A Comparative Examination of the Nature and Instances of Unfair Terms in European–American Law, Islamic Jurisprudence, and Iranian Law

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Abstract

Despite the emphasis of Islamic jurisprudential and religious teachings on justice and fairness—and, consequently, the emphasis placed on this matter within the legal system as its foundation, source, and objective—the concept of unfair terms in Islamic jurisprudence, and by extension in Iranian law, remains characterized by ambiguity and lack of clarity. This stands in contrast to European legal systems, where this legal institution is a well-recognized concept and numerous regulations have been enacted with the aim of preventing and combating such terms in contracts. Accordingly, given the existing ambiguity in jurisprudential sources concerning the nature and effects of unfair terms, as well as the inadequacy of statutory law in addressing this issue, it appears that the appropriate solution must be sought within the general principles of contract law. In this regard, recourse to the principle of justice and fairness is considered an appropriate approach, as this principle is capable of establishing justice in the most effective manner, ensuring that neither party to the transaction is subjected to injustice or undue hardship.

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1. Introduction

The inclination toward living freely and the tendency toward equality and independence lead human beings to resist external constraints. This natural resistance to external impositions gives rise to a respected institution and establishes the principle of freedom, enabling individuals to organize their private-law relations—namely contracts and their terms—according to their preferred manner, and to construct a form of fairness that they themselves deem appropriate to govern their social and legal relations. The objective and rationale of the legislator in recognizing contracts lies in preserving and adhering to their conditions, contents, and legal effects, and in commercial affairs and economic exchanges, loyalty to promises and covenants constitutes an indispensable requirement. Consequently, the principle of binding force (pacta sunt servanda) plays an effective and unavoidable role in establishing stability, security, and order in the legal relations of contractual parties. No individual or authority, including the legislator, denies this principle or the obligation to respect private and contractual relations, nor is any

entitled to interfere with or alter them; rather, observance of this principle is necessary in order to respect freedom of will in contracts and to maintain a balance of fairness. Fairness is a concept that has existed since the dawn of humanity and has long been discussed in various fields of knowledge, particularly ethics and law. Fairness bears two meanings: one refers to equality, and the other to the judgment of conscience and morality (Mazaheri & Al-e-Eshaq Khoeni, 2012).

According to some scholars, fairness constitutes a set of rules that exist alongside the primary rules of law; in other words, reliance on superior and overarching moral principles may abrogate or qualify legal rules (Katouzian, 2011).

Studies indicate that, unfortunately, in Iranian law, unfair or unjust terms—despite the considerable attention paid to justice and fairness in Islamic law—remain vague and underdeveloped, and no comprehensive and systematic discussion of them exists. Nevertheless, scattered discussions can be found in various sources. As observed, the Iranian legislator has, in certain instances, opposed such terms and, in expressing this opposition, has at times employed the term "unfair" and at other times "unjust," while in reality pursuing a single objective: protecting the weaker party to the contract who, due to necessity and under the influence of particular circumstances, has agreed to terms that are unjustly in favor of the stronger party. Despite this approach, the legislator has neither defined such terms nor specified their instances. On the other hand, although in European legal systems significant measures have been taken to protect consumers, the difficulty of identifying imbalances between rights and obligations, as well as the need to avoid ambiguity arising from insufficient conceptual and practical clarity regarding unfairness—which may lead to divergent judicial opinions and discretionary applications—has prompted legislators, in certain laws and directives, to enumerate non-exhaustive lists of terms deemed unfair in order to facilitate their identification and prevent potential disputes. In this regard, Directive 93/13 of the European Economic Community on unfair terms in consumer contracts obliges Member States to adopt and implement its provisions in their domestic legislation (Lando & Sharifi, 2001). Given this context, a jurisprudential examination of such terms, undertaken independently of broad concepts such as justice and fairness, appears necessary in order to contribute to the improvement of economic order.

Opposition to unjust or unfair contractual terms is supported by philosophical, ethical, jurisprudential, economic, and social foundations and justifications (Amini et al., 2013).

The principle of autonomy of will, on the one hand, is rooted in theoretical foundations and debates within the philosophy of law, and on the other hand, it entails numerous practical consequences and applications—particularly in the contemporary era, in which the expansion of economic relations and specific commercial needs have left no alternative but transformation and innovation in contractual models at both national and international levels. Examining the nature of this principle in each legal system, its historical development, and the determination of its instances constitute three central axes that are addressed comparatively in this article. Accordingly, the present study, while examining instances of unfair terms in Islamic jurisprudence and Iranian law, seeks—through analysis of unfair contractual terms in European law, Islamic jurisprudence, and Iranian law—to pave the way for reform and enhancement of citizens' rights within such contracts.

2. Research Method:

In the present research, an effort is made to adopt a legal-descriptive approach combined with content analysis based on logical legal rules, with the aim of reaching the most sound conclusions, clarifying existing ambiguities, and identifying and presenting the true position of the subject matter. Furthermore, the author endeavors to ensure that, while the presentation of the research findings retains a theoretical dimension, it also possesses practical and applied relevance. Accordingly, in the process of compilation and data collection, an analytical method and library-based sources have been employed. Despite the limited resources available on this topic, the views of jurists—both domestic and foreign—relevant to the subject have been gathered, and, to the extent possible, their books and articles have been consulted. In addition, prevailing practical approaches and practices have been examined and presented where relevant.

