary and Majlis compliance and consultation where the same are proposed by the Head of the Judiciary and are appointed by the representatives of the Majlis. However, there exists a significant point that

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practically makes the process questionable. The Head of the Judiciary who shall, as well, be a *Faqih* is directly appointed by the Leader who has absolute power in appointing him. His tenure is five years. However, the Leader is authorized to reappoint him for successive term(s). Therefore, in appointing the six jurists of the Guardian Council, too, the Leader indirectly plays a very important role. Particularly, when disagreements and incongruence arose between the Head of the Judiciary and the *Majlis* in appointing the jurists of the Guardian Council, an Approval passed by the Expediency Council granted more authority to the Head of the Judiciary and limited the *Majlis* representatives’ role in the electing of the jurists. The issue began when in 2001 the membership term of three jurists would come to an end soon, and the Head of the Judiciary proposed six persons among his reliable jurists so that the *Majlis* would elect three required jurists. However, the representatives of the *Majlis* cast absolute votes for only one of them and the other five persons were rejected. It was natural that the Head of the Judiciary had to propose some other persons, but he absolutely refused! He insisted that the *Majlis* elect three of the same only. The arguments having come up between the *Majlis* and the Judiciary were not peacefully settled up where with the order of the Leader on Aug. 5, 2001, the Expediency Council one of whose duties is to solve the intricate questions of the regime met for immediate session and attended to the issue. On Aug. 6, 2001, the Expediency Council passed an Approval stating that the jurists of the Guardian Council, in the first round, shall be elected with the absolute votes cast by the representatives and in the second round, which had to be held on the same day, with the relative majority! The Leader, too, on Aug. 6, 2001, on the same day, confirmed the Approval and announced it to the *Majlis*, the Guardian Council, and the Judiciary for implementation.

By passing this Approval, what the Head of the Judiciary desired was granted, because in the first round any of the proposed persons who obtain the

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998 Ibid., Art. 157.
999 Ibid., Art. 110.
1000 As it will be discussed in the part relating to the Expediency Council, its approvals shall be confirmed by the Leader.
absolute majority of the votes are elected and in the second round, the rest will be elected with the relative majority. That is, there is no quorum and any person who obtains more votes than what his rivals do is certainly elected. It goes without saying that in such a situation even if all the representatives of the Majlis cast ‘blank votes’ and only one representative writes the required candidates’ names on his vote slip, they will be elected as the jurists of the Guardian Council and in this way, the Judiciary Head’s claim will be satisfied.

It seems interesting that the first round of taking votes relying on absolute majority of voters is absolutely in vain, so it appears as wasting the time in the Majlis and this enjoys no legal standpoint effect. Probably, the Expediency Council wanted to settle the challenge between the Judiciary and the Majlis but in reality, it completely disposed the Majlis of its power.

In addition to all the points stipulated on the conditions and manner of appointing the Council members, three more things concerning their independence and impartiality are worth mentioning:

Firstly, the Council members are elected for a period of six years to assume their positions. The Constitution of Iran has not predicted any rule for the renewal of their tenure, but as it is implied from the renewals of tenure of the same Councilors for several terms, it is a matter of practice, and it is obvious that there is no obstacle for the renewal of their tenure. The determination of the limiting of Councilors’ tenure to six years, on the one hand, and the possibility of their being reappointed, on the other, is that the Councilors should act in accordance with their appointing authorities’ view to be reappointed. Therefore, it proves quite natural that this manner of appointing

1002 For example, there have been a few changes in composition of the Guardian Council Faqihs since its beginning. Since July 1980, i.e., the beginning of the Council, Ayatollah Jannati has been the unchangeable member of the Council. Ayatollah Khazali had the membership seat for 19 years (from 1980 to 1999), Ayatollah Qumi for 25 years (from 1983 - continued), Ayatollah Rezvani for 22 years (from 1980 to 1983, and from 1989 to - continued), Ayatollah Imami Kashani for 16 years (from 1983 to 1999), Ayatollah Mohammad Gilani for 11.5 years (from 1983 to 1994), Ayatollah Mohammad Yazdi for 10 years (from 1988 to 1989 and from 1999 - continued) and Ayatollah Safi Golpayegani for 8 years (from 1980 to 1988). Therefore, in the composition of the Council, the accompaniment of Ayatollah Jannati, Ayatollah Momen Qumi, Ayatollah Khazali, Ayatollah Imami Kashani and Ayatollah Rezvani had been a part of the main and unchangeable composition of the Council for many subsequent years. Also, since 1999, Ayatollah Jannati, Ayatollah Momen Qumi, Ayatollah Rezvani, and Ayatollah Yazdi have not been changed at all. (http://www.shora-gc.ir/portal/Home/Default.aspx?CategoryID=93afba0-f1cb-490e-88c8-732260eb5fb9 visited on Sep. 5, 2007.)
the Councilors definitely affects their independence and they will not be able to be impartial in their making-decisions.

Secondly, the Council members must not have any other official job; otherwise, their acquired job and the relationships developed through the career may strongly affect their review and decisions to the extent that they may deviate from the limits of impartiality. Therefore, Article 141 of the Iranian Constitution that bans all the Government staff from getting another job applies to the Councilors of the Guardian Council, as well. Nevertheless, the Council can in practice, while interpreting the Constitution that is one of its responsibilities, exclude all the members of the Council from the inclusion of the Article. In this respect, it can be referred to the concurrent presence of the vice Presidents of the fifth (1989-1993), sixth (1993-1997), and seventh (1997-2001) Government or to the concurrent presence of the Management and Human Resource Development Deputy President and the Minister of Justice of the ninth Government (2005-continued), among the jurists of the Guardian Council. It should be noted that the presence of the Minister of Justice of the ninth Government aroused a tempestuous political and legal controversy in July 2007. The controversy resulted in the Majlis’ passing an Act banning any Government employees of the three branches from being a Guardian Council member in April 2008. However, in May 2008, exactly after one month, the Guardian Council finding that the Act would prove against its two members, returned the same to the Majlis and announced it as inconsistent with Articles 141 and 91 of the Constitution. While Article 141 insistently stipulates, “The President, Deputies of the Presidents, Ministers, and Government employees may not hold more than one Government job …” Moreover, Article 91 stipulates nothing but the composition of the Guardian Council as well as the conditions and manner of appointing the Council.

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1004 The Constitution of IRI, Art. 98.
1005 Hashemi, supra note 964, p. 21.
members. It is not clear why and how the Council declared the Act as contrary to the two Articles mentioned above, whereas, the Guardian Council’s opinion itself contradicts Article 141! Moreover, the Acts approved by the Majlis shall be implemented by the government and in fact the government shall undertake discharging the burden of the Acts. Does not the presence of the government employees in the Council cause them to help reject the Acts that may not be desired by the government even if they are consistent with the Constitution? On the contrary, does not their presence lead to confirm the Acts whose inventor is the government even if they are contradicting the Constitution? Does it not harm the Guardian Council’s independence and its impartiality? According to S. J. Madani, those who consider their membership of the Council as a second job or so, or are engaged in numerous jobs outside the Council which prevent them from attending the Council regularly and never fear the offence and violation of law, and/or are not independent in their viewpoints, disparage the Council.1008

Finally, in line with safeguarding the independence and impartiality of the Guardian Council, the Council members must not be partial with or a member of a political party or wing. That is to say, they must not be prone to the Left or the Right Wing,1009 while, as it will be vivid in the following sections, some of the Councilors’ dependency on and belonging to some special political parties cannot be concealed. Even some had already been secretaries of the parties.1010

2.2. Internal Organization of the Guardian Council

“In proportionate to its duties or responsibilities, the Guardian Council has some particular official and administrative formations.”1011 Accordingly, the Rules of Procedure of the Guardian Council have specified particular provisions to manage the Council.

1008 Madani, supra note 971, p. 236.
1009 Hashemi, supra note 1003, p. 331.
2.2.1. Sessions

The sessions of the Guardian Council are of two types: ordinary sessions and extraordinary ones.\textsuperscript{1012} The ordinary sessions are held three times a week and the extraordinary ones are held when felt necessary by the secretary of the Council or by three Councilors’ requisition, and concerning the emergency bills.\textsuperscript{1013} The sessions are official with the presence of three-Fourths (nine members) and the voting is taken with the same number. Regarding the necessity and emergency, the sessions are formal with the Council’s discretion with the absolute majority of the members (seven members).\textsuperscript{1014}

The sessions to review whether the Acts passed by the \textit{Majlis} conform to \textit{Shaiah} will be held just with the presence of the \textit{Faqihs}, and the sessions will be called formal with the presence of majority of them (at least four \textit{Faqihs}).\textsuperscript{1015}

2.2.2. Managing the Sessions

According to Article 17 of the Rules of Procedure of the Guardian Council, to run its sessions, it possesses a secretary, a deputy secretary, and one spokesman who are elected from the members for one year. Moreover, by virtue of Article 18, “The secretary, his deputy, and the spokesman are elected with the absolute majority and through secret ballot. Whenever neither the secretary nor his deputy is from the \textit{Faqihs}, to run the \textit{Faqihs’} specific session(s), a member of the \textit{Faqihs} will be elected for one year.” To announce the start of the session and its finish, to control it, and to implement the Regulation, the secretary will be in charge, and in his absence, the deputy secretary will run the session.\textsuperscript{1016} Moreover, taking care of the turns of delegations,\textsuperscript{1017} announcing the agenda of

\footnotesize{\textsuperscript{1012} The Rules of Procedure of the Guardian Council, Art. 8.  
\textsuperscript{1013} As it will be clearly stated in the succeeding sections, by virtue of the second part of Article 97 of the Constitution, the Guardian Council members shall attend the \textit{Majlis} and express their opinions when an urgent bill is on the agenda of the \textit{Majlis}.  
\textsuperscript{1014} The Rules of Procedure of the Guardian Council, Arts. 9 & 10.  
\textsuperscript{1015} Ibid., Art. 10.  
\textsuperscript{1016} Ibid., Art. 23.  
\textsuperscript{1017} Ibid., Art. 24.}
the session(s)\textsuperscript{1018} and taking votes\textsuperscript{1019} are all the responsibilities of the secretary.

“The secretariat of the Guardian Council under the control of the secretary, and in his absence his deputy, administers the clerical affairs of the Council and in proportionate with the volume of the work, required clerks who are pious, committed, and skilful in running the clerical work are employed. The secretary is in charge of the Secretariat.”\textsuperscript{1020} The approvals of the Council shall be officially and formally announced.\textsuperscript{1021}

2.2.3. Manner of Vote-taking

Concerning the manner of vote-taking and the required quorum for the confirmation of the Acts passed in the Majlis, Article 96 of the Iranian Constitution stipulates, “The majority of Faqih\textsuperscript{s} of the Guardian Council shall decide whether or not the legislation passed by the Majlis is in conformity with the precepts of Islam. The majority of all members of the Guardian Council decide whether or not the same complies with the provisions of the Constitution.”

In the session held on Aug. 24, 1981 with the presence of 12 members of the Guardian Council, the manner of taking votes on the Acts of the Majlis to review their constitutionality was thoroughly discussed and investigated in details. Some insisted that votes be taken for the constitutionality of the Acts and if the majority of the Guardian Council members (7 out of 12) voted for their constitutionality, they will be effective and can be enforced. On the other hand, some others maintained that votes should be taken for the unconstitutionality of the Acts, and if the majority of the members voted for their unconstitutionality, they will be sent back to the Majlis to be reviewed. Regarding the particular issue, votes were cast and nine members with the second interpretation (voting for the unconstitutionality) and finally the second

\textsuperscript{1018} Ibid., Art. 25.
\textsuperscript{1019} Ibid., Art. 26.
\textsuperscript{1020} Ibid., Art. 20.
\textsuperscript{1021} Ibid., Art. 21.
interpretation was approved.\textsuperscript{1022} Hence, concerning the Constitution, the view of seven members out of the twelve voted for unconstitutionality of the Acts of the Majlis is reliable and valid.

Regarding the examination of the Acts to control their conformity with Shariah the Faqishs of the Guardian Council, in a specific period, maintained that the majority of Faqishs (at least four of them) should confirm the conformity of the Acts with Shariah. If the majority did not confirm them, they would need to be returned to the Majlis for reconsideration and correction. Therefore, in case three Faqishs, for example, confirmed the conformity of an Act with Shariah and the other three did not confirm its conformity with the same, or if two members concurred on its conformity and one remained abstaining, the Act would not be confirmed. Thus, some of the Acts that were announced as contrary to Shariah in that period did not enjoy more than three votes for their unconformity and usually with the expression that “the Act was not confirmed by the Faqishs of the Guardian Council” would be reported to the Majlis. However, the tempestuous arguments and disagreements concerning the problems and dead ends having resulted from this mode of interpretation led them to accept that for the conforming of the Acts with Shariah, at least four out of the six Faqishs (the majority) should opine on the unconformity.\textsuperscript{1023}

Thus, since the vote taking is for the unconformity of the Acts of the Majlis with the Constitution and Shariah, the problem of equality of votes (6 vs. 6 or 3 vs. 3) will never come up. At least seven councilors are needed to confirm the inconsistency of the Act with the Constitution and Islamic rules. That is, if six councilors, for example, consider an Act inconsistent, and the other six do not have the same opinion, it is announced to the Majlis that the Council has not recognized the Act as contrary to the Constitution and Shariah and therefore the Act is legally effective and can be enforced.\textsuperscript{1024}

\textsuperscript{1023} See Mehrpour, supra note 977, p. xxxii.
\textsuperscript{1024} Mehrpour, supra note 932.

As mentioned earlier, the main responsibility of the Guardian Council is to safeguard Shariah and the Constitution by reviewing the laws and regulations.1025 In this respect, the Constitution of the Islamic Republic of Iran has identified some specific provisions:

- Article 4 of the Constitution stipulates, “All laws and regulations including civil, criminal, financial, economic, administrative, cultural, military, and political or otherwise, shall be based on Islamic principles. This Article shall apply the generality of all Articles of the Constitution and other laws and regulations. It shall be decided by the Faqih of the Guardian Council ...” This Article carries extremely emphatic foci in its content, “All,” “or otherwise,” “generality of all Articles of the Constitution and all other laws and regulations.” This emphasis is indicative of the Iranian Constitution Framers’ concerns about practicing sovereignty of Islam through the government of the Islamic Republic. Therefore, specifically on this regard, the Constitution has recognized only the Faqih of the Guardian Council eligible to confirm the conformity of the laws with Shariah and the majority of them are merely the criterion.1026 In this regard, the competency of the Guardian Council Faqih is general and comprehensive and includes all types of laws and regulations at the legal hierarchy and even the Constitution.1027

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1025 The Constitution of IRI, Art. 91.
1026 Ibid., Art. 96.
1027 The Guardian Council’s supervision over the Constitution does never imply that the Council Faqih are allowed to void the Constitutional provisions that they may opine as contrary to Shariah. Rather, all provisions are stable. However, while comparing an Act with Shariah and the Constitution, if the Act is found consistent with the Constitution by the majority of all the members of the Council, but it is found contrary to Shariah by the Faqih, the Act will be sent back to the Majlis to be reconsidered. (Hashemi, supra note 964, p. 237.) For example, on May 22, 1982, the “Act of limiting the Foreign Trade to the Government” was declared constitutional since, according to Article 44 of the Constitution, foreign trade is a part of the governmental sector. However, it was recognized as contrary to the Islamic principles, because through this Act all exports and imports would be exclusively controlled by the government; therefore, the Faqih of the Council did not confirm that Act. See Mehrpour, supra note 977, p. 160.
Article 71 of the Constitution states, “The Majlis may, within the limits of the Constitution, enact laws on all matters;” thus, the Acts passed by the Majlis shall not go beyond the limits identified in the Constitution and shall not contradict the contents of the Constitution. In other words, “The Majlis cannot enact laws that are contrary to the Constitution.”1028 The majority of all members of the Council are required for the discretion of conformity of the Acts passed by the Majlis with the Constitution.1029

Article 94 says, “All legislation passed by the Majlis shall be sent to the Guardian Council. Within a maximum period of ten days from the date of its receipt, the Guardian Council shall be required to examine the same to ensure that it conforms to the principles of Islam and the Constitution. If the Guardian Council finds any inconsistency in the legislation, it shall return it to the Majlis for review; otherwise, the said legislation shall be enforceable.”

Accordingly, the manner of the Guardian Council’s reviewing the Acts of the Majlis for the conformity of the same with both Shariah and the Constitution can be studied under the following details:

3.1. Deadlines for the Council’s Review
As observed in Article 94 of the Iranian Constitution, all the Acts passed by the Majlis including (even international agreements and conventions)1030 are required to be sent to the Guardian Council for the review, and the Guardian Council is never allowed to ignore the dispatched Act for any period of time to review and comment on. The Constitution has identified clear-cut time periods for the Guardian Council’s review so that, on the one hand, the process of legislation in the country is not decelerated, and, on the other, the Guardian Council does not neglect its discharging the duties assigned. The deadline

1028 The Constitution of IRI, Art. 72.
1029 Ibid., Art. 96.
1030 Ibid., Arts. 77 & 125.
provided for the Guardian Council’s constitutional review power varies depending on the importance of the bills.

3.1.1. Deadline for the Ordinary Bills

The bills are usually ordinarily treated and discussed in the Majlis. Ordinary investigation is commonly carried out in two deliberations. In the first deliberation, the generalities of the bill are approved and in the second, the details are discussed and then approved.\textsuperscript{1031} Regarding such Acts, the Guardian Council is required to review and provide comments on them within ten days, and if the period does not suffice, the Council can ask the Majlis for a respite of ten more days.\textsuperscript{1032} The start point when the deadline of the Council begins is not the date when the Majlis has passed the Act, but the date when the Guardian Council has received the package. Thus, if the bill is at rest for some time in the Majlis after being passed, the resting period will not account for the deadline of the Council. The necessity of asking for an extension (of time) is assigned to the Council. Therefore, on announcing the request for the extension, the Council is automatically granted the extra period and there is no need to ask the Majlis for permission, albeit the Council shall announce the need for the extension in time within the first 10-day period; otherwise, relying on Article 94 of the Constitution, the Act will be enforced.\textsuperscript{1033}

Article 97 of the Constitution of Iran states, “With a view to accelerating the work, members of the Council may attend the Majlis sessions while a Government bill or a member’s bill is being discussed and listen to deliberations.” As well, a part of Article 7 of the Rules of Procedure of the Majlis states, “The members of the Guardian Council are allowed to attend all the sessions of the Majlis.”

\textsuperscript{1031} The Rules of Procedure of the Majlis, 1986, and its subsequent Amendments, Arts. 150 & 152.
\textsuperscript{1032} The Constitution of IRI, Arts. 94 & 95.
\textsuperscript{1033} Hashemi, supra note 964, p. 240.
3.1.2. Deadline for the Urgent Bills

The second part of Article 97 of the Constitution states, “If an urgent government or members’ bill is on the agenda of the Majlis, members of the Guardian Council shall attend the Majlis sessions and express their view.”

The Rules of Procedure of the Majlis have identified three categories of urgency for the urgent bills: 1) bills with a one-starred urgency, 2) bills with a two-starred urgency, and 3) bills with a three-starred urgency.\(^{1034}\)

Hence, the two-starred urgency of the bills is to prevent the likely damage and loss of time,\(^{1035}\) and the three-starred urgency is for the highly urgent and vital cases,\(^{1036}\) while in the one-starred urgency bills, no sharp reason is felt and the urgency is only because of their priority to other bills on the desk.\(^{1037}\) The question that is raised refers to whether, concerning the one-starred urgency bills, the presence of the Council members is required or not. Regarding the same, the Council in its interpretive opinion of Nov. 5, 1989 has stated, “The purpose of the phrase ‘urgent bills’ in Article 97 of the Constitution refers to the bill that a delay in its examining will result in damage and loss of time. The bills which are not highly important or vital are not included in this Article.”\(^{1038}\)

Accordingly, the second part of Article 7 of the Rules of Procedure of the Majlis states, “If any bill(s) with a two or three-starred urgency is on the agenda of the Majlis, the members of the Guardian Council need to attend the session(s).” Therefore, the Council practically does not have to attend the sessions of the Majlis when one-starred urgency bills are being discussed.

According to Article 12 of the Rules of Procedure of the Guardian Council, after the urgent bills have been passed through the Majlis, the Council members leave the Majlis and have to express their views within 24 hours. In very vital and high urgent bills, the Council session keeps on and the members are not allowed to leave the Majlis until the case(s) is settled down.

\(^{1034}\) The Rules of Procedure of the Majlis, Art. 158.
\(^{1035}\) Ibid., Art. 160, Clause 2.
\(^{1036}\) Ibid., Clause 3.
\(^{1037}\) Ibid., Clause 1.
3.1.3. Deadline for the Bills passed in the In-camera Sessions
Since the case in the in-camera session is secret, it requires that instead of the Majlis’ sending the Act to the Guardian Council the members of the Council be present in the session and express their views on the Act at the point and impose changes right there. In this way, the secrecy of the session and the Act is not damaged. In this regard Article 69 of the Constitution of Iran says,

… In emergency conditions, under circumstances when the national security requires it, the Majlis sessions may be held in camera, upon the request by the President, or one of the Ministers, or ten representatives. Law and regulations passed at a session held in camera shall be valid only if approved in the presence of the Guardian Council by three-fourths of the total number of representatives.

The Acts approved by the Majlis may face one of the following:

3.2.1. Confirmation of the Acts
In case the Guardian Council finds an Act conforming to the Constitution and Shariah, its confirmation will be announced to the Majlis and the public. Having been confirmed, the Act gets out of the Majlis’s agenda and is sent to the President to be signed and enforced.1039

3.2.2. Silence of the Council
The silence of the Guardian Council is, at times, in the ordinary occasions where the Council would not like to announce its view in the first ten-day deadline or in the extended ten-day period. The silence can also occur in the urgent cases where the Council members are all present in reviewing the Act, but their opinion is not announced immediately or within 24 hours.

