

The Function of the Principle of Non-Enumerated Contracts in Emerging Agreements: A Comparative Study of Iranian Law, Afghan Law, and Sunni Islamic Jurisprudence

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Abstract

The principle of non-enumerated contracts constitutes one of the fundamental foundations of contract law in legal systems influenced by Islamic jurisprudence and plays a significant role in recognizing and legitimizing emerging contractual forms. This article adopts an analytical-comparative approach to examine the function of this principle in Iranian law, Afghan law, and Sunni Islamic jurisprudence, seeking to clarify its relationship with the principle of contractual freedom and contemporary socio-economic developments. In the first section, the concepts of enumerated and non-enumerated contracts and their jurisprudential foundations are analyzed, with emphasis on the general verses of the Holy Qur'an and jurisprudential maxims such as *al-'uqūd tābi'ah lil-quṣūd* (contracts follow intentions), *aṣālat al-ibāḥah* (presumption of permissibility), and *al-mu'minūn 'inda shurūṭihim* (believers are bound by their conditions). Subsequently, the status of the principle of non-enumerated contracts in Iranian law is examined, focusing on Articles 10, 219, and 223 of the Iranian Civil Code and its role in recognizing modern and innominate contracts. The study then analyzes Afghan law from the perspective of the Afghan Civil Code and Hanafi jurisprudence, demonstrating that although this principle has not been explicitly codified, it has been implicitly accepted through general contractual rules and the principle of permissibility. The comparative findings indicate that the principle of non-enumerated contracts, while preserving the framework of public order and mandatory legal rules, serves as an effective mechanism for enhancing contractual flexibility, supporting economic innovation, and strengthening legal certainty in contemporary societies. The article concludes by emphasizing the necessity of reinforcing a substantive approach in judicial analysis of emerging contracts and expanding the jurisprudential and legal scholarship in this field.

Keywords: Principle of Non-Enumerated Contracts, Freedom of Contract, Emerging Contracts, Iranian Law, Afghan Law, Sunni Islamic Jurisprudence.

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1. Introduction

Contract, as one of the most fundamental instruments for regulating social, economic, and legal relations, has consistently played a central role in legal systems. From ancient times to the present, human interactions have inevitably relied upon agreement and reciprocal commitment, and law, as an organizing framework for these relations, has established structures and rules governing the validity and enforceability of contracts. However, rapid economic transformations, the expansion of modern technologies, increasing complexity of commercial relations, and the emergence of new forms of cooperation have rendered many traditional contractual models insufficient to meet contemporary needs. In such circumstances, the legitimacy and validity of *emerging contracts* have become one of the primary challenges of modern contract law, particularly within legal systems grounded in Islamic jurisprudence.

One of the most fundamental debates in this regard concerns the question of whether contracts are *restrictively enumerated* or *non-enumerated*. According to the restrictive (enumerative) theory, only those contracts explicitly recognized and approved by the Legislator or the law are valid and enforceable, and any agreement falling outside this framework faces serious doubts regarding legitimacy (Bahadori & Jahangiri, 2019; Hatamikia, 2019). In contrast, the theory of non-enumerated contracts is founded upon freedom of will and the supremacy of the parties' mutual intention, maintaining that any rational and lawful agreement is binding provided that it does not contradict explicit religious texts, mandatory laws, public order, or morality (Katouzian, 2006; Parvar, 2020). This theoretical divergence directly affects the acceptance of innovative contractual forms and determines the degree of flexibility of legal systems in responding to social change.

Within Islamic jurisprudence, particularly among Imami jurists and the majority of Sunni scholars, substantial evidence supports the theory of non-enumerated contracts. General Qur'anic injunctions emphasizing fulfillment of contracts, together with jurisprudential maxims such as *contracts follow intentions*, the presumption of permissibility, and the binding force of agreed conditions, all affirm respect for party autonomy and the obligation to honor contractual commitments (Khoei & Tohidi, 2009; Mohaghegh Damad, 1989; Sadr, 1996). These foundations indicate that Islamic law does not provide a closed catalogue of contracts but rather establishes a general and flexible framework capable of adapting to changing temporal and social conditions.