3. Research Background:

Mohammad Jafar Jafari Langroudi, in his work *General Philosophy of Law: The Theory of Balance Based on the Primacy of Action*, states that if the expressions of the contracting parties are silent or ambiguous and the only solution lies in justice

and fairness, the court must render its judgment on the basis of justice and fairness, relying on constitutional and statutory principles (Jafari Langroudi, 1975).

Mehdi Alizadeh, in his work *Foundations of the Principle of Good Faith and Fair Dealing in Contracts*, writes that although Shiʿi jurisprudence and the legal system respect the will and consent of contractual parties as a primary principle, they have, through clarification of technical concepts and detailed elaboration, enacted mandatory rules to prevent excessive demands by one or more parties beyond the bounds of moderation, customary practice, and law. Through this approach, the system has sought to block avenues for those who attempt, through deceptive or unfair conduct, to undermine honesty, integrity, and justice in transactions, and to prevent disruption of contractual security and social tranquility (Alizadeh, 2005).

Abdolhossein Shiravi, in *Preliminary Agreements in Common Law with Emphasis on English and American Law*, observes that although since the seventeenth century the issue of unconscionable and conscience-offending contracts has been مطرح in English law and courts of equity have, in specific cases such as assignments of expectant inheritance, refused enforcement on grounds of unfairness, the doctrine of unfair and unconscionable terms has not achieved general application in English law (Shiravi, 2002).

In a contemporary legal lexicon, it is stated that the domain of the principle of justice and fairness lies in situations where the human sense of balance in rights is activated; in such cases, the judgment of reason and conscience forms the rule of justice and fairness, encompassing equality before the law and respect for the rights of others, as well as moral concepts derived from conscience and innate disposition that may not be explicitly reflected in positive law (Asghari, 2009).

In analyses of freedom of contract, it has been argued that a contract may be considered unfair where one party, by virtue of superior conditions and resources, imposes its will regarding the terms and characteristics of the contract upon the other party, such that the weaker party has no real role in shaping the contractual content and is compelled to submit to the stronger party's economic demands (Bennett Marrow, 2000).

In the law of contract within the common law tradition, courts have sought, through contractual interpretation and reliance on doctrines addressing excessive and unfair terms, to modify or refuse enforcement of such terms. Where a term is ambiguous in scope or content, it is interpreted against the drafter and in favor of the other party; where certain terms in adhesion contracts are excessively harsh or unfair, courts may decline to enforce them. Although this doctrine has attracted attention since the seventeenth century, it has been applied only in limited circumstances, with legislative intervention largely addressing the need for its broader application (Guest, 1994).

In *Chitty on Contracts*, it is noted that a loan agreement may be deemed excessive and unfair if the debtor or the debtor's relatives are required to pay an exorbitant amount, or if the contractual terms clearly violate principles of fair dealing. In determining whether a payment is excessive or whether fundamental principles of fairness have been breached, courts consider not only external and objective factors—such as prevailing interest rates at the time of contract formation, the level of risk assumed by the creditor, and related agreements—but also personal factors, including the debtor's age, experience, commercial capacity, physical and mental condition, and economic circumstances and financial pressures at the time of contracting (Guest, 1994).

4. The Nature and Instances of Unfair Terms in American and European Law

4.1. The Nature of Unfair Terms in American and European Law:

Ordinarily, fairness relates to the entirety of a legal act, and what is ultimately regarded as contrary to fairness is the legal act as a whole. If an act is considered unfair according to customary standards, such unfairness alone does not render it defective or legally invalid unless a specific legal sanction has been prescribed for it, such as rescission on the ground of gross disparity. An "unfair term," however, occupies a distinct position. While it may extend its unfairness to the entire contract, where a legal sanction exists, that sanction is, as a matter of principle, confined to the term itself and to the removal of its adverse effects. In other words, an act contrary to fairness lacks a precise legal definition or criterion and is ultimately distinguished through customary or even moral judgment; by contrast, from the perspective of the present study, an unfair term possesses a specific legal meaning, a narrow definition, and calls for a determinate legal consequence. This distinction is more clearly articulated

in common law systems, where "fairness" is equated with *equity*, which itself encompasses more than a dozen subsidiary rules and principles (Adel, 2010), whereas the "unfair term" is discussed under the labels *unfair term* and sometimes *harsh clause*. An examination of common law reveals that, despite their interrelation, these concepts remain analytically distinct.

The theoretical foundation of the doctrine of unfair and unconscionable terms in American law can be traced back to English common law. An unfair and unconscionable contract was traditionally understood as one that, on the one hand, no person of sound conscience who had not been subjected to deception would agree to undertake, and, on the other hand, no fair and honest person would propose. This understanding reflects the classical equitable conception of unconscionability that later informed American jurisprudence (Bennett Marrow, 2000).

