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In the previous chapters, a sincere attempt has been made to discuss the historical and theoretical generalities and common principles of the constitutional review and its most important and relatively successful models in the world. Focusing on the most visible and important aspects of constitutional review power, this study has examined comparatively the constitutional review scenario regarding the Acts of Legislatures in India and Iran. The main objective of this study has been to uncover the social, historical, and national features and the internal logic of formation functioning of the constitutional review in India and Iran to propose specific approaches to establish a completely independent and efficient body of constitutional review. A truthful attempt has been made to assess the impact of the decisions made by the constitutional review bodies of India and Iran and their contribution in bringing about a legal and social change within the parameters of the Constitutions of these two countries.

In this concluding Chapter, an attempt will be made to give a summary of the previous chapters and to present the findings of this study. Further, a few suggestions and recommendations for the eradication of weaknesses and restrictions of the two systems of constitutional review of India and Iran, and for the future study are presented in this Chapter.

1. Summary of the Chapters

As already pointed out, this study has been divided into 6 chapters including the Introduction and Conclusion. Apart from the Introductory Chapter, a wise summary of the preceding chapters may be given as under.

In the Second Chapter, a theoretical framework about the creating of a well established constitutional court has been presented by relying on the scientific attempts of some leading law scholars. This Chapter has suggested that to create a constitutional court in new democracies, decision makers ought to consider some significant issues as follows:

The required provisions concerning the independence of the constitutional court such as administrative and financial independence as well as conditions
and manner of appointing the members ought to be predicted in the Constitution.

The membership of the constitutional court should be incompatible with that of the government, the parliament, or any other popular representative body. As well, persons who are under employment of or hold office in a political party should not belong to the constitutional court.

Appointing the judges of the constitutional court should be a function generally shared among the Executive, the Legislature, and the Judiciary. If one body nominates judges, another might then have the power to confirm them, so that no branch may pack the court with its politically favored nominees.

The tenure of judges should be long and nonrenewable. The possibility of reappointment of the judges has the potential to reduce judicial independence, because judges who seek to remain in office must be sensitive to the political interests of those bodies that will reappoint them.

_A posteriori_ and concrete review, as in the United States, requires litigation of constitutionality in the context of a particular case. It allows more information to be considered. On the other hand, _a priory_ and abstract review, as in France, determines the constitutionality of a statute without a specific case. It increases the average quality of legislation. However, in _a priory_ review the constitutional court may become a partisan in disputes between legislative factions, or between the executive and legislature. The Austrian Constitutional Court practices both abstract and concrete reviews.

Regarding the effect of the decisions, it can be said that the decisions of the courts in every leading model of constitutional review enjoy _res judicata_ feature and are generally binding.

To accept an institution as a constitutional court, it is required that its decisions on the unconstitutionality of a law totally annul the law. However, when a court has not such a competency and it just has to return it to the parliament, its being a court appears dubious. Similarly, when a court is officially allowed to rewrite a law or replace all the regulations felt necessary for the previous ones, then the court is not judiciary but legislative. On the
other hand, every institution that is vulnerable and exposed to the interference of the Legislative or the Executive cannot be a constitutional court. Furthermore, when a constitutional court is seen as just a political actor rather than a neutral servant of constitutional norms, it will then be unable to perform its high function of protecting Constitution and citizens’ fundamental rights. Nevertheless, if a constitutional court is placed in its defined framework, there will be no problem in saying that this or that constitutional court is officially entitled council, court, or the constitutional Supreme Court.

As an instance of a well established constitutional review body, the Second Chapter has referred to the Austrian model. This model has integrated both the American and French notions of supervising the laws in the form of a Constitutional Court. The Austrian Constitutional Court interprets its own jurisdiction in relation to the fundamental rights as being so extensive. Although a few number of these rights have been enumerated in the Austrian Constitution, the Court has redressed this shortage by relying on the practices relating to the principle of equality (rule of law) mentioned in the Austrian Constitution.

In the Third Chapter, two constitutional review systems of America and France by which the Indian and Iranian systems were inspired respectively have been discussed.

In the United States, the body to control the constitutionality of laws is the very federal judiciary of that country with the Supreme Court at the top, courts of appeal in the middle, and district courts at the bottom. However, because of the high master review of the Supreme Court, American judicial review is normally studied under the name of the ‘Supreme Court.’

