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The Principle of the Non-Enumerative Nature of Contracts with Reference to the Legal Systems of Iran, Afghanistan, and Sunni Jurisprudence

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ABSTRACT

The principle of the non-enumerative nature of contracts constitutes one of the fundamental issues in Islamic commercial jurisprudence and contract law, playing a decisive role in the acceptance or rejection of emerging contracts and in regulating contemporary economic relations. The central question in this context is whether the validity of contracts is confined exclusively to specific and explicitly prescribed legal or religious forms, or whether any rational and lawful agreement remains valid and binding so long as it does not contradict an explicit rule of Sharia or statutory law. This article adopts a descriptive-analytical approach using a comparative method to examine the principle of the non-enumerative nature of contracts within three jurisprudential and legal frameworks: the Iranian legal system, the Afghan legal system, and Sunni Islamic jurisprudence. The findings indicate that although certain views supporting the enumerative nature of contracts have existed within Islamic jurisprudence—particularly among some early jurists and specific schools such as the Zahiri tradition—the dominant position among Imami jurists and the majority of Sunni scholars affirms the non-enumerative nature of contracts. This position relies on general religious evidences, including the Qur'anic injunction "Fulfill the contracts," traditions concerning the obligation to honor contractual stipulations, the principle of dominion over property (qa'idat al-taslit), and the presumption of permissibility in transactions, all of which support the validity of newly emerging contractual forms. In Iranian law, this principle is explicitly embodied in Article 10 of the Civil Code, which provides the legal foundation for recognizing unnamed contracts and contractual freedom. In contrast, although the Afghan legal system lacks an explicit statutory provision addressing this principle, an implicit acceptance may be inferred from the general rules governing contracts and from the system's doctrinal influence by Hanafi jurisprudence. Ultimately, the article concludes that the principle of the non-enumerative nature of contracts—despite limitations imposed by public order and mandatory legal rules—plays a fundamental role in ensuring the dynamism of contract law, promoting contractual justice, and enabling legal systems to adapt to evolving economic and social needs.

Keywords: *Principle of the Non-Enumerative Nature of Contracts; Freedom of Contract; Unnamed Contracts; Iranian Law; Afghan Law; Sunni Jurisprudence.*

Introduction

Extensive economic and social transformations in contemporary societies have increasingly highlighted the necessity of reconsidering the foundations of contract law. One of the most significant issues in this regard concerns



the question of whether contracts are *enumerative* (restrictively recognized) or *non-enumerative* in nature; namely, whether the validity and enforceability of contracts are limited exclusively to specifically prescribed religious forms or whether the parties' will may, within the framework of general legal principles, constitute the basis for creating new contractual forms. This question is important not only from a theoretical perspective but also carries extensive practical consequences for accepting or rejecting emerging contracts, regulating modern economic relations, and enabling the legal system to respond to evolving societal needs (1, 2).

Within Islamic jurisprudence and legal systems influenced by it, diverse viewpoints have emerged regarding the nature of contracts. While some scholars, relying on a traditional approach, regard contracts as restrictive and consider the legitimacy of transactions dependent upon explicit religious authorization, the dominant view among later jurists—particularly within Imami jurisprudence and Sunni jurisprudence—supports the non-enumerative nature of contracts. This perspective, grounded in general religious evidences, the principle of fulfillment of contracts, the doctrine of dominion over property, and the authority of rational custom, maintains that any lawful and rational agreement is valid and binding so long as it does not conflict with an explicit rule of Sharia or statutory law (3, 4). The reflection of this approach can be observed, with varying intensity, in the positive law of Islamic countries such as Iran and Afghanistan (5, 6).

The present article adopts a comparative approach to examine the principle of the non-enumerative nature of contracts within three jurisprudential and legal contexts—the Iranian legal system, the Afghan legal system, and Sunni jurisprudence. The objective is to clarify the theoretical and jurisprudential foundations of this principle, analyze its manifestation within statutory laws and legal practices in the two countries under study, and identify their similarities and differences. The study seeks to demonstrate that the principle of non-enumerative contracts is not incompatible with Islamic jurisprudential foundations; rather, it may function as an effective instrument for achieving contractual justice, enhancing legal flexibility, and responding to the emerging needs of Islamic societies (7, 8).

Theoretical and Conceptual Foundations of the Principle of the Non-Enumerative Nature of Contracts

The principle of the non-enumerative nature of contracts means that a new contract need not conform to a specific explicit religious text; rather, any rational and lawful agreement that does not contradict a clear religious or legal rule is considered valid. Proponents of the restrictive theory of contracts argue that contracts are presumed invalid unless expressly legitimized by the legislator. According to this view, the validity of every transaction requires explicit approval, and only contracts recognized during the formative religious period fall within the scope of general legal recognition (9, 10).

In contrast, the theory of the non-enumerative nature of contracts is grounded in the principles of freedom of contract and party autonomy. Relying upon general religious injunctions commanding fulfillment of agreements, this theory asserts that contracts are not confined to historically established forms and that any transaction accepted by rational custom and not explicitly prohibited by Sharia remains valid and enforceable (11, 12). In other words, any agreement socially recognized and not expressly forbidden by religious authority is legitimate and legally binding (2).

Jurists' opinions in this field vary. Some scholars reject extending the presumption of validity and insist upon the restrictive nature of contracts. Others, however, relying on general jurisprudential principles and textual evidences concerning fulfillment of obligations, conclude that Islamic law grants individuals freedom to structure private agreements so long as they do not contradict definitive religious rulings (4, 13). Consequently, the majority of

contemporary jurists—both Imami and Sunni—consider contracts inherently non-enumerative and recognize modern contractual forms such as insurance and complex financial agreements without requiring their assimilation into classical contractual categories (14, 15).