Despite this jurisprudential foundation, the reflection of the principle of non-enumerated contracts within the positive law of Islamic countries is not uniform. In Iranian law, the principle is explicitly embodied in Article 10 of the Civil Code and functions as one of the pillars of contractual freedom, forming the basis for recognizing private and innominate contracts (Katouzian, 2006; Kazemi, 2020). By contrast, Afghan law does not expressly codify the principle; nevertheless, its implicit acceptance can be inferred through general contractual provisions and reliance on Hanafi jurisprudence (Ghanavati et al., 2020; Rahimi, 2024). This legislative and interpretative divergence raises important questions regarding the practical effectiveness and operational scope of the principle in the two legal systems.

Examining Sunni jurisprudence is equally significant because it not only forms the doctrinal foundation of Afghan law but also plays a decisive role in legislation and adjudication across many Islamic jurisdictions. Understanding Sunni perspectives on whether contracts are restrictive or non-restrictive contributes to a deeper appreciation of the capacity of Islamic jurisprudence to accommodate emerging contractual structures (Ansari, 1994; Sadr, 1996).

Accordingly, this article adopts an analytical–comparative approach to clarify the concept and foundations of the principle of non-enumerated contracts and to examine its function within Iranian law, Afghan law, and Sunni Islamic jurisprudence. The central objective is to demonstrate that this principle may operate as a bridge between classical jurisprudential tradition and contemporary legal needs, enabling flexibility, innovation, and legal certainty in contractual relations while preserving religious and legal norms.

2. Conceptual and Theoretical Framework of the Principle of Non-Enumerated Contracts

The concept of the *restrictive nature of contracts* refers to the view that no contract is religiously valid unless explicitly approved by the Legislator. Under this approach, the presumption is the invalidity of agreements unless confirmation is derived from religious authority (Bahadori & Jahangiri, 2019; Hatamikia, 2019). Consequently, only contracts recognized during

the formative period of Islamic legislation are considered valid, while newly created agreements encounter legitimacy challenges.

In contrast, the theory of non-enumerated contracts—or contractual non-restriction—emphasizes freedom of contract and party autonomy. Based on general religious texts supporting consensual transactions and jurisprudential principles such as *contracts follow intentions*, any customary transaction mutually agreed upon by the parties is considered valid unless specific evidence prohibits it (Khoei & Tohidi, 2009; Mohaghegh Damad, 1989). With evolving economic and social conditions, acceptance of new contractual forms becomes necessary, and both jurisprudential and legal foundations recognize emerging contracts so long as they do not conflict with religious norms.

Consistent with this intellectual trajectory, the Iranian legislator, through Article 10 of the Civil Code (1934), formally recognized the principle of free will, declaring that private contracts are valid insofar as they do not contravene explicit law (Katouzian, 2006). As explained by Katouzian, this provision signifies that, except where law restricts contractual effectiveness, individual will governs contractual destiny and freedom of will must be accepted as a fundamental principle (Katouzian, 2006). Accordingly, within the Iranian legal system, any legitimate agreement that does not conflict with mandatory law or public order remains valid. Article 223 of the Civil Code likewise affirms the presumption of validity and enforceability of contracts absent explicit legal or religious prohibition (Kazemi, 2020). In summary, the principle of non-enumerated contracts rests upon respect for party autonomy, meaning that all contracts—traditional or modern—are enforceable provided they do not violate binding legal or religious rules.

2.1. *Relationship Between the Principle of Non-Enumerated Contracts and Freedom of Contract*

The position of party autonomy represents the cornerstone of contractual validity and legal effects. The principle of freedom of will possesses two essential dimensions: first, free will constitutes the primary source of obligations and the foundation of the legal order; second, the consequences of contractual commitments depend directly upon the parties' consent (Katouzian, 2006). Thus, the continuity of contractual validity depends upon the convergence of wills between contracting parties. Iranian law explicitly recognizes this principle through Article 10 of the Civil Code, permitting individuals to structure contractual terms according to their intentions while remaining subject to mandatory law and public order limitations (Kazemi, 2020). Within this framework, contractual relations are fundamentally shaped by party intention.

The jurisprudential maxim *contracts follow intentions* further reinforces this principle. According to this doctrine, any transaction recognized by custom as a contract and agreed upon by the parties is valid, since legitimacy derives primarily from mutual intention and consent (Khoei & Tohidi, 2009; Mohaghegh Damad, 1989). Even when agreements lack a traditional juridical classification, their legitimacy remains grounded in shared intention rather than formal categorization. This rule therefore constitutes one of the theoretical pillars of the non-enumerative approach to contracts.