The Supreme Court is composed of nine members including the Chief Justice. The judges of the Court should be among the greatest legal minds in the country. Under the American Constitution, the President appoints the judges with the advice and consent of the Senate.

The judges of the Court serve in office for life. They are removed from office only for a lack of “good behavior” through a special procedure known as
‘Impeachment.’ Therefore, the special position of the judges grants them a very vast independence against the President and the Congress.

Constitutional review in America is always of a posteriori and concrete type. Each party of a case, either the plaintiff or the defendant, can challenge the constitutionality of an Act. The Supreme Court’s judgment in the constitutionality of a law is the final word in a case. The laws that are declared unconstitutional are not excluded from the official codes, and if their unconstitutionality is declared by some subordinate courts, the other courts are free to enforce them or not. However, if the judgment is given by the Supreme Court and if it does not change its judgment later on, the respective law will, in practice, be void.

In the early years of its formation, the Supreme Court of the United States made use of its authorities very cautiously and conservatively. The Court’s decision in Dred Scott regarding the issue of slavery and racial discrimination badly impaired its grace, and in some individuals’ opinion, the decision paved the way for American Civil War. However, the Court gradually started acquiring an activist and liberal stance through constitutional interpretations. Therefore, it could play a significant role in the gradual changes that have taken place in America. After World War II, the Court unlike its previous policy started to support Franklin Roosevelt’s programs to eliminate the discrimination. In 1954, in Brown v. Board of Education, the Court ending the prohibition of the black students in the white’s schools and universities brought about a great positive social change in the American society.

Decisions of the Court have always been of political effects, but these effects have been different in terms of time. The conservative behavior of the Supreme Court, especially during the New Deal, caused it and even the idea of judicial review to lose their reliability and validity. It was considered as ‘government by the judges’ by the French legal doctrine. It was said that the Court blocked all reformations while it offered no alternative solutions. However, supporting the individual rights and freedoms has turned the Supreme Court into a powerful instrument for the social changes. The provisions of Ten
Amendments have been exposed to different interpretations that have resulted in the creation of modern and excessive liberalism. The freedom of speech is now interpreted as individual satisfaction and excessive support of individual behaviors. For example, the Court invalidated the Acts concerning prohibition of burning of the American flag reasoning that these Acts were contrary to the foundation of freedom of speech.

In France, a political institution named ‘the Constitutional Council’ discharges the constitutional review power. The French Constitutional Council, in fact, is composed of nine members three of whom are appointed by the President of the Republic, three by the president of the National Assembly, and the last three by the president of the Senate.

The members of the Council are not required to have higher education in law. However, in practice, the members are from among the eminent lawyers and law professors and/or experienced judges. The membership of the Constitutional Council is incompatible with that of the Cabinet, the Parliament, the socio-economic Council, the local electoral institutions, and the management in a political group or party.

In the appointment of the members, the political appointing authorities are almost absolutely free. However, after an individual joins the Council as a member, he enjoys the immunities as judges of the judiciary courts do. Moreover, a non-renewable nine-year tenure of the councilors, the Council’s administrative and financial autonomy, and the difficult procedure for dismissing a member from the Council guarantee the Council’s independence and impartiality. Accordingly, French jurists say that the Constitutional Council is a court because its status gives its members absolute independence from political authorities. Nevertheless, an important issue that can impair the independence and impartiality of the Council members is that they cannot choose the president of the Council but he is appointed by the President of the Republic from among the members. This grants the President of the Republic a notable power before the Council.
Supervising the laws for their constitutionality is the main responsibility of the Constitutional Council. It is of a priori and abstract type. The Institutional Acts, before their promulgation, and the Rules of Procedure of the Parliamentary Assemblies, before their coming into force, must be referred to the Constitutional Council. However, the ordinary laws are supervised only when the President of Republic, the Prime Minister, the presidents of the two Assemblies, and sixty deputies or sixty Senators refer the laws to the Council. Therefore, many laws are not referred to the Council to control their constitutionality. Moreover, the Council does not consider itself competent enough to review some laws such as the ones passed through referendums.

The Constitutional Council’s decisions about the constitutionality or unconstitutionality of laws enjoy res judicata feature. They are binding on public authorities and on all administrative authorities and all courts.