The Principle of Freedom of Contract and Its Position in Law and Jurisprudence

The principle of freedom of contract, also known as party autonomy, permits individuals to determine the type and content of their agreements without unjustified governmental interference, provided that the contract does not violate mandatory law, public order, or morality. This principle has deep roots in Islamic jurisprudence. Numerous Qur’anic verses and traditions form its doctrinal foundation, emphasizing both the permissibility of transactions and the obligation to fulfill contractual commitments (3, 12).

In Iranian law, this principle is explicitly reflected in Article 10 of the Civil Code, which recognizes private contracts as valid and binding so long as they do not contradict explicit law. Legal scholars interpret this provision as confirming the dominance of individual will over contractual destiny and as filling legislative gaps in situations of silence or ambiguity within statutory law (8). By recognizing unnamed contracts, Article 10 affirms contractual diversity while simultaneously restricting invalidity to cases involving conflict with mandatory legal norms, public order, or good morals (16).

Furthermore, the jurisprudential maxim *al-‘uqud tabi’ah lil-qusud* (contracts follow intentions), rooted in Imami jurisprudence, constitutes an additional guarantee of contractual freedom. According to this principle, contracts must be interpreted based on the parties’ true intentions so that their shared purpose is realized. Sunni jurisprudence likewise supports the theory of non-enumerative contracts through the doctrine of original permissibility (*asalat al-ibahah*) and general religious commands requiring fulfillment of agreements (11).

The Concept of Contract in Civil Law

Article 183 of the Iranian Civil Code defines a contract as an agreement whereby one or more persons undertake an obligation toward another person and such undertaking is accepted by the latter. Two essential elements emerge from this definition: the concurrence of wills and the creation of legal obligation. In other words, a contract is realized when the parties align their intentions toward establishing a shared obligation, whether through performance of an act or transfer of a right (17).

This definition has been subject to scholarly criticism. One criticism concerns the confusion between cause and effect, as the law defines the contract through its consequence—the creation of obligation—rather than its juridical nature. Another critique argues that proprietary contracts such as sale or lease, whose primary effect is transfer of ownership rather than obligation, appear insufficiently reflected within the definition. A further criticism is that the definition seemingly emphasizes gratuitous contracts while failing explicitly to address reciprocal obligations characteristic of bilateral contracts (8).

Nevertheless, responses have been offered. The wording of the legal definition may implicitly encompass both parties, since the undertaking of one party presupposes acceptance and reciprocal legal engagement by the other. Moreover, the term “obligation” in jurisprudential discourse has been interpreted broadly as establishing a legal arrangement, which may include the transfer of ownership itself. From this perspective, many jurists and legal scholars consider the statutory definition—despite its apparent simplicity—sufficiently adaptable to encompass customary contractual forms (3).

In summary, although the statutory definition of contract is not free from critique, jurisprudential and legal interpretations demonstrate its practical applicability to various contractual types, including proprietary and bilateral agreements. Contemporary Iranian law, similar to many modern legal systems, recognizes unnamed contracts under Article 10 of the Civil Code, thereby opening the path for contractual innovation (1).

Accordingly, the principle of the non-enumerative nature of contracts represents a fundamental rule in Islamic and Iranian law that safeguards the freedom of parties in structuring agreements. Under this principle, contracts remain valid unless a religious or legal ground for invalidity exists. This broad jurisprudential and legal perspective contributes to flexibility within contract law and facilitates economic innovation, provided that contractual activity remains within the limits of mandatory law, public order, and good morals. The maxim that contracts follow intentions, together with Qur'anic teachings and traditions emphasizing fidelity to agreements, reinforces this principle and consolidates the doctrine of contractual freedom within Iranian and broader Islamic legal systems (8, 12).

The Principle of the Non-Enumerative Nature of Contracts in Iranian Law

Concept and Historical Development of the Principle of the Non-Enumerative Nature of Contracts

The concept of the “enumerative nature” of contracts signifies that every new contract must rely upon explicit authorization by the religious legislator; otherwise, it lacks validity. According to this traditional view, which appeared in early Imami jurisprudence, contracts were considered legitimate only when falling within expressly recognized religious categories such as sale or lease, while newly emerging transactions required specific approval or ratification by the legislator. Opponents of this position regard party autonomy as the governing principle and argue that emerging contracts remain valid so long as no explicit religious or statutory prohibition exists (2, 9).

Within the historical evolution of Imami jurisprudence, early jurists generally viewed contracts as restrictive in nature. However, later juristic opinions increasingly relied upon the presumption of validity of transactions and general religious principles emphasizing permissibility and fulfillment of contractual commitments, thereby recognizing the independent validity of new contractual forms (3, 4). In recent decades, this doctrinal transformation has been reflected in Iranian civil law, particularly through Article 10 of the Civil Code (1928), which explicitly recognizes freedom of contract by declaring that private agreements are binding upon the parties provided that they do not contradict explicit law. Consequently, concepts such as “unnamed contracts” have become established in Iranian law, enabling the formation of diverse modern contractual arrangements (8).

Article 10 of the Civil Code and the Recognition of Unnamed Contracts

Article 10 of the Iranian Civil Code demonstrates the implicit acceptance of unnamed contracts—private agreements lacking predetermined legal titles. Under this provision, the will of the parties is respected so long as the agreement does not explicitly violate statutory law. The practical implication is that any new contract not clearly contrary to religious or legal rules will be considered valid. Iranian lawmakers, influenced by contemporary juristic thought, adopted the principle of party autonomy and rejected the restrictive nature of contracts, thereby affirming the validity of non-specified agreements (8, 18).

In other words, Article 10 establishes the primacy of intention as the criterion of contractual validity and implicitly recognizes newly emerging unnamed contracts as legitimate and enforceable. As a result, Iranian law allows

contractual freedom not only within legally defined contracts but also through innovative and flexible private arrangements (1).

