

EXPEDIENCY DISCRETION COUNCIL AND THE PROBLEM OF LEGISLATION IN IRAN (WITH A COMPARATIVE STUDY OF THE INDIAN AND FRENCH LAW)

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1. Introduction

In the Islamic Republic of Iran, the Parliament has one chamber called the Islamic Consultative Assembly. This assembly, which is known as *the Majlis* based on the Constitution of Iran, is exclusively empowered to pass laws applicable to all affairs of the Country.¹ Along with the Majlis, there is another institution called *the Guardian Council* which does not have any jurisdiction to enact laws; however, the Council is crucial and important in that without it "the Majlis shall have no legal validity."¹ The Guardian Council that is adapted from the French Constitutional Council is in effect a constitutional court.²

According to the Constitution of Iran, the Majlis shall not pass any law that is inconsistent with the Sharia (the Islamic Rules) and the contents of the Constitution.

The Guardian Council is responsible to find out and examine any inconsistency of the

Majlis approvals with the Sharia and the Constitution.³ The supervision the Guardian Council undertakes is of priori, abstract and centralized type, that is, all laws after being approved and before they are promulgated and enforced, shall

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1. Art. 93

2. Dr. Naser Katozian, one of the most outstanding professors of Law in Iran, who was a member of the 6-member commission of preparing the first draft of the Constitution in 1979, writes: 'Dr. Habibi, a member of the aforementioned commission, submitted a Persian translation of the 1958 Constitution of France to Imam Khomeini, the former Leader of the Islamic Republic of Iran who was in exile in Paris then, and Imam Khomeini told him to return to Iran and present the translation before the commission. See N. Katozian, *A Survey on the First Draft of the Constitution of Islamic Republic of Iran*, Constitutional Law Journal, 1st year, Vol. 1, (Tehran, 2003), p.124.

3. Supra note 1, Art. 72.

necessarily and regularly be sent to the Guardian Council to examine their consistency with the Sharia and the Constitution.⁴ If it is found inconsistent with the Sharia or the Constitution of Iran, the law with all its relevant sources of inconsistency and the Council's opinions shall be referred to the Majlis for reconsideration before the first meeting.⁵ In case the Majlis does not accept to rectify the returned approval, or the Guardian Council does not consider the rectification sufficient, how long should this return be repeated? The Dec. 1979 Constitution of Iran has not anticipated such a case because "on codifying the Constitution, the sovereignty of the Sharia and the Constitution over the approvals of the Majlis was taken for granted."⁶ The problem emerging over 'the Civil Land Act' between the Majlis and the Guardian Council initiated in Aug. 1981 and got intensified with the issues concerned with 'the Labour Act'. The Guardian Council utterly disagreed with both cases - 'the Civil Land Act' and 'the Labour Act' - claiming that they were against the Sharia, but the Majlis insisted that they were to maintain the expediencies of the country. To meet this burdensome problem, Imam Khomeini, the then leader of the regime, in Feb. 1988 issued an order to establish an institution entitled '*the Expediency Discretion Council of the Regime*'. This council, which is called *the Majma*, after being constituted worked for 1.5 years without any legal position in the Constitution of Iran. In Aug. 1989, when the Constitution was reviewed for rectification and modification, and by virtue of Article 112 the Majma was embedded into the Constitution of Iran.⁷

The Majma basically has no right to enact any laws, but in practice since its very establishment, it has passed many laws. The question is how and relying on what justifications and principles does the Majma enact laws? Is it really authorized to pass a law? Other questions are derived from the heart of these questions which the authors will try to answer by extracting their responses from the Iranian law texts.

It should be mentioned that the matter at hand has some political aspects, and it may raise some political reflections; however, the authors don't have any political intents in developing this article. They are just interested in examining the subject matter and suggest some solutions to solve the existing problem of the Iranian legal system. Needless to say, for better examination, a matter should be considered in

4. Ibid, Art. 94.

5. Ibid

6. Mohsen Khalili, *The Relations of Expediency Discretion Council of the Regime and the Executive Power in Comprehensive Development Plan of the Country*, Constitutional Law Journal, 3rd year, Vol.4, Tehran: 2005, p.7.