The Constitutional Council in its early years of existence was strongly influenced by the personality of Charles de Gaulle. In the disputes arisen between the government and the Parliament in regard to the legislative and decree powers, the Council ruled in favor of the decree powers of the government. However, after the political stabilization of Charles de Gaulle period, there were two very important developments through which the Constitutional Council could play a great role in developing the French constitutional law. The first development concerned the definition of the “Constitutional Stature” in 1971 where by expanding the defined limits of the Constitution and including the other elements such as 1789 Declaration of Human and Civil Rights, the Council could expand its activity domain. The second development was the 1974 Act. Previously, the authorities or bodies close to the ruling government could refer an Act to the Council, but after 1974, a relatively small number of members of the Parliamentary oppositions were allowed to challenge the Acts passed by the majority. After these developments, the Council was more referred to and made some significant decisions concerning some controversial issues. These decisions, at times, have brought about very strong objections among the majority and even in the heart
of the Government. It indicates the independence of the Council from the ruling political party’s pressures in its decision-making.

The Fourth Chapter has discussed the constitutional review of the Acts of Legislatures in India. Indian judicial branch is organized as a single, integrated hierarchy of courts with the Supreme Court at its apex. On the other hand, the High Courts stand at the head of a State’s judicial administration.

The Supreme Court and the High Courts have been given the power to finally supervise the constitutionality of laws and declare them unconstitutional if they were proved to be contradictory with the Constitution. This power is exercised by relying on two different concepts. The first concept is “Fundamental Rights” which is invoked to examine the ordinary laws enacted by the Parliament and the State Legislatures, and the second one is “Basic Structure” which is utilized to control the Constitutional Amendments enacted by the Parliament.

Independence of the Judiciary is now the basic structure of the Indian Constitution. Appointing the most qualified persons as the judges of the courts, the manner of appointing them, the length of the tenure until their retirement (the age of 62 years for the High Court judges and the age of 65 years for the Supreme Court justices), the difficult procedure for the removal of judges, the difficult procedure for their transfer, and several other constitutional provisions have been made to ensure the judicial independence. For example, although according to the Indian Constitution every judge of the Supreme Court and High Courts is appointed by the President, the executive interference in this matter has now been limited. Judges in the Supreme Court are gentlemen selected mostly from the Chief Justices of different High Courts. The selection is by a collegium of Chief Justice and four senior judges and the appointment is by President of India. The selection is now based on seniority. In this manner, judicial independence has been guaranteed.

Nevertheless, there are some disturbing trends that may threaten the independence and impartiality of the Indian courts. For example, appointing retired judges to the high offices may tempt a judge to compromise his
independence by looking forward to such post-retirement appointment by the
government. As well, the incidents of indiscipline and corruption charges
levelled against certain judges of various High Courts and the judges’ not to be
answerable to any one for their misconduct also harms the independence of the
judiciary.

India’s set of fundamental rights guaranteed in Part III of the Constitution is,
in effect, its counterpart to the American Bill of Rights. They form the basic
structure of the Constitution and, therefore, they may be abridged by
Constitutional Amendment but cannot be abrogated or destroyed. For the
enforcement of the fundamental rights, special remedies including writs in the
nature of *habeas corpus, mandamus, prohibition, quo warranto,* and *certiorari*
have been provided. In this regard, the right to move the Supreme Court is
itself a fundamental right.

The doctrine of waiver formulated by some American judges interpreting
the American Constitution is not applied in interpreting the Indian Constitution,
so the person who is entitled to the fundamental rights cannot waive his right.

In case of the violation of a fundamental right, any person whose right is
violated can directly move the Supreme Court for an appropriate remedy. This
traditional rule of *locus standi* has been considerably relaxed by the Supreme
Court after the Emergency period. The Supreme Court facilitated access to the
Court by entertaining letters from persons interested in opposing illegal acts
and allowing social activist organizations or individuals to fight on behalf of
the poor and disadvantaged sections (Public Interest Litigation).

Constitutional review in India is of *a posteriori* and concrete type. The
Supreme Court’s decision is the final word in a case. The law declared by the
Court is an authoritative precedent and it is binding on all subordinate courts. A
statute which is inconsistent with the Constitution is not wiped out entirely
from the statute book. Therefore, if by the subsequent Constitutional
Amendment the inconsistency is removed, the law will become enforceable. As
a result, although the Indian courts can declare unconstitutional Acts null and
void, Parliament can effectively nullify judicial verdicts through amending the
Constitution.

