

# Islamic Legal Studies Program

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## Contracts and Torts: *A Comparative Approach to Liability in Islamic Law*

a lecture by

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# Subtle shades of an Islamic constitution

As Ali Akbar Rafsanjani reaches the end of his term as Iranian president, the separation of powers remains important in Iran's political system, writes *Chibli Mallat*



The president of Iran, Rafsanjani, has been appointed to the CDNI by the leader of the Islamic Republic, Ayatollah Khamenei

The appointment last week of president Ali Akbar Hashemi Rafsanjani to the previously obscure Council for the Discernment of the National Interest (CDNI, *majma'-e tashkhis-e maslahat-e nizam*) allows for a unique appreciation of the complex institutional structure in the Islamic Republic of Iran. What is this council and what does the appointment of Rafsanjani signify?

This council did not exist in the first constitution of the Islamic Republic (1979). It was established only ten years later, because of institutional deadlocks which the CDNI was supposed to solve.

These deadlocks were recurring typically between the Iranian parliament, the Majlis, on the one hand, and, on the other hand, another obscure institution, the powerful Council of Guardians.

Significantly, the appointment of Rafsanjani, whose term as president comes to an end this summer, was made by the leader of the Islamic Republic, Ayatollah Khomeini.

'Leader' is the official appellation, according to the constitution, of the highest position in the country. In Persian, the word is *rahbar*, and a full chapter seven is consecrated to the *rahbar* in the constitution.

The leader enjoys the most powerful position in the country, even if not elected directly by the people, as are the president and the members of parliament.

In order to have a clearer picture of the constitutional structure in Iran, one should perhaps keep in mind two parallel schemes of 'separation of powers' [see diagram].

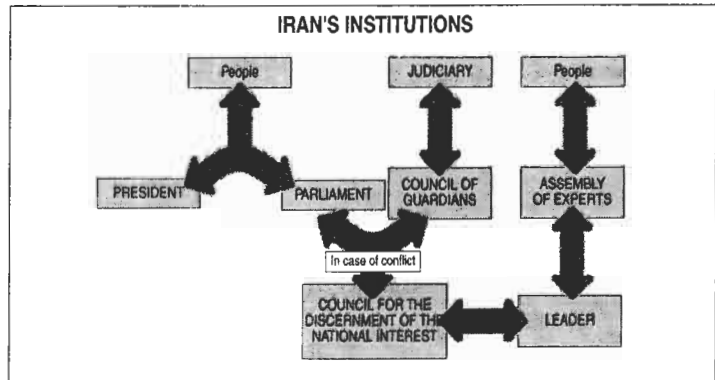
The first scheme is the traditional scheme, which one finds in most democratic countries, with the three powers – the executive, the legislative and the judiciary – checking and balancing each other.

This scheme can be found also in Iran: the president, presently Rafsanjani, is elected for a period of four years, which can be renewed only once. Parliament is also elected for a period of four years, and the judiciary is appointed by the president.

As in France and in Lebanon, there is a constitutional court, called the Council of Guardians. Its writ, however, is very wide, because it looks automatically into the constitutionality of every single piece of legislation.

As mentioned, a deadlock developed in the first decade of the revolution between the 12 members of the Council of Guardians, on the one hand, and the government and parliament on the other.

The deadlock was so severe that the late Ayatollah Khomeini, who was the previous leader of the Islamic Republic, had to step in several times to reconcile the two bodies.



Finally, in 1988, even Khomeini could not stem the tide of a constitutional revision, which resulted in the creation of the CDNI. This was a body over and above both the Council of Guardians and parliament. Its main task was to step in should the deadlock between the two persist.

Parallel to this traditional constitutional scheme, which is complicated enough of its own accord, runs the so-called 'leadership'. The position of 'leader' is unique in the world, and has developed from a specific set of historical circumstances, which are special to Iran and to the Shi'i tradition.

In Iran, more than 95 per cent of the population is Shi'i. There is historically no specific electoral scheme for a leader to be chosen. The leader is the one among the learned scholars of Shi'i Islam whose reputation is so well established that he 'naturally' becomes the main religious reference in the Shi'i community at large.

Usually, there are several such 'references' across the Shi'i world, but there is also a constant search for a supreme ayatollah, which was arguably reached by someone like the Iraq-based Ayatollah Khomeini before his death in 1989.

One should note in this respect that there are no boundaries for recognition.

A well-known religious figure sitting in Najaf in southern Iraq might command more respect for Iranian or Lebanese Shi'is than an Iranian or Lebanese figure.

To that extent, the leadership is a transnational phenomenon.

This complicated picture explains the delicate position of the leader in the Islamic Republic.

So sophisticated is the structure of Shi'i leadership and so difficult the precise assessment of 'reputation for scholarship' that the Iranian constituents first thought of a leadership council of three to five persons.

When this proved too complicated to set up, it was decided to go for one single leader. An 80-member Assembly of Experts (*majlis-e khubregan*) is periodically elected by the people just for the purpose of nominating the leader. The Assembly of Experts meets from time to time to confirm or depose a given leader.

Ayatollah Hussein Muntazeri, for instance, had been chosen in the mid-1980s by the assembly to succeed the first leader, Khomeini, but they fell out and the assembly reconsidered its choice and appointed Khomeini in his stead a few years later.

The leader is all-powerful in Iran, but his importance is also a function of his charisma as a political cum-religious expert. While that was not put in doubt at the time of Khomeini, the position of the current leader is more delicate, and Khomeini had to admit in December 1995 that as traditional leadership goes, he was not necessarily the sole, let alone, the top 'reference' in the country.

It is within this wider context that his appointment of Rafsanjani to the leadership of the CDNI must be appreciated.

On the one hand, it ensures that the game of musical chairs persists – and that Rafsanjani does not disappear from the institutional scene at the end of his presidential mandate.

On the other hand, it helps the position of Khomeini, to whom Rafsanjani will feel, no doubt, indebted. This would be particularly useful to Khomeini if the new president is not quite to his taste.

*Chibli Mallat is a practising lawyer and professor of law at St Joseph University, Beirut. His book, The Renewal of Islamic Law (Cambridge University Press, 1993), discusses these institutional points in more detail. An Arabic translation is due shortly from Dar al-Nahar*