Limits of Contractual Freedom in Iranian Law

Despite the Civil Code's emphasis on contractual freedom, such freedom is not absolute and remains confined within the framework of general legal standards and mandatory rules. Any contract contrary to explicit law or incompatible with public interests lacks legal validity. Moreover, constitutional principles allow governmental intervention where necessary to protect public welfare or economic justice. In practice, contractual freedom is restricted through three principal mechanisms: legal regulations and social order, public order and good morals, and mandatory legal provisions (7, 16).

Public Order and Good Morals

Article 975 of the Iranian Civil Code provides that courts may not enforce agreements contrary to good morals or public order. Accordingly, any contract inconsistent with fundamental societal values or accepted ethical standards is considered legally ineffective. Agreements related to socially harmful activities, even if formally drafted as contracts, lack legal validity because they conflict with public order. In Iranian jurisprudential and legal discourse, good morals function not merely as a subset of public order but as an independent evaluative criterion capable of limiting contractual freedom on its own (16).

Legal and Judicial Limitations

Beyond public order considerations, contracts must also comply with mandatory legal provisions that cannot be waived even by mutual consent. These include prohibitions against fictitious transactions, protection of property rights, and compliance with financial and banking regulations. Any agreement violating such mandatory norms is deemed void. Iranian judicial practice has likewise imposed limitations on contractual freedom. Courts have occasionally invalidated unfair or incompatible contractual conditions by emphasizing contractual justice and the balance of obligations, thereby preventing abuse arising from contractual stipulations (8).

Overall, while freedom of contract is recognized in Iran, its scope and direction are regulated by constitutional principles, civil legislation, and specialized legal rules designed to maintain fairness and social order (7).

The Role of Imami Jurisprudence in the Acceptance or Limitation of Emerging Contracts

The Iranian legal system is deeply rooted in Imami Shi'i jurisprudence, and juristic debates play a decisive role in determining the status of new transactions. Within Imami jurisprudence, two general viewpoints exist. One group maintains a restrictive approach, recognizing only traditionally defined contracts as legitimate. In contrast, the majority of later Imami jurists reject contractual restrictiveness by relying on general religious principles and the presumption of validity, thereby affirming the inherent legitimacy of new contractual forms (1, 3).

This jurisprudential development is clearly reflected in Iranian legislation and legal practice. Unlike certain traditional systems, Iranian civil law does not impose rigid formal limitations on contractual structures and instead emphasizes flexibility in contractual arrangements. Consequently, innovative agreements—such as urban

partnership contracts or complex financial instruments—are accepted under the principle of validity of transactions, provided that religious and public limitations are respected (8).

Nevertheless, Imami jurisprudence continues to influence specific areas, particularly interest-free banking, where financial mechanisms must be structured so that they remain compatible with recognized Islamic contractual forms. Thus, Iranian law simultaneously benefits from the innovative capacity of the non-enumerative contract doctrine while preserving its Islamic juridical identity (12).

The Principle of the Non-Enumerative Nature of Contracts in the Afghan Legal System

The Afghan legal system has developed through a combination of civil law regulations and Hanafi jurisprudential foundations. Although Afghan civil legislation does not explicitly articulate the principle of freedom of contract, its general definitions and provisions implicitly recognize the non-enumerative nature of contracts. Article 497 of the Afghan Civil Code defines a contract as an agreement of two wills aimed at creating, modifying, transferring, or extinguishing a legal right within the limits of law, without imposing restrictions regarding contractual type or title (5, 6).

Furthermore, general contractual provisions extend to all forms of agreements, whether specified or unspecified, indicating that Afghan lawmakers accept contractual autonomy so long as agreements do not contradict legal or religious requirements. In practice, Afghan law respects voluntary agreement and party autonomy while invalidating only transactions explicitly prohibited, such as usurious or gambling arrangements. This flexible approach reflects Hanafi jurisprudential principles such as the presumption of permissibility and the presumption of freedom from liability, which place the burden of proving invalidity upon the party alleging corruption of the transaction (6).

Accordingly, within Afghan law a contract remains valid and enforceable unless it conflicts with an explicit religious or statutory rule. The combined legal and jurisprudential foundations of Afghanistan therefore support the principle of the non-enumerative nature of contracts within the framework of its constitutional and civil legal order (5).

Definition of Contract in the Afghan Civil Code

According to Article 497 of the Afghan Civil Code (1977), a contract is defined as an agreement between two wills intended to create, modify, transfer, or extinguish a legal right within the limits of law. Thus, any bilateral legal act formed through mutual consent and producing legal effects constitutes a contract. The legislator has also specified requirements for contractual validity, including legal capacity of the parties, lawful subject matter, and conformity of contractual content with public order, morality, and Islamic legal principles (6).

This broad definition demonstrates that Afghan civil law does not confine contracts to traditional categories but instead emphasizes party autonomy and voluntary agreement as the foundation of contractual relations.

General Principles Governing Contracts and Their Implication for the Non-Enumerative Nature of Contracts

The Afghan Civil Code has established a set of common general rules applicable to all types of contracts. Pursuant to Article 504 of the Civil Code (1977), “the general rules relating to contracts shall apply to all contracts.” This means that the foundational principles of contracts—such as concurrence of wills and requirements of validity—are uniform across all contracts, while only the specific details of each contract are set out in the provisions governing that particular contract. This legislative approach reflects the principle of freedom of contract, meaning

that the parties may structure any lawful agreement within the framework of law and public order. In practice, Afghanistan also emphasizes individuals' voluntary freedom in organizing economic and legal affairs, except where a contract or a condition is explicitly contrary to statutory law or Sharia. Under Islamic rules and the Constitution, transactions such as usurious sales and gambling-based transactions are deemed prohibited and void; other contracts recognized in ordinary custom are generally accepted by law, provided that they do not conflict with public interests or the fundamental norms of Islam (5, 6). Accordingly, the general principles governing contracts in Afghanistan, by emphasizing respect for voluntary agreement and the general legitimacy of transactions, provide the basis for the non-enumerative nature of contracts (6).