The Uniform Commercial Code of the United States, in Article 2-302, defines a contract or a contractual term as unconscionable by providing that if a court, as a matter of law, finds a contract or any clause thereof to have been unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable term, or limit the application of such term so as to avoid any unconscionable result (McLaughlin, 1994).

Under the Australian Consumer Law (ACL), unfair terms are those that cause a significant imbalance in the parties' rights and obligations arising under the contract, are not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and would cause detriment—whether financial or non-financial—to the other party if relied upon or applied (Paterson, 2009).

From Paterson's perspective, a dependent unfair term is one that is intertwined with other provisions and essential elements of the contract. Due to its close connection and integration with the subject matter and other contractual terms, such a clause cannot be easily disregarded or severed, even though it is the very source of unfairness. Given the interdependence of the term with the remaining contractual provisions, the assessment of unfairness should not be limited to the clause in isolation; rather, the entire contract must be taken into account when determining whether a particular term is unfair (Paterson, 2009).

By way of example, a company may enter into a contract with a manufacturing firm for the supply of equipment and, while stipulating the price, include a term providing that if the quality of the equipment fails to meet the approval of the company's experts—even after installation—not only shall the price of the delivered equipment be reduced to one-tenth of the original amount, but such reduction shall also apply to future payments. In this example, the clause forms part of the contractual content and subject matter and directly influences the determination of the final contract price.

4.2. Instances of Unfair Terms in European–American Law:

In common law systems, contracts and terms are regarded as unfair where they are contrary to good faith in contracting and where there is a manifest imbalance between the parties' rights and obligations to the detriment of the consumer.

Due to divergences among the laws of European Union Member States regarding the identification of unfair terms in consumer contracts, the Union adopted Directive 93/13/EEC on **5 April 1993** in order to protect consumers against unfair terms (Lando & Sharifi, 2001).

The preamble to this Directive also emphasizes the need to eliminate unfair terms from contracts concluded between sellers and providers of goods and services and their consumers. Insurance contracts concluded between insurers and policyholders likewise fall within the scope of this Directive. In accordance with the Directive, terms in insurance contracts that are specifically negotiated by the parties are not treated as unfair terms. By contrast, any term that is not individually negotiated in an insurance contract will be regarded as unfair if it is contrary to the requirement of good faith and causes an imbalance in the rights and obligations arising from the contract (Lando & Sharifi, 2001).

From a comparative perspective, Article 3(1) of Directive 93/13/EEC of the Council of the European Union considers a term unfair where it has not been individually negotiated, provided that it is contrary to good faith and causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Pursuant to Article 3(2), pre-drafted contracts and standard terms—where the consumer has no real possibility of influencing the content—are treated as not having been negotiated. Moreover, negotiation of a single specific term is not sufficient to treat the entire contract as negotiated; rather, the overall process and context of negotiation must be considered (Lando & Sharifi, 2001).

For a term to be deemed unfair and excessively onerous, Article 3 of the Directive provides that:

- The term must not have been individually negotiated; that is, it must have been prepared in advance by the seller or supplier and presented to the consumer, who could not alter it because it was included in a standard-form contract.
- A serious imbalance must have arisen between the parties' contractual rights and obligations. The court must assess the rights and obligations generated by the contract and determine whether the balance has shifted materially against the consumer.
- The imbalance must operate to the detriment of the consumer.
- The term must be contrary to the requirement of good faith (Lando & Sharifi, 2001).

In addition to the foregoing, Article 4(1) of the Directive provides that, in determining whether a term is unfair, attention must be paid to the following: the nature of the goods or services forming the subject matter of the contract; the time of conclusion; all circumstances existing at the time of conclusion; other terms of the contract; and other contracts on which this contract depends or with which it is connected. Article 4(2) further provides that terms relating to the definition of the main subject matter of the contract or to the adequacy of price—so long as they are drafted in a clear manner—are not subject to this assessment. Accordingly, one cannot claim a term is unfair merely because the goods or services are expensive. Likewise, in insurance contracts, where clauses limiting liability in practice determine the premium the policyholder must pay to the insurer, such clauses should not be taken into account by the court (Guest, 1994).

In a general classification, certain instances of unfair and excessively onerous terms include: terms intended to exclude or limit the seller's or supplier's liability for personal injury or death resulting from an act or omission; terms excluding or limiting the seller's or supplier's liability even in cases of total or partial non-performance; contracts that bind the consumer to perform obligations while making the seller's or supplier's obligations dependent upon the seller's or supplier's sole discretion; terms allowing the seller to retain sums paid upon termination without providing an equivalent protection for the buyer; terms requiring the buyer to pay disproportionately high compensation upon non-performance; unilateral termination rights granted to the seller without granting corresponding rights to the buyer; terms allowing the seller to appropriate paid sums upon termination where goods are not delivered or services not provided; terms granting the seller an unlimited right of termination without giving reasonable prior notice; automatic renewal terms favoring the seller without a consumer request; terms binding the consumer to obligations whose real scope could not reasonably be understood prior to conclusion; terms granting the seller a unilateral right to alter contractual conditions without any valid reason recognized in the contract; terms allowing unilateral alteration of qualitative characteristics of the subject matter so that the seller may supply goods or services of a quality determined by the seller; price-determination clauses where the price was not known at the time of conclusion or—if known—where the seller retains the right to increase the price at delivery without granting the buyer a right of termination where the increase is substantial; terms granting the seller the authority to decide whether goods or services conform to contractual terms; terms granting the seller an exclusive right to change any contractual term; and terms limiting a service provider's obligations with respect to the acts of its agents (Shiravi, 2002).