Before Emergency, particularly in the early years of its formation, the
Supreme Court made use of its judicial review power very conservatively. In
this period, the Court judges had a positivist role. The most controversial area
of the Supreme Court’s performance before the Emergency period was the
Court’s interpretations of the constitutional provisions on the right to property.
Favoring a western-influenced libertarianism, the Supreme Court during this
period appeared to be a vigorous defender of property rights, but was
significantly less protective of individual rights under the Constitution’s due
process guarantee. In this period, the Gopalan approach declaring that the due
process standard contained in Article 21 is limited to matters of procedure was
prevailing. This approach was applied in the subsequent cases during the years
1950-70; however, the Court tried to move slowly towards an activist
approach.

In India, although the Supreme Court is not essentially influenced by the
ruling political party in its decision-making, during the Emergency the Court’s
majority was in line with the ruling party. In this period, the Government
appeared more interested in institutionalizing authoritarian political rule
through political and constitutional changes. Therefore, Parliament passed
several Constitutional Amendments to eliminate judicial review of several laws
violating fundamental rights during the Emergency. For example, the 42nd
Amendment was the most dangerous assault on the Indian constitutional
democracy. Relying on these Amendments as well as the COFEPOSA and
MISA, the national and state governments detained thousands political
opponents and journalists. The aggrieved party was denied all relief by the
inclusion of the violating Acts in the Ninth Schedule, thereby rendering them
nonjusticiable. Throughout this period, the Court judges had a passive role. The
Supreme Court acquiesced in virtually all of the Government’s encroachments.
The Court also refused to hear a challenge to an Amendment as contrary to the
basic structure of the Constitution.
After the end of the Emergency in 1977, the Supreme Court, to regain its legitimacy, dramatically shifted from its passive stance during the Emergency and loudly championed the fundamental rights, interpreting them in a decidedly egalitarian way in several leading cases. In its activist stance, the Court created a range of new rights and extended a number of old ones. Several leading judges did virtually everything possible to transform the agenda of the Court. In this period, a major part of the activism by the Supreme Court involved the nature and conditions of individual rights. In *Maneka Gandhi*, the Supreme Court rejected the *Gopalan* approach to the protection of personal liberty embodied in Article 21 and declared that Article 21 allows both a procedural and a substantive evaluation of law. In fact, the reinterpretation connected the meaning of the Article 21 due process guarantee with the Article 14 equality guarantees and the Article 19 protections of fundamental liberties so that Article 21 came to be used as a means for evaluating the substance of legislation in light of equality and liberty. The new approach to Article 21 created such rights as the right to a livelihood, the right to be free from exploitation, the right to legal aid, and the right to be free of environmental pollution, and so on.

The Supreme Court’s decisions in secularism cases undoubtedly gave great strength to the principle of secularism. However, if the Indian version of secularism is equal respect to all religions, the Court has failed to observe it in the *Hindutva* cases (Election Cases) as well as in the *Ayodhya* case (*Ismail Faruqui*). In these cases, the Court has failed to act effectively because it chose a more passive form of secularism and showed the biggest clemency towards the majoritarian view of secularism. While interpreting the provisions of the election law, it appears to have adopted a very formal approach. In the *Prabhu* and *Joshi* judgments, the same three Justices chose to categorize the two similar cases differently; one treats it as religious and the other as non-religious rhetoric. Nevertheless, it seems that it was not due to the pressures from the ruling party, because in the case of the *Prabhu* and *Joshi* judgments a minority coalition led by the Congress party, which had a preference for banning all
references to ‘Hindutva’, was in power, while the Supreme Court judgment in Joshi was against this preference.

At the end of this Chapter, the researcher states that in spite of its undeniable role to protect and promote the Indian democratic socialism, the Supreme Court is charged not only with exceeding its institutional capacity, but with reversing constitutional priorities, usurping both Legislative and Executive functions, causing conflict and imbalance of powers between the three branches of the government, violating the rule of law, riding roughshod over traditional rights and succumbing to the corrupting temptations of power. However, supporters of the Court and judicial activism assert that the Court merely performs its legitimate function.