Islamic jurisprudence also assigns significant importance to social custom (*'urf*) in identifying contractual forms. Any agreement recognized by reasonable social practice and not inconsistent with mandatory religious norms is considered binding (Dadmarzi, 2001; Mirzanejad Jouybari, 2018). Custom reflects collective social understanding and adapts more rapidly than fixed textual formulations, thereby enabling jurisprudence to respond flexibly to new transactional realities.

2.2. *The Status of Emerging Contracts within the Theory of Non-Enumerated Contracts*

Emerging (or newly developed) contracts refer to agreements that did not exist during the formative period of Islamic legislation and are not explicitly addressed in classical juridical texts. Examples include insurance agreements, modern partnership arrangements, and technology-based financial instruments. Jurists adhering to the principle of non-enumeration recognize the legitimacy of such arrangements and classify them as independent contractual forms (Khatibi, 2024; Saadi & Mirzakhani, 2013; Soleimanpour, 2010).

Unlike emerging contracts, nominate contracts such as sale, lease, and settlement possess clearly defined structures within jurisprudence and statutory law, while mixed contracts combine elements of several traditional agreements. Emerging

contracts, however, lack predetermined structures and often integrate multiple legal characteristics, making accurate legal characterization particularly important (Dadmarzi, 2001).

According to general jurisprudential and legal principles, any new contract falls within the scope of general rules of transactional validity unless a specific prohibition exists. Broad religious directives supporting contractual fulfillment and the presumption of permissibility extend validity to emerging agreements, reinforcing the non-enumerative theory (Mohaghegh Damad, 1989; Sadr, 1996). Iranian law similarly adopts this approach through Article 223 of the Civil Code, which maintains the presumption of validity absent explicit prohibition (Kazemi, 2020). Although certain jurists have discussed methodological challenges in applying general principles to modern contracts, even critical perspectives ultimately acknowledge the validity of new agreements when supported by general legal and jurisprudential foundations (Saadi & Mirzakhani, 2013).

Overall, despite interpretative differences, the governing criterion remains clear: unless evidence establishes prohibition or invalidity, the presumption of validity and obligation to perform contractual commitments prevails. This theoretical and legal orientation has enabled both Iranian and Afghan legal systems to recognize and accommodate emerging and innominate contracts within contemporary contractual practice (Ghanavati et al., 2020; Rahimi, 2024).

3. Examining the Principle of Non-Enumerated Contracts in Iranian Law

3.1. *The Legal Basis of the Principle in Iranian Law*

Iranian legislation has explicitly accepted the principle of contractual freedom and the presumption of validity of contracts in Article 10 of the Civil Code. This provision states: “Private contracts, with respect to those who have concluded them, are enforceable so long as they are not contrary to the explicit provisions of law.” Accordingly, the legislator has not imposed formalistic or procedural constraints as a condition of contractual validity, and it has recognized private agreements—even those lacking a specific legal label (innominate contracts)—as legitimate and enforceable (Katouzian, 2006). In addition to Article 10, other provisions also emphasize the binding force and validity of contracts. Article 219 of the Civil Code articulates the “principle of the binding nature of contracts,” providing that contracts concluded in accordance with law are binding upon the parties and their successors (unless dissolved by mutual consent or a legal ground for rescission) (Katouzian, 2006). In other words, any valid contract binds the parties and their heirs. Article 223 further codifies the “presumption of validity” by declaring that any concluded transaction is presumed valid unless its invalidity is established (Kazemi, 2020). This approach corresponds to the jurisprudential rule of the presumption of correctness and treats new agreements as valid unless proven otherwise (Mohaghegh Damad, 1989).

At the same time, the principle of non-enumerated contracts is subject to general public limitations. Under Article 975 of the Civil Code, the court may not enforce agreements that are contrary to public morality, offend public sentiments, or are otherwise deemed inconsistent with public order. Thus, private autonomy is recognized only insofar as it does not conflict with mandatory law, public order, or the moral foundations of society (Mirzanejad Jouybari, 2018).

- **Article 10 of the Civil Code:** Recognizes private agreements—including innominate contracts—as enforceable. This rule reflects the primacy of party intention and contractual freedom in Iranian law and limits validity only by explicit legal prohibitions, public order, and morality (Katouzian, 2006).

- **Article 219 of the Civil Code:** Declares the binding force of contracts and treats contractual obligations as enforceable once validity requirements are met, except where lawful rescission applies (Katouzian, 2006).

