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**TÍTULO:** Restricciones legislativas de la asamblea consultiva islámica derivadas de la calidad de las leyes con respecto al procedimiento del consejo de tutores.

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**RESUMEN:** La pregunta central en este documento es: ¿cuáles son las restricciones legislativas del parlamento sobre la calidad de las leyes, con respecto al procedimiento del consejo de tutores? Un método analítico-descriptivo reveló, que algunos de los criterios legislativos cualitativos no son observados por el parlamento, por lo que el consejo de guardianes no solo está obligado a ajustar el acto del parlamento a los criterios y principios de constitución de la Sharía, sino que también se espera que supervise el acto del parlamento en términos de normalidad, exactitud, coherencia, accesibilidad, aplicabilidad, imparcialidad, solidaridad y similares.

**PALABRAS CLAVES:** Asamblea Consultiva Islámica, restricción legislativa, calidad de ley, consejo de tutores.

**TITLE:** Legislative constraints of the Islamic consultative assembly arising from quality of laws with respect to procedure of the council of guardian.

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**ABSTRACT:** The central question in this paper asks, what are parliament's legislative constraints about the quality of laws with respect to procedure of the council of guardian? An analytical-descriptive method revealed, that some of the qualitative legislative criteria are not observed by the parliament, so the council of guardian is not only obliged to adjust act of parliament to Shariah criteria and principles of constitution, but also is expected to supervise act of the parliament in terms of normality, accuracy, consistency, accessibility, applicability, fairness, solidarity and such like.

**KEY WORDS:** Islamic Consultative Assembly, legislative restriction, quality of law, council of guardian.

**INTRODUCTION.**

Although, legislation is a substantive act based on inherent criteria, with respect to recognized principles in the constitution or procedures formed to create harmony and clarity in the legislative process, its legitimacy depends upon some adjective and substantive criteria. Therefore, the laws are different in any legal system with respect of requirements or specified principles of the constitution; however, there are some common criteria among different legal systems because of available similarities in nature and function of legislative system (Fallah Zade et al, 2018; Tereso et al, 2018). Principles of legislation and law have been criticized by experts in a variety of aspects. It is obvious that, the legal principle requires good quality to create fair condition for social relations and to ensure rights and liberty of citizens, regardless of common and adjective qualities of the law.

Today, some countries take into account good adjective and qualitative criteria of the laws. As mentioned in the literature review; although there are several books, papers, dissertations on qualitative qualities of the law as well as duties of the council of guardian as a supervising institution, each one takes into account only issues related to parliament's legislation, certain functions of the council for legislation or the necessity to increase quality of law in general (Baykalova et al, 2018; Feresin & Močinić, 2017).

On the other hand, in addition to available books and dissertation on duties and liabilities of the council, lengthy negotiations and comparative, interpretive opinions of the council have been published by the research center of the council of guardian through which not only copious references of the council's opinions are provided, but comparative studies about similar institutions in other legal systems worldwide and investigations about functions and procedures of the council in the form of research reports are also provided.

My thesis is composed of two themed chapters. Chapter one begins by laying out generalities. The second chapter addresses opinions and judgments of the council of guardian as well as procedures and criteria of supervising the quality of laws. Finally, the conclusion gives a brief summary and critique of the findings.

In this chapter, first, an introductory in law and features of legal principles are offered, then, theoretical bases on legislative constraints arising from quality of law in the procedure of the council of guardian are addressed. Literally, the law is predicated to the origin and measures of something, also it is about those dictums, rules and orders enacted through councils or parliaments to preserve and administrate social affairs (Amid, 932). However, it has several meanings as follow:

1. A juridical rule with sanction about a certain case.
2. A general or special juridical rule enacted by the legislature. It is the exact meaning of the law (Ja'fari Langroudi, 517, 518).

To recognize juridical rules and distinguishing them from those affecting individuals and the social life, it is necessary, at first, to determine factors forming spirit of the law. Although, there are a variety of descriptions for juridical rules, it lacks a sense of solidarity among them.

The features are:

1. A juridical rule is compulsory.
2. The government assures observing the juridical rule.
3. The juridical rule is general and permanent.
4. Law is a social system, it means that juridical rules aim to justify social relations, not purity of spirit and conscience (Katouzian, 2006).