The Fifth Chapter has discussed the constitutional review of the Acts of Legislature in Iran. Prior to the Iranian 1979 Revolution, there was not any constitutional review system in the Iranian law. Besides, in the legal doctrine of Iran, the judicial authorities such as the Supreme Court have never been allowed to supervise the statutory laws. Therefore, after the Revolution a political institution called the Guardian Council was established to safeguard the Constitution as well as the Islamic rules. The Guardian Council is a part of the Iranian Legislative branch, although it does not have lawmaking power.

The Constitution of Iran has specified two groups of members for the Guardian Council: six Faqihṣ who must be just and acquainted with the needs of the time, and six jurists who must be Muslim and specialized in law. The Faqihṣ are appointed by the Leader and the Leader has absolute power in appointing them. However, the jurists are proposed by the Head of the Judiciary to the Majlis and are elected by the Majlis. The Judiciary can propose either its experienced judges or law professors. Members of the Guardian Council are appointed for a six-year renewable term.

The manner of appointing the Guardian Council members and their tenure can be criticized. With respect to the fact that the Faqihṣ of the Council have been granted more authorities than the jurists, the manner of their appointment through only the Leader is legally under question. In addition, in appointing the
six jurists of the Council also, the Leader indirectly plays a very important role, because the Head of the Judiciary is directly appointed by the Leader. Particularly, when disagreements appear between the Head of the Judiciary and the Majlis in appointing the jurists, the Head of the Judiciary’s opinion is more preferable than the votes of the representatives of the Majlis.

Furthermore, the Councilors’ tenure can be renewed for successive terms. 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 these provisions definitely affect the independence and impartiality of the Councilors. In addition, according to the Guardian Council’s interpretative opinion now the Council members can take up another official job in the Executive as a Minister or Vice President. They also can belong to some special political parties, even as the General Secretary of the parties.

All the Acts passed by the Majlis are required to be sent to the Guardian Council for the review before their promulgations. The Council usually has to examine the dispatched Act within 10 days. The Council’s review is of a priori and abstract -not concrete- type.

If the Guardian Council confirms the Act based on the Constitution and/or Shariah, it will be enforceable after going through some legal procedures; otherwise, the Council returns it to the Majlis to revise and rectify. Provided that the Majlis is not willing to rectify it or the Guardian Council finds the rectifications insufficient, the remittance will be repeated once more, and finally the Act is referred to the Expediency Council if the two do not come to a solid concurrence on the Act.

Regarding the issue of the Council’s reviewing the laws passed by the Parliament of previous regime, most Iranian lawyers maintain that the Guardian Council is not competent to annul the un-Islamic laws of the past Regime. By this, they do not mean that 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.

The Guardian Council before Amendment of the Constitution 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 reviewing the un-Islamic laws of the past Regime and even annulling them. 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.” 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 where it compromised with this Wing’s interests. The issues of Double Standard Treatment with respect to Article 71 of the Constitution, Selection Act, and Parliamentary Election Acts are the manifest examples in this regard. The political inclination of the Guardian Council is even manifested in its religious decisions, affecting them deeply. For example, in the issue of conditional legislation, 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 Majlis’ Acts in the fourth and fifth terms of the Majlis with the Right Wing majority and in the sixth term with the Left Wing majority shows that the Council normally is more prone to turn towards the Right Wing’s interests and inclinations.

While Chapter III of the Iranian Constitution has mentioned the fundamental rights of the nation in details and while there are many Acts violating these fundamental rights, the Council does not care to protect these rights.

Formation of the Expediency Council, which in turn caused a crisis of legislation in Iran, 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 for a period of five years. They can be reappointed for successive terms. The approvals of the Expediency Council, too, shall be confirmed by the Leader.

The Expediency Council enacts laws directly and indirectly. Nevertheless, it must be said that according to the Iranian Constitution, only the *Majlis* can enact laws through many formalities and procedures. Besides, the approvals of the *Majlis*, which is a popularly elected body and constitutionally authorized to legislate, must be supervised by the Guardian Council, while the approvals of the Expediency Council, which is a tiny unelected institution, are not supervised by any institution. The Council’s engagement in legislation is against the principle of incompetence in public law as well. This principle means a political institution has not any competency beyond the one(s) enumerated in the law. Furthermore, in a long and bulky legal text, 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, some problems may naturally appear. The story of the Labor Act and its terrible mistakes creating many problems for the Iranian workers 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 and change its main purpose. It may even create crisis in the Iranian legal system.
2. Findings of the Study

During the course of this study the following findings regarding the similarities, differences, nature, and features of the two constitutional review systems of Iran and India have been obtained.