1039 The Constitution of IRI, Art. 94.
By virtue of Article 94 of the Constitution and with reference to the delegations of the Iranian Constituent Assembly in 1979, the silence is assumed as confirming the Act’s conformity to Shariah and the Constitution and can therefore be enforceable because Article 94 states, “... If the Guardian Council finds any inconsistency in the legislation, it shall return it to the Majlis for revision; otherwise, the said legislation shall be enforceable ...” The adverse meaning of this sentence is that if the Council finds the Act of the Majlis consistent with Shariah and the Constitution, the Act will not be returned to the Majlis. Since the assumed duty of the Council is just to announce the inconformity -not the conformity- of the Act, the silence implies that there is no inconformity in the Act.

3.2.3. Discretion of Inconformity of the Act

It is possible that the Guardian Council finds the whole or a part of the Act inconsistent with the principles of Islam and/or the Constitution. In the former case, the whole Act and in the latter just the inconsistent part will be returned to the Majlis for revision; the Guardian Council shall give the reason(s) for the decision(s) made. “Giving the reason(s) does not imply the Majlis must be justified and accept it, but get to know why the Act has been rejected so that it [the Majlis] can rectify the same.”

3.3. Shariah Review over the Laws of the Past Regime

As mentioned earlier, Article 4 of the Constitution clearly stipulates,

All laws and regulations including civil, criminal, financial, economic, administrative, cultural, military, and political or otherwise, shall be based on Islamic principles. This Article shall apply generally on all the Articles of the Constitution and other laws and regulations. It shall be decided by the Faqih of the Guardian Council whether or not such laws and regulations conform to this Article.

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1041 Madani, supra note 971, p. 228.
1042 Ibid.
The phrase ‘all laws and regulations’ implies that first, there is no limitation concerning the hierarchy of laws (constitutional, ordinary, and governmental regulations) to conform to Shariah, and secondly, in this Article no specification of time (past, present and future) has been determined. Nevertheless, there are many doubts and questions regarding the scope and limits of the Guardian Council’s power to control the laws that had been passed in the Parliament of Shah’s regime or in the Revolutionary Council for their conformity with Shariah. Regarding the issue, the questions are, “Is the Council allowed to review the laws that had been passed before the Majlis was founded in 1979? If yes, are the Faqihs of the Guardian Council allowed to independently and directly review the laws and annul them in case of any contrariness to Shariah?”

In the early years after 1979, Revolution this issue was more prominent in the trial sessions where the judges did not know how to deal with the ordinary laws of the past that [might] be inconsistent with Shariah. An upstanding example in this regard is the issue of interest on money. According to the laws of the past regime, the courts had to judge the debtor to pay interest as the delayed payment damage with a specific rate, say twelve-hundredth, while this was not consistent with the principles of Shariah.

Regarding the issue, there are two completely different interpretations that are discussed hereafter. It is worth mentioning that with respect to a long time after the 1979 Revolution, many past laws have become Islamic and it seems that there is no longer any justification to discuss in this regard. However, thanks to the significance of the issue, the effect it has had on Iranian law and the possibility that it may come up again in future the researcher feels it necessary not to ignore the significance and its discussion.

1043 Hashemi, supra note 964, p. 241.
1044 See Madani, supra note 971, p. 223.
3.3.1. Different Interpretations of Article 4

Some lawyers and legal writers believe that Article 4 is inclusive of all ruling laws of the country. From their perspective, the Guardian Council *Faqihs*’ review is not merely confined to the laws passed by the *Majlis*.

According to Mehrpour, In the Islamic Republic Regime, laws and regulations cannot be contrary to *Shariah* and the inconsistent laws can never be enforced or acted upon. Any enforceable and ruling law in the country shall abide *Shariah* either the laws have been passed by the *Majlis* or they had been passed in the Parliament of the past regime. If by approving Constitution of the Islamic Republic of Iran all the past laws had been declared void and ineffective, there would be no problem, but when the past laws were not cancelled and were/are still enforceable and valid, naturally the Guardian Council *Faqihs*’ supervision is required. Particularly, this Article absolutely and generally rules over all Articles of the Constitution. When the Guardian Council *Faqihs* can review the Articles of the Constitution and opine on their consistency with the Islamic principles, they have a fortiori right to review and evaluate the past laws and opine on their consistency with the principles of Islam. All in all, Mehrpour maintains that Article 4 of the Constitution connotes that with the establishment of the Islamic Republic Regime, all laws and regulations of any kind shall be consistent with the Islamic principles, and the inconsistent ones are never enforceable unless their inconsistency is not proved or certified. Therefore, once the Guardian Council *Faqihs* recognize a law as inconsistent with the Islamic principles, no authority can establish its creditability.

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1046 Ibid.
1047 Ibid. See also Hajipoor, *supra* note 956, pp. 75-91.
Therefore, the Council’s supervision includes Acts and regulations having been approved before the Revolution or before the approving of the Constitution of the Islamic Republic, *i.e.*, the Acts passed by the Revolutionary Council. Having this in mind, for the first time on Feb. 3, 1981, the Guardian Council announced to the Ministry of Housing and Urban Planning that the Executive By-law of the Act of Nullifying the Urban Barren Land Proprietorship passed by the Revolutionary Council was nullified by the *Faqihs* of the Council because it was against Islamic rules.\(^{1048}\)

This interpretation was again emphasized on Apr. 28, 1981 in responding to the question raised by the High Judiciary Council\(^{1049}\) as an interpretive opinion. The High Judiciary Council which seemed to have the same interpretation of Article 4 and clearly witnessed the enforcement of some of the past laws which seemed contrary to Islam, posed a question before the Guardian Council on Apr. 13, 1981. “The implementing of laws of the past regime which are contrary to the principles of Islam, and the issuance of judgments in courts based on them, relying on Articles 4 and 170 of the Constitution,\(^{1050}\) are absolutely illicit. This opinion has been announced to the High Judiciary Council where by virtue of the two Articles, all laws and regulations contrary to the Islamic principles shall be void and courts are required to judge according to the Islamic principles … and in this manner the implementing of laws inconsistent with the Islamic principles is banned. It is required that the opinion of that Council in writing be announced.”\(^{1051}\) In reply, the Guardian Council drew the result of investigating the past laws through the *Faqihs* of the Guardian Council relying on Article 4. The Council stipulated, “Based on Article 4 of the Constitution, all laws and regulations in all grounds shall absolutely and generally conform to the principles of Islam and the *Faqihs* of the Guardian Council are responsible and competent for the discretion.

\(^{1048}\) See Mehrpour, *supra* note 1022, pp. 169-76.

\(^{1049}\) According to Article 158 of the 1979 Constitution, the Judiciary of Iran was managed by the High Judiciary Council composed of five members including the Chief Justice of the Supreme Court, the Attorney General, and three other judges elected by all judges of the country. However, in the Amendment of the Constitution in 1989, by virtue of Article 157 the Head of the Judiciary replaced the aforementioned Council.

\(^{1050}\) Article 170 says, “Judges of Courts shall be required to refrain from implementing Governmental decrees and regulation which are contrary to law or the rules of Islam …”

Therefore, the laws or regulations which are enforced in the judiciary courts and which the High Judiciary Council holds contrary to the principles of Islam shall be sent to the *Faqihs* of the Guardian Council to investigate their conformity or inconformity to the standards and principles of Islam.”

Therefore, according to this interpretive opinion, the Guardian Council is competent and allowed to investigate and then announce the laws and regulations of the pre-Revolution Parliament and the Revolutionary Council before the 1979 Constitution void and ineffective.

Thenceforth, the Guardian Council, either because of the High Judiciary Council and other authorities’ question, or by itself reviewed some of the past laws and declared them null and void due to their inconsistency with *Shariah*. For example, on Feb. 16, 1983, the High Judiciary Council asked the Guardian Council whether ‘not hearing the claim because of limitation of actions stipulated in Article 731 of the Civil Procedure Act,’ was conforming to *Shariah* or not. The Guardian Council replied, “The contents of Article 731 of the Civil Procedure Act onwards about the limitation of actions were reviewed by the Council’s *Faqihs*. In their opinion the stipulated contents stating that after a period of time say ten or twenty years … the claim will not be heard were contrary to *Shariah,*” and declared the Article null and void. However, it is worth mentioning that some of the Articles which the Guardian Council had recognized as contrary to *Shariah* were again reviewed by the Expediency Council later on and were known as consistent with *Shariah*, such as the case of ‘key money’ which will be discussed later.

Unlike the aforementioned interpretation, most Iranian lawyers maintain that the Guardian Council is just to supervise the consistency and/or inconsistency of the laws passed by the Islamic Consultative Assembly (the *Majlis*) with *Shariah* and it is not competent enough to review the laws that

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1053 The Parliament of the Shah’s regime was made up of two chambers, namely the National Consultative Assembly and the Senate.
1054 See Mehrpour, *supra* note 1022, p. 231.
have been passed by the Parliament of the past regime. In other words, Article 4 of the Constitution does not include the laws of the past regime.

In “Constitutional Law of the Islamic Republic of Iran”, by presenting two analyses— legal analysis and socio-political analysis, S.M. Hashemi is trying to prove that the Council is not allowed to independently and directly get involved in annulling and canceling the past laws. In his legal analysis, by relying on Articles 72, 91, 94, and 96 of Iranian Constitution and by peering into the delegations of the Constituent Assembly, Hashemi expresses that the Council’s review is just limited to the Acts of the Islamic Consultative Assembly (the Majlis) founded after the 1979 Revolution. The Acts of the pre-revolution Parliament and even the Revolutionary Council are not included in its constitutional review power. He states that Chapter 6 of the Constitution that concerns the legislative has explicitly identified the domain of the Guardian Council’s supervision over laws and regulations:

- Based on Article 72, the Majlis may not enact laws contrary to the principles and rules of the official faith of the country. This matter shall be decided by the Guardian Council.
- Based on Article 91, to safeguard the rules of Islam and the Constitution so that the Acts enacted by the Islamic Consultative Assembly are not inconsistent with them, a Council known as ‘the Guardian Council’ is established.
- By virtue of Article 94, all legislation passed by the Islamic Consultative Assembly shall be sent to the Guardian Council.
- By virtue of Article 96, the majority of Faqihs of the Guardian Council shall decide whether the legislation passed by the Islamic Consultative Assembly is in conformity with the percepts of Islam. The majority of all members of the Guardian Council shall decide whether the same complies with the provisions of the Constitution.
Therefore, he maintains that in all cases the Guardian Council’s supervision is just limited to the laws passed by the Islamic Consultative Assembly (the Majlis).\footnote{Hashemi, supra note 964, p. 243.}

In his socio-political analysis, Hashemi argues that the enactment of law is a societal need felt in any time and any place. The legal system of Iran is based on the numerous laws most of which had been passed before the Islamic Republic and the Islamic Consultative Assembly (the Majlis) were established. Most of these laws are still valid and enforceable. Any stoppage of these laws will cause disturbance and chaos in the society. Changing the political system of a country, if resulting from a revolution and if accompanied with the changing of values and concepts, cannot demand the achievement of the objectives in short run and quickly. The laws of the past regime, too, had been devised as per the requirements of time and society through experience and societal changes. Moreover, most of the laws are not politically based and can be enforced at any time with no hindrance and obstacle. Under Article 4, the Constitution stipulates that the Faqihs of the Guardian Council are competent to review the unconformity of a law with Shariah. They are only experts to identify the inconsistencies, and once they have identified them, they shall not be allowed to continue with the cancellation of the law. If the cancellation of laws and regulations, which are contrary to the precepts of Islam, are considered as the right of the Council’s Faqihs, it will create a big legal gap for the society and the government. Consequently, the problems resulting from the gap are far worse than when the Islamic laws are not practiced.\footnote{Ibid., pp. 243-44.} According to Hashemi, the best solution for this change to achieve the ideals of the Revolution is the one that can create the best results and the least loss. In this regard, clause 24 of Article 42 of former Rules of Procedure of the Majlis, had predicted a special Commission for reviewing the laws of the Revolutionary Council and those of the past regime. According to Article 61 of the same Rules of Procedure, this Commission was assigned to produce the required
changes or modifications of the laws that were contrary to Shariah in the form of a bill to the Majlis for the approval. The above mentioned solution was legal and seems logical, but the Commission never took any steps, nor it thought of any bills. The Commission’s passivity in reviewing the laws of the past regime and those of Revolutionary Council were closely related to the fact that the society still was not prepared for the changes. Undoubtedly, if any danger from the past-regime laws towards the Islamic regime had been felt, the Commission would have for sure taken measures for the changing of the laws on expediency. Nevertheless, the expediency of the society requires that changes, modifications or cancellation of laws be based on the contents stipulated in the Constitution and be carried out or executed under legal conditions. As such, he concludes that the Council has no right and no right to cancel the pre-revolution laws.

According to N. Katuzian, in public law any right shall be enforced based on some special formalities. In this system, there is a set of assumptions. For example, it is said that ‘law’ represents ‘popular will,’ but is that really true? Concerning a representative of the Parliament, who has taken a seat with only one more ‘vote,’ and his/her bill gets enacted in the Parliament with only one more ‘vote,’ how can the law which is passed by him/her represent popular will? We assume so because it is the only solution, but these assumptions shall be with their special formalities conditions to be resulted or documented. However, what is the result of this discussion? That Article 4 of the Constitution has known the Guardian Council as the authority to review the consistency or inconsistency of laws with the Constitution and Shariah does never mean that it can declare any law null and void, but it means that the Council shall perform this power based on some formalities which are provided in law itself. It is never more important than the people’s right! Wherever people are constitutionally granted any rights, the formalities of enforcing them

1057 Ibid., p. 244.
1058 Ibid., pp. 244-45.
are clearly stipulated. Therefore, the Guardian Council can only return the laws to the *Majlis*; it cannot annul them.\(^{1059}\)

### 3.3.2. Examination and Analysis of the Interpretations of Article 4

The two interpretations of Article 4 do not differ in principles because both insist on the reviewing and amending the laws of the past regime inconsistent with *Shariah*; however, the way each group follows to achieve the set goals differs. According to the first interpretation, the Council authoritatively and without the past laws being discussed, amended, or changed in the *Majlis*, reviews the same and, if they are contrary to *Shariah*, it declares them null and void. However, according to the second interpretation, the past laws shall be examined in any possible way, for example, by a special commission and, if found contrary to *Shariah*, they are returned to the *Majlis* for the modifications, thereafter the Guardian Council will discharge its responsibilities. In other words, the second group, the lawyers, does not mean that even if the past laws are contrary to *Shariah*, they shall be enforced. However, they maintain that “all of them must be reviewed so that if they contradict *Shariah*, they shall be deleted and replaced by new laws based on the principles of the official faith of the country and expectations of the Islamic Republic Regime.” Nevertheless, this must be followed and accomplished by the *Majlis* (Islamic Consultative Assembly) itself. After the *Majlis* has approved the modified laws, the *Faqihs* of the Guardian Council shall review and comment on their conformity or unconformity with *Shariah*.

Moreover, the second interpretation does not imply that the Guardian Council should not comment on the past inconsistent laws, but it suggests that firstly, the Council cannot by itself and initatively start to do it, and secondly, it cannot declare these laws null and void because Article 94 of the Iranian Constitution says, “… If the Guardian Council finds any inconsistency in the legislation, it shall return it to the *Majlis* for review …” Furthermore, the

annulment of existing laws causes a legal gap in the society and harms the legal order of the country. It is completely obvious that the monopoly review and annulment of the laws that seem contrary to *Shariah* is direct interference in legislative system of Iran and disturbance of the principle of separation and balance of powers.

**3.4. Limitations of the Constitutional Review**

In spite of providing the Guardian Council’s systematic and automatic supervision in the Iranian Constitution, there are some laws that no mechanism, either *a priori* and abstract or *a posteriori* and concrete, has been predicted to check their constitutionality. These laws are as follows:

1. Laws passed by the Parliament of the Shah’s regime and the Revolutionary Council: these laws, as discussed earlier, are controlled by the Guardian Council’s *Faqihs* to be consistent with *Shariah*. However, there is no way to check their consistency with the Iranian Constitution.¹⁰⁶⁰

2. Approvals of the Assembly of the Leadership Experts mentioned in Article 108 of the Constitution: this Assembly is composed of a large number of *Faqihs* elected by the people who determine the Leader of the Islamic Republic of Iran. Article 108 says, “The law relating to the number and qualifications of the experts to manner of their elections and the rules of procedure pertaining to their meetings … any amendment or review in this law, and the approvals of other regulation related to function of the experts shall be within the competence of the experts themselves.”

3. Approvals of some special institutions which in practice enact laws as a legislature, such as the National Security High Council mentioned in Article 176 of the Constitution, the Cultural Revolution High Council without being constitutionally recognized and authorized, and the

Expediency Council (direct and indirect legislation), which will be discussed later.

As a result, there is a possibility that some unconstitutional laws are approved by the abovementioned institutions and entered in the Iranian legal order.\textsuperscript{1061}

4. A Glance at the Guardian Council’s Performance since its Formation

Since its formation, the Guardian Council has made many decisions all of which can be classified in three categories based on the Acts passed in the Majlis:

(1) The Acts that have been away from any political and religious inclinations and sensitivities and that have only tried to solve the social problems or to establish legal order in the relations between the people. Therefore, naturally they have all been confirmed by the Guardian Council.

(2) The Acts that have commuted between the Majlis and the Guardian Council for several times and finally have, because of the Majlis’s rectifying them, been confirmed by the Guardian Council.

(3) The Acts that have been under dispute between the Majlis, the Guardian Council, and even the government (for those proposed by the government) that finally the Majlis has kept them dormant, or they have been solved by the Expediency Council’s involvement, or have been claimed back by the government.

Except for the Acts of the first group, there have been some Acts in the second and third groups that, for any reason, they have been religiously and politically sensitive and have resulted in very serious disputes between the Majlis and the Guardian Council. On the other hand, since the Majlis is a

\textsuperscript{1061} Ibid., p. 137.
political institution where different parties with different political views and
tendencies compete and try to act upon their view in passing laws, there is a
possibility that the Guardian Council’s supervision might have been influenced
by these political tendencies. Therefore, before commencing the discussion
about the performance of the Guardian Council, it feels necessary to have a
look at the deployment of political parties and the headlines of their policies
after the 1979 Revolution so that political inclination and religious strictness or
impartiality and tolerance in the Guardian Council’s decision-making is well
evaluated. Then some of the most controversial decisions of the Council are
discussed and finally a critique on the Council’s performance with a statistical
look at its decisions concerning the three controversial terms of the Majlis is
presented.

4.1. Deployment of the Iranian Political Parties and their Policies after the
1979 Revolution
In the early tense years of the 1979 Revolution of Iran where the Islamic
Republic still had not got stabilized, the consensus and unity of words among
the Islamic forces was something that all Islamic revolutionaries agreed upon
in general. Accordingly, when there were any types of discrepancies or tension
between the various parts of the government, the decisive governmental order
of Imam Khomeini, the founder of Islamic Republic Regime, could solve them.
During these years, the partial system did not exist formally and legally.
Although, there were many attempts to establish parties on the part of many
people, the hot revolutionary mottoes that all invited all groups of people to
unite did not allow them to have any partial activities. The only official party
that could form at that phase was the Hezb-e Jomhori-e Eslami (Islamic
Republic Party) which vanished in the famous Jun. 28, 1981 terrorist act where
the main office of the Party with most of its outstanding members was blown
up. However, after these years and the stabilization of the Islamic Republic
Regime, gradually discrepancies replaced the consensus and personal and
collective interests of some individuals and special groups in the form of
political party-game emerged. The peak of these groups’ discrepancies which were largely based on their economic and financial interests began when in the second term of the Majlis from 1984 to 1988, a wing who were later called the ‘Conservatives’ (Right Wing) started hard objections against the Bill of Labor Act in the government and the Majlis. In the mid 1981, there was a relative balance of political power in the Legislative and the Executive between the Conservative Wing and the other wing that was later known as the ‘Reformists’ (Left Wing). For example, in Mir Hossein Mousavi’s prime ministership, the then leftist Prime Minister, 50 % of the Council of Ministers, especially the Ministry of Labor, Ministry of Commerce, Ministry of Post, Telegraph and Telephone, and Ministry of the Interior had been occupied by the Conservatives. The Conservatives concurrently enjoyed a powerful fraction in the second term of the Majlis.

Of the most upstanding parties of ‘the Conservative (Right) Wing’ are the Jameh-e Rohaniat-e Mobarez (Society of Militant Clergy) and the Hezb-e Motalefeh-e Eslami (Islamic Coalition Party), and of the most important parties of the ‘Reformist (Left) Wing’ are the Majma-e Rohanioun-e Mobarez (Union of Militant Clerics) and the Sazeman-e Mojahedin-e Enghelab-e Eslami (Organization of the Islamic Revolution Fighters). These two wings, the Right and the Left, have different political, cultural, and economic dispositions.

1062 Of the most controversial expressions in the Iranian contemporary political literature are the two words of ‘Left’ and ‘Right’ which have been articulated by many since they were first used by the Reformists. They used them for the changes of the political grouping in the Islamic regime, but this classification has always been criticized by the Conservatives. The history of this classification dates back to the devising of Labor Act in the second term of the Majlis. In that period, the advocates of Labor Act called the opposition groups the ‘Right Wing’ who advocated the capitalism, and the Right Wing, called them the ‘Left Wing’ who were supposed to advocate the socialism. (“Transformations of the Labor Act from the Victory of the Revolution to the Present Time.” Neshat Newspaper, year 1, no. 37, Apr. 18, 998, p. 2) It should be mentioned that these expressions are political allegations used by the Conservatives and the Reformists to smack down the opponent on the stage. Since in the early years of the Iranian Revolution, Cold War between the former USSR and the USA was dominant, Iranian authorities shouted the slogan of ‘No West, No East, but only the Islamic Republic’. This slogan, denied communism, on the one hand, and capitalism on the other. Therefore, the allocating of any of these two wings to those two systems (Capitalism and Communism) could seriously disgrace them among the public. The ‘Left’ and the ‘Right’ in the political literature of post-Revolution Iran referred to those ‘Left’ and ‘Right’ advocates within the frameworks of the Islamic Republic Regime, i.e., those who follow the same Islamic and revolutionary goals but have different manner of achieving it and enjoy different tasks. For example, the Left Wing in the power-game in Iran, though it has some socialist views by advocating the rights of laborers on its agenda, in the ultimate analysis is just a left fraction of one great party, “the Hezbollah” or “God’s Party.”