Generally, it should be noted that although, since the seventeenth century, the issue of unfair and unconscionable contracts has been raised in European law—particularly in England—and courts of equity have, in specific cases such as assignments of expectant (future) inheritance, refused enforcement on the ground that such contracts were unfair and contrary to conscience, the doctrine of unfair and unconscionable terms did not become a general doctrine within European law (Shiravi, 2002).

In many situations where contracting parties are vulnerable persons requiring legal protection, courts have been authorized through statute to intervene in private contracts to restore justice. While legislative intervention reduced the perceived necessity for courts to construct a broad general rule within common law to address unfair terms, the slow judicial response to the need to confront unfair and unconscionable contracts—primarily emerging through standard-form contracts—led the legislature to intervene by statute and to permit courts, in specified cases, to refuse enforcement of certain unfair terms and to restore justice through contract adjustment or other mechanisms (Shiravi, 2002).

Until the early twentieth century, the doctrine of unfairness and excessive harshness did not undergo major development; thereafter, courts gradually considered themselves entitled to review contracts and, where they found terms unconscionable and excessively harsh, to set them aside (Bennett Marrow, 2000). As an illustration, in **1951**, the New York Appellate Division

stated that an unfair and unconscionable contract is one that, in light of the prevailing custom and practice at the time and place of conclusion, is so unreasonable and unusual that enforcement of its provisions cannot be ordered.

The adoption of the Uniform Commercial Code in various U.S. states caused the judicial practice developed for addressing harsh and unconscionable terms to become institutionalized in American law and to attain a broader, more general character. Article 2-302 of the Uniform Commercial Code—treated as a principal statutory provision in this area—provides that, as a matter of law, if a court finds that a contract or any term thereof was unconscionable at the time it was made, it may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable term, or limit the application of the unconscionable term so as to avoid an unconscionable result (McLaughlin, 1994).

Where it is alleged, or becomes apparent to the court, that a contract or some of its terms are harsh and unconscionable, the parties should ordinarily be given an opportunity to present evidence concerning the commercial setting, purpose, and effect of the contract, in order to assist the court in its decision-making (McLaughlin, 1994).

This provision sets out conditions for the realization of unfair and unconscionable terms, which are briefly examined here. The first condition is that the term must have been unconscionable at the time of contract formation. Accordingly, if a term becomes unfair and unconscionable only after the contract has been concluded due to the passage of time and changed circumstances, the matter falls outside the scope of the doctrine. Thus, a contract that was fair at the time of conclusion does not fall within the doctrine even if, at the execution stage, certain terms later become unfair and unconscionable. Unconscionability is treated as a question of law and is entrusted to the judge, whereas good faith is treated as a question of fact and its determination lies within the competence of the trier of fact. Because the determination of unconscionability is assigned to the judge, an appellate court may disagree with the trial court's conclusion and re-examine the case. This follows from the theoretical basis of unconscionability, which is rooted in equity (McLaughlin, 1994).

Under this provision, a court may, on its own initiative, examine the unconscionability of contractual terms even if no such request has been made. The court may allow the parties to present evidence concerning the commercial setting, purpose, and effect of the contract so that it can reach a more accurate decision. The aim is to disclose matters that may have remained hidden from the court and to enable a balanced assessment of whether the contract or its terms should be regarded as unconscionable. For example, a manufacturer of a device may argue that because the subject matter was produced to the buyer's specifications, substantial costs were incurred to manufacture the ordered items. In some cases, a term may appear unfair when examined in isolation; however, when assessed together with other contractual terms and the circumstances existing at the time of formation, it may become clear that the term was not excessively harsh or unfair (McLaughlin, 1994).

Overall, the adoption of the Uniform Commercial Code in different U.S. states led to the entrenchment of the doctrine in American law and gave it rule-like force. The Code authorized courts to set aside or modify unfair and excessively harsh terms, but left to the courts the determination of what counts as an unconscionable term (McLaughlin, 1994).

Finally, it should be noted that courts did not confine application of the doctrine to the scope of the Uniform Commercial Code; they extended it to other contracts, such as "marital financial agreements," "arbitration clauses," and "employment contracts." In **1979**, the California legislature incorporated the substance of Article 2-302 of the Uniform Commercial Code into Section 1670 of the California Civil Code, which applies to contracts generally. This legislation reflects the American system's inclination to extend the doctrine across all contracts (McLaughlin, 1994).