The laws are categorized according to adjective and substantive. A substantive law with a legal form and text is necessarily issued by the legislator, for example, quality of law in those countries having a constitution and separation of powers.

Therefore, the adjective law is determined by the legislature depend upon its duties provided by the constitution. It probably lacks specific legal principles, like bill of general budget. Although adjective law is issued by the parliament, it usually has no law.

Although a substantive law includes a text with juridical law, sometimes it is not issued by the legislature. A well-known example of substantive law is legislative and administrative regulations and even common regulations, decisions of ministries and city halls. Every law including juridical rules are substantive whether it is within the competence of the executive power or other legal or administrative organizations. The categorization of laws according to substantive or adjective is of the most importance in the law, especially in the constitutional law (Edmond Rabbath, 2014; Ingavale, 2013).

Some jurists are of the opinion that it is necessary to observe substantive and adjective principles to write laws. However, adjective rules are not considered as spirit of the law, regardless of their importance to arrange and parallel juridical rules. Spirit of the law does not suffer damage due to lack of qualification; a bad written law is a law and makes juridical rule. However, violation against those techniques relevant to the nature of the juridical rule makes a situation in which the law does not include these rules, eventually, it has limited, temporal effects (Katouzian, 2006; Jahan et al, 2016).

## **DEVELOPMENT.**

### **Theoretical basics.**

Legitimacy of the judge, as someone to preserve the constitution, has been taken into account by jurists recently. Generally, two basics, including justification with recourse to dominance of the constitution and justification based on democracy are the heart of all opinions.

All the opinions emphasize that legitimacy of preserving the constitution depends upon its compatibility with structure of the legal system due to objection of the authority to intervene the content and nature of laws and on the other hand, it is based on the provided mechanisms (Ajorlou, 2013). Therefore, it is essential try in search of three other following basics in order to find justifying basics about supervision of the judge (here, the council of guardian).

### **Spirit of the constitution.**

On one hand, spirit of constitution is crucial to justify supervision role of council of guardian over quality of laws. Accordingly, supervision role of the council of guardian does not mean withdrawal of comparing common law with the constitution, on other words; council of guardian is aimed primarily to criticize laws with respect to spirit of the constitution and its general basics rather comparing common law with basic principles of the constitution.

So, passing an incomplete law lacking some features like normality, clarity, consistency and such like, in fact, is tantamount to backtracking on the general spirit of the constitution, which it has been specified in the introductory of the constitution or as a presupposition in the basics of preliminary formulators of the constitution, deducing from the general spirit of principles and concerns of the council of guardian to codify the constitution. Members of the parliament are of the opinion that concepts such as human benevolence, liberality and liability need to be taken into account to bring in legislation) department general of educational affairs and public relations of Islamic consultative assembly, 1985).

Regarding some negotiations of members of parliament, for example, about principle 4 of the constitution, it is stated that, “the law really needs to be clear and conclusive.

The term “principle of sovereignty of law” is generally understood to mean people are not at the whim of individuals. It is not a law, when there is always a possibility for exception (department general of educational affairs and public relations of Islamic consultative assembly, 1985, 349). On other words, the law needs to be clear and conclusive; it means that observance must be provided for attentive audiences (department general of educational affairs and public relations of Islamic consultative assembly, 1985).

### **Preserving the Islamic law.**

Islamic intellectual and jurists favor an effective legislation; so, making effectual laws is within the professional competence of the Islamic government, so following the law is tantamount to doing Islamic duties; for example, as far as Allame Mirza Mohammad Hossein Naeini is concerned, on the one hand the law must determine duties of the governor, and the other hand, specify liberalities of citizens according to Islamic standards, so violation against rules is tantamount to abuse of confidence.

To provide rational supervision, a commission composed of intellectuals, well-wishers and those experts in law and politic need to be established. So, according to Naeini, an idealistic legislation is based upon liberality, equity and supervision of the people representatives over governing body (Parrot & Leong, 2018).

First, he describes problems and challenges of a despotic legislation, and then takes into account two considerable steps to form a strong government and good legislation, including codify a good law and creat an Islamic consultative assembly (Naeini, 2003). Ayatollah seyyed Mahmoud Taleghani underlines the relationship between Islamic standards and a good, strong legislation, he emphasizes that Islam signifies formality of religious for an idealistic legislation (Taleghani, 1982).