1064 For a detailed look at the Iranian political parties, see Barzin, Sa’eid. Political Wings in Iran from 1980s to June 1997, 1st ed. Tehran: Markaz Publication, 1998 (in Persian); Mortaji, Hojjat. Political Wings in Today’s Iran,
4.1.1. A Short Look at the Right Wing’s Viewpoints

The Right Wing believes that determining the Leader of the Islamic Republic of Iran (Vali-e Faqih) by the members of the Assembly of Leadership Experts, who are directly elected by people, is a discretion and discovery issue not electoral, and people can play no role in determining him. Ayatollah Mahdavi Kani, one of the members of the central Council of the Jameh-e Rohaniat-e Mobarez of Tehran, who was one of the first Faqih of the Guardian Council in 1980, states, “Velayat-e Faqih is not electoral, but it is a matter of discretion. If a person does executive work, he is never allowed to meddle with the Fiqh or the divine law in the public affairs of the country.” Ayatollah Reza Ostadi who was a member of the Guardian Council from 1999 to 2001, states, “The legitimacy of Velayat-e Faqih is never influenced by the people’s ideas, and their agreement or disagreement can never change the principle of Velayat-e Faqih.” In other words, this Wing believes in divinity and sacredness of Leadership so that Velayat-e Faqih “shall never be criticized nor spoken of before the public.” Moreover, Vali-e Faqih is beyond the Constitution and the legitimacy of all institutions of the society is from him only.

This Wing does not believe in the republicanism of the regime, but it maintains that the Islamic government shall be based on the Islamic rules. Ayatollah Mesbah Yazdi, a leading theoretician of the Wing, lectured a Friday congregational prayer gathering on Jul. 10, 1998, “Be careful that they won’t fool you. The acceptance of Islam is in no way compatible with the acceptance of democracy in legislation.” He then asked his audience “Is the criterion for legality the vote of the people, or is it the religion that claims having laws for...
all aspects of people’s lives?"¹⁰⁷³ Ayatollah Mahdavi Kani, too, states, “Any government whose ruler is appointed and explicitly identified by God is legal, though all people may not accept it; however, any government that is not allowed and appointed by God is considered illegal and tyrannical, though people have accepted it.”¹⁰⁷⁴ In fact, this Wing believes in Faqis ruling not the republic one.¹⁰⁷⁵ Ayatollah Mohammad Yazdi, a member of the Central Council of the Jameh-e Rohaniat-e Mobarez and the chairman of this formation in Qum Religious School (Hozeh-e Elmieh-e Qum) who has been a member of the Guardian Council, states, “Politics, government, and the Leadership are under the competency of comprehensively competent clergymen, and while they and the Leader of Islamic regime exist, the rest are never allowed to interfere with the State affairs.”¹⁰⁷⁶

By virtue of the Right Wing’s viewpoints, parties are not allowed to act as those in western countries do. Ayatollah Hayeri Shirazi, one of the clergymen advocating the wing, states, “In our society, instead of partial governance, Velayat-e Faqih is dominant. If parties would like to activate here, they have to abide our school of thought; parties cannot go the way which the Leader does not because in that case two poles develop ... and instability grows.”¹⁰⁷⁷ Ayatollah Mahdavi Kani, too, says, “I strongly oppose any party-grouping since clergymen are people’s fathers.”¹⁰⁷⁸ Javad Larijani, a prominent theoretician of the Right Wing states, “Any political formation that is deviating from Islam if not eliminated, will surely bring on destruction.”¹⁰⁷⁹

This Wing maintains that people’s political participation is not a right but it is a religious duty. Ayatollah Mahdavi Kani states, “People’s only way of political participation is not just their presence in political parties; people by contacting the Islamic intellectuals and religious scientists participate in political affairs. Our Revolution prescribes a different pattern for people’s

¹⁰⁷⁴ Resalat Newspaper, Apr. 16, 1997, p. 5.
¹⁰⁷⁵ Mortaji, supra note 1064, p. 50.
¹⁰⁷⁸ See Mortaji, supra note 1064, p. 55.
¹⁰⁷⁹ Ibid., p. 56.
participation. When people go and pray in mosques several times a day, contact their religious leaders, and consult with them in social and political matters they are in fact actively participating in political affairs.”

The Right Wing believes that “the Majlis seats … must be occupied by the religious, national, revolutionary, brave, experienced and tried or tested people, and … newcomers and those who had no role in the Revolution and had only been spectator of the cause shall have no place in the Majlis.”

In this respect, the bulletin of the Jameh-e Rohaniat-e Mobarez stipulates, “The major difference between the elections in Iran and other countries is that in other countries the electoral choice is between the corrupt and the pious. However, in Iran, with the existence of Velayat-e Faqih and the Election Act (Approbatory Supervision), it is between the competent (pious) and the most competent (the most pious).” Elsewhere, the bulletin of the Jameh-e Rohaniat-e Mobarez of Tehran states, “The approbatory supervision of the Guardian Council is the most practical and important instrument to safeguard people’s votes and protect their rights from any violation and unjust agents’ propaganda. The approbatory supervision allows the competent individuals to be selected by the Guardian Council of whom the most competent are elected by the people.”

Economically, the Right Wing advocates privatization of production units and development of non-governmental economy. Regarding the issue, Javad Larijani says, “In our regime, the most ideal situation is one where over 80% of economic affairs are controlled by the private sector. The government must just monitor the administration of the affairs and must gradually assign the execution of affairs to the private sector.” In general, this Wing suggests trade-axis economy and supports foreign and interior investments in the

1084 Ibid., no. 28, Nov. 5, 1995, p. 3.
1085 Mortaji, supra note 1064, p. 65.
sections of gas, energy, oil, petrochemical, mining, metal, transportation, and transformation industries and sections.\textsuperscript{1087}

Since the Right Wing culturally enjoys a traditional disposition towards religion, it maintains that intercultural exchange and interaction is a threat to the religious culture and refutes it. Therefore, it holds that the government must control all the cultural activities and urges the preventive supervision of the cultural products before publication because foreign culture integration and incorporation is de facto a western direct and indirect invasion and is the most important way of influencing the home culture.\textsuperscript{1088} The Right Wing also supports the government’s controlling the contents of university curricula and syllabi and the faculty of the universities. Akbar Natiq Nouri, the defeated candidate of the Right Wing for the 1997 Presidential Election\textsuperscript{1089} states, “Concerning the universities, the management must be strictly controlled and taken care of; the lecturers of the universities must be under the magnifying glass so that they can never deviate from the Islamic path. The contents of the university textbooks need to be observed since there are some texts that do not conform to Islam or our values.”\textsuperscript{1090} In addition, Ayatollah Ebrahim Amini states, “In selecting the faculty members, the following requirements must be checked out: a) faith in Islamic values, b) commitment to religious duties (\textit{vajebat}) and abandoning un-Islamic actions (\textit{moharramat}), c) strong belief in the Islamic regime and \textit{Velayat-e Faqih}, and d) faith in the fact that Islam has very practical and useful precepts in humanities and life issues. Moreover, in selecting students, it is required that their moral competency, faith in Islamic principles and values, not being subjected to any thought-deviations, admitting Islamic regime as it is, and \textit{Velayat-e Faqih} be controlled by experts and then confirmed.”\textsuperscript{1091} As Javad Larijani stated, “The \textit{Jameh-e Rohaniat-e Mobarez} of

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\textsuperscript{1087} Mortaji, \textit{supra} note 1064, p. 69. \\
\textsuperscript{1088} Ibid., p. 71. \\
\textsuperscript{1089} The Election that resulted in the reformists’ victory led by S. Mohammad Khatami. \\
\textsuperscript{1090} \textit{Sobh Periodical}, no. 64, Dec. 1996. \\
\end{flushright}
Tehran prescribes a strong and solid traditional disposition in cultural affairs.  

4.1.2. A Short Look at the Left Wing’s Viewpoints

This wing maintains that the authorities of Vali-e Faqih must be within the limits of the Constitution, and Vali-e Faqih must act as the Constitution stipulates. Concerning the issue, Behzad Nabavi, one of the Leaders of the Sazeman-e Mojahedin-e Enghelab-e Eslami states, “The absolute Velayat-e Faqih must be within the defined absolute framework: if it is not the case, the Constitution is in vain.” Furthermore, Mohammad Salamati, the Secretary General of the same Party says, “Essentially, the Leader in our society is not supposed to reflect for all and suggest solutions in different grounds. This precept requires that no legal institution (governmental and non-governmental) be established and activated otherwise they derive Velayat-e Faqih to extremities.” This Wing holds that the Leader (Vali-e Faqih) must be elected by people. Asadollah Bayat, a member of the Central Council of the Majma-e Rohanioun-e Mobarez says, “Vali-e Faqih is legitimate only when people have approved and accepted his leadership.”

Salam Newspaper, one of the organs of the Majma-e Rohanioun-e Mobarez, suggests that ignoring people’s votes means getting away from Islam and says, “If sometime, under the pretext of guaranteeing the Islamic precepts of the regime, people’s votes are ignored in making decisions on the country’s affairs, it is definitely indicative of deviating from the genuine Islam.” Therefore, the Majma-e Rohanioun-e Mobarez and groups close to it insist on the activities of political parties, “In the present era where people’s participation

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1093 Article 57 of the Constitution of Iran says, “The sovereign powers in the Islamic Republic of Iran consists of the Legislature, the Executive and the Judiciary, which shall be exercised under the absolute Velayat-e Faqih in accordance with following Articles.”
proves principal, political parties not only feel necessary but their inexistence in any country looks questionable and shocking.”

Mahdi Karroubi, the former Secretary General of the Majma-e Rohanioun-e Mobarez, says, “Establishing political parties in the country can more consolidate the Majlis, help people take elections more seriously, guarantee the regime, and rejuvenate people stimulating their motivation and enthusiasm. Powerful parties can serve as supervisory groups preventing any offences from taking place and creating and paving the grounds for healthy competitiveness.” Elsewhere, he says, “The regime … forms with people’s votes. Even the Constitution of Iran has vividly emphasized the significance of political parties, and we strongly advocate political parties and their real functions.”

Concerning political freedoms, the Left Wing maintains that freedom of expression is the divine and natural right of all the people of a society not as a privilege granted to specific individuals or groups by the government. “Freedom requires that even the opponents’ rights as one’s own rights be taken into account and that any movement against ‘law’ be condemned.” The Left Wing considers freedom and democracy as an essential method to run a society and stabilize security and development and as an investment to eliminate the likely hostilities in the regime, not as an ideology. The first draft of the Sazeman-e Mojahedin-e Enghelab-e Eslami’s positions states, “By providing an appropriate ground to expand people and political groups’ rights and freedoms and taking measures to institutionalize the authority of the society, the Revolution and the government based on it can strongly guarantee their power.”

This wing advocates and supports the institutionalizing of public political participation, and maintains that participation in running the country’s affairs is

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1101 Mortaji, supra note 1064, p.88.
1103 Ibid., no. 12, Apr. 5, 1995, p. 2.
1104 Ibid., no. 57, Nov. 13, 1996, p. 2.
more a social and legitimate right than an individual duty. People welcome this right when they feel that they are really ruling over their own destiny and when they learn that their participation is effective and brings about fruitful results.1105

Economically, the Left Wing opposes extensive privatization of production units and believes that it must be in a limited range. For example, the Sazeman-e Mojahedin-e Enghelab-e Eslami respects limited and conditional private proprietorship and even holds that it is useful. It recommends privatization but to the extent that it does not cause capitalism to rule over the society so that a special group of people mounts on power. Moreover, privatization should not violate the principle of ‘No harm and loss to others’ and should not cause exploitation. It further must not prevent the social justice from being practiced. Besides, by virtue of preference of public interests to individuals’ interests, it should help eliminate any kind of conflict between private and public proprietorship.1106

This Wing maintains that the government must, to respect the social justice and equality and support the vulnerable groups of people, provide ration system for the governmental staff, workers, and vulnerable groups of the society.1107 Changing the Taxation Act to get more tax from the rich and reducing it for the poor and low earning classes of the society, continuing to pay subsidies to the consumers, generalizing the social security system, and developing and improving the unemployment insurance are other objectives of the Left Wing.1108

All in all, the Left Wing believes in the development of social justice and maintains that it is only possible when the social class gaps are eliminated or reduced to the least, the minimum living requirements of people are satisfied, and equal opportunities for all citizens are provided. To enforce and obtain social justice and equality, the government should not merely take a

supervisory role and only enact laws or regulations to direct the economy, but it must continuously and directly involve in the economic process and play the role of comprehensive policy makers and enjoy centralized planning and direct controlling and allocating sources.\textsuperscript{1109}

Culturally, the Left Wing believes in the post-publishing supervision of the cultural product. It holds, “The supervisory principle of books relies on the trust in cultural creators and it must be based on the principle that writers and publishers are servitors of culture … The publishers, too, can, like the responsible managers of journals, be responsible for the publication of their books. Therefore, the supervisory principle of books can be of a post-publishing type.”\textsuperscript{1110} All in all, the Left Wing maintains that “intellectual and cultural aspiration and escalation can be guaranteed through thought-conflict, and cultural interaction and transactions.”\textsuperscript{1111}


The Guardian Council’s performance during its almost thirty years of existence can be divided into two relatively different periods: the period before Amendment of the Constitution in 1989, and the period after Amendment of the Constitution. Nevertheless, it should be mentioned that since the challenges between the Majlis and the Guardian Council about some controversial issues lasted for years, this classification may overlap in some points. That is, some controversies which began and got extensive in the first period produced a result in the second period, and reversely some controversies that got extensive in the second period and even in some cases they are still pending began in the first period.

\textsuperscript{1109} Ibid., no. 12, Apr. 5, 1995, p.2.
\textsuperscript{1110} \textit{Salam Newspaper}, Jul. 19, 1997, p. 2.
\textsuperscript{1111} \textit{Asr-e Ma Periodical}, no. 13, Apr. 19, 1995, p. 2.
4.2.1. The Period before Amendment of the Constitution
This period includes the early years of the Guardian Council’s activity from 1980 to 1989. The most important characteristic of this period is the effective and influential presence of Imam Khomeini in the political structure of Islamic Republic of Iran that in turn created a balance of power between the emerging political parties. The most important event of this period in the sphere of the constitutional review system of Iran was the establishment of the Expediency Discretion Council of the Regime to solve the disputes and disagreements between the Majlis and the Guardian Council. The Constitution of 1979 had not predicted any solution for these disputes. This period finished with the demise of Imam Khomeini and the amending of the Constitution in 1989.

Some of the controversial decisions of the Guardian Council in this period will be discussed hereafter.

4.2.1.1. Issue of the Urban Land Act
The Urban Land Act was enacted by the Majlis in August 1981, and was sent to the Guardian Council for the review. According to this Act, all the urban barren lands (mavat) should have been ceded to the government and their proprietorship deeds and documents should have been canceled. Related to the idle lands (bayer), the owners could only occupy 1000 meters of their land and had to start construction in their sites and were not allowed to sell them unless to the government and after getting them valued by the government. The owners of the utilized lands (dayer) and idle lands were required to sell parts of their lands to the government and the municipality as much as of which they needed after getting them valued by the government. This Act was in fact enacted because of the population growth and shortage of land for expansion and construction of houses and planning of the city, a necessity that was inevitable. In other words, the unplanned population increase in that time could have no other solution, but to make the Majlis enact this Act.

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Concerning the first case, that is the barren lands, there were no substantive different viewpoints. However, related to the second and third ones, that is, the idle and utilized urban lands, that directly threatened the proprietorship of the owners, there were many controversies and after discussing the Act in the Majlis, even in the religious jurisprudents societies, the Faqishs and religious scholars, too, exposed their views. Nevertheless, the Faqishs of the Guardian Council announced this Act, which was to make the owner give up his property, as contrary to Shariah. It stated, “Some parts of Articles 7 and 8 and their notes, and Article 10 that relate to idle and utilized lands contradicted the holy verse of the Koran stating, ‘Do not eat up each other’s property unlawfully unless it is through legal transaction and both sides are satisfied’ … Moreover, the indisputable [Islamic] rule says, ‘People have the absolute right over their property.’ Therefore, it was not confirmed by the majority of the Faqishs.”

After learning the Council’s decision rejecting the Act, the Majlis, which felt the enactment of that Act necessary started to seek for some religious justification and a loophole to obtain a permit as a necessity and governmental order, to get the Act confirmed. Hence, the Majlis spokesman wrote a letter to Imam Khomeini on Sep. 27, 1981 asking him for his opinion on the Acts where the necessity of maintaining the public interests and resolving the problems were felt. On Oct. 11, 1981, Imam Khomeini wrote back,

Whatever whose doing or giving up causes disturbance in the system and whatever whose doing or giving up brings on problems can be enacted and enforced with a emphasis on its being temporary when the majority of the representatives of the Majlis feel it necessary for a period until the problem exists. Then the Act is automatically canceled …

Having gotten this help and permission from the Leader, the Majlis inserted the justification ‘necessity’ in the legislation and, thus, enacted the Act of

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1113 Ibid., pp. 48-9.
1114 See Mehrpour, supra note 977, pp. 68-9.
1115 See Mehrpour, supra note 1112, pp. 49-50.
Urban Lands for five years and sent it back to the Guardian Council for review. The Guardian Council began to review the Act with a second intention of considering the ‘necessity discretion’. However, again it found it contrary to the principles of Islam reasoning that “the necessity of housing in all cities and districts is not the same,” and “there is a huge difference in the minimum amount to solve the necessity among different districts.” Therefore, “determining identical and uniform regulations does not seem logical and religious and is indicative of the fact that the discretion process of this Act has not been thoroughly thought of.” Thus, the Act was returned to the Majlis for rectifying again, and eventually, the Majlis considering the Guardian Council’s opinion passed the Act on Mar. 18, 1982 under the title “necessity” and the Guardian Council confirmed it.

4.2.1.2. Discretionary Punishment (Tazirat) Case

There are four types of punishment applied to the guilty in the Islamic judiciary system and the Islamic Republic of Iran: Hodoud (religious punishment), Qesaas (retaliation), Diyat (blood-money), and Tazirat (discretionary punishment). ‘Qesaas and Diyat’ are personal and with the claim of the victim or victim’s family, they can be applied to the criminal, and they must be proportionate to the crime committed. On the other hand, Hodoud and Tazirat are in the same row but their sizes differ. Hodoud refers to those special types of punishment for a group of special crimes determined in Shariah, which are not changing according to time and place. They include crimes such as theft, adultery, and drinking. The punishments applied as Hodoud include death, lashing, cutting one hand, exile, cutting the right hand and the left foot, and imprisonment for life. Tazirat refers to those penalties whose size is not determined in the Islamic law, but they are subjected to the judge’s decisions depending on the type and importance of the crime and the criminal’s

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1116 Ibid., p. 51.
1117 Ibid.
1118 Ibid.
1119 Ibid., p. 52.
condition. However, its size must be less than the size of Hodoud, that is, Tazirat is essentially lighter than Hodoud.\textsuperscript{1120}

For the first time, on Aug. 21, 1982, the Guardian Council, concerning Hodoud and Qesaas, and their respective regulations, stated that the determination of the size of Tazirat in many clauses of this Act do not conform to Shariah and the Faqihs of the Council do not confirm them. After reviewing the Council’s opinion, the Majlis tried to rectify the Articles of the Act and used the phrase “is punished” instead of determining the size of Tazirat. Nevertheless, from that date on, the disputes concerning the issue started to rise between the Guardian Council, the Majlis, and the High Judiciary Council, and in the subsequent Acts especially the Act of Tazirat the disputes mounted on rage.\textsuperscript{1121}

Having 159 Articles and 18 notes, the Act of Tazirat was approved by the Judiciary Commission of the Majlis in August 1983, and it was sent to the Council for the review. Since it was a bulky Act and because the Guardian Council was too busy then, the Council by asking an extension of ten days reviewed the Act and found many faults with it the most important of which was the very determination of the size of Tazirat. However, before announcing its opinion on the substantiative faults, it found a formal defect in the Act. Relying on the statements of only one of its Faqihs who had already been a member of the High Judiciary Council, the Guardian Council criticized the manner of devising the Act of Tazirat by claiming that it was unconstitutional,\textsuperscript{1122} and released its opinion to the Majlis on Sep. 1, 1983 as follows, “According to the opinions of some of the respected gentlemen who had already been members of the High Judiciary Council, in devising the Act of Tazirat the majority of High Judiciary Council members had not been present and had not had any role in the approving process. By virtue of clause 2 of Article 157 of the Constitution in preparing the judicial bills, the majority of

\textsuperscript{1121} Ibid., p. 106.
\textsuperscript{1122} Ibid., p. 107.
the High Judiciary Council members must be present and approve of the same. Therefore, to respect the mentioned Article, the Act must be returned to the High Judiciary Council members, and having been approved in the open session of the Majlis, it shall be sent back to the Guardian Council.” The Majlis spokesman answered the Council in a letter on Oct. 6, 1983, “… The objection of that respected Council concerning the manner of preparing the Act is of no value to the Majlis and is not accepted because the Act was delivered to us by the High Judiciary Council as it was signed and prepared legally. Besides, the High Judiciary Council, too, emphasizes its integrity. The informal and unofficial information cannot be a standard to accept or reject an Act. Please send your opinion on the contents of the Act.”