The Status of Justice, Good Faith, and Will in Contracts

While supporting freedom of contract, the Afghan legal system also gives attention to contractual justice and good faith. The Afghan Civil Code, in several instances directly or implicitly, emphasizes justice and the prohibition of abuse within contractual relationships. For example, contracts formed through deception or exploitation are considered voidable under relevant provisions, and supplementary legislation treats unfair terms as invalid. Afghan legal scholars have stressed that notions of justice and equity occupy a high place in Afghanistan's positive law, and that terms which unjustly increase one party's obligations are expressly declared void in certain specific laws, such as consumer protection legislation and commercial contracts legislation (5). This legal policy indicates that although the parties may enter into contracts through free consent, they may not use such freedom as a vehicle for imposing disproportionate or justice-damaging terms. In other words, where a contract includes terms that depart from Sharia-based limits or fair commercial custom, courts may refuse enforcement based on general legal rules, such as the prohibition of unreasonable restrictions on obligations. In sum, Afghan law presumes the validity and enforceability of lawful contracts, but evaluates this presumption within the framework of social justice and respect for public order (5, 6).

The Influence of Hanafi Jurisprudence on the Afghan Legal System in the Field of Contracts

Islamic Sharia—particularly Hanafi jurisprudence—constitutes a major source of Afghanistan's private law, and the Constitution emphasizes that legislation must not contradict Islamic rules. From the Hanafi perspective, principles such as the presumption of permissibility in transactions, the presumption of non-liability, and party autonomy are central. Hanafi jurisprudence maintains that all lawful transactions are permissible unless evidence establishes their prohibition or invalidity. Likewise, under the presumption of non-liability, a transaction should be treated as valid unless its invalidity is proven. The principle of party autonomy, in Hanafi doctrine, means that whenever the contracting parties intend to form a contract and offer and acceptance are realized—absent fundamental impediments such as coercion or lack of legal capacity—the transaction is valid. These jurisprudential foundations directly influence Afghan law, in that the Civil Code and judicial practice generally treat lawful transactions as enforceable and invalidate them only when they explicitly conflict with Sharia or statutory law (6). In other words, Hanafi jurisprudence, by emphasizing the presumption of validity of transactions and applying Sharia with regard to its objectives, provides the theoretical infrastructure for the principle of the non-enumerative nature of contracts in Afghanistan (5, 6).

Jurisprudential Foundations of the Principle of the Non-Enumerative Nature of Contracts in Sunni Jurisprudence

Sunni jurists have held different views regarding the nature of contracts. On one side, the Zahiri school treats contracts as enumerative and recognizes the legitimacy of transactions only within the framework of contracts specified by Sharia. In contrast, the majority of Sunni jurists—such as the Hanafi, Shafi'i, Maliki, and Hanbali schools—regard contracts as inherently non-enumerative and, by relying on the presumption of permissibility, general evidences requiring fulfillment of contracts, and social necessity, uphold the permissibility of new transactions. In other words, many contemporary Sunni scholars maintain that Islamic law has provided the necessary framework for concluding modern contracts, and that a new contract is enforceable so long as it does not face a specific religious or legal impediment.

Jurisprudential Views on the Enumerative or Non-Enumerative Nature of Contracts

Sunni jurists have expressed various views on whether contracts are enumerative. According to some sources, only the Zahiri school endorses the enumerative nature of contracts, whereas the majority of jurists in the Sunni schools—particularly Hanafi, Shafi'i, Maliki, and Hanbali—do not consider contracts enumerative. In their view, Islamic Sharia, while preserving general principles and observing definitive texts, enables the conclusion of new contracts to respond to the needs of time and place. For example, it has been stated that the majority of Sunni jurists “regard contracts as inherently non-enumerative,” and that Iranian and Afghan law also contain bases for the principle of the non-enumerative nature of contracts.

The Theory of the Enumerative Nature of Contracts and Its Evidences

Under the theory of enumerative contracts, only those contracts known and prevalent in the formative period of legislation are valid and binding, and any new agreement is effective only if it conforms to a previously recognized structure and title. Proponents of this view typically rely on three categories of evidence: scholarly consensus, restricting the scope of general evidences, and a specific interpretation of the verse commanding fulfillment of contracts.

Reliance on Consensus

Proponents of enumerative contracts invoke statements attributed to major jurists as suggesting a form of general agreement. For instance, it has been claimed that certain jurists asserted that the non-enumerative nature of contracts was not the position of Imami jurists and was not even raised as a possibility, implying that Imami jurists unanimously regarded contracts as enumerative. On this basis, some writers have treated such statements as evidence of consensus supporting the enumerative nature of contracts.

Restricting the Scope of General Evidences

Another argument for the enumerative nature of contracts is that general and unrestricted evidences do not extend to newly emerging contracts. The claim is that since the legislator at the time of the Prophet and the Imams did not confront modern contractual forms, general evidences requiring fulfillment of contracts were understood as referring only to contracts common in that period and therefore do not apply to new contracts. Accordingly, under

this reasoning, the validity of a new contract requires a specific religious proof, and general principles cannot establish its enforceability.

Interpreting the Verse “Fulfill the Contracts” within the Enumerative Theory

The Qur’anic command to “fulfill the contracts” is among the important evidences in the jurisprudence of transactions. Advocates of enumerative contracts argue that this verse does not encompass all contracts but is limited to those contracts prevalent during the formative period. On this reading, interpreting the term “contracts” in an unrestricted sense would entail excluding most contracts by way of extensive specification, which is viewed as unacceptable, and therefore the intent of the legislator is said to be limited to the “contracts customary at the time of revelation.”