- **Article 223 of the Civil Code:** Confirms the presumption of contractual validity, meaning that any concluded contract remains valid unless its invalidity is proven, thereby extending legal support to new contracts (Kazemi, 2020; Mohaghegh Damad, 1989).

- **Article 975 of the Civil Code:** Establishes the ethical–public limitations on enforceability; courts cannot enforce contracts contrary to morality or public order, and agreements conflicting with fundamental social values are treated as legally ineffective (Mirzanejad Jouybari, 2018).

Taken together, these provisions form a coherent framework that both secures the presumption of contractual validity and ensures that, once contracts enter the public domain, social and moral imperatives are respected.

3.2. *The Role of the Principle in Recognizing Emerging Contracts*

The principle of non-enumerated contracts fundamentally enables the formation and legal recognition of novel and innominate agreements. Under Article 10, private contracts encompass any form of agreement so long as it does not conflict with explicit law, meaning that a contract is not confined to traditional nominate forms (Katouzian, 2006). This approach means that judges are not required to force modern agreements into a predefined nominate category such as sale, lease, or settlement. In practice, the principle authorizes courts to move beyond formalistic classification and focus instead on the substance of the transaction and the parties' real intention. Many contemporary disputes arise precisely because parties cannot find an exact statutory label for their specific transaction; under older form-driven approaches such contracts could be treated as invalid, whereas the principle of non-enumerated contracts emphasizes the legal relevance of customary content and mutual intent (Dadmarzi, 2001).

Accordingly, even if an agreement has no clear statutory pedigree, it may still be recognized and enforced as an innominate contract provided that it does not violate mandatory law, public order, or morality. For example, newly developed specialized service arrangements, technology collaborations, or modern investment partnerships—despite lacking explicit statutory templates—may be treated as legitimate and binding so long as general conditions of contractual validity are satisfied (Khatibi, 2024; Soleimanpour, 2010). This structured reading of emerging contracts has opened space for the expansion of new economic and social cooperation through innovative contractual forms.

3.3. *Practical Functions of the Principle in the Iranian Legal System*

In practice, the principle of non-enumerated contracts produces significant effects on judicial performance and the operational dynamics of contract law. Several key axes are emphasized, and they may be summarized as follows:

- **Legitimizing emerging contracts:** The principle enables courts to identify novel agreements—lacking a definite statutory framework—as independent and enforceable. Without this principle, judges would be compelled either to disregard such contracts or to recharacterize them artificially under nominate categories such as sale or lease, thereby distorting the transaction's true nature. Under the principle, the judge is no longer required to force the parties' agreement into the mould of a nominate contract; rather, it may be recognized as an innominate contract or a valid private agreement based on the parties' intent and capacity (Katouzian, 2006). As a result, many modern agreements previously outside clear legal coverage can now be enforced according to the parties' intent.

- **Strengthening legal certainty:** Consistent reliance on the principle in judicial practice enhances predictability and legal stability. When courts issue decisions grounded in the rational substance of a contract—even absent a formal label—citizens can enter transactions with greater confidence. Systematic acceptance of the principle brings many real-world relations that previously lacked legal support within the protective scope of law, reduces the risk that contracts will be invalidated for purely formal reasons, and minimizes the prospect of rights being undermined through formalistic evasions (Mirzanejad Jouybari, 2018).

- **The judge's role in substantive contract analysis:** Acceptance of the principle elevates the judicial role from a mechanical "applier of statutory labels" to a substantive analyst. To determine validity, the judge must examine core elements such as shared intention, the purpose of the agreement, the governing custom, and the expected outcomes. This approach removes adjudication from rigid formalism and aligns it with a more realistic and function-oriented understanding of contractual relations. Rather than focusing on contractual labels, the judge assesses the agreement through the lens of party autonomy and legal rationality, which contributes to contractual justice by clarifying the real content of the parties' relationship (Dadmarzi, 2001; Katouzian, 2006).

3.4. *Limits on the Application of the Principle in Iranian Law*

Despite the breadth and importance of freedom of will in contractual relations, like any general principle its application is subject to limitations. In Iranian law, these constraints derive from several primary sources:

- **Public order and morality:** Contracts must not conflict with fundamental social values or moral norms. Under Article 975 of the Civil Code, agreements contrary to morality or public order lack enforceability. In other words, no contract may stand in clear opposition to public security or the essential cultural–ethical values of society, even if signed by the parties. This limitation curbs absolute self-referential autonomy and shows that contractual freedom in Iran operates under ethical and social constraints (Mirzanejad Jouybari, 2018).