1. In both systems of Iran and India, the objectives of supervising the statutory laws are the observance of the rule of law, the protection of the Constitution, and the consolidation of the constitutionalism.

2. In both systems, the constitutional review is not based on judicial dogma as in the United States, but it is explicitly determined by a written Constitution.

3. There are also some similarities between the two systems in some interpretation rules and some effects of decisions. For example, the doctrine of severability is applicable in both systems, that is, if some of the provisions of a statute are found inconsistent with the Constitution and the rest are not inconsistent, then, only the provisions which are inconsistent shall be treated as unconstitutional and not the whole statute.

4. Constitutional review in Iran, like France, is of centralized type. That is to say, it is exercised only by one institution called the Guardian Council situated in the very structure of its Legislative branch. While, the constitutional review in India, as in the United States, is of decentralized and diffuse type, that is, the Supreme Court as well as all the States’ High Courts throughout India are vested in this significant power.

5. Indian Courts supervise the laws just for their conformity with the Constitution. However, in Iran the Guardian Council examines the laws for their conformity with both the Constitution and Shariah.

6. Constitutional review in India, as in the United States, is of *a posteriori* and concrete type. It requires litigation of constitutionality in the context of a particular case. Besides, the Indian system has conferred the right to challenge the constitutional validity of laws on individuals for the enforcement of their fundamental rights. On the other hand, the
constitutional review in Iran, like France, is a priori and abstract, and individuals have no right to challenge the constitutional validity of a statute even when the statute violates their fundamental rights. Nevertheless, it is worth mentioning that the French Constitutional Council since 1970s through recognizing the 1789 Declaration of Human and Civil Rights and conferring on the parliamentary opposition the right of referring a law to the Council has shown a great interest in protecting the citizens’ and political minorities’ rights. While, in Iran, in spite of the fact that most of the universal fundamental rights have been recognized by the framers of the Constitution, the Guardian Council, in practice, does not attend to protecting these rights. Therefore, they have not any legal guarantee in the Iranian law.

7. In Iran, the manner of appointing the Guardian Council members, the temporariness of their tenure, the possibility of their being reappointed, the possibility of holding another official job by them, and their membership in some political parties of the country harm their independence and impartiality. However, in India, the Constitution has provided enough safeguards to enable the Indian constitutional courts to work in an impartial and independent atmosphere. For example, the qualifications of the Supreme Court justices, the manner of their appointment, and the stability of their tenure highly maintain their independence. The justices are appointed by the President through an effective consultation with the Chief Justice of India. Moreover, they serve in office for life.

8. In Iran, the Guardian Council, unlike the French Constitutional Council, is not authorized to invalidate an inconsistent law. It can just return the law to the Majlis to be revised and modified; however, in India the Courts are allowed to invalidate an unconstitutional law. They can even declare a Constitutional Amendment null and void, if it takes away or abridges the basic structure of the Indian Constitution. The
constitutional courts in the other leading democracies have never such a power.

9. In Iran, the Guardian Council’s decisions, unlike the French Constitutional Council’s decisions, do not enjoy finality and binding feature. However, the Indian Supreme Court’s decision is the final word in a case. The law declared by the Court is an authoritative precedent and it is binding on all subordinate courts.

10. With respect to its constitutional review power over the Acts of the Majlis, the Iranian Guardian Council appears as a constitutional court. However, the doubts about its independence, the lack of individuals’ right to challenge the laws when their fundamental rights are violated, and the lack of finality and binding feature of the Council’s decisions indicate that it is not a constitutional court whatever.

11. Constitutional review in Iran, in the ultimate analysis, concerns the Leader as the highest authority of the Iranian Executive, because firstly, the Faqih of the Guardian Council are appointed and reappointed only by the Leader. Secondly, although the jurists are elected by the Majlis representatives, they are proposed to the Majlis by the Head of the Judiciary who himself is appointed by the Leader. Thirdly, the Expediency Council that was formed to solve the disputes between the Majlis and the Guardian Council is an institution affiliated to the Leader. Besides, the decisions of the Expediency Council shall be confirmed by the Leader.