7. See Hossein Mehrpour, *Expediency Discretion Council of the Regime and its Legal Position*, New Point of Views in Legal Cases, (Tehran: Ettelaat Publication, 1993), pp. 45-65; also see S. Mohammad Hashemi, *Constitutional Law of the Islamic Republic of Iran*, Vol. 2, 7th ed. (Tehran: Mizan Publication, 2003), pp. 539-543.

all its entire aspects. If some aspects for any reason are left off, the examination will surely not be complete and will not touch upon the point.

2. Powers and Duties of the Majma

Article 112 of the Constitution of Iran has vividly provided the powers and competency of the Majma:

The Expediency Discretion Council of the Regime (the Majma) shall be convened at the order of the Leader to determine such expedience in cases where the Guardian Council finds a law enacted by the Majlis against the Sharia or the Constitution, and the Majlis in view of the expedience of the regime is unable to satisfy the Guardian Council, as well as giving consultation on the matters referred to it by the Leader. The permanent and mutable members of the Majma shall be appointed by the Leader. Regulations related to the Majma shall be prepared and approved by the members of the Majma itself and finally ratified by the Leader.

The main philosophical logic behind the establishment of the Majma and its most essential competency is just to settle the dispute between the Majlis and the Guardian Council. However, when such an institution with a huge amount of budget and a large number of human resources 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 Majma among which the most important are: admonishing the Leader in cases he refers to it for consultation such as to determine the general policies of the regime,⁸ helping the Leader to resolve the intricate questions of the regime,⁹ electing one of the Faqihs¹⁰ to join the temporary Leadership Council when the Supreme Leader is absent because of an irremediable illness or his death, and confirming some certain approvals of this council.¹¹

3. Expanding the Majma's Competencies to Legislation: Origins and Pretexts

Various articles of the Constitution of Iran clearly indicate that the role of the Majma is only to settle the dispute between the Majlis and the Guardian Council, and it is not authorized to pass any laws. The Majma can only approve its own internal regulations and instructions which shall be carried out at the order of the Leader.¹² What pretexts the Majma poses to interfere in legislation is the issue which this part discusses.

8. Supra note 8, Art. 110, Clause 1.

9. Ibid, Art. 110, Clause 8.

10. Jurisconsults in Mohammedan law

11. Ibid, Art. 111.

12. Ibid, Art. 112.

3.1. The Majma's Indirect Interference in Legislation

Whenever the Guardian Council finds a law enacted by the majlis contrary to the Sharia 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 law 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 law, either by the Majlis or through the President's preference and/or the Majma's chairman's request, will be referred to the Majma.¹³ Here, the Majma feels privileged to have the authority to issue a third view other than the ones given by the Majlis and the Guardian Council, and this is the first pretext of the Majma to get involved in the very important task of legislation because, based on one of the Majma's members' view, "sometimes neither is the Majlis's opinion stating the consistency of a law with the necessities and expediencies correct, nor is the Guardian Council's opinion stating the inconsistency of the law with the Constitution or the Sharia approvable; they both are right only to some extent. Hence, the Majma presents an in-between opinion to settle the dispute between the Guardian Council and the Majlis."¹⁴ Therefore, the text approved by the Majma confirms either the approval of the Majlis or the Guardian Council's opinion, and/or it is an independent opinion based on "a specified expedience" advisable to settle the aforementioned dispute.¹⁵ Regarding this, Article 28 of the Internal Regulations of the Majma on 25.10.1997 approved by the Majma itself 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 reformations in the other article or articles, the Majma will do them as long as they are necessary.