- **Mandatory rules:** Mandatory laws—rules that private parties cannot derogate from by agreement—also restrict contractual freedom. For example, legal requirements related to property rights, prohibitions on sham transactions, statutory formalities (such as formal registration requirements for definitive transfer of immovable property), and specialized banking and regulatory norms function as mandatory constraints; violation may render an agreement invalid (Katouzian, 2006; Kazemi, 2020).

- **Foundations of Imami jurisprudence:** Iranian civil law is historically rooted in Imami Shi‘a jurisprudence, and doctrinal principles therefore influence contractual structure. Shi‘a jurists accept general principles such as the presumption of validity and legal exoneration, and the Iranian Civil Code reflects these ideas implicitly through Articles 10 and 223 (Katouzian, 2006; Mohaghegh Damad, 1989). In practice, many Imami jurists emphasize the permissibility of new contracts and the legitimacy of agreements responsive to contemporary needs, provided they do not contradict explicit religious texts or definite religious interests (Khatibi, 2024; Parvar, 2020). At the same time, critical discussions about certain emerging contracts have also been reported in jurisprudential literature, illustrating that recognition of new agreements remains conditioned on non-conflict with binding religious constraints (Bahadori & Jahangiri, 2019; Hatamikia, 2019).

Accordingly, Iranian law recognizes contractual autonomy, but its exercise is accompanied by significant requirements. The state and judicial institutions may, to secure public interests and protect the moral and religious foundations of society, apply supervision and adjustment through mechanisms such as mandatory rules and public-order review. This approach preserves a balance between contractual flexibility and public, ethical, and religious considerations.

4. **The Function of the Principle of Non-Enumerated Contracts in Afghan Law**

The principle of non-enumerated contracts is not explicitly stated in Afghan legislation; however, the content of Article 497 of the Afghan Civil Code indicates its implicit acceptance. Article 497 defines a contract as “the agreement of two wills to create, modify, transfer, or extinguish a right within the limits of the law,” without imposing any typological limitation on contractual forms. Furthermore, Articles 497 to 750 of the Afghan Civil Code contain comprehensive general provisions concerning the validity and effects of contracts and do not distinguish between nominate and innominate agreements. This legislative structure reflects the Afghan legislator’s inclination toward the principle of party autonomy and legal flexibility in contractual regulation (Ghanavati et al., 2020; Rahimi, 2024). In other words, Afghan law recognizes contracts as valid “within the limits of the law,” and unless an explicit religious or statutory prohibition exists, the presumption favors the validity and enforceability of agreements.

4.1. *The Implicit Legal Basis of the Principle in the Afghan Civil Code*

The implicit establishment of the principle of non-enumerated contracts in Afghan law primarily derives from Article 497 and other general contractual provisions. By defining contract in general terms without specifying particular contractual categories, Article 497 demonstrates that the legal criterion for enforceability rests solely upon agreement of wills and compliance with legal norms. A substantial portion of the Afghan Civil Code is devoted to general rules governing contractual validity and effects, without differentiating between traditional and emerging contracts. For instance, the essential elements of contractual validity—mutual consent, legal capacity, legitimacy of subject matter, and conformity with public order—are formulated independently of predetermined contractual forms (Ghanavati et al., 2020).

This legislative structure clearly evidences implicit acceptance of the principle of non-enumeration, since the Afghan legislator has effectively enabled the formation of new contractual arrangements within general legal rules without requiring the enactment of new religious or statutory texts for each emerging agreement (Rahimi, 2024).

4.2. *The Influence of Hanafi Jurisprudence on the Acceptance of Emerging Contracts*

Hanafi jurisprudence, which constitutes the principal doctrinal foundation of Afghan civil law, plays a decisive role in recognizing emerging contracts and applying the principle of permissibility. According to the principle of permissibility (*ibāḥah*) in Hanafi jurisprudence, all transactions are considered lawful unless evidence establishes their prohibition or invalidity. Thus, where the Legislator has not declared a transaction unlawful, the presumption favors validity and permissibility, allowing any rational and legitimate agreement to be concluded (Ansari, 1994; Sadr, 1996).