Nevertheless, the Guardian Council did not reply to the request within the determined period of 10 days as stipulated in the Constitution. Thus, the Majlis spokesman, after the ending of the 10-day-deadline, on Nov. 1, 1983 sent the Act to the President to sign it, claiming that since the Guardian Council had not replied to the returned Act within the time-limit of 10 days, it can be implemented by the Executive. The President, too, signed the same, and on Nov. 14, 1983 by publishing it in the Official Gazette, it was enforced. On the other hand, the Guardian Council did not accept this quick manner and it made them write frequent letters and brought about grounds for long bitter controversies and consultations to solve the problem. During all these controversies, there was a special situation concerning the Act of Tazirat that included a major part of the punishments relating to different crimes. The Act passed by the Majlis had been published and communicated as an enforceable law and its order of enforcement had been issued, but the Guardian Council insisted that the Act had not gone through the legal procedures and, therefore, was not legal, and it must be stopped from being implemented and practiced. The criminal courts faced the enforceable published Act on the one hand, and on the other hand, they legally and religiously hesitated to act upon it because

1123 See Mehrpour, supra note 977, p. 407.
1124 Ibid., pp. 407-8.
1125 Ibid., p. 409.
they had already heard the Guardian Council’s opinion through the communication between the Majlis, the Council, and the President.\textsuperscript{1126} To solve the problem, after some sessions being held by the members of the High Judiciary Council, the Faqihs of the Guardian Council, and the Majlis spokesman, the Act, eventually with Imam Khomeini’s intervention, was returned to the Guardian Council. On Jan. 11, 1984, in a letter of four pages with 42 clauses of religious faults, the Faqihs of the Guardian Council announced their opinion on the matter to the Majlis. The most important fault concerned the determination of size of Tazirat as mentioned earlier. Based on clause 42 (the last clause) of this letter, determination of Tazirat was contrary to Shariah and it had to be decided by the respective judge.\textsuperscript{1127} It is obvious that the Council’s opinion was against the principle of ‘legitimacy of offence and punishment’ that is vividly and emphatically stipulated in Articles 36 and 166 of the Constitution of Iran.

Albeit, after the Guardian Council’s opinion had been announced to the Majlis, no measures were taken to rectify or amend the Act, and it was enforced as it was. Therefore, this issue remained unsolved and if the Acts passed by the Majlis contained one or more clauses concerning Tazirat whose size was determined, they were always rejected by the Guardian Council.\textsuperscript{1128} Hence, the Majlis had to enact laws according to the Guardian Council’s view in this regard. For example, Article 83 of the Parliamentary Election Act approved in March 1984 concerning the determination of sizes of Tazirat for the electoral violations stipulated, “The penalties of this chapter are not limited to the mentioned penalties and the judge can sentence the violator with a penalty proportionate to the violation and/or crime he has committed as stipulated in the Act of Tazirat.” This made the Judicial and Legal Commission of the Majlis seek for help from the then Leader, Imam Khomeini, to solve the problem. A part of the letter written by the Head of the Judiciary Commission in November 1985 said, “… it appears that if in the laws, the size of

\textsuperscript{1126} Mehrpour, supra note 1120, p. 430.
\textsuperscript{1127} Mehrpour, supra note 977, p. 116.
\textsuperscript{1128} Mehrpour, supra note 1120, p. 118.
punishment is not determined, it not only implies that the enactment of a law is in vain but it also creates a lot of problems concerning the judgment … Every judge acts personally and identifies a different size of punishment for the same crime. This will eventually bring on a big damage on the judiciary system of the country.”

The formula that finally got stabilized which the Guardian Council, too, confirmed was that the minimum and maximum of punishment such as imprisonment, flogging, and fine were determined by the Majlis. As well, a note was added that if the public prosecutor could conclude that the violator could be punished by advising and preaching, he should be preached, and if the violator had committed the crime for the first time, the case would be filed in the archives and not sent for the trial. That is, although the public prosecutor knows that the person is guilty, he closes the case just by advising and preaching and does not send the case to the court. Of course, even when the case is sent to the court, the judge can, too, as required, just advise the violator and end up with preaching, encouraging, reproaching, and threatening him/her not to commit anything wrong again. Thus, he can even refuse the penalties of imprisonment, fine, and lashing. Meanwhile, the judge has no limitations in carrying out and issuing the above mentioned penalties; only he cannot go further and lesser than the minimum and maximum determined in the Act. Nevertheless, the question is, “Through this formula, are not the two indisputable legal principles, that is, the legitimacy of offence and punishment and equality of people before the law violated?”

This formula was used in the penal Acts that were passed by the Majlis from the mid 1987 onwards. As an example, it can be referred to ‘The Act of Prohibition of Selling and Buying the Ration Coupons of Essential Commodity’ approved by the Majlis on Apr. 12, 1988. Article 1 of this Act says that the ration coupons of essential commodity are considered as bonds and deeds and any type of fake or forgery, theft and any kind of misusing them

1129 See Ibid., p. 119.
1130 Ibid., p. 129.
is a crime. Article 2 of the same Act stipulates that anyone who commits a forgery or legal print of these coupons, not only will have to return whatever money he/she has earned through selling them, but also he/she will be imprisoned for 1-5 years and flogged 10-74 continuous lashes. In Article 10 of the same Act it is stipulated, “If the offender has committed the offense for the first time, and the public prosecutor finds it trivial where by advising, threatening, and taking undertaking the offender will be punished, he can close the case and get it filed in the archives by assigning above reformative punishment. The court, too, has the same right to close the case as the judge finds the offense as trivial.”

Later, the Faqih of the Guardian Council gave up their strict manner and never again objected to the unconditional determination of penalties in the Acts for Tazirat, because in the Expediency Council where the Faqih of the Guardian Council have the membership, without any solution similar to the one explained, some Acts were passed where the size of Tazirat were carefully determined. The upstanding example of Acts passed by the Majlis in this way that the Faqih of the Guardian Council have confirmed is the Act of Islamic Punishments (Tazirat), 1996. For example, Article 538 of this Act says, “Anyone who personally or through others, forges a medical certificate on behalf of a doctor to exempt himself or any other one from military service or to deliver it to the court will be given a sentence of 6-12 months of jail or pay 3,000,000 – 6,000,000 Rials fine.”

4.2.1.3. Some Articles of the Public Punishment Act
On Dec. 9, 1981, in a letter the High Judiciary Council wrote to the Guardian Council, “Because of its legal and Islamic duties, the High Judiciary Council decided to adapt all the Judiciary courts to the principles of Islam. The most important obstacle to this objective is the existence of un-Islamic laws among which the statutory laws passed in the previous regime and especially the penal

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131 Rial is the currency of Iran. Today, with the decreasing value of Iranian currency in the global markets, one U.S. Dollar equals about 9500 Rials. However, in the early 1990s Rial was much more valuable than now.
Act are seen. Since, according to Article 4 of the Constitution of Iran, the
discretion of the statutory laws’ conformity or unconformity with Shariah is
the competency of the Guardian Council’s Faqis, … the reviewing of the laws
of the past regime are not an exception. Therefore, the High Judiciary Council
sends the respected Guardian Council the Civil and Penal Acts whose contrary-
to-the-Islamic parts to be identified … and announced to the High Judiciary
Council so that the judgment is not what God has not sent to us …”

In response on Feb. 4, 1982, the Guardian Council declared 13 Articles of
the Public Punishment Act of the past regime null and void. Soon after,
Imam Khomeini in a meeting where the members of public prosecutor’s offices
and Revolutionary Courts were visiting him on Aug. 22, 1982, emphasized the
making of laws Islamic and ignoring and annulling the laws passed in the past
regime that were contrary to the principles of Islam. In a speech delivered on
that day, he said,

All the laws that were passed in the past regime and were contrary to Shariah
shall be thrown away, and I’m responsible for that … The Guardian Council
and the High Judiciary Council must circularize the matter and announce it
anywhere that the laws passed in the past regime that are contrary to Shariah
must not be implemented …

In another Decision on Aug. 23, 1982, the Guardian Council cancelled some
other Articles of the Public Punishment Act (Articles 49, 50, 51, 52, 53, and
54), and at the end told the High Judiciary Council to send any other Article
which it found contrary to Shariah to the Guardian Council for the review and
annulment. Articles 49-54 of the Public Punishment Act passed in the past
regime, which the Faqis of the Guardian Council had found contrary to
Shariah related to the criminal limitation of actions. For example, in Article
49, it was stipulated, “Limitation of actions discontinues the criminal pursuit

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1132 See Mehrpour, supra note 1022, pp. 177-78.
1133 Ibid., p. 177.
1134 See Mehrpour, supra note 977, p. 232.
1135 See Mehrpour, supra note 1022, pp. 183.
and its period is: 1) 15 years for the crime whose penalty is execution imprisonment for life, 2) 10 years for other felonies, and 3) 5 years for the cases whose penalty is utmost 3 years of imprisonment …”

On Feb. 16, 1988, following the question of the High Judiciary Council relating to the legality or illegality of not hearing the claim because of limitation of actions, the Guardian Council, concerning Article 731 of Civil Procedure Act, stated, “Article 731 onwards of the Civil Procedure Act concerning the limitation of actions stipulating that after the passing of 10, 20, 3, and 1 years etc. the claim cannot be heard in the courts was found contrary to Shariah.”

The deletion of the rule “limitation of actions” created many problems in the Iranian law that later made the Iranian legislature accepts this rule in a limited form for the criminal cases. Hence, in Articles 173 and 174 of the Criminal Procedure Act of General and Revolutionary Courts approved on Sep. 19, 1999, the rule of ‘limitation of actions’ was recognized in criminal cases under certain conditions.

4.2.1.4. Issue of the Key Money or Good Will

The legitimacy of good will or key money in the sense that ‘the occupier of business as the tenant can claim some money back from the owner for vacating the place after the termination of the tenancy period,’ was controversial for long. Generally, the Fatwa was against the money to be taken from the owner. Related to this issue, a man whose property had been rented by a governmental bank which demands key-money to vacate the property wrote a letter to Imam Khomeini. He asked, “Can the tenant who has never paid any money as key money to the owner and has no right to let the rental place to others claim key-money after his tenancy is over?” In reply, Imam Khomeini adjudicated, “In the name of God. He does not have such a right.”

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1136 See Mehrpour, supra note 1045, pp. 24-5.
1137 Mehrpour, supra note 1022, pp. 204.
1138 Ibid.
The Bank Affairs Deputy of Ministry of Economy and Finance Affairs, too, asked the Guardian Council the same question on Jul. 11, 1982. The Faqihs of the Council announced their opinion on Sep. 21, 1982 stating that Article 19 of Lessee and Lesser Relationship Act passed on Jul. 24, 1977 related to the same key-money or good will was contrary to Shariah and was annulled.\textsuperscript{1139} Article 19 stipulated,

In case the tenant of a business is, by virtue of the rental agreement, allowed to let the place to someone else, he/she can cede the interests of the rental place to another person through an official deed. Whenever, in a rental agreement, the right to transfer the place to another is not granted to the tenant, or there has been no agreement and the owner would not like to cede the place to another, he/she has to pay the key-money or good will. The tenant can also approach to the court to regulate the transfer-deed … The new tenant, in all conditions, is the representative of the previous one.

The Guardian Council’s opinion was not accepted in practice. Courts could hardly enforce that. The High Judiciary Council did not support and approve of the Guardian Council’s opinion, and since there were too many problems, it did not recommend the courts to act as the Guardian Council said, but as the content of Article 19 did. The Guardian Council was criticized and even some started to religiously justify Article 19 and to approve the key money issue.\textsuperscript{1140}

It was really interesting that the High Judiciary Council which from the very beginning believed in the Guardian Council’s opinions on the past regime’s laws, and even it had written a letter to seek for its opinion to see whether the past laws were Islamic, it did have a very different view concerning the key-money. Moreover, it started to murmur that the Guardian Council was only to review the Acts of the Majlis and had no right to review or cancel the past laws

\textsuperscript{1139} Ibid., p. 201.
\textsuperscript{1140} Ibid., p. 204-5.
because Article 4 of the Constitution of Iran is just related to the Acts passed by the Majlis.\textsuperscript{1141}

Nevertheless, the issue of key money remained unsolved as many others did. In November 1986, the Majlis passed a Single Article entitled “The Annexation of one Article to the Lessee and Lesser Relationship Act” that was a modification of Article 19. However, the Guardian Council insisted on its previous opinion of annulling Article 19. Therefore, after a few years, the issue was referred to the Expediency Council, and in January 1991, this Council announced its opinion, “Regarding the key money, the Lessee and Lesser Relationship Act, passed on Jul. 24, 1977, is effective and it must be enforced.” Thus, Article 19 of the said Act was revived and the Faqih’s religious opinion was invalidated.\textsuperscript{1142}

4.2.1.5. Issue of the Appeal Deadline

There have always been deadlines for the appeal for the civil and criminal cases in the statutory law of Iran: usually ten days with a consideration of distance. However, after the establishment of the Islamic Republic Regime in Iran, in some of the Acts that were passed by the Majlis and a deadline was identified for the appeal, it was usually objected by the Guardian Council due to their unconformity to Shariah. This view of the Guardian Council raised the thought that the losing party could be deprived of the right to appeal only when it is revealed that he/she does not will to use the right to appeal; otherwise, only passing of the prescribed deadline could not prevent the right to appeal.\textsuperscript{1143} For example, in Article 10 of the Act of the Civil Courts 1 and 2 passed in 1985, with respect to the opinion of the Council Faqih, it was regulated, “Regarding the judgments by default the absent losing party has the right to protest against the judgment in a period of one month from the date of observing or being informed of the judgment unless he/she abandons his/her right to appeal.”

\textsuperscript{1141} Ibid., p. 206.
\textsuperscript{1142} Ibid., p. 206-7.
Nevertheless, the Guardian Council found even this Article faulty. In its opinion on the Article on Jul. 28, 1985, the Council held, “Concerning the absent losing party who does not have the right to object to the judgment issued against him/her, as stipulated in Article 10, after one month, it should be mentioned ‘If he/she does not object to the judgment without any acceptable excuses’; otherwise, it is contrary to Shariah.” Therefore, Article 10 was rectified in the following way, “Regarding the judgments by default the losing party has the right to object to the judgment unless he/she confirms his/her satisfaction with the judgment or his/her abandoning the appeal is confirmed.”1144 Thus, it is clear that determination of the deadline is in vain, since the losing party can object to the judgment any time he/she wishes by not confirming his/her satisfaction with the judgment.

The issue of illegality of determining a deadline in the “Act of Determination of Deadlines for the Appeal of the Judgment Issued by the Courts and the Manner of Investigating them” passed in Sep. 1987, too, was carefully investigated by the Guardian Council. The Council heavily insisted on its opinion and finally could make the Majlis leave out Article 12 of the same Act. In its reply, on Sep. 23, 1987, the Guardian Council, regarding Article 12 where a 10-day deadline was identified wrote, “If the purpose of this Article is not hearing the appeal after the deadline, it is not conforming to Shariah.” After two returns of this Article from and to the Guardian Council, the Majlis had to finally accept the Council’s opinion to leave out the 10-day deadline, and eventually in October 1988, the Act was confirmed by the Council. In this Act, the appeal deadline for any other sentence either criminal or civil and from any judicial authority, by virtue of the Council Faqis’s view, was eliminated.1145 In this manner, it happened that the appeal deadline died in Iranian law. However, the problem is that the religious basis of the opinion of the Council Faqis is not clear, and the investigation of the other Faqis’s (either old or new) views did not indicate any other Faqis’s pointing to the

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1145 See Mehrpour, supra note 1143, p. 205.
issue at all.\textsuperscript{1146} Apparently, the \textit{Faqihs} meant that in cases where the appeal is religiously allowed and the losing party has the right to appeal, no one can determine any deadline for it, and his/her request should not be rejected just because the deadline is over, unless he/she is surrendered to the judgment and/or abandons the right to appeal.\textsuperscript{1147}

Unlike the Council \textit{Faqihs}' view, there is no logical reason and no philosophy and advisability to ignore the appeal deadline. As well, it is not incorrect unreasonable to say to appellant that if he/she is claiming his/her sentence is not fair, he/she has to appeal in the specified time, because the lengthy and unlimited period may provide some false loopholes for him/her to deviate from the right path. It also causes some problems for the people and judicial system of the land. In addition, this deadline determination contradicts no Islamic standards or judicial advisability and philosophy. Therefore, although reaching a reality and exactly enforcing the social justice are desirable, it is more significant to finish up the issue. Meanwhile, as it was mentioned earlier, there are no religious texts and reasons to reject the appeal deadline. However, it is to regulate the process of procedure where it is logical to find the best method to guarantee and secure the rights and enforcement to justice, and eliminate the hostility and stop the claim, but not to lengthen a claim for years and even ages. Thanks to these reasons, after several years, in Article 236 of the Criminal Procedure Act of the General and Revolutionary Courts passed on Sep. 19, 1999 and Article 336 of the Civil Procedure Act of the same Courts passed on Apr. 9, 2000, it was stipulated with the same composition, “The deadline for appealing for the claim parties inside Iran is 20 days, and for the people living abroad two months after observing the sentence.” Surprisingly, the two Articles were immediately confirmed by the Guardian Council: the first one on Sep. 22, 1999 and the second on Apr. 16, 2000.\textsuperscript{1148} In this manner, the appeal deadline was revived in the Iranian law and

\textsuperscript{1146} Ibid., p. 202.
\textsuperscript{1147} Ibid., p. 209.
Civil and Criminal Procedure Acts. The question that has remained is, “Is determining the appeal deadline Islamic or un-Islamic?” If it is un-Islamic, why did the Faqihs of the Guardian Council confirm the same somewhere else later in time?, and if it is Islamic, why did not they confirm it in the earlier times? Is not it a vicious circle where one swerves himself and his circle without reaching anywhere but the same place, while exerting a lot of energy, losing lots of time and money, and spoiling many people’s rights? Does it not keep the legal system of the land suspending and wondering with no-where to go?

4.2.1.6. Story of the Labor Act

In some laws, people are assigned some obligations through which their will and freedom get limited. At times, one gets dubious about and wonders how and to what extent the government is allowed to interfere in social relationships of people, assign restrictions and even unlike their will get involved in regulating the agreements. For example, in labor law the employer is required to insure the employee and pay some portion of the insurance fees. Is such an obligation religiously legitimate? The legitimacy of this scheme was dubious and under question because according to a very significant Islamic rule on which the Faqihs heavily insist and rely, owners have absolute legal power to exercise control over their property. Moreover, no one is allowed to interfere in their utilization and proprietorship, nor is anyone allowed to assign any obligation for them (Qa’edeh-e Taslit). The solution which was decided in the early Revolution years was that this obligation was for the services which the government rendered to the employers.1149 For example, regarding the Unemployment Insurance Act passed in June, 1987, this solution was applied. Article 1 of this Act states, “All people included in the Social Security Act (employers, employees, workhouses, etc.) who and which enjoy the governmental services such foreign currency, energy, raw materials, bank

1149 See Mehrpour, supra note 1112, p. 53.
credits, etc. are required to abide this Act.” The application of this solution was to stop the Guardian Council from finding religious faults with the Act.\textsuperscript{1150}

The 1979 Revolution definitely was not a labor revolution, but needless to say the poor groups and especially the workers by demonstrations and protests shared a big part in the process. Moreover, the revolutionaries’ slogan and manner were to fight with the cruel rich and mansion holders and to advocate the poor and the nomadic groups’ ruling and controlling over the land and people. Hence, the low class of the society particularly the workers expected the newly established regime to pass a fair Labor Act and return the rights and freedoms such as syndicate freedom and right to strike which the past Labor Act had not granted. Therefore, in beginning months of 1980, the thought of regulating a new Act in the Ministry of Labor and Social Affairs was established and the ‘Institution for the Labor and Social Security’ that was a research Institute, a part of the aforementioned Ministry, was assigned to do the job. Some of the experienced experts and authorities of the Ministry started to prepare the rough draft of the new Labor Act. These people during about two years, at times enthusiastic and sometimes desperate, on the basis of the Iranian Constitution strived to study and investigate the potentialities and the status quo of the country and tried to figure out the standards accepted in the International community for the new Labor Act.\textsuperscript{1151}

The first draft prepared by this Institute, known as “the Bill of the Labor Act’ was never published because in 1982 the then Labor Minister was replaced by a new Minister who heavily relied on the Conservative Party, and never tolerated the contents of the aforementioned draft.\textsuperscript{1152} Therefore, it was urged that another draft of the Labor Act be prepared, which was based on Faqih’s views. This second draft was published in several Iranian newspapers on Dec. 21, 1982.\textsuperscript{1153} In this draft, the basis for the relationship between the employee and the employer was that of agreement between the two parties and

\textsuperscript{1150} Ibid., pp. 53-4.
\textsuperscript{1152} “Transformations of the Labor Act from the Victory of the Revolution to the Present Time,” supra note 1062, p. 2.
\textsuperscript{1153} Keyhan Newspaper, Dec. 21, 1982.
was indicative of the Faqihs’ viewpoints who believed the relationship between
the worker and employer was the same as the relationship between the lesser
and the lessee. They believed that the government’s involvement and
interference in the relationship between the worker and the employer and its
forcing or obliging the employer to abide the provisions of the Labor Act were
contrary to Shariah. This rough draft was not agreed by the Council of
Ministers and, thus, the gap between the leftist and the rightist Ministers of Mir
Hossein Mousavi’s first Council of Ministers got enlarged. On the finishing of
Mir Hossein Mousavi’s first term of prime ministership some of the
Conservative representatives of the Majlis decided not to cast vote of
confidence for him if he were the candidate again. They were known as
“Ninety Nine Individuals” because they ignored Imam Khomeini’s request
asking the representatives to cast vote of confidence for Mir Hossein Mousavi;
while in their beliefs and principles, they maintained that the absolute Vali-e
Faqih must be strictly listened to and followed.