The Theory of the Non-Enumerative Nature of Contracts and Its Evidences

In contrast to the preceding theory, a group of jurists maintain that contracts are inherently non-enumerative, and that general religious evidences as well as various rational principles extend to newly emerging contracts. Their principal evidences include: the applicability of general Sharia proofs to modern contracts, the “presumption of permissibility” or the “presumption of validity of transactions,” the authority of custom (*urf*) and socially grounded expediency, and reliance on broadly framed traditions such as “people have dominion over their property” and “Muslims are bound by their stipulations” (3, 11).

Applicability of General and Unrestricted Proofs to Emerging Contracts

The most fundamental argument of this theory is the inclusion of emerging contracts within the scope of general and unrestricted Sharia evidences. The principal textual support invoked for this claim is the Qur’anic command to fulfill contracts, which—according to many—covers “all agreements that are customarily recognized as contracts,” whether traditional or newly developed. From this perspective, the legislator has required fidelity to the genus of contract, rather than to a limited set of historically identified instances. In addition, statements of leading jurists in exegetical and jurisprudential works have been used to argue that general texts have been applied beyond historically common cases, which supports extending such general proofs to modern transactions. In short, proponents argue that Sharia did not restrict these general evidences to specific contractual forms but rather endorsed customary understandings, except where a specific prohibition exists; therefore, there is no impeditory proof negating the validity and enforceability of newly emerging contracts (4).

The Presumption of Permissibility

The presumption of permissibility, or the “presumption of validity of transactions,” is regarded as a shared principle among Sunni jurists. According to this principle, any transaction for which Sharia contains no explicit ruling is lawful and valid. In Hanafi discourse, this is expressed as the proposition that where the legislator has not specified a prohibition, the default is validity and permissibility. Functionally, this operates as the inverse of a prohibition-based approach: unless a definitive proof establishes the invalidity of a contract—such as an explicit text declaring it unlawful—the contract is deemed permissible. Many Sunni jurists have relied upon this presumption to treat new contracts as intrinsically lawful, and similar reasoning has also appeared in segments of Imami

jurisprudence in relation to stipulations and related matters. On this basis, if a contract is customarily regarded as legitimate and does not contradict a definitive text, it is treated as ratified, and the obligation of performance extends to it (11).

The Role of Custom and Social Interests

The role of *'urf* (custom) and social interests in expanding contractual forms is another major foundation supporting the non-enumerative nature of contracts. Hanafi jurisprudence, in particular, has historically emphasized public interest and customary commercial practice through an adaptive approach to legal rulings. This means that where custom constructs a rational transactional pattern and it does not conflict with a definitive Sharia text, it is recognized as legitimate. Accordingly, it has been argued that the authority of custom and the interests of people constitute a significant doctrinal basis in Hanafi jurisprudence, with observable effects in juristic literature. The flexibility of Hanafi jurisprudence in accommodating diverse human relations is said to have facilitated recognition of emerging contracts in a manner consistent with the principle of non-enumerative contracts. Many contemporary transactions, moreover, arise within the sphere of custom before being reflected in statutory law or classical juristic categorization, and practical experience may demonstrate their legitimacy. In this way, custom—serving as an operative guide for many matters—becomes a source of legal and juristic validation for modern contracts (6).

Reliance on the Traditions “People Have Dominion Over Their Property” and “Muslims Are Bound by Their Stipulations”

Among the broadly framed traditions frequently invoked to establish the legitimacy of modern transactions are the hadith “people have dominion over their property” and the hadith “Muslims are bound by their stipulations.” Jurists who affirm the non-enumerative nature of contracts argue that these traditions confirm the owner’s dominion over property and, within general conditions, support the legitimacy of any agreement customarily recognized as a transaction. For example, it has been reported that Shaykh Ansari, in criticizing reliance on the dominion tradition, maintained that it establishes only dominion over property rather than dominion over Sharia rules governing property. In response, others argue that the tradition’s language is general and that the legislator intended to establish a general rule of proprietary dominion; accordingly, restricting it in the suggested manner is contestable, and the tradition should be read in an unrestricted sense (13).

With respect to the hadith “Muslims are bound by their stipulations,” two main approaches appear. Some jurists have treated “initial stipulations” as outside the hadith’s scope on the ground that the term “stipulations” does not apply to them. Others, including later authorities, interpret “stipulation” as any binding commitment and thus consider the hadith inclusive of all types of stipulations, whether initial or incorporated within a contract. From this view, any contract that possesses the ordinary effects of an agreement may fall within the hadith’s scope. In addition, a customary solution has been suggested: even if the term “stipulation” is not linguistically applied to initial stipulations, one may refer to customary reason to treat both explicit and implicit undertakings as belonging to a single category of binding commitments, and accordingly treat all of them as enforceable (12).

In summary, this theory maintains that the legislator has instituted a general presumption of validity regarding contracts and stipulations and regards any agreement consistent with general requirements—such as absence of uncertainty in the subject matter and absence of contradiction with the essence of the contract—as lawful and binding. Broad traditions such as “people have dominion over their property” and “Muslims are bound by their

stipulations” are also taken as evidence supporting the obligation to honor customary agreements and valid contractual conditions (3, 13).

A Comparative Study of the Principle of the Non-Enumerative Nature of Contracts

Commonalities Among the Iranian Legal System, the Afghan Legal System, and Sunni Jurisprudence

A comparative analysis of the Iranian and Afghan legal systems (in light of Islamic jurisprudence) indicates that despite structural and sectarian differences, both systems share fundamental foundations in their treatment of the principle of the non-enumerative nature of contracts. In both countries, contract is understood as a legal institution whose legitimacy must be compatible with Sharia norms. However, this connection to jurisprudence does not entail acceptance of enumerative contracts; rather, under the prevailing approach in both systems, Islamic jurisprudence establishes general rules and guiding principles and leaves the determination of contractual forms to customary rationality and the parties’ will. From a jurisprudential standpoint, this shared understanding means that Sharia concepts such as “fulfillment of contract,” “contract,” and “trade” have a broad and customary meaning and include any legitimate binding agreement. Accordingly, in both systems the default is validity of contracts, and invalidity or non-enforceability requires specific proof; thus, the primary response to modern contracts is not denial or rejection, but analysis and justification within the framework of general legal principles (6, 8).