This jurisprudential principle forms the theoretical basis for accepting new contractual forms. Hanafi jurists rely on general legal and religious evidences—such as broad scriptural authorizations of trade and the rule binding believers to their contractual conditions—to affirm the enforceability of modern agreements without requiring specific textual authorization (Mohaghegh Damad, 1989). Consequently, proof of validity does not depend upon identifying a precedent contract in classical jurisprudence but rather upon the absence of a prohibitive rule.

Custom (*urf*) and social welfare considerations also hold significant importance in Hanafi jurisprudence. Comparative doctrinal analysis demonstrates that Hanafi legal thought has historically exhibited flexibility in adapting legal rulings to the real needs of diverse Islamic societies. This flexibility has facilitated acceptance of newly emerging contractual practices recognized by social custom, provided they do not contradict explicit religious rules (Dadmarzi, 2001). Accordingly, under Hanafi foundations, party autonomy in forming new contracts is respected so long as the subject matter does not conflict with religious texts or mandatory legal provisions. This jurisprudential orientation has directly influenced Afghan law, which—being grounded in Hanafi doctrine—permits valid agreements without imposing rigid requirements concerning specific contractual forms (Ghanavati et al., 2020).

4.3. *Practical Functions of the Principle in Afghan Law*

In practice, the principle of non-enumerated contracts contributes to diversification and development within Afghanistan's contractual system. First, it enables the formation of modern economic agreements. Research indicates that acceptance of this principle has expanded contractual opportunities, reinforced contractual freedom, and reduced formalistic limitations in contractual practice (Rahimi, 2024). Particularly within the economic sphere, the principle supports commercial innovation and facilitates international economic relations by allowing economic actors to design agreements suited to contemporary conditions without strict adherence to traditional contractual models. As reliance on classical nominate contracts decreases, flexibility in structuring economic relations correspondingly increases.

At the same time, legislative gaps and practical challenges remain visible within Afghan law. The absence of systematic legal scholarship and coherent doctrinal literature concerning this principle, together with limitations in judicial practice, has restricted its full operational realization. The theoretical foundations of the principle largely remain embedded within Hanafi jurisprudence, while judges and legislators have addressed it only to a limited extent. In judicial practice, emerging contracts may still be interpreted through traditional nominate categories, reflecting judicial caution and the persistence of conventional legal perspectives (Ghanavati et al., 2020). Moreover, complex political and social conditions, combined with insufficient institutional specialization, have prevented the full realization of the principle's capacity to support innovative contractual arrangements.

In summary, the principle of non-enumerated contracts in Afghan law facilitates the formation of diverse and modern agreements grounded in party autonomy and contributes to the dynamic evolution of the legal system in response to contemporary needs. It also promotes economic innovation and reduces exclusive reliance on traditional contractual templates. Nevertheless, effective implementation requires addressing legislative gaps and strengthening judicial and educational institutions so that statutory law and judicial practice may fully benefit from the flexibility inherent in this principle.

5. Comparative Study of the Function of the Principle in the Three Legal Systems

5.1. *Points of Convergence*

• **Acceptance of contractual freedom:** In both Iranian and Afghan legal systems, despite structural differences, the principle of freedom of contract has been recognized. In Iran, Article 10 of the Civil Code explicitly provides that private contracts are enforceable so long as they do not contradict explicit law, demonstrating that party autonomy governs contractual relations. As Katouzian explains, except in cases where the law creates an obstacle to contractual effectiveness, the will of individuals governs the destiny of their agreements and freedom of will must be accepted as a fundamental principle (Katouzian, 2006). Similarly, in Afghanistan the principle of contractual freedom is acknowledged through Hanafi jurisprudential foundations, according to which parties are free to conclude any lawful agreement and assume the obligations arising from it, provided that no religious or legal prohibition exists (Ghanavati et al., 2020; Rahimi, 2024). Accordingly, in both systems a contract is considered valid as long as it does not conflict with explicit statutory or religious norms.