Even this much interference of the Majma in legislation can be ignored as it can be considered as settling the dispute. However, the Majma acts beyond this as Article 29 of its Internal Regulations states:

When the issues related to the expediency discretion are being investigated and when the Majma's members do not vote for the issue under dispute unless some other parts of the articles that were not rejected by the Guardian Council are reformed, the Council refers the case to the Leader and seeks his agreement. When agreed upon, that part is reformed.

As observed, the Majma has not cut its coat according to its cloth and has gone further its limits as stipulated in the Article 112 of the Constitution and allowed

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13. Internal Regulations of the Expediency Discretion Council of the Regime approved on 25.10.1997, Art. 25.
 14. Hossein Mozafar, Special News Debate, Islamic Republic of Iran Broadcasting, Channel 2, 05.08.2007.
 15. S. Mohammad Hashemi, Constitutional Law of the Islamic Republic of Iran, Vol. 2, 7th ed. Tehran: Mizan Publication, 2003, P. 549.

itself, with the Leader's agreement, to reform the articles of the law that were not under dispute and to limit the competency of the Majlis "who has to keep silent"¹⁶ against all the changes. More interesting is the point that the Majma by itself arranges the articles of the law and sends it to the President to sign and enforce.¹⁷

Using this self-made right, the Majma has already passed lots of approvals. The last case of these kinds of approvals that raised many controversies was 'the Act Concerning the Integrating and Synchronizing of the Presidential and Parliamentary Elections' on 22.04.2007 to curtail the costs of the elections. By virtue of the Act, it was agreed to reduce the ninth (current) term of Presidency by four months and increase the seventh term (current) of the Majlis by seven months to synchronize the tenth term of Presidential election and the eighth term of Majlis election to be held in November 2008;¹⁸ however, Articles 63 and 114 of the Constitution stipulated that the terms of office for the Majlis and the President is four years. Therefore, the Guardian Council did not approve this law,¹⁹ and neither did the Majlis change its position. When referred to the Majma, the Act was rejected and a new Act to synchronize the sixth term of the Local Councils' election and the eleventh term of Presidential election in 2013 was passed by the Majma.²⁰ How strange it was to see the issue which was never thought of or given any account to but to turn out as a third baby born without its legal parent! It is really interesting, ironically speaking, that Majlis speaker, as a representative of people and speaker of an institution where all legal criticisms about the unrighteousness of the Majma's interference with the legislation process are to help return the Majlis's lost or being lost competencies, reflecting on the question raised by an IRNA reporter's question whether the Majma can pass an Act to synchronize the Local Councils and Presidential elections says: "The Majma has opined that it can pass such an Act and it is not against its Internal Regulations."²¹ But the question is, 'Isn't the same Internal Regulations in contradiction with the Constitution and legal principles?'

3.2. The Majma's Direct Interference in Legislation

The Majma's interference in legislation does not end here. This appointed- not elected- institution that was established with a governmental order and inserted into the Constitution in the 1989 Constitutional Amendments was lucky or clever enough²² to find a place next to one of vague phrases of the Constitution in the same

16. Supra note 7, p.32.

17. Hossein Mehrpour, Expediency Discretion Council of the Regime and its Legal Position, New Point of Views in Legal Cases, 2nd ed. Tehran: Ettelaat Publication, 1993, p.77.

18. Available at www.radiofarda.com

19. Available at www.baztab.com

20. Available at www.bbcpersian.com

21. Gholam Ali Hadad Adel, The Approval of the Expediency Council is in Accordance with the Regulations, Tehran: Hamshahri Newspaper, 06. 08. 2007.

amendments and get interpreted in its own favor. This phrase that is the second pretext of the Majma to interfere in legislation is included in Clause 8 of Article 110 of the Constitution. This article concerning the functions and authorities of the Leader says: ...8. To resolve the intricate questions of the regime that cannot be settled through ordinary means through the Majma...