5. The Concept and Instances of Unjust Terms in Islamic Jurisprudence and Iranian Law

5.1. The Concept of an Unjust Term in Islamic Jurisprudence:

A specific term explicitly labeled "good faith and fair dealing," or a distinct principle or dedicated heading that addresses this subject comprehensively and exclusively, has not been customary in Shiʿi (Imami) jurisprudence or in the Iranian legal system. However, by examining juristic sources and the terms that are synonymous with—or opposed to—these concepts in contractual contexts, as well as certain thematic headings within those sources (particularly those related to the contract of sale), one may conclude that Shiʿi and Islamic legal thought has in fact engaged with good faith and fair dealing through other, closely related concepts. The principle that appears most proximate to good faith and fair dealing in Imami jurisprudence is the principle of justice (Alizadeh, 2005). Justice is regarded as a supra-religious principle against which the truth-claims of

religions are assessed, and as a general standard governing exchanges whose authoritative basis is affirmed through the Qur'an, traditions, consensus, and reason (Asghari, 2009).

5.2. Instances of an Unjust Term in Islamic Jurisprudence:

In the Qur'an, numerous verses emphasize the observance of justice: "Say: my Lord has commanded justice…" (al-Aʿrāf, verse 29); and "O you who believe, stand firmly for justice…" (al-Nisāʾ, verse 135). In many narrations as well, the Infallibles have recommended justice and fairness to the community. The Prophet of Islam (peace be upon him) is reported to have said: "One hour of acting justly is better than seventy years of worship, spent in night vigil and fasting by day." Elsewhere he is reported to have said: "The just shall, on the Day of Resurrection, be upon pulpits of light at the right hand of the Most Merciful… those who act justly in their judgments, within their families, and with respect to those under their authority." In another narration, he is reported to have said: "Guarantee for me six qualities and I guarantee for you Paradise… and be fair to people with respect to yourselves…" Rational proof for the obligation of justice functions as a general rule in Islamic jurisprudence and Islamic law; among the most self-evidently commendable matters to reason are justice and fairness, just as the most self-evidently blameworthy matters are oppression and injustice (Mahamed, 2002). The intended meaning is that the Sacred Lawgiver, across the totality of Islamic rulings—whether devotional or transactional—has observed both individual and social justice and has not legislated any oppressive rule, because oppression is incompatible with divine justice and wisdom. From this it follows that justice, in creation and in legislation, is a principle admitting no exception; in other words, justice is the spirit of divine rulings. Accordingly, exchanges and transactions must be grounded in justice. In Islamic jurisprudence, numerous instances can be found in which justice and fairness are observed with respect to obligations arising from contracts (Jafari Langroudi, 1975). In the works of jurists such as Shaykh Ansari, appeals to fairness are prominent—so much so that fairness appears almost as a fifth source of legal inference (Eskini, 1986). On this basis, justice and fairness constitute foundational principles of Islamic law; in the realm of transactions and contracts, the parties are obliged, in both formation and performance, to act in accordance with justice and fairness and to create a just agreement so as not to facilitate the destruction or deprivation of the other party's rights ("lā ḍarar wa lā ḍirār fī al-Islām"). Therefore, violation of the principle of justice and insertion of unjust terms into a contract may be treated as an instance of causing harm to others. Article 40 of the Constitution also reflects this important juristic maxim and prohibits harm.

5.3. Characteristics of an Unjust Term in Islamic Jurisprudence:

The question of justice has long been among the most significant concerns of humanity and the divine religions, to such an extent that the realization of equity and justice may be regarded as among the principal aims of prophetic missions and the legislation of divine law (al-Ḥadīd, verse 25). Justice is so consequential for the fate of nations and governments that even tyrannical regimes hypocritically attribute it to themselves and, to win public support, proclaim their objective as establishing equity and justice. In jurisprudence, "justice" has a technical meaning that differs from its lexical meaning in several respects.

First, whereas in ordinary language the opposite of justice is injustice and tyranny, in jurisprudence the functional opposite is often treated simply as oppression. Thus, if a ruler fully avoids oppression in practice but holds corrupt beliefs, he may be called "just" in a purely lexical sense, because lexicographers do not treat belief as essential to justice; yet from a juristic standpoint, he is not described as just. Consequently, there is a fundamental difference between justice in jurisprudence and justice in ordinary language.

Second, the term "ʿadl" and its derivatives appear frequently in the Qur'an and in many narrations. Therefore, even if the term did not acquire a distinct legal meaning in the Prophet's era, it developed a specialized usage among the religious community and moved beyond its lexical sense by the era of the Imams. In any case—whether juristic justice matches the lexical meaning or not, and whether one accepts a "legal truth" or "customary religious truth" for it—justice in jurisprudence has a specific definition, and jurists have attached conditions to it. Lexicographers often define justice as balance and soundness; however, determining which person is considered balanced and sound (i.e., just) in the Shariʿa, and which conditions contribute to that soundness, falls beyond the lexicographer's domain. For this reason, even if one does not treat the juristic concept as divergent from the lexical meaning, analysis of the juristic concept remains necessary. Accordingly, jurists describe the traits