As far as Imam Khomeini is concerned, legislature is crucial for every country, an Islamic country need governance of the law, so disobey disagree the law is tantamount disobey Islam, too (Ghaderi, 2008). So, according to principle 4 of the Iranian constitution, the council of guardian has liability to adjust all country's rule to Islamic standards.

The prerequisite for titles such as "Islamic standards" and "Islamic judgment" in the Iranian constitution is that, substantive and adjective laws must agree with the Islamic standards. The necessity of codifying high-quality laws become important, especially, when the Islamic consultative assembly is taken into account as the lawful consultative institution for making law in lands without Islamic laws, hence the council of guardian supervises legislature as the keeper of Islamic standards. So, it could be said that, approving low-quality laws is in fact backtracking Islamic standards and supervising of the laws is within the professional competence of the council of guardian. On other words, some qualities like clarity are necessary for Islamic judgment of the council, so the council of guardian refuses to pass a comment on ambiguous approvals. It does not mean that, from Islamic intellectuals' point of view, in fact, a good law is of mentioned criteria in the present research, but,

the present research aims to emphasize that according to the Islamic thought, qualities like normality, clarity, fairness and such like are indirectly meet purposes of a good legislation.

### **Secure basic rights and liberalities of individuals.**

Securing basic rights and liberalities of individuals is so important that is subordinate to duties of the Islamic republic of Iran in principle 3 of the Iranian constitution as “securing social and political liberalities within the law”. Legislation is definitely duty of the Islamic consultative assembly; however, regarding supervising role of the council of guardian, it tries to codify appropriate law to secure basic liberalities of individuals.

In the French law, also, those laws limiting rights, liberalities and sanctions need to have general qualities in order to mitigate their negative effects, so legislation is mainly duty of the judicial institution (Shekar, 2008). Therefore, some jurists are of the opinion that preserving citizen rights develops the most legitimacy for courts of constitution (Gorji Azandriani, 2015).

Accordingly, there is no doubt that lack of normal, clear, fair and appropriate laws jeopardize individuals’ basic rights, so the council of guardian as the supervising institution over legislation is obliged to provide effective control.

### **Qualities of the law.**

According to jurists the law has two qualities, including inherent and extrinsic. Inherent qualities refer to those distinction and constitutive factors, the law really requires them. A rule without these qualities lacks legitimacy, so crucial functions of a judicial rule are not carried out. Hence, the following list possess functionalism. To justify interpersonal relations, the law needs to possess specific qualities, including compulsory, generality, imperative, publicity, clarity, provident; furthermore, it needs to be passed by a lawful authority (Rasekh, 2013).

The term “extrinsic qualities” is generally understood to mean however, a rule lacks these qualities it is still called law.

As extrinsic features arising from a special legal theory, so, these flexible qualities possess the liability to meet social needs, express opinions of people, supply public interests, ensure conformity to morality, as well as being fairness, permanent, efficient, effectual and futuristic (Rasekh, 2013). As explained earlier, jurists are of the opinion that juridical rules are general, compulsory and permanent. Furthermore, as far as intellectuals of the common law are concerned, essential features of juridical rules include normality, clarity, consistency, materialization, fairness and proportionality.

### **Generality of laws.**

The term “generality of laws” means that the law implies on a general behavior, and on the other hand, the law dominates over a social stratum (Rasekh, 2005).

A general law addresses all not a particular individual. Generality is a special requirement for the principle of equality, mentioned in principle 20 of the constitution; it means that all individuals are equal to the law. By and large, the legislator is not obliged to enact a law for a special stratum (Madani: 30, 31).

### **Normality.**

In every country, a qualitative critical element in nature of approved laws by the legislature power is its legal normality. Normality of a law mainly possess two features, including compulsory and obligatory (Gorji Azandriani, 2014).

The term “compulsory” means followers commit themselves to obey the law; in fact, this form of obligation is a sense obliges follower to obey the law (Fallah Zade et al, 2018). On other words, law is not only general but also administrable; it means that conforming to an instance gives the law a compulsory nature; therefore, all people are obliged to follow the law (Madani, 32 & 33).