12. In spite of providing the Guardian Council’s systematic and automatic constitutional supervision in the Iranian Constitution, there are some laws that no mechanism has been predicted to check their constitutionality, such as the approvals of the Cultural Revolution High Council and the Expediency Council. As a result, there is a possibility that some unconstitutional laws are approved by the abovementioned institutions and entered in the Iranian legal order. Similarly, in India, there are some limitations on the judicial review power of the courts. For
example, the laws under Articles 31(B) as “Validation of certain Acts and Regulations (the Ninth Schedule)” and 31(C) as “Saving of laws giving effect to certain directive principles” are immune from being examined by the Supreme Court and High Courts.

13. Although the evidences of the Guardian Council’s performance, particularly after the Amendment of the Constitution, show that the constitutional review by a political institution in Iran has turned towards one specific political wing’s inclinations and preferences, it cannot be generalized to all systems of constitutional review by a body with political nature. For example, the French Constitutional Council after its early years of existence, which was strongly influenced by the personality of Charles de Gaulle, could perform independently and impartially. Besides, the evidences of the Indian Supreme Court’s performance during the Emergency period show that the judiciary, as in India, also is likely to turn towards the ruling political party’s inclinations.

14. In spite of some lapses, the Indian Supreme Court over the years could help the Indian democracy to develop the constitutional norms of the country and to protect the fundamental rights of the citizens. However, the evidences show that in Iran the Guardian Council was not successful in playing such a role during its almost thirty years of existence. The Guardian Council’s narrow interpretation of the Constitution and Islamic rules has retarded positive transitions and natural development of the Iranian legal system.

15. Although the behavior of the judiciary in its activist stance, particularly in the United States, has occasionally been considered as ‘government by the judges,’ it can be said that the judicial activism is a necessary and essential aspect of the Court’s existence. It does not mean ‘the government by the judges.’ The judges themselves have imposed restraints on their powers to minimize their lapses or prejudices (judicial self-restraint). The judges, bound by the rule of stare decisis, have to
follow precedents, the decisions of the higher courts, and certain rules of interpretation. Furthermore, the court’s decisions are reasoned and are often subject to appeal. Therefore, with all the lapses of the judicial process, it seems that it is better than the political process.

16. The evidences of the Expediency Council’s engagement in lawmaking show that the Council’s practice in this regard instead of solving the problems between the *Majlis* and the Guardian Council has over the years led to legislation crisis in the Iranian legal system.

3. Suggestions and Recommendations

3.1. Suggestions and Recommendations for the Iranian System

To guarantee the efficiency and productivity of the constitutional review body, under any title with any nature, its shortcomings, and weaknesses should be eradicated or at least minimized without any prejudice. In this regard, the following suggestions and recommendations are made for the betterment of the Iranian constitutional review system:

1. The independence of the Guardian Council should be guaranteed in the Constitution through the explicit and precise provisions concerning the appointment, tenure, and some other significant issues concerned. In this regard,

   ➢ the Council members should be appointed through a precise cooperation of three branches of power, namely the Executive, the Legislative, and the Judiciary in a manner that the balance of powers between these branches in the composition of the Council is preserved,

   ➢ the problem of the limiting of the Council members’ tenure to six years and the possibility of their being reappointed which definitely impairs their independence and impartiality can be solved in two ways: either the limitation of six-year tenure should be cancelled so that they can hold the position until their retirement, or the possibility of their reappointment shall be
avoided so that they can assume the seats of the Council only for one term,

- the prohibition of the concurrent membership of the Council members in the government offices should be explicitly mentioned in the Constitution, and
- the members of the Council must not be an official member or hold an official post in a political party.

2. To solve the problem regarding the Guardian Council’s reviewing the laws passed by the Parliament of the past regime, it seems perfect that the *Faqihs* of the Council examine the past laws having been informed by one of the higher authorities such as the President and/or the Head of the Judiciary. Finding the laws contrary to *Shariah*, they shall return them -as they do for the other laws- to the *Majlis* that will change or modify them according to the views of the Guardian Council.