of justice in different ways: some maintain that justice is a moral faculty (malaka) that causes a person to adhere to piety and propriety (Hilli, 1997). Others regard justice as external conduct—performing obligations and avoiding prohibitions—provided that such conduct proceeds from an entrenched moral faculty; in other words, justice is practical steadfastness on the path of the Shariʿa, on condition that it is grounded in a stable disposition. Narrations emphasizing trust in a person's religiosity and scrupulousness—such as the report of Abū ʿAlī al-Rāshid ("Do not pray except behind one whose religiosity you trust…")—also indicate that mere abstention from sins does not by itself generate confidence in a person's religiosity and piety unless one has knowledge or a well-founded presumption that a stable disposition to avoid sins exists. Abstention may occur due to lack of opportunity, personal motives, or coincidence; it gains probative value when it becomes a settled disposition. Narrations concerning the justice of witnesses include descriptions and titles that apply only to one who possesses such a disposition—such as chastity, concealment, uprightness, and self-restraint. Moreover, consensus holds that these traits are not additional conditions separate from justice for a witness; thus, they are understood as expressive of justice itself, which supports the view that justice is a moral faculty (Ansari, 1995). Many Imami jurists, in addition to abstaining from sin, also require observance of "muruwwa" (social propriety) for justice to be realized.

Among the principal proofs advanced for requiring muruwwa are: (1) reliance on a report attributed to ʿAbd Allāh b. Abī Yaʿfūr and, in particular, on the phrase "that you know them by concealment and chastity," from which some have inferred that justice entails avoiding conduct that is not socially fitting; and (2) reliance on a phrase such as "the proof of that is that he conceals all his faults," with the argument that "faults" includes both juristic and customary faults, so engaging in customary faults (conduct contrary to muruwwa) would negate the description of concealing all faults, and hence preclude a finding of justice (Mousavi Khoei, 1995). It has also been argued that interpreting "chastity" to include avoidance of all non-fitting conduct is not fully persuasive because most lexicographers define chastity as abstaining from what is unlawful, and in cases of doubt one should adhere to the minimum certain meaning. It is also problematic to treat minor sins as not undermining justice while treating permitted acts as undermining justice.

5.4. Instances of an Unjust Term in Iranian Law:

To examine instances of unjust terms in Iranian law, it is first necessary to consider the legislative background of the issue. Unfortunately, in Iranian law, unfairness-related discussions have not received the attention they warrant. By contrast, in European countries—especially within the common law sphere—given the importance of the topic, reliance has not been placed solely on customary rules, and legislative measures have been adopted. As a result, the struggle against unfair terms has evolved into an internationalized practice within European law (Katouzian, 2008). At the European Union level, several directives exist in this area, the most important of which is Directive 93/13/EEC. Members of the Union may, as appropriate, enact these minimum standards through legislation in line with their own policy preferences (Shiravi, 2002).

By searching the "Iranian Laws Database," several instruments can be identified in which "unfair" or "unjust" treatment is referenced; the most significant include the following.

1. The "Agreement on Air Transport between the Government of the Islamic Republic of Iran and the Government of Tunisia," in Article 8, which concerns competition issues.
2. The "Agreement on the Promotion and Reciprocal Protection of Investment between the Government of the Islamic Republic of Iran and the Government of the Republic of South Africa," Article 4 (repeated), paragraph 2, concerning unfair discrimination.
3. The "Treaty of Izmir," which refers to unfair trade policies.
4. The "Consumer Rights Protection Law," enacted on **7 October 2009**, by the Islamic Consultative Assembly, which in Article 1(5) treats the imposition of unjust conditions based on commercial custom as an element within the definition of "collusion," yet limits itself to criminalization and does not determine the civil-law status of such contracts.
5. The "Law on the Continuous Improvement of the Business Environment," enacted on **5 February 2012** by the Islamic Consultative Assembly, which in Article 23 obliges executive bodies—aiming at creating consent and "making contracts fair," including adhesion contracts—to use uniform forms when contracting with private and cooperative sector companies.

6. Provisions that explicitly refer to unfair terms are as follows.
7. The "Law Amending Certain Articles of the Law on the Economic, Social, and Cultural Development Program of the Islamic Republic of Iran and Implementing the General Policies of Article 44 of the Constitution," which pertains to commercial competition among suppliers of goods and services and does not include individual consumers; therefore, it falls outside the present discussion.
8. The "Electronic Commerce Law," which in Article 46 treats an unfair term to the detriment of the consumer as ineffective; in this respect, it provides a relatively new and distinct rule and is more worthy of adoption than the other instances. It remains to be examined whether, in combating unfair contractual terms at a general level, this provision can be used beyond its immediate statutory context.
9. It is also noteworthy that Article 179 of the Iranian Maritime Code, concerning salvage and assistance contracts, provides that where such contracts are concluded during a peril or under its influence and their conditions are deemed "unjust" by the court, the court may declare those terms void or modify them. In substance, this provision was enacted to prevent exploitation of necessity (Asghari, 2009). It is clear, however, that due to the specialized nature of maritime law and the exceptional conditions governing such contracts, its rule cannot readily be extended to other analogous cases. By contrast, Article 46 of the Electronic Commerce Law does not face the same limitations and therefore merits closer examination.
10. These findings further expose the weakness and insufficiency of domestic law in consumer protection and in combating "unfair terms." This deficiency reflects, in part, the legislator's critique of traditional—and also juristic—frameworks governing transactions and nominate contracts. Alongside social necessities, this gap underscores, first, the need for up-to-date legislation and, second, the challenge posed to jurists to address the legislative vacuum and to move in the direction of justice.