In both systems, the nature of contract is defined on the basis of mutual consent and the intention to create legal effects, rather than mere conformity with pre-established forms. This shared approach conditions contractual validity upon lawful consent and the parties’ intention; hence, the principle of consent plays a central role in justifying the non-enumerative nature of contracts and facilitates recognition of agreements that do not fit within traditional named contracts but nonetheless satisfy the parties’ legitimate needs. Moreover, both systems accept contractual freedom in a qualified manner, subject to defined constraints. That is, freedom grounded in the non-enumerative nature of contracts is accompanied by limitations such as non-contradiction with mandatory Sharia rules, binding statutes, public order, and good morals. These constraints indicate that the principle is applied to achieve contractual justice and protect public interests, not merely to secure individual autonomy (5, 16).

Another common feature is the prominent role of rational custom (*urf*) in interpreting and supplementing contracts. In both systems, custom is accepted not only as a secondary source but as a primary instrument for understanding contractual concepts and identifying instances of contract. This acceptance is especially significant for emerging contracts, because custom—unlike limited texts—can adapt to rapid economic and social transformations. Accordingly, both legal systems, by relying on custom, have moved away from rigidity toward traditional forms and have adapted legal rules to changing social realities (6).

In addition, a shared feature appears in the legislative philosophy of both countries: lawmakers have drafted general contractual rules in a manner capable of extending to diverse contractual types. This legislative approach indicates that both lawmakers—though with varying degrees of explicitness—implicitly accept the idea that contractual relations cannot be confined within fixed and limited forms, and that the law must be capable of responding to evolving societal needs. This similarity is particularly important in Afghanistan, as it suggests that the Afghan Civil Code contains the capacity to further develop the principle of the non-enumerative nature of contracts, even if it requires stronger articulation and reinforcement (5).

In conclusion, these shared features indicate that the principle of the non-enumerative nature of contracts in both Iran and Afghanistan is not an exception or an imported approach; rather, it is the logical result of a shared understanding of Islamic jurisprudence and the social function of contract law. These commonalities provide an appropriate theoretical basis for legal dialogue between the two systems and enable mutual benefit from legislative and judicial experiences.

Points of Divergence in the Acceptance and Application of the Principle of the Non-Enumerative Nature of Contracts

Despite foundational commonalities, there are significant differences in how the principle of the non-enumerative nature of contracts is accepted and operationalized in Iran and Afghanistan. The most important difference concerns the degree of statutory explicitness supporting the principle. In the Iranian legal system, freedom of contract is expressly stated in Article 10 of the Civil Code, and private agreements are deemed enforceable so long as they do not contradict explicit law (8). This explicit statutory recognition has entrenched the principle of the non-enumerative nature of contracts as a fundamental doctrine of private law and has clarified the permissible scope of judicial interpretation in this area (7).

By contrast, in Afghanistan, although acceptance of the principle can be inferred from the general rules of contract, the absence of a clear and independent provision in the Civil Code has meant that the principle appears with less textual clarity and doctrinal coherence. This legislative difference has tangible implications for legal certainty and the predictability of judicial outcomes, because reliance on inference from dispersed rules may produce greater interpretive variability (5, 6).

Another divergence appears in judicial practice. In Iran, Article 10 enables courts to invoke freedom of contract directly and has facilitated the gradual reception of emerging contracts in case-law. Although a tendency still exists in practice to analyze some agreements through the lens of traditional named contracts, the governing interpretive approach increasingly emphasizes substantive analysis and identification of legal effects independently of a specific juristic label (8). In Afghanistan, judicial practice often proceeds more cautiously and, in many instances, seeks to fit agreements into recognized traditional forms. This conservative orientation has meant that, notwithstanding theoretical acceptance of the principle of non-enumerative contracts, practical implementation may encounter constraints (6).

A further divergence concerns the level of development in legal scholarship and theory-building. In Iran, extensive research over recent decades has addressed freedom of contract, the nature of unnamed contracts, and the relationship between jurisprudence and modern law. This scholarly literature has clarified the jurisprudential foundations of the principle and has provided analytical frameworks for dealing with complex and novel contractual structures (1, 7). In Afghanistan, relevant legal scholarship is more limited and less systematized, which has contributed to the principle being raised less frequently as an independent analytical doctrine. Institutional differences also matter: the relative coherence of Iran's judicial system and the presence of more structured educational and research mechanisms in private law have supported more coordinated patterns of practice, whereas Afghanistan faces constraints such as plural legal sources, limited specialized training, and the influence of non-legal conditions that complicate consistent implementation of general private-law principles (5, 6).

Ultimately, these differences in approaching the principle of the non-enumerative nature of contracts do not arise from a conflict in jurisprudential foundations, but rather from differences in the extent to which the principle has been institutionalized within the legal structure. In Iran, statutory explicitness and theoretical development have elevated

the principle into an operational rule, whereas in Afghanistan it largely remains at the level of doctrinal inference and requires stronger legislative articulation and interpretive reinforcement (5, 8). This divergence highlights the need to reconsider legislative drafting and interpretive approaches in contract law and indicates that full realization of the principle depends on alignment among jurisprudential foundations, statutory text, and judicial practice.