In fact, "during the 8-year imposed war between Iraq and Iran specific political problems appeared which were to be settled by the heads of the three powers at the order of the then Leader, [Imam Khomeini]. The problems originated from the misunderstanding and disagreement between the authorities and did not have to do with the deficient mechanism of legal institutions."²³ After the establishment of the Majma in Mid Feb. 1988, in addition to its duty to settle the dispute between the Majlis and the Guardian Council, it was assigned to resolve the specific political problems at the order of the then Leader, Imam Khomeini. Accordingly, in the same year the Majma initiatively and directly started to enact laws without a law being passed in the Majlis and rejected by the Guardian Council. The most important laws passed by the Majma were 'the Barren Lands Act' approved in Aug. 1988, 'the Act of Supervising the Governmental Discretionary Punishment' passed in Oct. 1988, and 'Antidrug Campaign Act' passed in Dec. 1988.²⁴ Although "the Majma had been authorized by the then Leader to enact laws to resolve the chronic difficulties in emergency conditions of the war",²⁵ "it was disarmed from this authority on 29.12. 1988 at his order through a letter to the members of the Majma and it was limited to discharge its functions of settling the dispute between the Guardian Council and the Majlis only."²⁶ Nevertheless, the Majma with those few approvals to resolve the specific political problems could discover the great role and joy of legislation and tried not to lose that power, but strongly to maintain it.

Referring to the details of negotiations of the Reviewing Council of the Constitution done in 1989, we find that the main reason for inserting Clause 8 into Article 110 has been the problems and intricate questions which might not be legally solved easily or might be solved very slowly. To get rid of such a dead end, an authority was needed to resolve the difficulties as soon as possible.²⁷ Hence, the

22. Imam Khomeini issued the order of revising the Constitution on April 24, 1989 but he passed away in June 4 the same year and could not pursue the modifications in the Constitution that were carried out in the summer of the same year. This was a great opportunity for the members of the Majma who were also members of the Reviewing Council (the Constitution of Islamic Republic of Iran, Art. 77) to modify this part of the Constitution as they wanted.

23. Supra note 15, p.551.

24. Ibid

25. Supra note 17, p. 68.

26. Ibid, p. 63.

27. Detailed Negotiations of the Reviewing Council of the Constitution of the Islamic Republic of Iran, Vol. 2, Tehran: Communication and Publication Office of the Islamic Consultative Assembly, 1989, pp. 835 & 839.

Leader who, according to the Constitution, can control all the three powers and resolve disputes and coordinate relations between them²⁸ was the best to help to identify the intricate questions and resolve them. As such, the Majma that was considered as the advisor of the Leader was authorized to help him in this significant matter. However, the phrase '*to resolve the intricate questions of the regime*' was so vague and unreferenced an interpretation that it could be applied to reduce the authority of all three powers. On the other hand, the phrase '*that cannot be settled through ordinary means*' opens a path to escape or deviate from the provisions of the Constitution.²⁹

However, to resolve the intricate questions of the regime, the Majma passed lots of various subjects among which are 'the Act of Receiving Banks' Claims' passed in Dec. 1989, 'the Act of Violations, Crimes, and Penalties of ID Documents' approved in Aug. 1991, 'the Act of Determining the Assigned Lands of Government to the Institutions' in March 1992, 'the Act of Determining the Limits of General and Special Courts' Competencies' in July 1994, and 'the Act of Determining the Hows of Electing the Guardian Council's Jurists' in Nov. 2001.³⁰

Unfortunately, in many cases where the Majma has passed a law, there is no acceptable justification to leave off the ordinary way of enactment of law by the Majlis, and it is too difficult to consider them as the reference for *resolving the intricate questions of the regime*.³¹ For example, we can refer to 'the Act of Violations, Crimes, and Penalties of ID Documents' in Aug. 1991 that consists of 23 articles and 3 notes and is to oblige people not to lose their ID certificate, and in case of any loss, they have to pay 5,000 Rials for the first time, 20,000 Rials for the second time, and 100,000 Rials for the third time to get it reissued. Moreover, for the untrue statements at someone's birth or death or fake use of his ID certificate, a sentence of imprisonment between 91 days and 1 year with a fine of 200,000 - 1,000,000 Rials or both at the same time were predicted in this law and lots of trifles as such.³² "It is really too difficult to understand what unsolvable problem there is where the absence of such a law would solve that is not solved through the laws of the Majlis; these are already laws passed in the Majlis regarding the same, but through the laws by the Majma only people were assigned more fine and penalty in case of any infraction that could not be solved by the Majlis's laws while the same laws have already been enacted by the same Majlis and approved by the Guardian Council."³³ "Apparently,