With respect to identifying instances of unjust terms in Iranian law, one of the most notable statutory sources concerning unjust contracts is, without doubt: (a) the Law on the Implementation of the General Policies of Article 44 of the Constitution of the Islamic Republic of Iran. Subparagraph "Ṭ" of Article 45 of this law identifies "abuse of a dominant economic position" as one of the anti-competitive practices covered by that provision—an issue that, prior to this, had mainly been addressed in certain Arabic legal frameworks under the heading of "unequal bargaining power." In this part of the Article, six instances are enumerated for abuse of such a dominant and superior position, one of which is the imposition of unjust contractual conditions.

(b) Under clause 5-1 of the Consumer Rights Protection Law enacted in **2009**, one component of a contract's unjust character is identified as the imposition of unjust terms, which is labeled as "collusion" and, pursuant to Article 8 of the same law, is assigned a criminal characterization. Notwithstanding the foregoing—and despite the fact that some recent legislative measures sporadically exhibit traces of the penetration of the theory of contractual unfairness into domestic law—none of these laws has articulated or explained the components of "unjustness" or what renders a contract unjust.

(c) One prominent statute in which the penetration of the theory of unjustness can be observed explicitly in Iranian law is the Maritime Code enacted in **1964**, which is a translation of the French Maritime Code. Article 178 of this law, in determining the criterion for remuneration for maritime salvage operations, treats the parties' agreement as the primary basis; if, for any reason, no agreement has been concluded, the amount of remuneration for the salvor or salvage agents shall be determined by the court. Article 179 further provides: "Any salvage agreement concluded during a peril or under its influence, the terms of which are deemed unjust by the court, may, at the request of either party, be annulled or modified by the court. In all cases, where it is proven that the consent of one of the parties was procured by trickery, fraud, or deception, or where the remuneration stipulated in the agreement is, in proportion to the services rendered, extraordinarily high or low, the court may, at the request of either party, modify the agreement or declare it void." From analysis of the foregoing provision, it follows that judicial intervention in a maritime salvage agreement requires a finding that the agreement is unjust; such a finding is conditioned upon: first, that the contract was concluded during a peril and under its influence; second, that the consent of one party was obtained through deception or fraud; third, that the imbalance between the counter-performances is grossly excessive; and fourth, that these conditions are established by the court.

(d) As noted earlier, the Iranian legislator, following the views of Imami jurists, has recognized rescission for gross disparity (khiyār al-ghabn) in the Civil Code as one ground for termination where the balance between the counter-performances has been disrupted. On the one hand, Articles 416 and 417 of the Civil Code attend to the disadvantaged party's knowledge of the

price of the subject matter of the transaction; on the other hand, they address equality and equilibrium between the counter-performances (Katouzian, 2011). A notable point regarding gross inequality between the counter-performances is that the benchmark for assessing such inequality is the time of contract formation; that is, equality must be evaluated at the moment of consent. In reality, no one knows the future, and each party expects future developments to work to their advantage—expecting, for example, that the asset purchased will increase in value and that one's gain-seeking impulses will be satisfied. Although the Iranian legislator has not expressly elaborated this matter in the Civil Code, what can be inferred from juristic opinions is that disparity is calculated at the time of the transaction (Ansari, 1995). Another condition for the realization of gross disparity is the disadvantaged party's lack of knowledge of the true value of the counter-performance; this basis is expressly reflected in the Civil Code. Under Article 418: "If the disadvantaged party, at the time of the transaction, knew the fair price, he shall not have the right of rescission." The predominant view among Imami jurists aligns with this. If the basis of rescission for disparity—or one of its bases—is treated as preventing harm to the disadvantaged party (the no-harm rule), then knowledge of the true price may, by virtue of the "assumption of risk" (qāʿidat al-iqdām), weaken the place of rescission and allow the latter rule to prevail. Article 418, by treating knowledge of gross disparity as negating the right of rescission, indicates the influence of a subjective standard of disparity in Iranian law; this reflects the legacy of juristic theories that have treated disparity as a defect in consent (Ansari, 1995).

(e) In employment contracts, terms that constitute occupational risk and delineate the employer's liability limits are not, as such, the focus of assessment for unjust terms, because such terms and limitations are factored into the wage that the worker is to receive. Put differently, in assessing unjust terms, clauses that define the scope of the contractual subject matter or determine the price proportionate to the quantity, type, and quality of the services rendered are, in principle, not subject to evaluation—provided that they are drafted in a clear and comprehensible manner (Guest, 1994). Having noted this, the following categories are among the terms observed in employment contracts that are treated as unjust:

1. **Terms that mislead the worker.** This category includes terms for which the worker has no adequate prior opportunity to become familiar before contract formation—for example, where the employment documents and annexes are numerous and the worker lacks a reasonable and sufficient opportunity to read and understand all provisions. This category also includes terms that restrict the employer's responsibilities in relation to obligations undertaken by the employer's representatives.
2. **Terms that create a gross imbalance in the parties' contractual obligations.** Examples include terms that inappropriately restrict established employment-related legal rights, or terms that oblige the employee to perform notwithstanding partial non-performance by the employer.
3. **Terms that obstruct compensation for harm suffered by the worker.** These include clauses that deprive the worker of the ability to bring a claim or to pursue any other legal remedy.
4. **Terms granting the employer a right to terminate where no corresponding right is granted to the worker.**
5. **Terms allowing the employer, upon dissolution of the contract by the employer, to retain amounts paid by the worker for services not yet rendered.**
6. **Terms granting the employer a right to terminate without any lawful cause**—that is, clauses conferring termination rights for an indefinite period and without customary notice, except where fundamental reasons justify such termination.
7. **Terms granting the employer a unilateral right to amend the contract without justified reason,** such as clauses permitting unilateral wage increases during a coverage period.
8. **Terms obliging the employer, upon breach, to pay a very large sum as damages.**
9. **Terms granting the employer an exclusive right to interpret the contractual terms.**

In conclusion, although the parties—under the principle of freedom of contract—consent voluntarily and autonomously to concluding contracts, the crucial questions are: what justifies legislative and judicial intervention in contracts containing unjust terms, and how should such terms be addressed? An unjust term in a contract refers to contractual arrangements in which the balance between the value of the counter-performances has been disrupted through the inclusion of harsh and unjust clauses, notwithstanding the parties' formal consent. Today, holders of economic power, by exploiting certain types of contracts—such as construction and contracting agreements, lease-to-own arrangements, transport contracts, insurance, loans, and standard-

form (adhesion) contracts—reduce the scope of their own obligations and, through the insertion of terms (especially in adhesion contracts), seek to exclude or diminish their liability, impose heavy duties and responsibilities on the counterparty, and deprive the weaker party of any meaningful ability to renegotiate, adjust, or modify those terms.

6. Conclusion

The findings of this study indicate that the unfairness of a contractual term is a concept that must be assessed in light of the nature of the goods and services, the time of contract formation, all events leading to its conclusion, and the other terms of the contract or any related agreements. In this assessment, particular importance must be attached to the linguistic quality of the term, especially its clarity and comprehensibility. Since the seventeenth century, courts of equity have recognized that even if a contract is not affected by defects such as duress or mistake, it may nevertheless contain unfair, excessive, and unconscionable terms—terms that no person of sound conscience would propose and no reasonable or rational individual would accept. Although common law courts addressed unfair and unconscionable terms in a limited manner, they were consistently cautious in extending the scope of this doctrine. In England, as the birthplace of common law, the doctrine of unfair and unconscionable terms never attained a comprehensive or general character and remained confined to specific contexts. Attempts by certain judges to broaden the doctrine were not embraced by others, and judicial practice failed to confront such contracts effectively. Owing to the slow response of common law courts to unfair and excessively harsh contractual terms, legislators sought to address unfair, excessive, and unconscionable terms through statutory intervention. The most recent English statute in this regard was the *Unfair Terms in Consumer Contracts Regulations 1999*, enacted in implementation of European Community Directive 93/13/EEC. From the early twentieth century onward, courts in the United States gradually adopted a more affirmative stance toward unfair and unconscionable terms and applied the doctrine more broadly. The growing tendency of courts to intervene in private contracts on the basis of unfair and unconscionable terms, together with the adoption of the Uniform Commercial Code across various U.S. states, led to the institutionalization of this doctrine and its assumption of a general character in American law.

On this basis, it must be stated that although issues relating to contractual terms constitute some of the most important discussions in civil jurisprudence, neither the writings of jurists nor classical jurisprudential sources explicitly address unfair terms as such.

The findings further demonstrate that, in light of jurisprudential reasons and foundations, Islamic jurisprudence has paid attention to the principle of commutative justice within the sphere of exchange contracts. The permissibility of rescinding or invalidating a transaction that involves some form of imbalance between the counter-performances—such as cases of gross disparity, usury, transactions concluded under ignorance or necessity according to certain views, or imprudent transactions—would be less justifiable without reference to the principle of commutative justice. Moreover, the concept of an unjust term is jurisprudentially valid, and by relying on jurisprudential foundations it is possible, within Iranian law as well, to prevent the effectiveness of contracts containing unjust terms and—contrary to the strict implication of Article 230 of the Civil Code—to allow the injured party and the courts to rescind or modify such contracts. In Iran's positive law, however, this matter has not been adequately addressed through legislation, and only a limited number of statutes—referred to in the present study—have been enacted with the aim of consumer protection. Even in these statutes, no general rule for combating unfair terms has been properly established, nor have unfair terms and their legal consequences been clearly articulated. Given the divergence of juristic opinions concerning justice and fairness, and the lack of strong support for this concept among leading jurists, it may be concluded that justice and fairness do not occupy an independent position in the derivation of Sharia rulings. This may explain why the unfairness of terms has not attracted sustained attention in jurisprudential discussions. It thus appears that justice and fairness alone lack sufficient capacity to control unfair contractual terms, and that other jurisprudential frameworks—such as disruption of social order, unlawful appropriation of property, uncertainty (gharar), and impossibility of performance—must be examined to address this issue effectively.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

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Conflict of Interest

The authors report no conflict of interest.

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