• **Non-restriction of contracts to traditional forms:** Both legal systems adopt a moderated approach rejecting the confinement of contracts to traditional juridical categories. Contractual freedom is not absolute but operates within the framework of mandatory rules and public order. Comparative analysis shows that legislators in both Iran and Afghanistan have implicitly rejected the exclusivity of legally enumerated contracts. The principle of party autonomy is formally guaranteed in Iran through Article 10 of the Civil Code and functionally recognized in Afghanistan through the absence of restrictive legislative categorization combined with reliance on Hanafi jurisprudence (Ghanavati et al., 2020; Katouzian, 2006). Consequently, contractual validity depends primarily on essential elements such as intention, consent, and lawful subject matter rather than adherence to predefined contractual forms. This shared approach originates in common Islamic jurisprudential foundations, where the concept of contract is understood broadly and customarily, recognizing any binding agreement based on mutual consent unless it contradicts definitive religious or legal provisions (Mohaghegh Damad, 1989; Sadr, 1996). Hence, recognition of emerging contracts and new private agreements has obtained a legal basis in both systems, and contractual freedom is largely detached from rigid traditional classifications.

5.2. *Points of Divergence*

• **Explicit legal recognition in Iran:** In the Iranian legal system, the principle of contractual freedom is expressly codified in Article 10 of the Civil Code. Comparative studies indicate that the principle of non-enumerated contracts has been explicitly accepted as a manifestation of party autonomy, thereby enabling the formation of private and innominate agreements (Katouzian, 2006; Kazemi, 2020). This provision clearly states that private contracts are enforceable unless contrary to mandatory law, implicitly confirming the legitimacy of both nominate and innominate agreements within the framework of general contractual validity. Consequently, the Iranian Civil Code, through explicit legislative recognition, has facilitated the legalization of innovative and unfamiliar contractual forms.

• **Implicit recognition in Afghanistan:** Unlike Iran, Afghan law does not expressly declare the principle of contractual freedom as an independent legal rule; however, religious teachings and general legal provisions demonstrate its implicit acceptance. The definition of contract in Article 497 of the Afghan Civil Code and the general contractual provisions indicate that the Afghan legislator intentionally avoided imposing limitations on new contractual forms. In practice, consistent with Hanafi jurisprudence, parties remain free to conclude any lawful agreement, provided that it does not contradict explicit religious or statutory rules (Rahimi, 2024). Thus, whereas Iranian law recognizes contractual freedom through explicit statutory formulation, Afghan law adopts a more implicit approach grounded in jurisprudential doctrine and general legislative structure.

• **Diversity of jurisprudential opinions within Sunni law:** Within Sunni Islamic jurisprudence itself, differing doctrinal perspectives exist. Certain minority schools have viewed contracts as inherently restrictive and limited to traditional forms, whereas the majority of Sunni jurists—including Hanafi, Shafi‘i, Maliki, and Hanbali scholars—rely on general principles such as permissibility and the broad obligation to fulfill agreements, concluding that contracts are essentially non-restrictive (Ansari, 1994; Sadr, 1996). According to this dominant view, Islamic law has not confined transactions to specific contractual

categories, and any binding agreement concluded through mutual consent and not contradicting explicit religious provisions is legitimate. Accordingly, even within Sunni jurisprudence, the prevailing tendency favors the principle of non-enumerated contracts despite the existence of minority dissenting opinions.

5.3. *Comparative Evaluation of the Principle's Effectiveness in Emerging Contracts*

- **Degree of legal flexibility:** The principle of non-enumerated contracts expands the range of legitimate agreements and increases flexibility within contract law systems. Research findings indicate that application of this principle leads to outcomes such as expansion of contractual diversity, enhancement of legal adaptability, support for economic innovation, and strengthening of legal certainty (Khatibi, 2024; Soleimanpour, 2010). In other words, the principle enables contract law to adapt to evolving economic and social realities and facilitates the emergence of new transactional models. The adoption of general contractual rules in both Iranian and Afghan civil codes demonstrates legislative awareness of the need for legal responsiveness to economic transformation (Ghanavati et al., 2020; Katouzian, 2006).

- **Role of judges and jurists:** Acceptance of the principle significantly enhances the judicial role in substantive contractual analysis and in filling legislative gaps. Where the principle is explicitly codified, judges possess stronger legal authority to validate innominate agreements; where recognition remains implicit, judicial caution may lead courts to subsume emerging contracts within traditional categories, potentially producing inconsistent jurisprudence (Rahimi, 2024). The principle allows judges to transcend formal contractual labels and evaluate agreements independently on the basis of shared intention, legitimacy of purpose, and lawful conditions. Thus, judges are no longer compelled to force agreements into classical contractual frameworks but may recognize them as independent private agreements when essential validity requirements are satisfied (Dadmarzi, 2001; Katouzian, 2006). This interpretative flexibility promotes juridical reasoning and prevents innovation from being suppressed by rigid formalism.