After the consolidation of Mir Hossein Mousavi’s second term of prime
ministership, his executive authority increased and gradually the Conservative
Ministers were dismissed from the Council of Ministers. In this term,
Abolghasem Sarhaddi-zadeh who was closely related to the Worker’s Home, a
political-guild union of workers, was appointed Minister of Labor and Social
Affairs. At the same time, the third rough draft that had been prepared by
some of the Ministers was approved by the Council of Ministers and as a
bill, it was sent to the Majlis for approval on Apr. 28, 1985 and after many ups
and downs, the Act was passed by the Majlis on Nov. 15, 1987. Since in this
Act there were some obligations assigned for the employer and there was this
fear that the Guardian Council might reject it, the same formula or solution
mentioned above had been regulated in Article 1 of this Act as follows, “All

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1154 See Eraqi, supra note 1151, p. 78.
1155 From the very beginning of 1979 Revolution to the 1989 Amendment of the Constitution, the Executive of Iran
was based on three elements: the Leader, the President and the Prime Minister, but in the same year (1989) due to
some problems raised, the post of Prime Minister was eliminated. Based on Article 113 of the Amendment, next to
the Leader, the President shall be responsible for the exercise the Executive powers.
1156 “Transformations of the Labor Act from the Victory of the Revolution to the Present Time,” supra note 1062,
p. 2.
employers, workers, working places, production, industrial, service rendering, and agricultural institutions that enjoyed the services and facilities provided by the government such as foreign currency, energy, raw materials, and bank credits, were required to abide the Act …” The Guardian Council, by extending the 10-day deadline provided in the Constitution, released its opinion to the Majlis on Dec. 10, 1987. In this unprecedented opinion, the Council had found 74 Islamic and Constitutional faults with the Act of the Majlis. The introduction of the opinion stated, “It has to be mentioned that the Islamic faults with this Act concern Article 1 of the Act where the included people have to abide the Act as a legal obligation …” In other words, the Council’s Faqihs did not accept even the solution that they had already confirmed in the previous decision of the Unemployment Insurance Act.

It is interesting that the honorable Faqihs did not even know the exact meaning of law. Law does not mean a moral text of ideals for advice and request, but it is an enforceable legal text. If the Labor Act is not to assign the employers any duty or imposition, its enactment is meaningless unless we admit that the Faqihs of the Guardian Council essentially opposed to enacting an Act for the betterment of work relationships and according to their religious viewpoint, they thought the lease agreement would suffice to regulate these relationships and any Act contradicting this viewpoint would contradict the Islamic principles. While, it is completely obvious that supporting workers in essence does never contradict the Islamic principles.

Anyhow, the Act was returned to the Majlis and after receiving Imam Khomeini’s Fatwa issued on Dec. 7, 1987 which allowed the government to “regulate the obligatory conditions [for the employers] in any way possible” the Majlis modified some of the Articles and insisted on some other ones. However, the problem was not solved by Imam Khomeini’s Fatwa, and since

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1159 There are many holy Verses and Hadiths in the Islamic texts which all advocate and encourage freedom, brotherhood, equality, and equity such as, “Do never be one’s slave since God has created you free” (Imam Ali); “Poverty undoubtedly leads you to infidelity” (Mohammad, the prophet); “The one who enjoys no living does not enjoy resurrection” (Mohammad, the prophet); “A kingdom with infidelity sustains, but it never lasts with cruelty and oppression” (Mohammad, the prophet).
the Constitution of Iran had not predicted any solution for this problem, Imam Khomeini, on Feb. 6, 1988, ordered that a Council be formed which later was called ‘the Expediency Discretion Council of the Regime.’ The text approved by the Majlis was referred to the Expediency Council, but it coincided the ending of the second term of the Majlis. With the start of the third term of the Majlis in the summer of 1988, the issue was again pursued. However, the Expediency Council returned the Act to the Majlis due to some reasons. In this way, the Labor Act was again approved in the Majlis on Sep. 24, 1989. However, the Faqihs of the Guardian Council did not consider modifications in the Act sufficient and it was again rejected on Jul. 15, 1989.

Anyhow, the Labor Act was for the second time sent to the Expediency Council and finally, on Nov. 20, 1990, it was approved by this Council with some modifications and complements. In this way, devising and approving the Labor Act took 11 years; something which has never occurred in legislative history of Iran. This Act was one of the main reasons for the Expediency Council to form which in turn caused many crises in the Iranian legislative system, as it will be discussed later in this Chapter.

4.2.2. The Period after Amendment of the Constitution
This period includes the Guardian Council’s activity from 1989 onwards. The most important characteristic of this period is the complete distinction between the two political wings, namely the Right Wing and the Left Wing, and changing the weight of power in favor of the Rightists mostly by the Guardian Council through its effective means of ‘approbatory supervision of the elections,’ which will be discussed later. The practice of the Council in this regard led to the rightist majority in the forth, fifth, seventh, and eighth Majlis (except for the sixth Majlis). Some of the controversial decisions of the Council in this period are discussed hereafter.

1160 See Eraqi, supra note 1151, p. 81.
1161 Ibid., pp. 81-2.
1162 Ibid.
4.2.2.1. Eliminating Public Prosecutor’s Offices and Establishing General Courts

In the March of the year 1985, the Bill of Amendment of Criminal Procedure Act based on the organization of the chapters of the existing Criminal Procedure Act and with remarkable changes and a disposition from the Islamic judiciary system was submitted to the Majlis. The investigation and approval of the above-mentioned Bill, based on Article 85 of the Constitution of Iran, was assigned to the Judicial Affair Commission of the Majlis, and after a long time, the Commission passed the Criminal Procedure Act having 327 Articles and 72 notes in November 1987, and it was to be practiced on trial basis for 5 years. On Feb. 17, 1988, the Guardian Council announced the objections found with this Act in 79 clauses to the Majlis. For example, Clause 3 of the objections states, “The religious legitimacy of activities such as hearing the witnesses’ testimony that is just the responsibility of the certified judge [or religious judge] is not considered Islamic on the part of the public prosecutor and interrogator.” As well, Clause 33 said, “Articles 166, 167, and 170 do not consider the issuance of the mentioned writs and awards [such as writ of incompetence, writ of staying the proceeding, temporary detention award, etc.] by other than a certified religious judge legal and enforceable.” These objections to the Amendment of Criminal Procedure Act were an important cause to reinforce the thought of regulating the Bill of General Courts and Eliminate the Public Prosecutor’s Offices (public prosecutors and interrogators). In fact, to find solutions for the objections raised by the Guardian Council required that a big change be brought about in the Act and the modern criminal procedure system of Iran that had a history of 60 years of good experience to be totally disturbed for no good reason. However, the High Judiciary Council and the Judiciary Commission of the Majlis were not well prepared to do this job, so the aforementioned Bill was placed out of the

1163 According to Article 72 of the Constitution of IRI, the Majlis can delegate the right to legislate certain laws to its own internal commissions. In this case, such laws are enforced on trial basis for the period set by the Majlis. Their final approval, however, shall rest with the Majlis.

agenda of the Majlis. To seek for solution for this issue, a common meeting with the presence of the members of the Judiciary Commission of the Majlis and some of the members of the High Judiciary Council and the Guardian Council was held. In that meeting, while discussing and criticizing the manner of investigating the cases in the public prosecutor’s offices, the thought of breaking up the present status and lodging complaints directly to the judges instead of submitting them to the public prosecutor’s offices have been propounded.\footnote{Ibid., p. 272.}

On the other hand, most of Iranian lawyers maintained that carrying out the preliminary investigations by the public prosecutor’s offices and hearing the cases in the courts with a bill of indictment from the public prosecutor do not seem to be contrary to Shariah and the judicial percepts of Islam. Essentially procedural law is to arrange the best method and way to discover the reality to administer justice and to punish the offender for maintaining the security and order in the society and comfort of people, as well as, guaranteeing the right for the convict to defend. What is certain about the trial procedure in Islam is the administration of justice and indiscrimination between the parties of the claim and warranting the true testimony and the like which are not affected by time and place factors. Only not having any previous record [the public prosecutor’s offices and its manners of prosecution] in the Islamic texts and practical policy at the beginning of Islam and/or administration of justice proportionate to the case cannot imply their un-Islamic nature. Therefore, if it is found that the method of separating preliminary investigations from the trial phase of criminal cases and carrying out of the investigations through ‘the public prosecutor’s office’ composed of judicial qualified individuals help a fair trial, it does not seem to be un-Islamic only for the reason that it was never applied in the beginning of Islam. If it is the case, then the principle of separation of the three branches of power as stipulated in the Iranian Constitution must be considered as un-Islamic since it also was not applied at that time and even Muhammad,
the prophet, and Imam Ali by themselves were in charge of decision making, executing, and judicial affairs.\textsuperscript{1166}

With all the token in mind, the Act of Revolutionary and General Courts was ultimately approved by the rightist majority of the Majlis on Jul. 6, 1994 and the Guardian Council, in spite of the legal and logical comments of most Iranian lawyers confirmed the Act on Jul. 13, 1994.\textsuperscript{1167} The main message of this Act or in fact the essential change it brought about was: a) developing general jurisdiction for each judge or each branch of the court in such a way that they were competent enough to see to any civil, criminal, non-litigious, and familial cases at any object of claim and size of the crime, and b) elimination of public prosecutor’s offices and carrying out the preliminary investigations regarding the crime by the very judge who issues the judgment.\textsuperscript{1168} The main purpose of these two essential changes was announced to be the facilitator and accelerator of administration of justice in the courts as well as to make the judiciary system Islamic.\textsuperscript{1169} Article 1 of the Act suggests, “To settle and investigate all types of claims, and to directly reach the judge and to establish a uniform single unit of judicial authority, the courts with general jurisdiction shall be formed.”

With the enactment of this Act, many lawyers started to worry about the prospective results since the enforcement of this Act would disturb the work-share principle based on the expert knowledge and the order in judicial procedures. In fact, it would impair the required exactness and carefulness due to the bulk of work assigned to only one judge and thwart administration of justice. As predicted, these problems from the very beginning of the enforcement of this Act appeared and courts got into lots of troubles. Cases were piled up on the judge’s desk, and instead of facilitating and accelerating the process of investigation, it caused stretching the legal procedure and slowing down the trial trend. To solve the problems, several Amendments were

\textsuperscript{1166} Ibid., p. 281.
\textsuperscript{1168} Mehrpour, supra note 1164, pp. 269-70.
\textsuperscript{1169} Ibid., pp. 280-81.
added to this Act until the public prosecutor’s offices, after about 8 years of
losing the time and money and disintegrating the Iranian judicial system,\textsuperscript{1170}
were revived on Oct. 20, 2002, and criminal judges and civil ones were
separated again.

4.2.2.2. Approbatory Supervision and the Parliamentary Election Acts
According to Article 99 of the Constitution of Iran, the Guardian Council is
charged with the responsibility of supervising the election of the \textit{Majlis}.

After the ending of the war between Iran and Iraq in August 1988, and
Imam Khomeini’s demise in June 1989, the Right Wing or the Conservatives
who had a great influence in organs of the regime but could not show
themselves off because of Imam’s presence, captured the political power. In
July 1989 with the Amendment of the 1979 Constitution, they started to
stabilize and consolidate its power. The monopolist theory of the Wing could
be practiced only when it could determine the future of the elections,
particularly the parliamentary election so that no opponent could enter the
power game field. The Election of the fourth term of the \textit{Majlis} was
approaching (May 1992), but the third \textit{Majlis} representatives were not all in
line with this Wing to regulate and approve its desirable Parliamentary Act,
because the majority of representatives were from the Left Wing. Therefore,
the only way remained was the re-interpretation of Article 99 of the
Constitution by the Guardian Council so that the Right Wing could limit
people’s representative’s way to the \textit{Majlis} and could in fact institutionalize
their own political theory and help their own men enter the \textit{Majlis}.\textsuperscript{1171} To do so,
the then Chairman of the Central Supervisory Board affiliated to the Guardian
Council, sought for the Council’s interpretive opinion on Article 99 of the
Constitution, and the Secretary of the Council, through an official letter on May
22, 1991, replied, “… Supervision stipulated in Article 99 of the Constitution is

\textsuperscript{1170} The present Head of the Judiciary, Ayatollah Shahroudi, on his admitting and taking the power on Aug. 15,
1999 in an interview said something that turned out to be a catch phrase of many newspapers and people. He said,
“I admitted and took a ruined place.” Thenceforth, he started to revive the public prosecutor’s offices. See Iranian
Newspapers on Aug. 15, 1999 onwards.
\textsuperscript{1171} Etaa’at, \textsuperscript{ supra } note 1082, pp. 32-3.
approbatory and applies to all the administrative procedures of election, particularly confirming or rejecting the competency of the candidates.”1172

What the Guardian Council meant by the phrase ‘approbatory supervision’ in elections was that all legal actions of the elections, particularly the survey of candidates’ competencies and their qualifications of being elected as a representative of people must be under the direct control and approval and discretion of the Council. This discretion and advisability could consolidate and heighten the Council’s creativity so highly that they could easily select whomever they wanted and reject whomever they did not like.1173 In other words, through approbatory supervision, the Guardian Council could independently investigate the candidates’ qualifications and eventually deprive anyone of election they wanted. With this work known as “rejecting the candidates’ competency,” the Guardian Council interferes in the different procedures of the elections while in “The Act of the Guardian Council’s Supervision over Parliamentary Election,” which was passed by the Majlis on Jul. 31, 1986 and confirmed by the Guardian Council on Aug. 4, 1986, no word was spoken of the approbatory supervision.1174

The issue of approbatory supervision appears more serious when one learns that the decision of the Guardian Council in election matters is final and the claimant cannot lodge his complaint and objection before any judicial authority. In other words, there is no way to solve the election disputes in the Iranian law particularly when the Guardian Council even does not bother to say why the candidate is rejected, and even does not answer to the written and oral requests of the candidates asking for the reasons of their rejection.1175 While, based on a Single Article enacted by the Majlis on Oct. 12, 1999, rejected by the Guardian Council on Nov. 13, 1999, and finally approved by the Expedienency Council, the rejection of the candidates must be according to the legal reasons and reliable documents. The documents and reasons are to be

1172 See General Office of Compilation and Expurgation of the Laws, supra note 1038, p. 100.
1174 Mehrpour, supra note 1144, p. 489.
1175 Etaa’at, supra note 1082, p. 42.
submitted to the executive and supervisory authorities of the elections by the legally responsible centers such as the Ministry of Information and the Registering of Personal Status Organization. Moreover, on candidates’ request, the documentary reasons for their being rejected must be brought to their notice.\footnote{1176 See Guardian Council Research Center, \textit{supra} note 1148, pp. 847-51.}

With a lot of candidates’ being turned down through the approbatory supervision, the election of the fourth \textit{Majlis} was conducted in May 1992. It was natural that the Conservatives could and would get the majority of the seats of the \textit{Majlis}. With this new change and transition, the \textit{Majlis}, too, had to help the Guardian Council. One of the objections and criticisms on the interpretive opinion of the Guardian Council was the violation of Article 62 of the Constitution stipulating that the qualifications of candidates and the manner of elections shall be laid down by the law approved by the \textit{Majlis}. Therefore, the representatives of the fourth \textit{Majlis} on Jul. 9, 1995, started to reform the Parliamentary Election Act. They inserted the phrase “the Approbatory Supervision” into Article 3 of that Act so that this type of supervision could be institutionalized in the form of a statute.\footnote{1177 See Etaa’at, \textit{supra} note 1082, p. 44 -5.} This Article included, “The approbatory supervision in general applies to all electoral steps and affairs.” By doing this, the Council’s actions were legally justified since the Council could claim that the representatives of people have passed the approbatory supervision, as so it claimed. It is surprising that although this Act could justify the Guardian Council’s breaching Article 62, it was itself contradicting and violation of Article 60 of the Constitution. Article 60 explicitly assigns any executive affairs, including the conducting of elections, to the Executive branch, \textit{i.e.}, the President and the Ministers; the way the Guardian Council applied the approbatory supervision was just direct interfering in an important executive affair. Therefore, the Guardian Council as a protector of the Constitution should have already rejected Article 3, but such an expectation from the Council was completely in vain since it itself had started the game of
interpreting Article 99 of the Constitution in that manner. Therefore, it was natural that the Guardian Council not only would not reject the Article, but also would warmly welcome it, even if the principle of electoral competition was negatively affected and the electing power of the citizens was limited and the republicanism of the regime that is an indispensable and unchangeable principle of the Constitution was ignored and damaged.

One of the strangest measures taken by the Guardian Council concerning the supervision of the elections was that on Mar. 8, 1996 it cancelled an approval of the Council of Ministers regarding the “Recounting of the Votes of the Ballet-boxes which the President Determined” passed on Mar. 6, 1996. While, the annulment of unconstitutional regulations and approvals of the Council of Ministers, based on Article 170 of the Constitution, is the responsibility of the Administrative (High) Justice Court. It is not clear that on what basis the Council took such a shockingly strange measure!

A few years after the approval of the same Act, on the threshold of the Election of sixth Majlis in 1998, the Secretary of the Council who was witnessing extensive objections against the approbatory supervision, said, “The Guardian Council had no role in approving this Act. The representatives of the Majlis, that is, representatives elected by the people passed this Act thanks to the significance and sensitivity of the issue, and the Guardian Council is only the executive of this Act. Those have complaints against it shall consult with the representatives of the Majlis so that if they saw it advisable, they would reform it like any other laws.” The Council Secretary’s expressions, while confirming the fact of the Council’s not having the right to approbatory supervision, reveal the bi-fold words and actions of a man who is in a position of the Constitutional judge! The Secretary of the Council speaks of these

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1178 The Constitution of IRI, Arts. 6 & 177.
1179 Etaa’at, supra note 1082, p. 45.
1181 Apparently, there are some reasons why the Guardian Council insists on such a comprehensive supervision. The Secretary of the Council, on conducting the elections of fifth Majlis to prove the necessity of applying the approbatory supervision by the Council during the Friday Mass prayers narrated that a British girl in a manly form had sneaked into the Qum Religious School (Hozeh-e Elmieh-e Qum) and had been spying for five years! See Neshat Newspaper, year 1, no. 103, Jul. 12, 1999, p. 7.
1182 Salam Newspaper, Mar. 9, 1998.
expressions while the Council itself, on May 22, 1991 interpreted the word ‘supervision’ in Article 99 of the Constitution as ‘the approbatory supervision’ based on which in the Election of the fourth *Majlis*, in May 1992, it rejected many candidates’ competencies.

In the summer of 1999, the majority-wing of the *Majlis* (the Rightists), in order to more restrict the people’s electoral rights and guarantee the results of the sixth *Majlis* in their own favor, placed a bill on the agenda. This was strongly reacted by the then leftist President, Mohammad Khatami, and many protests of the Leftists. However, the *Majlis* paying no attention to these protests investigated its suggested bill and eventually by passing it, it confirmed the approbatory supervision of the Council again. It was natural that, the Election of the sixth *Majlis* would not be safe against the risk of rejecting the leftist candidates’ competency, but the Iranian public intention was to demand more reformations in the ruling political structure and more civil and political freedoms, which in turn resulted in the Left Wing’s victory. The sixth *Majlis* that was known as the “Reformist *Majlis,*” by virtue of the Council Secretary’s previous view expressed, approved ‘The Parliamentary Election Act’ on Mar. 5, 2003.

One of the most important points in this Act was the leaving out of the approbatory supervision from the previous Acts. However, the Guardian Council having found 35 Islamic and constitutional faults with the Act rejected it and returned it to the *Majlis* on Mar. 31, 2003. The strict disposition the Council had adopted against this Act and the various faults it had found with it were indicative of the fact that it was not happy with it at all, particularly with the leaving out of ‘the approbatory supervision.’ In the inducement of the first fault, it said, “In this ... none of the items have been observed.” This fault referred to the formal interpretation of Article 99 of the Constitution regarding the approbatory supervision made on May 22, 1991 by the Guardian

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By analyzing the 35 faults found by the Guardian Council, the following points can be drawn:

- The Guardian Council’s supervision is approbatory, absolute, exclusive, final, and perfect.
- The principle is the incompetence of the candidates unless its reverse is proved.
- Judicial investigation of the claims concerning the spoilage of electoral rights is not allowed.\(^{1185}\)

An example of the Guardian Council’s view can well clarify to what extent its motives and reasoning to reject the Election Act were logical and legal, and to what extent they were political to ‘create’ problems for the ruling government and the sixth Majlis. Note 1 of Article 25 of the aforementioned Act said, “Except for the President and the Ministry of Interior as the executives of the elections and the Guardian Council as the supervisor which can, if necessary, send inspectors to the constituencies and ballot-boxes to investigate the likely problems, no other organization or individual is allowed to send inspectors.” The Guardian Council found this provision contrary to Articles 60, 134, and 139 of the Constitution,\(^ {1186}\) while the Council’s opinion was itself completely contradictory to the Constitution and even the very Articles 134 and 137. Article 60 of the Constitution assigns the Executive affairs to the President and the Ministers, but it has not clearly identified which Ministry to conduct and control the elections. The assigning of the executive affairs of elections to the Ministry of the Interior is based on the ordinary law (Parliamentary Election Act) not the Constitution. Is the Guardian Council allowed to reject an ordinary law of the Majlis by relying on another ordinary law?

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\(^{1185}\) Ibid., 330.

Is the Guardian Council the protector of ordinary law or that of the Constitution?! Even if we wrongly consider that the Constitution itself has assigned the Ministry of the Interior to conduct and control the elections, is not the chancellery of the Executive and the Council of Ministers, according to Article 113 and other Articles of the Constitution, assigned to the President? Article 134 on which the Guardian Council relies states, “The chancellery of the Council of Ministers is assigned to the President to supervise the Ministers’ work … The President is responsible before the Majlis for what the Council of Ministers does.” Article 137, too, stipulates, “Any of the Ministers is individually responsible for his own duties before the President and the Majlis.” Does not this responsibility of the Minister permit the President to control his actions in his Ministry, and based on Article 136 dismiss the Minister if needed? When the Constitution has provided such permission for the President to dismiss a Minister, surely the President is allowed to give him instructions and orders to better discharge his responsibilities. Reliance of the Guardian Council on the above mentioned Articles not only contribute to the theoretical bases of the views and reasoning, but also it incapacities them. It is not clear how the Council has tried to extract such a meaning from these Articles stating that the President is not allowed to get involved in the elections.

Nevertheless, the set of faults mentioned above found by the Guardian Council with the Parliamentary Election Act made the government claim the suggested bill back being worried that the rectification the Majlis would be doing might turn out to be against the reformative wishes of the government itself and reversely guarantee the Guardian Council’s inner wishes. The Majlis, too, on Apr. 18, 2004 by returning the bill to the government placed it out of its agenda. In this way, the issue of apputory supervision remained more consolidated in the successive elections in the Islamic Republic of Iran.