Legal and Practical Consequences of the Differences

The existing differences in treating the principle of the non-enumerative nature of contracts have deep and wide-ranging consequences in private law. One of the first consequences is observable at the level of legal certainty. Legal certainty requires predictability regarding the legal effects of actions and agreements; thus, in systems where the principle is explicitly entrenched in statutory law, parties have greater confidence in the validity of emerging contracts (8). By contrast, when the principle is derived only through inference from scattered rules, predictability decreases and doubts about enforceability of novel contracts increase, which may lead to excessive caution, reduced willingness to conclude innovative agreements, and a shift toward informal arrangements (6).

Another important consequence concerns judicial performance. The principle of non-enumerative contracts is inherently interpretive and *ijtihadi*, and its effective application requires judges to move beyond traditional forms and conduct a substantive analysis of the agreement. Where the principle is explicitly stated in statutory law, judges possess stronger legal support for substantive interpretation and can identify legal effects by relying on the parties' shared intention (8). In systems lacking such explicit textual grounding, judges are more likely to proceed with caution and tend to analyze agreements within the framework of traditional named contracts. This constraint not only narrows judicial discretion but also increases the likelihood of inconsistent judgments and fragmented case-law (5, 6).

From the standpoint of the function of contract law, differences in implementing the principle directly affect the flexibility of this legal domain. The more fully the principle is institutionalized, the more dynamic contract law becomes and the greater its capacity to adapt to economic, technological, and social transformations. Conversely, practical restriction of the principle leads to legal rigidity and a growing gap between law and social realities. The principle also serves as a bridge between Islamic jurisprudence and modern law by demonstrating that jurisprudence, while committed to authoritative texts, has the capacity to accommodate change. When this principle is not properly reflected in positive law, an impression may arise that jurisprudence obstructs legal innovation, even though such a perception is not supported by jurisprudential foundations (3, 11).

The economic and commercial implications are likewise significant. Contemporary contracts—especially in financial, service, and technology-driven sectors—often cannot be accommodated within traditional contract forms and require substantive analysis. The more flexible a legal system is in accepting such contracts, the more conducive it becomes to economic development; by contrast, restrictive reception of emerging contracts can hinder growth and constrain the expansion of new markets. These effects show that the principle of non-enumerative contracts is not merely theoretical but plays a decisive role in the economic effectiveness of contract law (15).

Moreover, divergence in interpreting and accepting the principle influences the unity or fragmentation of judicial practice. In systems that explicitly recognize the principle, more coherent patterns of case-law can form, whereas in the absence of a clear basis each judge may adopt a distinct approach, producing inconsistent outcomes and reducing public confidence in the judiciary. Differences in handling the principle also carry legislative-policy

consequences: full acceptance of the principle encourages principle-based, flexible legislation and helps avoid overly detailed and fragmented regulatory drafting (7).

The Role of the Principle in Civil Proceedings and Contract Interpretation

The function of the principle of the non-enumerative nature of contracts in civil proceedings and contractual interpretation is particularly important. In litigation, the principle enables courts to move beyond formalistic categorization and to focus on the substantive reality of agreements. Many civil disputes revolve around whether an agreement fits within one of the named contracts; a form-centered approach often concludes that an agreement not fully matching any recognized contract is invalid. The principle of non-enumerative contracts challenges this approach by shifting analysis from the “contract label” to the “content and shared intention of the parties.” On this basis, judges need not force the parties’ agreement into predefined categories; rather, they may recognize it as a valid unnamed contract, provided that the essential requirements of validity—such as consent and lawful subject matter—are satisfied (8). This shift significantly affects judicial reasoning and brings many real-world relationships that previously lacked legal protection within the scope of enforceable law.

Acceptance of the principle strengthens the judge’s role as a substantive analyst of contractual relations. In this framework, the judge must examine the core elements of the agreement, including the parties’ shared intention, the economic or social purpose of the transaction, the governing custom, and the expected legal effects. This approach moves adjudication away from mechanical application and increases its dynamism. This is especially relevant in Afghanistan, where the Civil Code relies more heavily on general principles and avoids detailed regulation of every contractual type; in such a system, the judge’s interpretive role becomes even more significant, because reliance on general contract principles and the “spirit” of the law can fill legislative gaps and prevent injustice arising from silence or ambiguity (5, 6). The principle of non-enumerative contracts provides a conceptual tool for this form of judicial inference.

Another major challenge in contemporary litigation concerns disputes arising from emerging contracts that respond to new economic and social needs and often lack a clear legal pedigree. Without invoking the principle of non-enumerative contracts, a judge may either disregard such agreements or forcibly classify them under a named contract, which often distorts their nature. The principle enables independent recognition of these agreements and allows judges to assess their validity and effects without compelled alignment with traditional labels. This is particularly important in Afghanistan, where the economic structure combines traditional and modern relations, and agreements often blend conventional and novel elements—making interpretation difficult without the principle’s analytical framework (6).

The principle also plays a central role in ensuring contractual justice in adjudication. Contractual justice requires that rational and lawful agreements be protected and that they not be invalidated for purely formal reasons. The principle allows judges to evaluate obligations and legitimate expectations fairly, rather than focusing on formal defects or the absence of a specific statutory label. In many disputes, one party seeks to evade performance by arguing that the agreement does not conform to recognized legal forms; acceptance of the principle prevents such opportunistic reliance on formal gaps and transforms civil adjudication into an instrument for protecting good faith and mutual reliance in contractual relations (5).

In interpretation and supplementation of contracts, the principle has a key function as well. Contract interpretation aims to identify the parties’ true intention; the principle permits analysis of the agreement as an autonomous

arrangement whose provisions should be interpreted in light of the parties' shared intention, rather than solely through the vocabulary and traditional titles of named contracts. It allows the judge to treat the agreement as a coherent whole and, by using transactional custom and the logic of the relationship, resolve ambiguities so that the contract is not rendered ineffective due to silence or generality. The principle also provides a basis for supplementing incomplete contracts: where the agreement is silent, the judge may fill gaps by referring to the custom of similar transactions and general rules of obligations. This approach is vital in Afghanistan, where many agreements are concluded outside formal frameworks; without this principle, a substantial portion of real social relations could remain without legal protection (6).