**Clarity and certainty of laws.**

Laws are aimed to conduct social behaviors and determine clear standards to organize social affairs, so it seems logical to expect that the legislator express its decisions through clear phrases. It is necessary to reveal, what are the fields laws want to signify and organize. The term “clarity of the law” refers to a fair law understandable by followers and administrators for its provided purpose. An incoherent, ambiguous and abstruse law can easily confuse those following the law (Fallah zade, et al, 2018). Such a law seems to allow juridical and administrative authorities to behave out of character towards citizens as well as it leads to arise contradictory and varied interpretations (Rasekh, 2007: 22-24), because, conclusive laws play a pivotal role in advanced economies.

Accordingly, a definitive law refers to a law that specifies dominant rules over citizens’ behaviors to preserve them from insecurities in their life and workplace. As a result, the legislator is obliged to use constitutive and compulsory phrases rather than idealistic to codify laws in order to provide its followers with a reasonable ground to conduct their behaviors.

**Cohesion.**

There is no doubt, that inconsistency in laws leads to legal insecurity; therefore, citizens may suffer legislators every whim. Hence, one important legal feature among jurists is cohesion and consistency of law (Gorji Azandriani, 2015).

**Materialization and administration.**

Materialization is one qualitative feature of the law. Most of experts in the common law are of the opinion that, a non-achievable law is, in turn, origin of legal insecurity. A good written law is always administrable and achievable, regardless of various changes in time and place. On the other hand, the law must be ideally suited to people, that is, the same administrable feature of the law. It is obvious

that, a law would be unsuccessful or sometimes, dead and ineffectual or leads to trouble, when it is enforced beyond people's capabilities (Rasekh, 2006).

### **Consistency and proportion.**

In order to make laws, existence of consistency and proportion among different issues of a law is of the most importance. Principle of cohesion and proportion, as the subordinate to quality of law, need to be applied in line with the principle of clarity. In fact, in a full-scale, cohesion is mainly predicated to whole conception of the law, while, clarity of laws has a further small influence and refers to lack of ambiguity of laws. So, it could be concluded that, simultaneous supervision of these two mutually interdependent aspects is conducted by the lawful authority of persevering the Iranian constitution (Vije, 2011).

### **The role of council of guardian to supervise quality of laws.**

In this chapter, it is taken into account how council of guardian addresses qualitative features of the laws ratified by the Islamic consultative assembly:

#### ***Normality of the law.***

Normality of the law is not continuously supervised by the council; because substantive qualities of the law are less used to recognize normative value of the laws, so it is enough taking into account adjective qualities of the law. In fact, form of supervision depends upon the law, so the council adopts no definite, certain approach.

On the other hand, supervision of normality is not a dependent certain supervision by the council, therefore concern of the council over normality of laws could only be deduced through Islamic supervision of parliament's approvals. Professional judgments of the council about "bill of the Islamic penal code" reveals first concerted attempts of the council to create a quality called "normality" for ratified laws by the parliament.

Here, council of guardian emphasize that, 1) reprimands must be studied and addressed in the penal code, 2) all forms of reprimands must be clearly stated, and 3) all qualitative and quantitative features of reprimands have to stated clearly (research center of the council of guardian. 2005).

Under the clause, it is stated that, following subjects need to be observed in order to respect Islamic laws and relevant principles of the constitution about reprimands. Hence, the aforementioned judgment of the council emphasizes the necessity to respect the Islamic law.

However, it could be said that, the council not only propose the divine opinion, but also implicitly points imperative feature and firm obligations of the law, and on other words, the practical result of the emphasis may lead to “clarity” of the law.

Judgment of the council dated 2007/11/07 about “reforming some articles of the fourth economical, social and cultural development plan of the Islamic republic of Iran and enforcement of general policies of principle 44 of the constitution” is also of the most importance.

Under note 28, for the first time, the council of guardian utilized practice of avoiding “redundancy laws” and emphasized that: with respect to the judgment provided in the preliminary article, there is no sense in the note related to the appended article 1 (see the comprehensive system of the council’s opinions, <http://nazarat.shora-rc.ir>).

Perhaps, it could be a prelude to applying substantive criteria of law from the council of guardian. On other words, the adjective quality of the law, to date, was the dominant aspect in procedure of the council, would be changed.