3. The individuals should have the right to challenge the constitutional validity of laws. That is to say, *a posteriori* and concrete review should be recognized in the Iranian constitutional review system. In such a way, the Guardian Council, like the Austrian Constitutional Court, can perform through both *a priori*/abstract and *a posteriori*/concrete reviews. Supervising the laws regarding the basic structure of the Constitution and the Islamic rules can be performed through *a priori* and abstract review automatically or through the referring of some official authorities like the Leader, the President, the Head of the Judiciary, and a number of the representatives of the *Majlis*. On the other hand, protecting the fundamental rights of the people can be performed through *a posteriori* and concrete review by the individuals’ complaints. Through this type of review, all the statutory laws passed by the various Iranian in-practice-legislative authorities, such as the Expediency Council and the Cultural Revolution High Council, and even the laws enacted by the Parliament of the past regime can be supervised as well.
4. Because the Guardian Council composed of 12 members who are expert in law and Shari'ah, and are just and acquainted with the needs of the time and issues of the day, one of its responsibilities is making good and fair decisions through finding and determining the country’s expediency. Therefore, the power to invalidate the unconstitutional and un-Islamic laws should be explicitly conferred on the Guardian Council. Furthermore, the Council must say the final word in a case, that is, its decisions should enjoy res judicata and binding features. As such, the Expediency Council need not be allowed to solve the disputes between the Majlis and the Guardian Council, but its powers should be limited to give a consult to the Leader and some other powers stipulated in the Constitution. As well, to prevent and eliminate the problems in the Iranian legal system, the Expediency Council must not enact any law.

5. The Guardian Council should review and revise its performance during its almost thirty years of existence and like the French Constitutional Council, the Austrian Constitutional Court, and particularly the Indian Supreme Court contribute to the development of the Iranian constitutional law through attending to and expanding the individual’s fundamental rights. Moreover, the Guardian Council members should be non-political and their decisions should be based not on the considerations of political power but on the principles.

3.2. Suggestions and Recommendations for the Indian System
Although the Indian Supreme Court, after the Emergency period, has played its constitutional role very well, there are still some problems in the Indian system that should be resolved. The following suggestions and recommendations are made for the betterment of the Indian judicial review system:

1. As mentioned earlier, there are some limitations in the Indian judicial review system. For example, the laws under the Ninth Schedule are immune from being challenged before the courts. Although such limitations at the time of their creation were apparently justifiable
because of some rational and logical considerations, now that the Indian society has attained much social and economic development, it is advisable that these limitations are eradicated.

2. Because of the way in which the Indian judicial hierarchy works, most judges of the Supreme Court can serve only a few years before mandatory retirement. The tenure of the Court Chief Justice is usually extremely short due to the traditional process of selection by seniority. In this way, the judges may be removed from the Court untimely just when they may be beginning to find their feet as constitutional judges and approaching the period of their greater intellectual usefulness. Therefore, it is advisable that the age of retirement for the judges should go a little higher than now, for example 70 years for the Supreme Court justices and 65 years for the High Courts judges.

3. The mechanism for bringing fundamental right claims directly to the Supreme Court resulted in the heavy caseloads at the Indian constitutional Courts, especially at the Supreme Court. This matter overwhelmed the justices’ ability to function effectively. Although the number of justices of the Court has gradually increased over the years and the Court hears and decides cases by panels (benches), at the end of every year, normally there still are thousands cases waiting for decision. It seems that the solution applied in the American system is advisable and useful to eradicate this problem in India. In the United States annually about 7000 cases are referred to the Supreme Court. If at least four judges of the Court agree with the necessity of the review, the Court examines them. In this way, 95% of the cases are turned down. Therefore, the Court issues only 150-200 judgments every year.

4. The incidents of indiscipline and corruption charges levelled against certain judges of various High Courts and the judges’ not to be answerable to any one for their misconduct should be eradicated or at least minimized. This can be achieved through a precise and efficient
supervision of the judges as well as through an effective mechanism - whatever is appropriate that can be adopted- to punish a corrupt judge.

5. The possibility of appointing retired judges to the high offices that may tempt a judge to compromise with his independence by looking forward to such post-retirement appointments should be minimized.

4. Further Studies

There are some areas that can be studied by the prospective researchers in the future works, such as: Constitutional review of the administrative actions in Iran and India, supervising the validity of the Constitutional Amendment in Iran and India, and other functions of the constitutional courts throughout the world like supervising the various elections and solving the electoral disputes.