1187 Khatami, supra note 1184, p. 344.  
1188 Ibid., p. 345.  
4.2.2.3. ‘Selection’ in the Administrative Lexicon

In the early 1980s and establishment of the Islamic Republic, based on ‘The Legal Bill of Purging and Creating an Appropriate Environment for Developing the Revolutionary Institutions …’ approved on Nov. 24, 1979 by the Revolutionary Council, the term ‘purging’ entered the Iranian administrative lexicon. Accordingly, powerful committees named ‘Purging Committees’ formed in the governmental organizations to send the anti-revolution persons out. During these years of 1980s, the committees started to purge extremely extensively the organizations. Their activity was not just limited to the selection for the employment in the organizations, but it applied to the selection of the students where many students could not enter the universities.\(^{1190}\)

The severe behavior of these committees’ caused a lot of complaints and objections among the people. In a very short time, the complaints and objections were so many that Imam Khomeini burst at rage and wrath at the selection committees. Therefore, on Jan. 5, 1983, he issued an order on stopping the weird questions and quitting some undeserving and sinister behaviors that disgraced and insulted people and even the regime.\(^{1191}\) This order could help lessen the tensity of the inappropriate behavior of some of those committees. Another very important happening in that square of time was that the scattered selection committees were eliminated and instead a centralized selection institution was founded to discharge the selection of human resources for all the administrative organizations under the supervision of Imam Khomeini’s representative.\(^{1192}\)

After the ending of the war between Iran and Iraq in the summer of 1988 and Imam Khomeini’s demise in the spring of 1989, a new period called ‘the Reconstruction Period’ was launched. The closer we get to the mid 1990s and farther we get from the very tensive early years of the 1979 Revolution, the

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\(^{1192}\) Shirzad, supra note 1190, p. 9.
more stabilized the regime becomes. In such situations, it was expected that the strictness of the selection that was performed due to the necessity in the early 1980s would lessen. Nevertheless, suddenly the fourth Majlis that was the first product of the approbatory supervision of the Guardian Council and had almost a uniform composition of the Rightists, with the suggestion of the Commission of Education of the Majlis, enacted an Act entitled ‘The Act of Selection of Teachers and Educational Members of Staff’ on Apr. 9, 1995. This Act was finally, after three times of commuting between the Guardian Council and the Majlis, confirmed by the Guardian Council on Sep. 13, 1995. The faults that the Guardian Council had found with the Act did not criticize the basis of the Act that was reflected in Article 2 of the same, but they concerned the manner of selection and some of the trivial parts.1193 The domain the Act covered applied to all the staff of the Ministry of Education, non-profitable schools, affiliated organizations and cooperatives, and all in all, all the people who were in any way related to the educational institutions, even the janitors. In Article 2 of the Act, it said,

The applicants seeking for a position or job in the Ministry of Education should not only have general requirements of employment (academic competency and qualification, physical and mental abilities), but they should also morally, theologically and politically abide and possess the following features:
(1) Faith in Islam and/or in one of the official religious expressed in the Constitution,
(2) Commitment in Islamic orders and rules,
(3) Faith and commitment in the absolute Velayat-e Faqih, the Islamic Republic Regime, and the Constitution,
(4) No reputation for moral corruption and no openly debauchery,

1193 See Guardian Council Research Center, supra note 1167, pp. 709-22.
(5) No dependency or belongingness to or advocacy of parties, organizations, and groups that have been or are being recognized illegal unless his/her repentance has been proved,
(6) No effective record on criminal sentence, and
(7) No drug addiction.

Note 1: Religious minorities mentioned in clause 2 should not openly violate the Islamic rules.
Note 2: Those who have been to the war fronts voluntarily for a long time or they have been war captives or they are war wounded or one of their parents has been martyred will enjoy a priority in the selection. In the cases of limited opportunities or posts and high number of applicants, criteria such as remote areas, activities in the revolutionary institutions, participation in Friday Mass prayers, and wearing veil and cover for women will be prioritized.
Note 3: The discretion of clause 5 … is the responsibility of the Ministry of Information and in other cases the High Selection Board will discharge the responsibility.

The above text is not a column of advice, but it is an enforceable legal text, and each word of the text is significant in the execution process and will have its own consequences. For example, for the discretion of clause 1, the selection agent must make sure of the applicant’s inner religious beliefs and faith. For the second clause, he should make sure the applicant knows and performs all the Islamic practices such as saying prayers, fasting, and so on. According to clause 3, citizens’ practical undertaking the laws is not enough, but the applicant must have a hearty faith in Velayat-e Faqih and the Constitution, and this issue can be proved by the selection agents. It is not clear why an applicant must have faith in the Constitution. Must one have faith in the Constitution or should be, even he does not believe in it, respect it and feel bound and obliged to it? Moreover, are belief and faith in something essentially measurable with a meter band or balance to show whether the applicant is obliged or not. Does not this pave the way for the selection agents to impose

1194 See Shirzad, supra note 1190, p. 9.
their interests or hatred in their introspection and selection to accept or reject the legal application of the applicants?

In the fifth clause, supporting parties or political groups which ‘the competent authorities’ recognize illegal is a hindrance to the applicant’s employment. Note 3 of the Article introduces ‘the Ministry of Information’ as the competent authority, not the Judiciary courts. More importantly, note 2 of the Article places lots of emphasis on the selection institution in the employment and recruiting process. The note not only assigns this institution in a position to accept or reject the applicants for their having or not having the requirements but also allows it to give a particular mark to them and to displace the applicants’ names in the list of recruitment on the basis of some requirements which are absolutely discriminatory between the citizens. In other words, the note has provided the permit for the selection agents to practice their own personal likes and dislikes in selecting people for the job opportunities. As the evidences have shown, the major part of the selection disaster having happened during the years of enforcing this Act was particularly due to the note 2. There are too many who have legal merit to acquire a job but after months of waiting have received a confidential letter saying, “You do not have priority in the selection.”\textsuperscript{1195}

Article 17 of the same Act says, “The executive by-law of this Act will be prepared and approved by the Common Commission of Education and Administrative and Recruitment Commission of the Majlis within three months.”\textsuperscript{1196} This Article contradicts Article 138 of the Constitution where the Council of Ministers is in charge of approving the executive by-law. The commissions of the Majlis cannot enact executive by-law under any conditions and situations, and this has no record in the history of legislation of Iran. It is still under question that why the Guardian Council has not held Article 17 as contradictory to the Constitution.\textsuperscript{1197}

\textsuperscript{1195} Ibid.
\textsuperscript{1196} See Guardian Council Research Center, supra note 1167, p. 717.
\textsuperscript{1197} Shirzad, supra note 1190, p. 9.
It must be stipulated that all the discussed points above contradict the soul of the Constitution of Iran and its third Chapter regarding the Rights of the Nation, especially Articles 23 and 28. Article 23 explicitly states, “Investigation of one’s beliefs [inquisition] shall be prohibited. No one may be offended or reprimanded simply because of having a certain belief.” As well, Article 28 stipulates, “Everyone shall be allowed to take up a vacation he/she likes and which shall not be contrary to Islam, public interests and rights of others. The Government shall be required, with due consideration to the need of society for a variety of professions, to create opportunities of work for all and equal conditions for obtaining it.” However, since the Iranian constitutional review system is of ‘a priori’ and ‘abstract’ type and the people’s right of challenging the laws before the competent courts has not been recognized in the Constitution, those whose rights or privileges have been violated have no way out to complain about or object to the spoilage of their rights. In this system, even if all people and lawyers, on enforcing an Act, come to this conclusion that the respective Act is unconstitutional, nothing can anyone do because a posteriori and concrete review has not been provided in the Iranian constitutional review system unless the Majlis later modifies the Act; of course, if the Guardian Council does not oppose it!

A few months later, on May 18, 1996, just 12 days before its termination, the fifth Majlis approved an Act with a two-starred urgency entitled the “Act of Incorporation of Teachers and Educational Members of Staff Selection Act into Other Governmental Organizations and Offices.”\(^{1198}\) In this manner, the domain of inclusion of the Selection Act was widened being applied to all ministries, organizations, public companies, Revolutionary institutions, banks, municipalities, and all the institutes whose entire or partial budget was granted by the government. Therefore, from then on, the Act practically was known as ‘Selection Act’ for every governmental office. Thousands of people who desire to get a job in an administration must be filtered through that selection filter which once the Commission of Education of the Majlis approved for the

\(^{1198}\) See Guardian Council Research Center, supra note 1167, pp. 938-41.
teachers and staff of Education Department. This Act is still effective, and annually thousands people are valued and evaluated through it and are rejected for nothing and/or accepted.  

A few years later, in the sixth Majlis, “The Act to Modify the Teacher Selection Act and its Incorporation into Other Governmental Organizations and Institutions” was passed on Sep. 23, 2001. This Act included certain provisions to prevent the selection agents from practicing their own personal interests and hatred in selecting the applicants hunting for jobs. Note 2 of Article 5 of this Act had allowed those who had any objections to the final and firm decisions reached by the Selection Reviewing Committees (stipulated in Articles 4 and 5) to complain within one month of receiving the official communication to Administrative (High) Justice Court: the right which the previous Acts had not considered. The Guardian Council found 15 constitutional and Islamic faults with this Act and returned it to the Majlis on Oct. 14, 2001.  

The most important concern of the Guardian Council was that “this Act would allow the incompetent individuals to enter the administrative organizations and, thus, it was contrary to Shariah …” The Majlis made some modifications in the Act and again sent it back to the Guardian Council on Dec. 23, 2001. However, on Jan. 2, 2002, the Guardian Council stating, “The problems in some clauses of the Act are still remaining” again returned it to the Majlis. It was really interesting that the Guardian Council in its 4th clause of faults found declared the last part of Article 8 of the aforementioned modifications contrary to Shariah and Article 57 of the Constitution, because it included an approval of the Cultural Revolution High Council related to the issue of Selection. This part of Article 8 stipulated, “… All contradictory Acts and regulations from the date of passing the executive by-law of Article 7 are nullified and ineffective.” The Cultural Revolution High Council is an

1199 See Shirzad, supra note 1190, p. 9.  
1201 Ibid., p. 474.  
1202 Ibid., p. 481.  
1203 Ibid., p. 482.
institution that was formed by Imam Khomeini’s order in the early years of the 1979 Revolution. This Council enjoys no standpoint in the Constitution for which the power of legislation can be considered. However, the Guardian Council, on the one hand, based on Imam Khomeini’s order conferring the right of approving some legislations in cultural and educational issues on the Cultural Revolution High Council, declares any Act contradicting this order contrary to Shari'ah. On the other hand, based on Article 57 of the Constitution considering the Absolute Vali-e Faqih as a supervisor of the three Powers, declares any Act providing the control over the institutions affiliated to him contrary to the Constitution. As a result, approvals of the Cultural Revolution High Council are tantamount to Shari'ah and the Constitution, and even the Majlis cannot change or modify them by enacting laws!1204

With all this in mind, the further faults found with this Act caused it to be referred to the Expediency Discretion Council of the Regime on Mar. 10, 2002. On approving the issue of referring the Act to the Expediency Discretion Council of the Regime, the administrative body of the Majlis wrote, “... the faults the Guardian Council had found were largely eradicated, but unfortunately the Council … insisted that the problems still remained…, this is the people’s rights, and it shall be kept. Therefore, we suggest that it be sent to the Expediency Council.” Nevertheless, the Act was received by the Expediency Council; it was taken out of the agenda of the Council and it was not approved.1205

4.2.2.4. Issue of the Conditional Legislation

On Aug. 7, 2002, ‘The Bill of the Organizational Structure of the Country’s Social Security System’ was submitted to the Majlis by the reformist government, and on Dec. 9, 2003 it was enacted by the sixth Majlis. The main objective of this Bill as stipulated in its Article 1 was to develop an integration

1204 The issue of exempting the institutions under the control of the Leader from the domain of the legislation power of the Majlis was one of the strange innovations of the Guardian Council that will be discussed in details in the next section, i.e., 4.2.2.4. Issue of the Conditional Legislation.
1205 See Guardian Council Research Center, supra note 1200, pp. 282-83.
between the macro-policies of welfare to provide social justice and protect all individuals of the country against social, economic and natural disasters, and their likely consequences such as retirement, aging, unemployment, accidents, and supporting mothers and children without guardian, etc. Note 3 of Article 12 of this Act says, “All institutions which have been covering the families of the martyrs, captives, the untraceable, the handicapped, and the volunteers of the war, will merge into an institution called ‘Foundation of Martyrs and Volunteers Affairs.’ All the assets, properties, and facilities of the Martyrs’ Foundation and the Staff Attending to the Freed Captives’ Affairs, and 50 % of properties, assets, and facilities of the Foundation of the Needy and War Handicapped were supposed to be ceded to the Foundation of Martyrs and Volunteers Affairs. Moreover, the earnings obtained from the assets and properties would be spent on attending to the affairs of the martyrs and volunteers within the social security system framework.”

After the Act had been approved by the Majlis, a lot of objections from the respective institutions arouse. The basis for these objections was that all the assets, properties, and facilities were taken into the domain of Leader’s command and they were no longer governmental affairs; thus, the decision was out of the Majlis or the government’s control unless they were permitted by the Leader. On Jan. 4, 2004, the Guardian Council found 13 faults with the Act and announced them through a letter. For example, it held, “In note 3 of Article 12 … the manner of the merging of institutions mentioned in the Act and the transferring of assets, properties, and facilities as well as spending the earnings …, by virtue of the order given by the Leader to the President on Jan. 27, 2003, is contrary to Shariah and Article 57 of the Constitution.”

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1206 See Guardian Council Research Center, supra note 1189, pp. 122-63.
... now that the authorities of the country have felt necessary to merge the rendering of services to the honorable families of the martyrs, the dear war handicapped, and honored freed war captives in the Martyr’s Foundation ..., I approve of the results, provided that its institutional characteristic is not impaired so that this revolutionary institution can render more and more services to the volunteers and their families.1209

Article 57 of the Constitution which was relied on by the Guardian Council says, “The sovereign powers in the Islamic Republic of Iran consist of the Legislative, the Executive, and the Judiciary which shall be exercised under the supervision of the Absolute Velayat-e Faqih in accordance with the following Articles of this Constitution. These powers shall be independent of each other.”

It has not been long that in the policy of the Guardian Council, the opposing of Acts with the Leader’s views and orders imply the contrariness to Shariah and Article 57 of the Constitution. According to this religious school of thought, in the absence of Imam-e Zaman,1210 Val-e Faqih (the Leader) is the vice-Imam and has the exclusive right to run the State affairs; therefore, objection to his view is considered as contrary to Shariah.1211 After all, regarding the Guardian Council’s relying on Article 57, it must be mentioned that in the text of Article 57, after the phrase “under the supervision of absolute Velayat-e Faqih” the phrase “in accordance with the following Articles of this Constitution” has been mentioned. This implies that the mechanism of executing the supervision of the Leader over the three Powers is in fact what appears in the subsequent Articles; therefore, an independent look at Article 57 without observing the whole constitutional provisions is not a correct way to interpret the Constitution. The result of such interpretation is that the Leader in addition to the authorities stipulated in Article 110 of the Iranian Constitution can impose any commands and prohibition onto each Power.1212 This contradicts the philosophy of enumerating the authorities and duties for the

1209 Ibid., p. 140.
1210 See text at supra note 960.
1211 Abadi, supra note 1207, p. 163.
1212 Ibid., pp. 163-64.
Leader in Article 110 and the certain principles of the constitutional law, specially the principle of separation and balance of the Powers.

Following the Guardian Council’s issuance of its opinion, the Majlis decided to eliminate the faults found and added a phrase “Based on the Leader’s letter of Feb. 7, 2003 to the President … and on the condition of the Leaders agreement …” to the note 3 of Article 12. Eventually, this Act was confirmed by the Guardian Council on May 29, 2004.1213

This practice in the legislation of Iran that can be known as “Conditional Legislation” had been seen even before this Act was approved. For example, on Jul. 10, 1994, an Act known as ‘The List of Public Non-governmental Institutions Act’ was enacted by the fourth Majlis. This Act, which was a Single Article, included 11 public non-governmental institutions among which there were institutions under the direct control of the Leader such as the Foundation of the Needy and War Handicapped and the Martyr’s Foundation of the Islamic Revolution etc. In note 2 of this Act, it says, “The enforcement of the Act concerning the public institutions that are under the control of the Leader will be dischargeable only through his honor permission.”1214

Unlike the Guardian Council’s opinion, even if the Leader’s permission is required for the approval of the Acts concerning the institutions under his supervision, it is most logical that “the permission is granted before the Act is passed by the Majlis not after enacting it so that only its enforcement is subjected to the Leader’s permission,” because in the Iranian law, after an Act is approved by the Majlis, only two stages are provided for its enforcement. These stages are the President’s signature -just a formality- and its publication in the Official Gazette.1215 Therefore, adding the Leader’s ‘permission’ after an Act is enacted means adding one more ‘stage’ to the legislation process in the legal system of the country.

1213 See Guardian Council Research Center, supra note 1189, p. 163.
1215 The Constitution of IRI, Art. 123; The Civil Act of Iran, approved on May 1928, Art. 1.
4.2.2.5. Double Standard Treatment

In the early winter of 2007, the *Majlis* passed an Act regarding the changing of the banks’ working hours, but the Guardian Council rejected it relying on Article 57 of the Constitution that emphasizes the independence of three Powers and Article 60, which urges that the Executing authorities be discharged by the President and the Council of Ministers. In other words, the Council considered the *Majlis*’ enactment as an interfering in the Executive domain and as a factor disturbing the principle of independence of the three Powers. Unlike the Council’s opinion, it should be argued that Article 71 of the Iranian Constitution has granted the *Majlis* the right to enact laws in all areas of the unitary state of Iran. If the *Majlis* is not allowed to enact laws in the domain of the affaires of the Leader, the Executive, and the Judiciary, because it is considered as the interference in the authorities of other Powers and disturbance in their independence, then why has it been established?

Although the Guardian Council, thanks to its constitutional position, must be an impartial institution, its performance during the past years, particularly during the period of the reformist government indicates that it has been more taking special political disposition in the political affairs of the country. Therefore, it seems that the Council’s practice in rejecting the *Majlis*’ approval on changing the bank’s working hours was not out of its partial disposition because the records show that whenever the Council wanted to heighten the government against the *Majlis* it would say, by relying on Article 60, that the *Majlis*’ approval was an interference in the Executive affairs. On the contrary, whenever it wanted to strengthen the *Majlis* against the government, it would suggest, based on Article 71, that the *Majlis* had right enough to engage in all affairs of the country. For example, when the university entrance exam was conducted in a two-stage procedure, the general and the technical exams, many of the students and their families objected that it created agitation in the students and caused their performance to decline. Nevertheless, the then

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1217 Ibid.
government was not willing to change the procedure because it thought the two-stage exam as advisable according to the issue of time and place.\textsuperscript{1218} However, on Aug. 12, 1998, the fifth Majlis enacted ‘The Act of One-stage Procedure of the University Entrance Exam’ to attract the students and their families’ attention. The Guardian Council, too, confirmed the Act on Aug. 16, 1998,\textsuperscript{1219} while the Council could have reasoned that the conducting of the university entrance exam was within the authorities of the Executive not the Majlis, and the Majlis should not have interfered in it. As well, in the summer of 1997, a little before the reopening of the schools, the Ministry of Education decided to reopen the schools 15 days earlier, on Sep. 6 of every year, instead of Sep. 23.\textsuperscript{1220} However, the representatives of the Majlis produced a two-starred urgency bill entitled “Reopening the Schools on 23 of September of Every Year” and enacted it on Sep. 9, 1997. The same was confirmed by the Guardian Council the next day, \textit{i.e.}, Sep. 10, 1997.\textsuperscript{1221} With this Act, the reopening of schools returned to the previous scheduling and the government had to surrender to the Majlis’s want in spite of the fact that its executing experts had completely different view. Such enactments that have forcibly included even the most trivial authorities of the Executive are not few but too many, and most of them have been confirmed by the Guardian Council relying on Article 71 of the Constitution.

It is worth mentioning that the two Acts ‘One-stage Procedure of the University Entrance Exam’ and ‘Reopening the Schools on 23 of September of Every Year’ were discussed during the reformist President, M. Khatami, and ‘The Act of Changing the Bank’s Working Hours’ was in the period of new conservative (fundamentalist) President, M. Ahmadi-nezhad.

\textsuperscript{1218} Ibid.
\textsuperscript{1219} See Guardian Council Research Center, \textit{supra} note 1148, p. 20.
\textsuperscript{1220} Esmaeili, \textit{supra} note 1216, p. 4.
4.3. A Critique on the Guardian Council’s Performance

A look at the Guardian Council’s performance from its formation in 1980 to the present time shows that in its early years of activities when political party-grouping was not taken serious and the concern was just to execute the Islamic rules ignored by the past regime, the Council strived to Islamize the Iranian society. Accordingly, the Council tried to eradicate the un-Islamic laws from the Iranian legal system. As observed earlier, the Guardian Council in this period went beyond its defined authorities in the Constitution by independently reviewing the un-Islamic laws of the past regime and even annulling them. The issues of the Public Punishment Act, Key Money or Good Will, and Appeal Deadline are the manifest examples of the Council’s practice in this regard. At that time, the faults the Guardian Council found with the Acts of the Majlis, for example the Urban Land Act and Discretionary Punishment (Tazirat) Act, were also more of Islamic types. The Islamic faults found, though traditionally were not so incorrect, but they were strict due to the time and place requirements and advisability. This strictness resulted in the formation of a new political institution named “the Expediency Discretion Council of the Regime” to form. However, the farther we get from the early Revolution victory period and the more political parties with their specific viewpoints and policies and at times radical against each other get on power, the more politically biased the Guardian Council becomes. In other words, concurrent with the formation of political wings in the first period of the Council’s activity, its performance gradually turns towards politics. An outstanding example of the Council’s political inclination in its decision-making in this period is the story of the Labor Act where the Council supported the Right Wing’s policies in the issue of relationship between the labor and employer, though apparently, it tried to document its opinions concerning the Labor Act based on the Islamic rules and principles.