28. Supra note 1, Art. 57 & Art. 110, Clause 7.

29. Supra note 15, p. 552.

30. Available at www.maslehat.ir

31. Supra note 17, pp. 69 & 70.

32. Today, with the decreasing value of Iranian currency in the global markets, one U.S. Dollar equals about 939 Rials. However, in the early 1990s it was much more valuable than what it is now. In any case, the mentioned fines were not this much high that they can cause any intricate question then.

33. Supra note 17, p. 70.

the laws passed by the Majma might be disapproved by the Guardian Council due to its probable inconsistency with the Sharia and the Constitution. Thus, by posing the false fact that they would resolve the intricate questions of the Regime, they requested the Leader to refer the case to the Majma in implementing Clause 8 of Article 110 where they resolved the problems quickly. In other words, instead of going through all the long procedures of legislation (the Majlis, the Guardian Council, and finally the Majma's mediation, in implementing Article 112), a shortcut in Clause 8 of Article 110 was taken."³⁴

The procedure to pass an approval to resolve an intricate question is very similar to the law passed in the Majlis or the Parliament of Iran. "First, the intricate question is stated and described, and then the minister or head of the department, by which the question was raised, gives more details about it. Next, two pros and two cons will opine on the issue and finally votes will be collected."³⁵ "The approvals concerning the solution of the intricate questions are first referred to the Leader to decide on their communication and implementation, and then they will be announced to the Majma."³⁶

4. The Majma is not Authorized to Pass any Laws: Reasons and Proofs

The reasons and proofs of the above claim just stipulated are of general and specific type.

4.1. The General Reasons

This group of reasons that does not confirm the essence of interference in legislation passed by the Majma includes all the two pretexts of the Majma's engagement in passing laws:

(a) In a systematic political regime, the job description of each 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 their time limitations and supervisory institutions all indicate that by controlling and harassing the political refractory power, the ruling institutions cannot become arbitrary and tyrannical and ignore people's rights by expanding their competencies. 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. If every institution were to act upon its own self-made authority, there wouldn't be any guarantee for the proper function of the political structure and citizens' rights.³⁷

34. Supra note 15, pp. 552 & 553.

35. Supra note 13, Art. 27, Clause 2.

36. Ibid, Art. 30, Clause 2.

37. Abolfazl Ghazi, Constitutional Law and Political Institutions, Vol. 1, 5th ed. Tehran: Tehran University Press, 1995, pp. 765 – 770.

In the Constitution of Iran, despite some basic differences,³⁸ separation of powers and their independence are officially recognized and given their job description. It goes without saying that the Majma's engagement in legislation disturbs the separation and balance of powers in political system of Iran.

(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 Constitution concerning representative democracy stipulates:

The legislative power shall be exercised by the 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, according to the Constitution of Iran, only the approvals passed by the Majlis are considered solid 'laws' since they are enacted having gone through lots of formalities and procedures.³⁹ As well, the Constitution, in Article 59, has clearly considered the direct and pure democracy through the referendum. Consideration of this article in the Constitution is in fact to return people's sovereignty rights in legislation to themselves. 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.

(c) By virtue of Article 59, when returning people's own sovereignty right in legislation to themselves requires two-thirds of representatives' votes and while it has never taken place since the beginning of the Iranian Revolution,⁴⁰ how can an institution, which is not elected by the people, without their permission and representatives' request enact laws?