In addition, the principle prevents the imposition of unsuitable contractual categories on agreements. Under this approach, the interpreter is not compelled to impose all effects and rules of a named contract onto an agreement that only superficially resembles it; instead, the interpreter can identify the agreement's distinctive elements and provide an interpretation consistent with the reality of the relationship. This is particularly decisive for mixed or novel contracts in achieving contractual justice. Overall, the principle of the non-enumerative nature of contracts functions in civil litigation as a tool for moving beyond rigid formalism and for enabling purposive, content-based interpretation, thereby contributing substantially to the effectiveness and fairness of the judicial system (8).

Conclusion

The examination of the principle of the non-enumerative nature of contracts in light of Islamic jurisprudence and the legal systems of Iran and Afghanistan demonstrates that this principle, contrary to restrictive traditional interpretations, rests upon solid religious and rational foundations. Although certain historical juristic views emphasized the enumerative nature of contracts and required every agreement to conform to predefined religious forms, analysis of jurisprudential evidence and the evolution of legal thought indicates that the dominant position among Imami jurists and the majority of Sunni scholars supports the non-enumerative nature of contracts. This approach, grounded in general religious principles such as the obligation to fulfill contracts, adherence to contractual stipulations, the doctrine of dominion over property, and the presumption of permissibility in transactions, establishes the validity and enforceability of rational and lawful agreements as the default rule, while invalidity requires specific proof.

The comparative study of the Iranian and Afghan legal systems further shows that both systems, despite differing levels of explicit recognition and institutional development, generally accept the principle of the non-enumerative nature of contracts. In Iranian law, the explicit recognition of contractual freedom in Article 10 of the Civil Code has firmly established this principle as a foundational rule of private law and has enabled the acceptance of unnamed contracts and emerging contractual forms. In Afghan law, although no provision equivalent to Article 10 exists, the broad definition of contract, the general rules governing contractual relations, and the influence of Hanafi jurisprudence collectively support implicit recognition of the same principle. Nevertheless, the absence of explicit statutory formulation and the relatively cautious judicial practice have meant that the principle in Afghanistan remains largely theoretical and less frequently applied as an operational legal rule.

The overall conclusion of the study is that the principle of the non-enumerative nature of contracts not only aligns with the foundations of Islamic jurisprudence but also functions as an effective mechanism for achieving contractual justice, enhancing legal certainty, and enabling contract law to adapt to economic and social transformations. Strengthening this principle through theoretical clarification, legislative articulation, and development of judicial

practice can play a significant role in enhancing the dynamism of Islamic legal systems and ensuring more effective protection of the parties' lawful intentions and emerging contractual arrangements, provided that its application remains within the framework of mandatory rules, public order, and good morals.

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Authors' Contributions

All authors equally contributed to this study.

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Transparency of Data

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References

1. Khatibi M. Modern contracts from the perspective of Imami jurisprudence. *Islam and Social Studies*. 2024;31(119):7-39.
2. Parvar A. Jurisprudential investigation of the principle governing contracts and agreements: Freedom or restriction? *Journal of the Velayi System*. 2020;2(3):79-101.
3. Mohaghegh Damad SM. *Rules of Jurisprudence: Civil Section*: Tehran: Islamic Sciences Publishing; 1989.
4. Khoei SAM, Tohidi MA. *The Earnings: Lamp of Jurisprudence (Al-Makasib: Misbah al-Feqahat)*: Qom: Institute for the Revival of Imam al-Khoei's Works; 2009.
5. Ghanavati J, Maghrebi MT, Yasrebi SAM. Contractual justice in Afghan statutory law. *Kateb Quarterly*. 2020;2(8):29-44.
6. Rahimi MI. Investigation of the option of breach of condition in Afghan jurisprudence and law. *Divan (International Journal of Scientific Research)*. 2024;5(2):63-79.
7. Kazemi M. *Civil Law or Persian Jurisprudence: An inquiry into the sources and structure of the Iranian Civil Code*. *Journal of Private Law Research*. 2020;8(29):5-26.
8. Katouzian N. *Civil Law: General rules of contracts*. 7th ed: Tehran: Enteshar Publishing Co.; 2006.
9. Hatamikia M. Investigating the theory of the restrictive nature of contracts. *Ara Journal*. 2019(13):19-30.
10. Bahadori M, Jahangiri M. Investigating the evidence for the restrictive nature of transactions. *Mesbah al-Feqahat*. 2019;1(2):53-74.
11. Sadr SMB. *Researches in the Science of Principles*1996.
12. Imam Khomeini SR. *Inquiries*: Tehran: Institute for Compilation and Publication of Imam Khomeini's Works; 2013.

13. Ansari M. The Earnings: Qom: World Congress of Sheikh Azam Ansari; 1994.
14. Saadi HA, Mirzakhani R. The validity of life insurance as an independent jurisprudential contract. *Insurance Research Journal*. 2013;28(3):79-98.
15. Soleimanpour MJ. New financial contracts in Islam. *Islamic Economics*. 2010(11).
16. Mirzanejad Jouybari A. A discussion on the source of public order in Iranian contract law with a comparative study in American, English, and French law. *Comparative Law Research*. 2018;22(1):155-84.
17. Dadmarzi SM. The concept of contract in civil law. *Journal of Philosophical-Theological Research*. 2001;27(4):1-18.
18. Dabiri SA, Heydari M, editors. Investigating the success of specified contracts in Imami jurisprudence. *Proceedings of the 3rd National Conference on Humanities and Development (Shiraz)*; 2022.