However, after the early years (first period) when the criticisms were mostly on the Council’s strictness and attention to the outward appearance of the Islamic rules, the Guardian Council was mostly criticized for its partiality and
bias towards the Right Wing where it compromised with this Wing’s interests.\textsuperscript{1222} Strictness of the Guardian Council and even its wrong interpretation of the Constitution in rejecting the Amendments of Parliamentary Election Act and the Selection Act show that the Council does not tolerate any reform in the Iranian Society. The political inclination of the Guardian Council in this period is even manifested in its religious decisions, affecting them deeply. For example, in the issue of Eliminating Public Prosecutor’s Offices and Establishing General Courts, the Guardian Council, in spite of the comments of most Iranian lawyers and in spite of some guidelines of the Iranian Constitution, confirmed the Act approved by the Rightist majority of the \textit{Majlis} to revive the Islamic traditional courts (General Courts). This Act, as already discussed, ruined the judicial structure of the country in such a way that after some years the \textit{Majlis} regretted and therefore approved another Act to revive the Public Prosecutor’s Offices. Interestingly, the Council with nearly the same members confirmed this Act, too. Furthermore, in the issue of conditional legislation that was one of the weird innovations of the Council, it was observed that how the Council considered the Right Wing’s political viewpoint as the Islamic viewpoint and held that every law contrary to the Leader’s orders was un-Islamic.

A statistical analysis of the Acts passed in the fourth and fifth terms of the \textit{Majlis} on the one hand, and in the sixth term on the other, will help better understand the Guardian Council’s performance.

The fourth \textit{Majlis} from July 1992 to July 1996, and the fifth \textit{Majlis} from July 1996 to July 2000, because of the approbatory supervision that led to the Guardian Council’s rejecting the Left Wing candidates’ competencies, enjoyed a Right Wing majority Composition. The Table 1 shows the status of the \textit{Majlis}’s Acts under the close supervision of the Guardian Council in the two terms.\textsuperscript{1223}

\textsuperscript{1222} “Adjusting the Guardian Council,” \textit{supra} note 1010, p. 1.

Table 1: A Statistical Look at the Council’s Performance in the Forth and Fifth Term of the Majlis

<table>
<thead>
<tr>
<th>Term</th>
<th>Acts passed totally</th>
<th>Acts confirmed in the first stage</th>
<th>Acts confirmed after the faults eradicated</th>
<th>Acts enforced due to the Guardian Council’s silence</th>
<th>Acts returned to the Majlis (still pending)</th>
<th>Acts referred to the Expediency Council</th>
<th>Bills reclaimed by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fourth</td>
<td>352</td>
<td>226</td>
<td>112</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>-</td>
</tr>
<tr>
<td>Fifth</td>
<td>228</td>
<td>118</td>
<td>88</td>
<td>1</td>
<td>8</td>
<td>13</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>580</strong></td>
<td><strong>546</strong></td>
<td><strong>34</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

On the other hand, as stipulated earlier, the sixth Majlis from July 2000 to July 2004, in spite of the approbatory supervision, was a home to a majority of the Left Wing representatives who were in line with the then President, M. Khatami. The Table 2 shows the status of the Majlis’s Acts in this term.1224

Table 2: A Statistical Look at the Council’s Performance in the Sixth Term of the Majlis

<table>
<thead>
<tr>
<th>Term</th>
<th>Acts passed totally</th>
<th>Acts confirmed in the first stage</th>
<th>Acts confirmed after the faults eradicated</th>
<th>Acts enforced due to the Guardian Council’s silence</th>
<th>Acts returned to the Majlis (still pending)</th>
<th>Acts referred to the Expediency Council</th>
<th>Bills reclaimed by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sixth</td>
<td>481</td>
<td>292</td>
<td>83</td>
<td>1</td>
<td>51</td>
<td>50</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>481</strong></td>
<td><strong>376</strong></td>
<td><strong>105</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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With a comparison of the two Tables, it is concluded that in the sixth Majlis 481 Acts have been passed, while in the fourth and fifth Majlis altogether 580 Acts have been passed that is indicative of the fact the representatives of the sixth Majlis had an unquenchable desire to enact more and more Acts. However, the Guardian Council’s attitude towards the sixth Majlis is indicative of its dissatisfaction with this Majlis’ performance. For example, of all 580 Acts of the fourth and fifth Majlis only 15 were returned to the Majlis and still they are pending or under the process. As well, 19 have been referred to the Expediency Discretion Council due to the unsolved challenges between the Majlis and the Guardian Council. While, of all 481 Acts passed by the sixth Majlis, 51 were returned to the Majlis and 50 to the Expediency Council. Furthermore, 4 bills suggested by the government to the Majlis were reclaimed by the government. Therefore, of all 580 Acts of the fourth and fifth Majlis, only 34 Acts were thoroughly turned down, while of 481 Acts passed by the sixth Majlis 105 were refused. This indicates a big gap between the sixth Majlis with the Left Wing (Reformists) majority and the Guardian Council.

Anyhow, among the lawyers and political activists of Iran are serious reflections of the Guardian Council’s performance during its almost thirty years of existence. For example, N. Katuzian, one of the Iranian prominent lawyers, states, “The Constitution in any country is the regulator of the relations between the three branches of Power, the determiner of the people’s rights and freedoms, and the founder of a civil society. This is really important. The governments, which after the revolutions usually strive to shout the slogans of freedoms and rights to attract more and more people, include the public rights in the Constitution. However, after they stabilize their own position in the society and acquire the total authoritative resources, they start to seek a way to get back and limit those granted rights and freedoms to the people. One of the instruments to achieve this objective is the interpretation of the Constitution that completely changes the meaning and concepts embedded in the Constitution. One of the pains, which we suffer from, is that at times in the name of ‘interpretation’ of the Constitution, its contents are changed and heresy
is brought about. Heresy can take rights and freedoms from the society and people and cause the Constitution to deviate from the true path. It is unfortunate to say that most of the interpretations which the Guardian Council has made from the Constitution of Iran have been political and have caused the Constitution to deviate from its right path.”\textsuperscript{1225} For example, in Chapter III of the Iranian Constitution, the fundamental rights of the nation have been recognized with all its details. Some of the significant rights guaranteed in this Chapter are: principle of equal protection of law,\textsuperscript{1226} prohibition of inquisition of one’s belief,\textsuperscript{1227} freedom of expression,\textsuperscript{1228} political pluralism,\textsuperscript{1229} public right to take up a vocation and the government’s duty to create equal opportunities of work for all,\textsuperscript{1230} public right to social security,\textsuperscript{1231} duty of the government to provide a free education for public,\textsuperscript{1232} right to have a proper dwelling,\textsuperscript{1233} right to plead for justice,\textsuperscript{1234} right to appoint a lawyer in legal proceedings,\textsuperscript{1235} principle of legitimacy of offence and punishment,\textsuperscript{1236} prohibition of torture to obtain a confession or information,\textsuperscript{1237} and prohibition of defamation or aspersions of arrested, detained, jailed, and exiled persons.\textsuperscript{1238} According to N. Katuzian, the Guardian Council must be \textit{de facto} the protector of these fundamental rights, not the protector of power. Yet, the Council has not returned even one Act to the \textit{Majlis} because of and under the theme of these rights, while there are too many of these Acts.\textsuperscript{1239} By relying on what was discussed above, it can be said that “today, Iran faces the crisis of legislation in which the Guardian Council’s supervision, too, has its effect.”\textsuperscript{1240}

\begin{footnotesize}
\begin{enumerate}
\item Katuzian, supra note 1059, pp. 305-6.
\item The Constitution of IRI, Arts. 19-20.
\item Ibid., Art. 23.
\item Ibid., Art. 24.
\item Ibid., Art. 26.
\item Ibid., Art. 28.
\item Ibid., Art. 29.
\item Ibid., Art. 30.
\item Ibid., Art. 31.
\item Ibid., Art. 34.
\item Ibid., Art. 35.
\item Ibid., Art. 36.
\item Ibid., Art. 38.
\item Ibid., Art. 39.
\item Katuzian, supra note 1059, pp. 305-6.
\item Hashemi, supra note 1003, p. 332.
\end{enumerate}
\end{footnotesize}
Part Three
The Expediency Council and its Position and Role in the Iranian Constitutional Review System

One of the most important events in the history of the constitutional review system of Iran that happened in the first ten years of the 1979 Revolution was the formation of a body called ‘the Expediency Discretion Council of the Regime.’ This event was a direct consequence of the Guardian Council’s strictness in supervising the laws. This Part deals with the different aspects of the Expediency Council’s existence in the Iranian system.

1. History of the Expediency Council’s Formation
As mentioned earlier, the Guardian Council, in its early years of formation, was too strict in discharging its constitutional duties of safeguarding Shariah in such a way that the then Majlis could not discharge its duties well. At times, the Majlis found some Acts advisable and favorable to the country but the Guardian Council, in the name of Shariah, impeded their pulses and returned the Acts to the Majlis to rectify. “Therefore, though the Majlis was free to recognize and determine the expediencies of the country to approve any Acts, these two institutions challenged each other due to the Majlis’s insistence on its approvals and the Guardian Council’s refusal of confirming them because of their inconsistency with Shariah.”1241 Furthermore, the 1979 Constitution had not predicted any solution for such problems between the Majlis and the Guardian Council because “on codifying the Constitution, the supremacy of Shariah and the Constitution over the approvals of the Majlis was taken for granted.”1242 The problem emerged over ‘The Urban Land Act’ in Aug. 1981 and got intensified with the issues concerned with ‘The Discretionary Punishment Act’ and particularly ‘The Labor Act.’ The Guardian Council utterly disagreed with the three mentioned Acts claiming that they were against

1241 Hashemi, supra note 964, p. 540.
1242 Ibid.
Shariah, but the Majlis insisted that they were to maintain the expediencies of the country. Meanwhile, “it was the [Iran and Iraq] war time and the great Leader, Imam Khomeini, too, was thinking of the progress in the war and because of the sensitivity of time, he tried to support both the Majlis and the government, and refill the shortages the government had.”\textsuperscript{1243} To traipse such a condition and Guardian Council’s strictness, the thought of establishing the Expediency Council developed. In line with this thought, in February 1988, a letter was written by the Heads of the three Powers and sent to Imam Khomeini. In this letter, they had discussed the current problems in the legislation system of the country, specially the ones created by the strictness of the Guardian Council that caused some disputes between the Majlis and the Council. They added, “We were informed that Your Honor have decided to establish an authority which would help settle the disputes by issuing a governmental order. If you have come to a final decision, because many of the country’s important issues are still dangling, swift acting is required.”\textsuperscript{1244} In response to the letter, Imam Khomeini, on Feb. 6, 1988, founded the Expediency Discretion Council of the Regime (Majma-e Tashkhis-e Maslahat-e Nezam). After being created, this Council worked for one and half years without any constitutional position. However, in Aug. 1989, when the Constitution of Iran was revised, and by virtue of Article 112 it was embedded into the Constitution.

Albeit, from Imam Khomeini’s opinions and practices, it can be inferred that he was not profoundly willing to found the Expediency Council and preferred to end up the case in its natural process, but in the vulnerable and sensitive conditions of the war, he had to make such a decision. On Feb. 6, 1988, in the introduction of his famous letter, Imam Khomeini wrote, “Although, in my opinion … there is no need felt for the foundation of any authority, to secure the maximum precautions, a Council must be founded.”\textsuperscript{1245}

\textsuperscript{1243} Madani, supra note 971, p. 263.
\textsuperscript{1245} Ibid., pp. 69-70.
In another letter on Apr. 24, 1989, about one of the subjects of the agenda of the Constitutional Revising Council, Imam Khomeini wrote, “The Expediency Discretion Council is to solve the intricate questions of the Regime and to consult with the Leader in the manner that it does not possess as much power as the other Powers do.”

In fact, according to Imam Khomeini, the Expediency Council was not to be placed alongside the other three Powers.

2. Structure and Organization of the Expediency Council
The Rules of Procedure of the Expediency Council passed on Oct. 25, 1997, which was confirmed on Nov. 26, 1997 by the Leader, regulates some provisions concerning the manner of managing the Council.

2.1. Composition of the Council
By virtue of Article 112 of the Constitution of Iran, the permanent and mutable members of the Expediency Council are appointed by the Leader. Now, the composition of the Council, according to the Leader’s order on Feb. 27, 2007, is as follows:

- Legal people: a. the Heads of the three Powers, b. the Faqih of the Guardian Council, c. the respective Minister or Chief of the respective organization in terms of the subject matter, d. the Chairman of the respective Commission of the Majlis in terms of the subject matter,
- Natural people composed of 35 Faqih and clear-sighted people conscious of political, economic, social, and cultural issues.

In the first terms, necessarily and based on Article 3 of the first Rules of Procedure of the Expediency Council approved on Oct. 24, 1989, the President was to be the Head of the Expediency Council. However, at present according

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1246 Ibid., p. 71.
to the Leader’s order on Mar. 17, 1997, one individual other than the President\textsuperscript{1248} is the Head of the Expediency Council.\textsuperscript{1249}

2.2. Commissions of the Council

According to the Rules of Procedure of the Expediency Council, to provide exact and precise information related to the issues propounded in the Expediency Council, to prepare them for better decision making, and to fully enjoy the latest achievements of the governmental institutions and the basic developmental findings of the research institutions of the country, the Constant-specialized Commissions are constituted.\textsuperscript{1250}

The members of the Constant-specialized Commissions such as ‘Scientific, Cultural and Social Commission’ and ‘Political, Defense and Security Commission’ are appointed by voting in the early sessions of the Expediency Council. Each member other than the Head of the Council shall join one, and voluntarily two Commissions.\textsuperscript{1251}

2.3. Secretariat of the Council

The Secretariat of the Expediency Council is to arrange the work of the Commissions, to communicate with the governmental and public institutions to enjoy their findings, to continuously communicate with the consultative councils, to supervise the performance of the Commissions, to develop an information bank of researches carried out and reports related to the most significant national and international issues, to supervise the good performance of the general policies approved by the Leader, to announce the decisions and approvals of the Expediency Council, and finally to provide the detail minutes of deliberations and other administrative affairs of the Council. The Secretary who is the manager of the Secretariat is responsible for it.\textsuperscript{1252}

\textsuperscript{1248} This person is Mr. Hashemi Rafsanjani who was the President of Iran for two terms from 1989 to 1993 and 1993 to 1997.
\textsuperscript{1249} See Hashemi, \textit{supra} note 964, p. 543.
\textsuperscript{1250} The Rules of Procedure of the Expediency Council, approved on Oct. 25, 1997 by the Council, and confirmed on Nov. 26, 1997 by the Leader, Art. 4.
\textsuperscript{1251} Ibid., Art. 6.
\textsuperscript{1252} Ibid., Art. 31.
The secretary of the Expediency Council works under the supervision of the Head of the Council. The Head is the connector between the Council and the Leader.1253

2.4. Consultations of the Council
The consultation sessions of the Expediency Council for discussing the Acts referred to it are held by all the members of the Expediency Council. The sessions are official with presence of two thirds of the members and the decisions are valid by an absolute majority of the present members.1254

The ordinary sessions of the Expediency Council meet once every two weeks,1255 and extraordinary sessions meet with the opinion of the Head of the Council or through a written supplication of one third of the members only when the time has already been determined in the ordinary sessions.1256 The agenda of an ordinary session is determined by the Head of the Council three days before the session.1257

3. Powers and Duties of the Expediency Council
Article 112 of the Constitution of Iran has vividly provided the powers and authorities of the Expediency Council,

The Expediency Discretion Council of the Regime shall be convened at the order of the Leader to determine such expediency in cases where the Guardian Council finds an approval of the Majlis against the principles of Shariah or the Constitution, and the Majlis in view of the expediency of the regime is unable to satisfy the Guardian Council, as well as for consultation in matters referred to it by the Leader, and for discharging other functions laid down in the Constitution. The permanent and mutable members of the Expediency Council shall be appointed by the Leader. Regulations related to the Council shall be

1253 Ibid., Art. 32.
1254 Ibid., Arts. 19-20.
1255 Ibid., Art. 21.
1256 Ibid., Art. 22.
1257 Ibid., Art. 23.
prepared and approved by the members of the Council itself and finally ratified by the Leader.

The main philosophical logic behind the establishment of the Expediency Council and its most essential competency is just to settle the disputes between the Majlis and the Guardian Council. However, when such an institution with a huge amount of budget is established, it can no longer wait for a case of dispute to rise and for solving the same. As such, framers of the Constitution of Iran have determined other duties for the Expediency Council among which the most important are: consultation in matters referred to it by the Leader such as determining the macro policies of the regime, helping the Leader to resolve the intricate questions of the regime, electing one of the Guardian Council Faqis to join the temporary Leadership Council when the Leader is absent because of an irremediable illness or his demise, and confirming some certain approvals of this Council.


The Expediency Council has passed many laws since its very establishment. For example, as for the Labor Act that was eventually approved by the Expediency Council on Sep. 24, 1990, “the Council did not merely examine the Articles the Guardian Council had found contrary to Shariah and the Constitution, but it discussed some other Articles and made some changes in them, and even added some other notes and Articles.”

The letter of the then President and the Head of the Expediency Council to Ministry of Justice and Ministry of Labor on Jan. 3, 1990 communicating the Labor Act to be put into enforcement is indicative of this fact. The letter said, “The Labor Act … which was discussed by the Expediency Council in many meetings … and finally, because of necessity of time and with permission of the Leader, was modified

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1258 The Constitution of IRI, Art. 110, Clause 1.
1259 Ibid., Art. 110, Clause 8.
1260 Ibid., Art. 111.
1261 Eraqi, supra note 1151, p. 82.
by adding some other Articles [by the Expediency Council] … containing 203 Articles and 121 notes … is produced to be enforced.” What reasons and justifications the Expediency Council poses to enact law is the issue that will be discussed in this section.

The Expediency Council by relying on Article 112 of the Iranian Constitution indirectly gets involved in law-making process. According to Article 112, whenever the Guardian Council finds an Act of the Majlis contrary to Shariah or the Constitution, it returns the same to the Majlis to rectify it. In case the Majlis does not show any interest in rectifying the returned Act or the Guardian Council is not satisfied with the Majlis’s rectification, the return shall be repeated once more. If the Guardian Council is not satisfied again, the mentioned Act, either by the Majlis or through the President’s preference and/or Head of the Expediency Council’s request, will be referred to the Expediency Council. Here, the Expediency Council feels privileged to have the authority to issue a third view other than the ones given by the Majlis and the Guardian Council. This is the first reason why the Expediency Council is involved in the very important task of legislation because it is said that sometimes neither the Majlis’s opinion stating the consistency of an Act with the expediencies is correct, nor the Guardian Council’s opinion stating the inconsistency of the Act with the Constitution or Shariah is approvable. Rather, both of them are right to some extent. Hence, the Expediency Council presents an in-between opinion to settle the dispute between the Guardian Council and the Majlis. Therefore, the text approved by the Expediency Council confirms either the approval of the Majlis or the Guardian Council’s opinion, and/or it is an independent opinion based on ‘a specified expediency’ advisable to settle the aforementioned dispute. Regarding this, Article 28 of the Rules of Procedure of the Expediency Council stipulates, “Concerning the dispute between the Guardian Council and the Majlis leading to the reformation of an Article or Articles under dispute, if the reformation necessitates any

1262 See Ibid., p. 82.
1264 Hashemi, supra note 964, p. 549.
reformations in the other Article or Articles, the Expediency Council will do them as long as they are necessary.”

Even this much engagement of the Expediency Council in legislation is acceptable because it can be considered as settling the dispute. However, the Expediency Council acts beyond this as Article 29 of its Rules of Procedure states,

“When the Expediency Council’s members do not vote for the issue at hand unless some other parts of the Articles that were not under dispute are reformed, the Council refers the case to the Leader and seeks his agreement. When agreed upon, those parts are also reformed.”

As observed, the Expediency Council has allowed itself, with the Leader’s agreement, to change the Articles of the Act that were not under dispute -as it did in the process of approving the Labor Act- and to limit the competency of the Majlis. More interesting is the point that the Expediency Council by itself arranges the Articles of the Act and sends it to the President to sign and enforce.

The Expediency Council’s engagement in legislation does not end here. This appointed -not elected- body by relying on a vague expression in Clause 8 of Article 110 of the Constitution, which relates to the functions and authorities of the Leader, even directly gets involved in law-making process. Clause 8 says, “To resolve the intricate questions of the regime that cannot be settled through ordinary means through the Expediency Council.”

Using this self-made right, the Expediency Council has directly and indirectly passed many approvals since the very beginning of its formation. One of the recent cases of the Expediency Council’s legislation that raised many controversies was ‘The Act Concerning the Integrating and Synchronizing of the Presidential and Parliamentary Elections’ on Apr. 22, 2007 to curtail the costs of the elections. By virtue of the Act, it was agreed to

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1266 Mehrpour, supra note 1112, p. 77.
1267 The number of these legislations and some necessary information about them are available at: http://www.maslehat.ir/Contents.aspx?p=71df8d8c-2da0-4ba2-9cf6-546768083b1e
reduce the ninth term of Presidency by four months and increase the seventh term of the Majlis by seven months to synchronize the tenth term of Presidential election and the eighth term of Parliamentary election to be held in November 2008.\footnote{1268} However, the Guardian Council did not confirm this Act, because Articles 63 and 114 of the Constitution stipulate that the terms of office for the Majlis and the President is four years.\footnote{1269} When referred to the Expediency Council, the Act was rejected and a new Act to synchronize the sixth term of the Local Councils’ elections and the eleventh term of Presidential election in 2013 was passed by the Expediency Council.\footnote{1270} It is really interesting that the Speaker of the Majlis, reflecting on an IRNA\footnote{1271} reporter’s question whether the Expediency Council can pass an Act to synchronize the Local Councils and Presidential elections said, “The Expediency Council has opined that it can pass such an Act and it is not against its Rules of Procedure!”\footnote{1272}

It should be mentioned that the General Board of the Administrative (High) Justice Court, on Oct. 31, 1999, held that the Constitution of Islamic Republic of Iran by focusing on the separation and independence of the three Powers … has granted the enactment of laws in all issues to the Majlis based on Articles 58 and 71, and to the Expediency Council in the prescribed limits of Article 112.\footnote{1273} In this way, the Administrative (High) Justice Court, too, confirmed the Expediency Council’s power of indirect legislation by relying on Article 112.