Nearly all 46 members and the chairperson of the Majma are directly appointed by the Leader for a period of five years. The approvals of the Majma, too, shall be confirmed by the Leader so that they can announce and enforce them. Thus, "the Majma is affiliated to an institution absolutely dependent on the Leader."⁴¹

38. For example, "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 authority of the Supreme Leader... These powers, shall be independent of each other." (The Constitution of Islamic Republic of Iran, Art. 57). The Leader, by virtue of Article 107 of the Constitution, is elected by an assemblage of high rank religious clergymen (faqihs) from among the highest clergies for good.

39. Naser Katozian, *A Step toward Justice*, the Collection of Articles of Faculty of Law and Political Sciences, Tehran: Tehran University Press, 1996, pp. 67 & 83.

40. The Act of Referendum of Islamic Republic of Iran 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.

41. Abbas Ali Amidzajani, *Constitutional Law of Iran*. 1st ed. Tehran: Tehran University Press, 2006, p. 647.

(d) Monitoring the approvals passed through the Majma has also raised many controversies; the approvals of the Majlis, which consists of a large number of representatives elected by the public and can authoritatively enact laws as stipulated in the Constitution, shall be produced to the Guardian Council for final confirmation. While the approvals of the Majma, which is a tiny institution and whose members are just appointed rather than being elected and is not authorized to pass any laws in the Constitution, are not controlled by any responsible institution. Is this legally and logically accepted?

4.2. The Specific Reasons

These reasons challenge all the two pretexts that the Majma makes to interfere in legislation:

(a) Article 112 has vividly determined the function of the Majma as the '*Expediency Discretion*' not '*Expediency Enactment*'. This very delicate point is already indicated even in the name of the institution: '*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 one can assert that as the Guardian Council is to check the laws of the Majlis if they conform to the Sharia and the Constitution, the Majma was, too, constituted to confirm the opinions of the Guardian Council to be in line with the expediency of the regime in order that the government and the system would not get into trouble and run slowly. In other words, the premise is that the Majma shall openly consider the essentials and expediencies of the society."⁴² Therefore, "what the Majma should do is naturally like what the Guardian Council does; it shall only announce its discretionary views on the approvals of the Majlis and does never impose any modification. In fact, the Majma is not authorized to impose any change or modification on the approvals, nor is it authorized to regulate any laws; it is the discretionary agent of the expediency and should announce its discretion to the Majlis so that it considers its approval for rectifying and/or modification."⁴³ In other words, in these cases, it seems best for the Majma to announce its incompetency in rectifying the part(s) of an approval and shall send it back to the Majlis,⁴⁴ and the Majlis shall accept the Majma's views.

(b) The concept of '*resolving the intricate questions of the regime*' in Clause 8 of Article 110 does not mean that the Majma 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

42. Supra note 17, p. 66.

43. Ibid, p.76.

44. Supra note 15, p. 550.

profit, an Act entitled 'Bank Operation with No Usury' was passed by the Majlis in 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, they needn't enact a new act, but an influential authority was needed to settle the confusion. Thence, by virtue of the Leader's order on Jan. 25, 1989, an approval was passed through the Majma suggesting 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' in Aug. 30, 1983, urging the borrowers to refund the basic and interest of the loan on the fixed due date, 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 Majma to be enforced.⁴⁵ Hence, the approvals passed by the Majma shall have the nature of the directions given by the Leader to facilitate the implementation of the law.

5. The Interpretive Opinion of the Guardian Council: Reliability of the Majma'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 could be done only under the authority and supervision of the constitutional courts, that is, the Guardian Council in Iran.⁴⁶

Now let's 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 which were posed by the then President who was the chairman of the Majma to clarify the different dimensions of the nature of the Majma's functions: Are the approvals of the Majma laws? Do they have the features of other ordinary laws? If they are ordinary laws, with respect to Article 73 of the Constitution of Iran, the interpretation of ordinary laws is only under the authority of the Majlis. Now, if there is an ambiguity in the meaning of the approvals of the Majma, should