### ***Clarity of the law.***

As there is no clear definition, classification or framework for the laws in the Iranian constitution, the constitution lacks any basis for the principle of clarity; therefore, council of guardian enjoys all alternative principles to the legal securities to control it. Wide range of alternative principles to the legal security offers exciting possibilities for the council to supervise the clarity of principles through

many others. However, the council makes use of a certain approach to overcome deficiency of adequate basis for the clarity principle in the constitution. As clarity is considered as a prerequisite for judgment over approvals of the parliament, so the council forces the Islamic constitutive assembly to ratify more unequivocal acts.

On other words, the council of guardian not only needs necessary requirements in the approvals of the parliament to execute its roles, but also clarity of its judgment depends upon its duties, preserving the constitution and Islamic supervision, so the same subordinate role leads to lack of a definite approach to this supervision.

The following illustrates some instances of the diverse procedures. Council's judgment over "fair distribution of water" for the first-time revealed attitude of the council on clarity of laws. According to the council, enact the bill makes no sense, when there is no clear legal definition, terminology and titles. So, after approving a law or a statute supposed to be ratified later, these definitions lead to create an invalid enactment, so in terms of comparing to Islamic law and the Iranian constitution, it is impossible to pass a comment on it (research center of the council of guardian, 2005).

Although, the necessity for respecting principle 85 of the constitution takes into account here, the full return of the approval to the Islamic constitutive assembly without more detailed remarks reveals importance of clarity in judgments of Iranian trials. Regarding the aforementioned theory, the council of guardian takes into account clarity of laws from two different aspects: first, necessity for clear definitions and terminology to make comments in terms of comparing with Islamic laws, and second, clarity of legal dictums that is a supplement to the first point. On other words, in viewpoint of the council, two constructive and objective clarities are necessary for approvals of the parliament.

Opinion of the council about "insurance of agricultural crops", dated 1983/04/17, reveals the emphasis of the council of guardian on clarity of adjective laws. Under clause 2, the council clearly points ambiguity of one of its notes: "with regard to the existent ambiguity in note 1, and conflict

over its interpretation between the informant of the commission and agents of the agriculture ministry, it is necessary to revise wording and phrases of the note in order to reveal responsibility of the agriculture minister for the council's decision (research center of the council of guardian, 2005).

***Consistency.***

The council of guardian is of the opinion that, consistency in law is a step toward "having an effective administrative system". It is emphasized by the opinion of the council on the "bill of changing the salary table and payment standards of employees under the state civil service act", dated 1991/04/04. It is stated that, article 13 implies that it is a yearlong law, regardless contradiction of the arrangement with the effective administrative system, so it contravenes article 5 and note 8 approved on 1992 (see the comprehensive system of the council's opinions, <http://nazarat.shora-rc.ir>).

According to the council of guardian, an inconsistent law may cause trouble for the country's administrative system and eventually causes harm to legal security of citizens. It is a newfound supervision from the council of guardian, so it does not take into account for other cases.

It is obvious that, members of the council need to take it into account that inconsistent laws would bring about another damage called "legislative inflation" through which not only authorities face a large amount of abrogating and abrogated laws in the administration phase, but also it increases rate of violation against people's basic rights.

***Materialization and administration.***

Materialization and administration have a pivotal role in judgments of the council.

On 1990/04/30, the council of guardian reminds the Islamic consultative assembly about "bill of providing crippled of Islamic revolution and imposed war with facilities" that: under article eleven, with respect to other rules and approvals offering amount for other stratum, its administrable need to be considered, because the law reveals that quota exceed 100 percent (see the comprehensive system of the council's opinion, <http://nazarat.shora-rc.ir>).

The case is just a part of reminder of the council, so it is not an instance of the council's supervision and comparing approvals.

There is a part in procedures of the council of guardian called reminders about some of the provided opinions, therefore, they takes into account two different issue, however; some procedures reveal that the council of guardian recently actively pursues administration of its reminders, so implementation reforms in the form of provided reminders during second or third phases are seriously emphasized; for example, during the first phase of council's judgment about "activity of political parties" on 2015/06/17, it is stated that, reminder 1: under note 5 of article 1: a phrasal amendment is needed, if general assembly does not mean all members of the parties. Seemingly, the parliament has disregarded the reminder, so during the second phase, opinion of the council of guardian over the same approval on 2015/12/01 states that: reminder of the council in note 1 was not performed (see comprehensive system of the council's opinion, <http://nazarat.shora-rc.ir>).