5. Controversies over the Expediency Council’s Engagement in Legislation

There are many disputes between the opponents and supporters of the Expediency Council’s law-making practice.

\footnote{1269} Available at: http://www.tiknews.org/display/?ID=41263 visited on May 25, 2008.
\footnote{1271} Islamic Republic News Agency.
\footnote{1272} Available at: http://www.hamshahrionline.ir/News/?id=29331 visited on Nov. 9, 2007.
Among the supporters of the Expediency Council’s engagement in legislation, F. Hedayatnia and M.H. Kaviani in “Jurisprudential and Legal Studying of the Guardian Council” hold that the Expediency Council serves as a high council of the Leader and other dignitaries and bodies of the regime. It goes without saying that the approvals of this high institution are legally reliable and enforceable at all levels of the Regime. Its approvals are as the Leader’s orders that enjoy supremacy over all laws and regulations allover the country.\(^{1274}\) As it is observed, according to this point of view the Expediency Council has not only the right to enact laws but also the laws enacted by it are parallel to the Constitution and superior to all ordinary laws.

In “Constitutional Law of Iran,” while stating that the Expediency Council is not a legislative body in its nature, A.A. Amid Zanjani holds that one of the competencies assigned by Article 112 and other respective Articles of the Constitution to this Council is the legislation. He adds that with respect to the philosophy of existence of the Expediency Council that is to solve the extraordinary problems of the country, whenever the approvals of the Council are contrary to the Constitution while they are confirmed by the Leader, they shall be enforceable. However, they shall not be contrary to the precepts of Islam seen in the interpretative opinion of the Guardian Council given in June 1993.\(^{1275}\)

Among the people opposing the engagement of the Expediency Council in legislation, some prominent lawyers have a say:

H. Mehrpour in “The Expediency Discretion Council of the Regime and its Legal Position” maintains that the logic and philosophy behind the formation of the Expediency Council was just to settle the disputes about some main and important ordinary laws between the Guardian Council and majority of the Majlis. That is, this Council is an exceptional and extraordinary authority to decide on the laws and regulations; thus, it has to act in its domain of authorities defined in Article 112 of the Constitution, and it must not turn into a

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\(^{1275}\) Amid Zanjani, *supra* note 988, p. 674.
power alongside the three branches of power. He adds that the Expediency Council’s engagement in legislation deviates and breaches the true course of legislation and leaves undesirable consequences. Particularly, there is a sort of doubt and worry that some may directly, instead of referring one bill to the Majlis send the same to the Expediency Council to escape from the complicated and time consuming procedure of enacting laws by the Majlis and conforming them by the Guardian Council.

N. Katuzian, in “A Step towards Justice” believes that the Expediency Council cannot be a legislature because Article 112 of the Iranian Constitution must be interpreted and appreciated along with the generality of Article 58. Only the approvals of the Majlis are ‘laws’ since they are enacted through special formalities.

6. Rejecting the Notion of Expediency Council’s Right to Legislation

Unlike the view of supporters of the Expediency Council’s engagement in legislation, it must be said that the Council is not authorized to pass any law. The proofs of this claim are discussed under two headings in this section.

6.1. General Reasons

This group of reasons does not confirm the essence of engagement of the Expediency Council in legislation:

(a) In a systematic political regime, the job description of every political institution is carefully given in the Constitution and related laws. The philosophy of separation of powers, the wisely distribution of power throughout the ruling institutions, the temporariness of tenure of political positions, and existence of supervisory institutions all indicate that by controlling and harassing the political refractory power, the ruling institutions

1276 Mehrpour, supra note 1112, p. 79.
1277 Ibid.
1278 Article 58 of the Constitution of Iran says, “The legislative power shall be exercised by the Majlis that consists of elected members of the people…”
cannot become arbitrary and tyrannical and ignore people’s rights by expanding their competencies.\textsuperscript{1280} In the Iranian Constitution, in spite of some basic differences,\textsuperscript{1281} separation and independence of powers are officially recognized. It is completely obvious that the Expediency Council’s engagement in legislation harms the principles of separation and balance of powers in the political system of Iran.\textsuperscript{1282}

Moreover, the Expediency Council’s engagement in legislation is against the principle of incompetence in public law. This principle indicates that when through the text of the Constitution functions and powers of a political institution are carefully defined, it means the institution shall not exceed its competencies; otherwise, defining the functions and powers seems vain and useless. In other words, a political institution has not any power beyond the one(s) enumerated in the law. If every institution were to act upon its own self-made power, there would not be any guarantee for the proper function of the political structure and fundamental rights of the citizens.\textsuperscript{1283}

(b) In democratic societies, legislation as one of the most important components of popular sovereignty either directly belongs to the people or indirectly is attached to their representatives. Article 58 of the Iranian Constitution concerning representative democracy stipulates, “The legislative power shall be exercised by the \textit{Majlis} that consists of elected members of the people, and its approvals after passing through [some] proceedings … shall be notified to the Executive and Judiciary for implementation.” Therefore,

\begin{itemize}
\item \textsuperscript{1281} For example, Article 57 of the Constitution of Iran says, “The sovereign powers in the Islamic Republic of Iran consist of the Legislative, the Executive and the Judiciary, which shall be exercised under the absolute \textit{Velavat-e Faqih} … These powers, shall be independent of each other.” The Leader, by virtue of Article 107 of the Constitution, is elected by an assemblage of high rank \textit{Faqihs} (Assembly of Leadership Experts) from among the highest \textit{Faqihs} for good.
\item \textsuperscript{1283} Ibid., p. 236.
\end{itemize}
according to the Constitution of Iran, only the *Majlis* can enact laws through lots of formalities and procedures.\(^{1284}\)

\(\text{(c)}\) The Iranian Constitution, in Article 59, has clearly considered the direct and pure democracy through the referendum. This Article says, “The legislative power may be exercised through referendum and by seeking the direct vote of the people in matters involving very important economic, political, social, and cultural issues. The request to seek the direct vote of the people shall be approved by two-thirds of the total representatives of the *Majlis*.\(^{1285}\)” Now, the question is, “When returning people’s own sovereignty right in legislation to themselves requires two-thirds of representatives’ votes, how can an institution, which is not elected by the people, without their consent or their representatives’ permission enact laws?” As already observed, nearly all 46 members and the Head of the Expediency Council are directly appointed by the Leader for a period of five years. The approvals of the Expediency Council, too, shall be confirmed by the Leader so that they can announce and enforce them. Thus, the Expediency Council, as Amid Zanjani rightly points out, must be considered as an institution affiliated to the Leader.\(^{1286}\)

\(\text{(d)}\) Monitoring the approvals passed by the Expediency Council, as discussed earlier, has also raised many controversies. The Acts of the *Majlis*, which consists of a large number of people’s representatives and is constitutionally authorized to enact laws, shall be produced to the Guardian Council for supervision and final confirmation, while the approvals of the Expediency Council that is a tiny unelected institution, are not controlled by any responsible body, which is not accepted legally and logically.\(^{1287}\)

\(^{1284}\) Katuzian, *supra* note 1279, pp. 67-83.
\(^{1285}\) The Referendum Act was approved through the *Majlis* in June 1989, but it has never been acted upon and no ordinary law through referendum has been approved by the public.
\(^{1286}\) Amid Zanjani, *supra* note 988, p. 674.
\(^{1287}\) Ghasemi and Basavaraju, *supra* note 1282, p. 238.
6.2. Specific Reasons

(a) Article 112 clearly indicates that the role of the Expediency Council is only to settle the disputes between the Majlis and the Guardian Council and to give a counsel to the Leader in matters referred by him. According to this Article, the Council can only approve its own Rules of Procedure and instructions that shall be carried out with the approval of the Leader. In other words, the Article has vividly determined the function of the Expediency Council as the ‘expediency discretion,’ not ‘enacting laws based on the expediency.’ This very delicate point is already indicated even in the name of this body: ‘The Expediency Discretion Council of the Regime.’ It is only to determine whether what the Majlis claims that enactment of a law is in consistency with the necessities and expediencies is correct or not. “In effect, it can be said that as the Guardian Council is to check the laws of the Majlis if they conform to Shariah and the Constitution, the Expediency Council was, too, constituted to check the opinions of the Guardian Council if they are in line with the expediency of the regime.”1288

The problem with the Expediency Council’s engagement in legislation by relying on Article 112 is that eliminating, changing and/or adding to an Act under dispute cause the text of the Act to lose its uniformity and change its main purpose by entering wrong terms, words, and expressions. At times, it causes paradox in the Act as it did for the Labor Act. In fact, “some of the items which the Expediency Council added the Act had not been precisely worked on and even some of them were in conflict.”1289 In other words, there are some terrible mistakes in the Labor Act that have created many problems for the Iranian workers.

The most important problem existing in Labor Act that has made all think that the labor law of Iran is never ever supportive of workers’ rights is what appears in note 2 of Article 7. The legislature in Article 7 divides the work-agreement into temporary and permanent agreements and says that the

1288 Mehrpour, supra note 1112, pp. 66 & 76.
1289 Ranjbari, supra note 1158, p. 52.
temporary agreement is the one that is concluded in a term of stipulated limited period and on the discontinued jobs. In note 2 of the same Article it states, “In continuous jobs, if a term of period is not stipulated in the agreement, the agreement is of permanent type.” The adverse meaning of this sentence is that if in continuous jobs, a term of period is stipulated in the agreement, it is of temporary type. In this manner, this note allows the employer to conclude a temporary agreement not only in the discontinued jobs but also in the continuous ones. This big problem has caused the Labor Act to lose its significance since most of the supportive provisions of the Labor Act such as ‘no unfounded fire’ (for the protection of job security)\textsuperscript{1290} and workers’ retirement privilege\textsuperscript{1291} etc. are meaningful and applicable where the worker is a permanent worker.

Another problem of this type concerns the agricultural workers’ status. Thanks to the specific conditions of agricultural work, in the 1958 Labor Act of the past regime, it had been stipulated that agricultural workers must be under the application of their special Labor Act. This Act that was known as ‘Agricultural Labor Act,’ was eventually finalized in 1974. After determining and enumerating agricultural jobs, Article 2 of the Agricultural Labor Act included all workers of these enumerated jobs under the application of the Act. However, because the benefits and advantages of the 1958 Labor Act highly exceeded that of ‘Agricultural Labor Act,’ a big dissatisfaction developed. Therefore, after the 1979 Revolution, in the suggested bill of the Government, and the approved text of the \textit{Majlis}, this difference was eradicated and the agricultural workers went under the inclusion of the Labor Act.\textsuperscript{1292} As well, Article 200 of the new Labor Act announced, “With the approval of this Act and its executive by-law, all laws and regulations contrary to this Act are void.” However, the Expediency Council, in approving the final text of the Labor Act, added Article 189 to the Act. This Article after mentioning all the agricultural jobs stipulated in Article 2 of the 1974 Agricultural Labor Act, says that

\textsuperscript{1290} The Labor Act of Iran, approved on Nov. 20, 1990, Art. 27.
\textsuperscript{1291} Ibid., Art. 31.
\textsuperscript{1292} See Eraqi, \textit{supra} note 1151, pp. 140-41.
activities of the agricultural jobs can be exempted from the inclusion of some parts of this Act with the suggestion of High Labor Council and with the approval of the Council of Ministers. “Thus, if the Council of Ministers approves, many of the agricultural jobs may be excluded from some parts of the Labor Act. Nevertheless, the question is, “After being excluded, what and/or which other Act[s] will support the agricultural workers in the excluded parts?” In the past, although under the inclusion of ‘Agricultural Labor Act’ they enjoyed less benefits compared to the advantages of the Labor Act, their status was, at least, clear. However, now that the Agricultural Labor Act is cancelled, what law[s] will support them in the excluded parts? In the present Labor Act of Iran, there is no answer found to this question.1293

This kind of legislation resulted from the lack of integrity and harmony of language and content of law brings about confusion and suspending situation for the people who cannot find out the concept and inclusion of their rights and duties. In a long and bulky legal text where at times hundreds of Articles and notes are included, the observance of integrity, entirety, and harmony between its language and content requires skills and qualifications. Since the Expediency Council does not enjoy experts with such skills -and if it does- the Acts are legislated somewhere else (the Majlis) and the experts of the Expediency Council are not aware of the delicate and intricate points of the Act, these types of problems arise. According to H. Mehrpour and S.M. Hashemi, in these cases, to observe the formalities mentioned in the various provisions of the Iranian Constitution the Expediency Council must not impose any change or modification on the Acts of the Majlis. It just should accept the Majlis’ view relying on the expediency or admit the Guardian Council’s opinion based on Shariah, and if it has its own view (third one other than the two), it should announce its discretion to the Majlis so that the Majlis considers its Act for rectifying and/or modification.1294 Otherwise, one can say, “With the

1293 Ibid., p. 141.
1294 Mehrpour, supra note 1112, p. 76; Hashemi, supra note 964, p. 550.
existence of the Expediency Council, all principles and standards will be suspending!"¹²⁹⁵

(b) The concept of ‘resolving the intricate questions of the regime’ in Clause 8 of Article 110 does not mean that the Expediency Council can pass any laws, but it is a binding order to bring the doubts and disagreements in implementation of a law to a conclusion and settle the problem so that the law will be enforced. For example, according to Article 43 of the Constitution of Iran regarding the banning of usury and unlawful profit, an Act entitled ‘Bank Operation with No Usury’ was passed by the Majlis on Aug. 30, 1983. However, this caused many problems for the banks: The banks had already given big loans to the natural and legal persons, and, according to the Act of Banning Usury, they could not take the real claim and interest back from the consumers. The customers, too, having got to know the Act, refrained from paying back the interest and delayed payment penalty. Even some of them lodged petitions before the courts to claim their additional interest they had already paid. Nevertheless, the same Act had already stipulated that the Act was only applicable to those loans given after the enactment of the Act. To resolve this question, it was not needed to enact a new Act, but an influential authority was needed to settle the confusion. Thence, by virtue of the Leader’s order, an approval was passed by the Expediency Council on Dec. 26, 1989. It suggested that all the loans and financial facilities that banks had paid to the natural and legal persons up to the date of implementation of ‘Bank Operation with No Usury Act’ on Aug. 30, 1983, be returned to the loan providers based on the regulations effective at the time of signing the agreement. All the courts and notary units were charged to issue their orders and receive the banks’ claims accordingly. This approval was not a law but a direction given by the Leader via the Expediency Council to facilitate the implementation of a law already passed.¹²⁹⁶

¹²⁹⁵ Madani, supra note 971, p. 226.
¹²⁹⁶ See Mehrpour, supra note 1112, pp. 74 -5.
7. Interpretive Opinion of the Guardian Council: Reliability of the Expediency Council’s Approvals

Although the lawyers can form a legal doctrine and interpret the Constitution when issues are raised, legal and enforceable interpretation of the Constitution in Iran could be done only under the authority and supervision of the Guardian Council.\(^{1297}\) Now let us see how the Council has handled the problem and what interpretations it has offered confronting the following questions. The questions with little alternation are those that were posed by A.A. Hashemi Rafsanjani, the Head of the Expediency Council. To clarify the different dimensions of the nature of the Expediency Council’s functions, he asked the Guardian Council: Are the approvals of the Expediency Council ‘laws’? Do they have the features of other ordinary laws? If they are ordinary laws, since with respect to Article 73 of the Constitution, the interpretation of ordinary laws is only under the authority of the Majlis, should they be interpreted by the Majlis or by the Expediency Council? The approvals of the Expediency Council are under no special control of any constitutional institution; however, if they prove inconsistent with Shari'ah and/or the Constitution, which one is superior and preferable? Can the Majlis modify or annul the approvals after it finds it essential? Can the Expediency Council itself revise its own approvals after they have been announced and come into force?\(^{1298}\)

In the same year, the Guardian Council in its two Interpretative Opinions provided thorough answers to the all aforementioned questions. Firstly, Opinion 4575 on May 24, 1993 stated,

1) The Expediency Council cannot independently revise its own approvals.

2) The Expediency Council can only interpret the Articles of the laws approved by itself just to explain them; if the Council wants to develop or narrow the domain of its approvals, it cannot independently act.

3) By virtue of Article 4 of the Constitution, the approvals of the Expediency Council shall not be contrary to Shari'ah. However, according to Article 112 in

\(^{1297}\) The Constitution of IRI, Art. 98.

case the approvals are contrary to Article(s) of the Constitution that is under
dispute between the Majlis and the Guardian Council and in case of any other
law and provision of the land, the Expediency Council’s approvals are
superior and preferable …”

Secondly, Opinion 5318 on Oct. 16, 1993 stated,

No legislative authority can reject, invalidate, and cancel the approvals passed
by the Expediency Council. However, when the approvals are related to the
disputes between the Majlis and the Guardian Council, the Majlis, after the
determined time when the change of expediency is justifiable, can pass a new
Act. As well, when the approvals are passed to resolve the intricate questions
of the regime, in case of inquiry from the Leader and his agreement, they can
be produced and discussed in the Majlis.

Therefore, according to the Guardian Council, the Expediency Council’s
approvals regarding the settlement of the dispute between the Majlis and the
Guardian Council are considered ordinary laws; therefore, they cannot be
contrary to the Constitution. However, since the Expediency Council’s view in
the settlement of the dispute enjoys finality feature, the approvals may be
contrary to the constitutional provision(s) under dispute. As well, regarding
resolving the intricate questions of the regime, approvals of the Expediency
Council shall be contrary to all laws and regulations and even the Constitution,
where no authority except the Leader can modify or annul them. However, if
they are inconsistent with Shariah, they shall enjoy a lower rank and they shall
be modified. In other words, “as long as the approvals do conform to Shariah,
they are effective because their legal support is the governmental order of the
absolute authority of the Supreme Leader” who according to Article 57 is
higher than any other Powers in the political structure of Iran. It should be
noted that although approvals of the Expediency Council are not expected to be

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1299 Ibid., pp. 107-8.
1300 Ibid., p. 108.
1301 Khalili, supra note 1265, pp. 35-6.
contrary to *Shariah*, “at times the Expediency Council, relying on ‘vital expediency,’ votes to ignore *Shariah* and to leave out the Guardian Council.”\(^{1302}\)

On Jan. 17, 2007, the Guardian Council examined the “Two-starred Bill concerning the Interpretation of Part 3 of Clause B of the Act of Modification of Note 2 annexed to Article 76 of the Social Security Act” approved by the *Majlis*. In this regard, it held, “Since Part 3 of Clause B … has been approved by the Expediency Council and based on the Guardian Council’s interpretive opinion of May 24, 1993, the interpretation of the Expediency Council is its own responsibilities; therefore, the Approval of the *Majlis* is contrary to Article 112 of the Constitution.”\(^{1303}\)

**Conclusion**

In Islamic Republic of Iran, the judicial authorities such as the Supreme Court are never allowed to supervise the Acts of Legislature. This power is discharged by a political institution called the Guardian Council. This Council was inspired by the French Constitutional Council and was formed with nearly similar duties and responsibilities. It is a part of the Iranian Legislative branch without any law-making power.

The Constitution of Iran has specified two groups of members for the Guardian Council: six *Faqihs* who are appointed by the Leader and six jurists who are proposed by the Head of the Judiciary to the *Majlis* and are elected by the *Majlis*. They are appointed for a six-year renewable term. The manner of appointing the Guardian Council members, their tenure, the possibility of their being reappointed, and some related issues cannot guarantee their independence.

The Council’s review is of *a priori* and abstract -not concrete- type. All the Acts passed by the *Majlis* are required to be sent to the Guardian Council for


the supervision before their promulgations. The Council has no right to declare an unconstitutional and/or un-Islamic Act null and void, but if it finds any inconsistency in the Act, it shall return it to the Majlis for revision. The Council decisions do not enjoy res judicata feature and they are not binding on the legislature, executive, and the judiciary.

Regarding the issue of the Council’s reviewing the laws passed by the Parliament of the past regime, most Iranian lawyers maintain that the Guardian Council is not competent enough to annul the un-Islamic laws of the past regime. By this, they do not mean the un-Islamic laws should remain in the Iranian legal system, but they suggest that supervising and annulling the un-Islamic laws of the past regime should be done through the legal formalities and procedures.

Before Amendment of the Constitution in 1989 the Guardian Council strived to Islamize the society and to eradicate the un-Islamic laws from the Iranian legal system. The Council went beyond its defined authorities in the Constitution by independently annulling the un-Islamic laws of the past Regime. At that time, the faults the Guardian Council found with the Acts of the Majlis were also more of Islamic types. The strictness of the Council to enforce the Islamic rules resulted in the formation of a new political institution named “the Expediency Discretion Council of the Regime” to form. However, concurrent with the formation of political wings in this period, the Council’s performance gradually turns towards political inclinations.

After Amendment of the Constitution, the Guardian Council was mostly criticized for its partiality and bias towards the Right Wing. The political inclination of the Guardian Council in this period is even manifested in its religious decisions. To prepare a critical view on the Guardian Council’s performance, a statistical analysis of the Majlis’ Acts in three terms of the Majlis shows that the Council normally is prone to turn towards the Right Wing’s interests and inclinations. Nevertheless, it has not yet shown any interest in protecting the fundamental rights of the people stipulated in Chapter III of the Iranian Constitution.
The third part of this Chapter has dealt with the Expediency Council. Formation of this Council is a direct consequence of the Guardian Council’s strictness in supervising the laws. The Expediency Council was formed to solve the disputes between the Majlis and the Guardian Council in cases where the Guardian Council found an approval of the Majlis against the principle of Shariah or the Constitution, and the Majlis in view of the expediency of the regime was unable to satisfy the Guardian Council. The Expediency Council is an institution affiliated to the Leader. Nearly all members as well as the Head of the Expediency Council are directly appointed by the Leader. The approvals of the Expediency Council, too, shall be confirmed by the Leader.

As an appointed -not popularly- elected body, the Expediency Council basically has no right to enact law, but in practice, it has passed many laws indirectly and directly since its very establishment. This practice of the Expediency Council is criticized by many. After all, the story of the Labor Act is an obvious example that shows how eliminating, changing, and/or adding to an Act by the Expediency Council can cause the text of the Act to lose its uniformity, change its main purpose, and create many crisis in the Iranian legal system.