45. Supra note 17, pp. 74 & 75

46. Supra note 1, Art. 98

they be interpreted by the Majlis or the Majma? The approvals of the Majma are under no special control of any constitutional institution; however, if they prove inconsistent with the Sharia and/or the Constitution, which one is superior and preferable? Can the Majlis modify or annul the law after it finds it essential? Can the Majma itself revise its own approvals after they have been announced and come into force?⁴⁷

In the same year, the Guardian Council in its two Interpretative Opinions provided thorough answers to the all aforementioned questions:

Firstly, Opinion 4575 on April 22, 1993 stated: "...1. The Majma cannot independently revise its own approvals, 2. The Majma can only interpret the articles of the laws approved by itself just to explain them; if the Majma wants to develop or narrow the domain of its approvals, it cannot independently act [because a law shall first be passed by the Majlis and in case the Guardian Council does not confirm it because of its inconformity with the Sharia or the Constitution, the Majma can intervene], 3. By virtue of Article 4 of the Constitution, the approvals of the Majma shall not be contrary to the Sharia. However, according to Article 112 in case the approvals are contrary to the 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 Majma's approvals are superior and preferable...."⁴⁸

Secondly, Opinion 5318 on Oct. 16, 1993 stated: "No legislative authority can reject, invalidate and cancel the approvals passed by the Majma; however, when the approvals are related to the dispute between the Guardian Council and Majlis, the Majlis, after the determined time when the change of expediency is justifiable, can pass a new act, and 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."⁴⁹

Therefore, according to the Guardian Council, the Majma's approvals regarding the settlement of the dispute between the Majlis and the Guardian Council are considered ordinary laws; however, because the Majma's view in this case enjoys finality feature, the approvals must be regarded contrary to the article(s) of Constitution under dispute, and regarding *resolving the intricate questions of the regime*, they 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 the Sharia, they shall enjoy a lower rank and they shall be modified where Sharia rules are more dominant. In other words, "as long as the

47. General Office of Compilation & Expurgation of the Laws and Provisions, The Constitution of Iran and the Guardian Council's Interpretative Opinions, 6th ed. Tehran: Presidency Deputy of Laws and Provisions Research, Codification and Expurgation, 2001, p.107

48. Ibid, pp. 107 & 108

49. Ibid, p. 108.

approvals do conform to the Sharia, they are effective because their legal support is the governmental order of the absolute authority of the Supreme Leader⁵⁰ who according to Article 57 is higher and more effective than any other power in the political structure of Iran. Although the approvals of the Majma are not expected to be contrary to the Sharia, "at times the Majma, by virtue of vital expediency, votes to ignore the Sharia and to leave out the Guardian Council."⁵¹ Even if the Guardian Council finds Shariá faults with the approvals of the Majma - since to control the same regarding their contradiction with the Sharia, no prediction has been made and since these approvals are confirmed by the Supreme Leader who is the highest official religious authority of the Country - the Guardian Council should remain silent and the silence gives consent.⁵² Therefore, when the Leader confirms the Majma's approvals, they are no longer contrary to the Sharia.

6. A Comparative Study of the Problem

In the countries having posteriori, defused, and incidental constitutional (judicial) review system as India, the problem of dispute between the parliament and the constitutional court is already resolved because the Legislative and the Judiciary independently perform their particular functions based on the Constitution. The Legislative, the Parliament, enacts laws and they come into force without being constitutionally controlled. In the enforcement of a law in the courts, whenever either party of a case gets to know that the law applied by the judge is against the Constitution, he can challenge the same before the High Courts and the Supreme Court. After investigating the issue and comparing the law with the Constitution, if it is found against the Constitution by the High Courts or the Supreme Court, the law is canceled.⁵³ "Article 245 of the Constitution of India makes the powers of both Parliament and states legislatures subject to the provisions of the Constitution, and Article 13 declares that any law which contravenes any of the provisions of part III of the Constitution dealing with fundamental rights shall be void."⁵⁴ The order issued by the courts regarding the voidness of a law passed by the Parliament or states legislatures is a finalized and adjudicated matter. In this regard, Article 141 of the Constitution of India expressly states:

The law declared by the Supreme Court shall be binding on all courts within the territory of India:

In fact, the characteristics of posteriori review, the Court's authority in annulling the law that is contrary to the Constitution and finality of the Court's order have

50. Supra note 7, p. 36

51. Ibid, p. 33.

52. Ibid, pp. 35 & 36.

53. The Constitution of India, Arts. 13, 32, 131,132, 133, 134 & 226.

54. G. B. Reddy, *Judicial Activism in India*, 1st ed. Hyderabad: Gogia Law Agency, 2000, p. 87.

already helped to solve the dispute between the Parliament as a legislature and the Court as a supervisor of the Constitution in the Indian judicial review system.

The problem of dispute between the Parliament and the Constitutional Court appears in such systems as French and Iranian ones where the reviewing system is of priori and centralized kind. However, in France, whose constitutional review Iran has adopted, this problem has been prevented by anticipating some simple legal remedies. As well, many of the parliamentary acts are never referred to the Constitutional Council; therefore, the Council cannot object to and reject them whenever it desires. By virtue of Article 61 of the 1958 Constitution of France:

Institutional Acts, before their promulgation and the rules of procedure of the parliamentary assemblies and before their entry into force, must be referred to the Constitutional Council, which shall rule on their conforming to the Constitution. To the same end, acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of National Assembly, the President of the Senate or sixty deputies, or sixty senators.

Thence, "only 15-30% of the laws are annually referred to the Council."⁵⁵ On the other hand, according to the French Constitution "no appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts."⁵⁶ In a word, the Council's decisions are an adjudicated matter.

It appears that the most important solution for such a problem is to grant the feature of 'finality and adjudicated matter' to the orders of the constitutional courts, not to develop another political institution such as the Majma that both fattens (extends) the political structure of a country and interferes with the affairs of the other powers. However, the framers of the Constitution of Islamic Republic of Iran have thoroughly neglected this fine-fitting feature of the constitutional courts.

7. Conclusion and Suggestion

The Majma is an institution which did not exist in the 1979 Constitution. In 1988, to help solve the dispute between the Majlis and the Guardian Council, the then Leader ordered to constitute it. With more authorities and competencies the same was imposed into the Constitution in 1989, and now it has turned into a high legislative assembly! Its approvals regarding the settlement of dispute between the Guardian Council and the Majlis are considered to be ordinary laws, and concerning

55. Catherine Elliott & Catherine Vernon, *French Legal System*, Translation by: Safar beygzadeh, 1st ed. Tehran: Researches Center of Islamic Consultative Assembly, 2004, p. 176.

56. *The Constitution of France* approved on 04.10.1958, Art. 62, Clause 2.

the solution of the intricate questions of the regime they are higher than the Consitution. This Majma that was to settle the likely problems in the legislative system of Iran has turned and become a huge problem itself.

Nevertheless, in spite of all its intervention and interference in legislation and even the Guardian Council's interpretative opinions that confirm the interference, the Majma does not have any right to enact any law: this institution is an appointed one with a limited number of members whose job is not to pass laws, nor is it assigned such a competency in the Constitution. The Guardian Council's interpretations of the Majma's interference in the legislation are more likely a political or religious silence against the Supreme Leadership than a legal opinion in that, as in Article 57 of the Constitution, the Leader is the absolute authority that is beyond all the ruling powers in the political structure of Iran.

However, the problem of a third institution with the constitutional review and its involvement in legislation is typical to Iranian constitutional review system that does not exist in other countries as such; thence, probably the solution to solve this problem requires an attempt just typical to Iranian decisions. Therefore, the simplest and best solution is to grant the feature of 'finality and adjudicated matter' to the orders issued by the Guardian Council as a constitutional court, but not the establishment of a third political institution.