Accordingly, sometimes the council offers practical recommendations with regard to composition of laws; for example, opinions of the council over "bill of organizations, duties and country's elections of the Islamic assembly and mayors" tends to imply the concerns.

So, the council emphasizes, that as provided limitations in some notes of article 7 of the bill to determine members of councils seriously interferes and causes administrative issues, so it is better to begin from low population and end up with high population (see comprehensive system of the council's opinion, <http://nazarat.shora-rc.ir>)

The council of guardian sometimes takes into account professional competences of organizations, so it reminds that disposition for every public institution or office without paying attention to their professional competence and *raison d'être* is not logical and legal and may leads to administrative problems.

On 2010/03/03, council of guardian made several objections to the” bill of accession of some articles to the law of systemization and support for construction and distribution of houses”, because note 2 of article 1 specifies that the housing foundation of the Islamic revolution is obliged to issue deeds, while it is within the professional competence of office of registration of documents and lands (see comprehensive system of the council’s opinion, <http://nazarat.shora-rc.ir>).

***Cohesion and proportion.***

Cohesion and proportion principles are always taken into account by the council of guardian. They follow technical principles of legislation in two different aspects, including principles of the text language and principles of the text structure. The following addresses council’s judgments about these two aspects:

- ✚ This form of supervision includes reminder of ambiguities in the law as well as typo and spelling mistakes.
- ✚ This form of ambiguities includes abridgement, lack of disposition towards administration of the law, doubt about contradictory and different understanding of law. Inexpressiveness of terms leads to non-performance, unjust performance or abuse of law.

Furthermore, the council of guardian provides a reminder about lack of comprehensive definitions of specific juridical titles, lack of judgment about contradiction with the Islamic law and the Iranian constitution due to available ambiguities in the law, violation of people’s rights because of ambiguities of the law and such like. For example, judgments number 6196, 4911, 41905, as well as 3966, dated 1994/05/05, 1999/06/29, 2011/03/19 and 2017/01/07, respectively, are taken into account (see in the comprehensive system of the council’s opinions <http://nazarat.shora-rc.ir>).

The council mainly takes into account typos and spelling mistakes, generally these mistakes are usually bound to happen because of typos, dislocation of words and terms, inaccuracies in transposition of articles and notes, disuse of fluent Persian words in legal terms, spelling mistakes

and inobservance of grammar, existence of redundancy in some expressions, inattention to lack of some organizations and institutes during a specific period of time, developing several notes unlike common methods of legislation, inattention to amount and number of terms for inter-textual references, lack of accurate translated statute of international unions and organizations when accession of Iran to the statute is ratified, submission of parliaments' approvals through informal documents without signature and determining authorized articles and notes. So, the parliament makes several attempts to remove them.

## **CONCLUSIONS.**

As it can be seen in the present research, distinguishing feature of quality of laws is the compulsory nature, so it is better to be considered by legislators. Approvals of the Islamic consultative assembly reveal that the features are sometimes respected, but most of the time they are disregarded.

The first hypothesis is that judges are preliminary obliged to preserve constitution and try not to approve and administrate those laws against accepted social norms, however, the council of guardian is not only obliged to accomplish its duties, but also it is seriously expected to impede ratification and implementation of those laws lacking necessary competence according to principles of the Iranian constitution or Islamic criteria, however, although it is indirectly related to status of legislation, council of guardian seems to have no opinion about it. for example, in view point of council of guardian a text is ambiguous when it is not understandable because it could not be compared to the Islamic law and the Iranian constitution or it is against the public right or Islamic law, according to principles of chapter three or other principles of constitution.

Supervision of laws by council of guardian is not defined as an unjustified or extralegal practice, because preserving Islam and spirit of the constitution, providing people with basic rights are basics of this type of supervision of the council.

The council of guardian is not only obliged to provide clear, Islamic supervision, it is also within competence of the council to control quality of laws; however, in various aspects such as normality, fairness and clarity, its approach lacks legislative and innumerable principles. It seems that, what is of the most importance for the council of guardian is respect to Islam and Iranian constitution.

By and large, regarding some indication of the council of guardian's approach to control quality of laws, until recently, there has been no research that provides an in-depth analysis about it, so ordinary precedent of the council seems to provide the Islamic consultative assembly with qualitative criteria of law.

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