- **Practical effects in judicial proceedings:** In judicial practice, the principle prevents contracts from being rendered ineffective merely due to formal deficiencies or terminological imperfections. It enables courts to analyze agreements as coherent and dynamic legal arrangements and to resolve disputes arising from ambiguity or incomplete drafting by relying on general legal principles and commercial custom (Mirzanejad Jouybari, 2018). Acceptance of the principle also provides a basis for completing incomplete agreements, allowing judges to fill contractual gaps through reference to the parties' real intention, prevailing custom, and general obligations law. Consequently, socially significant transactions are not invalidated solely because they lack predefined statutory forms. Overall, in both Iranian and Afghan legal systems the principle of non-enumerated contracts serves the flexibility of contract law, shifting emphasis away from rigid formal structures toward responsiveness to parties' needs and the stability of economic relations.

6. The Function of the Principle of Non-Enumerated Contracts in Sunni Islamic Jurisprudence

6.1. *Sunni Jurisprudential Views on the Restrictive Nature of Contracts*

Within Sunni Islamic jurisprudence, jurists have expressed differing opinions regarding whether contracts are restrictive or non-restrictive. On one side, the *Zāhirī* school, adopting a strict textualist approach, considers contracts to be inherently restrictive, meaning that only those contracts explicitly recognized by the Legislator are legitimate, while newly emerging agreements lack validity.

In contrast, the majority of Sunni jurists—including Abū Ḥanīfa, Mālik, al-Shāfi'ī, and Aḥmad ibn Ḥanbal—maintain that contracts are intrinsically non-restrictive. These scholars rely on general religious evidence, rational custom, and jurisprudential principles such as the presumption of permissibility to legitimize the formation of new transactions (Ansari, 1994; Sadr, 1996). In particular, Hanafi jurisprudence, which forms the doctrinal foundation of Afghan civil law, demonstrates significant flexibility in recognizing new contractual structures and adapting legal reasoning to evolving commercial practices (Ghanavati et al., 2020).

6.2. *Jurisprudential Foundations Supporting the Non-Restrictive Nature of Contracts*

• **The Qur’anic command to fulfill contracts (“Fulfill your contracts”):** The Qur’anic verse commanding believers to fulfill contracts expresses a general formulation encompassing all agreements recognized by social custom. According to juristic interpretation, the term “contracts” in this verse includes not only transactions common during the Prophetic era but also future contractual forms emerging through social development. Consequently, unless a specific prohibitive text exists, every rational and customary agreement is considered legitimate and binding (Sadr, 1996). The verse therefore establishes a general obligation to honor contractual commitments irrespective of formal classification.

• **The principle of permissibility (*aṣālat al-ibāḥah*):** Sunni jurists generally presume permissibility with respect to human actions and transactions unless explicit evidence establishes prohibition. Under this principle, any new or unnamed contract is regarded as legally valid unless religious texts or authoritative legal rules demonstrate its invalidity (Ansari, 1994; Mohaghegh Damad, 1989). This doctrine, combined with general transactional rules, provides a broad theoretical foundation for legitimizing rational economic agreements. Jurists emphasize that agreements concluded through mutual consent cannot be invalidated absent clear textual prohibition.

• **The rule “Muslims are bound by their conditions”:** A widely transmitted prophetic tradition recognized in both Sunni and Shi’a jurisprudence establishes that parties are bound by the conditions they agree upon. This principle, frequently invoked in Sunni legal doctrine, indicates that agreements founded upon mutual consent are enforceable so long as they do not contradict explicit religious prohibitions (Mohaghegh Damad, 1989). Accordingly, Sunni jurists rarely invalidate contracts except where definitive textual evidence exists, such as in cases involving usury or manifestly harmful transactions. The governing presumption therefore remains the validity and permissibility of contractual dealings.

6.3. *The Capacity of Sunni Jurisprudence to Accommodate Emerging Contracts*

Sunni jurisprudence demonstrates considerable flexibility in accommodating emerging contractual forms. Jurists generally attempt either to interpret new agreements within the framework of existing nominate contracts or to analyze them independently when necessary. Provided that a new contractual form rests upon rational reasoning, accepted custom, and does not conflict with explicit religious texts or public welfare considerations, it is treated as legitimate and enforceable (Dadmarzi, 2001; Sadr, 1996).

In practice, many Sunni scholars analyze innovative agreements by applying general contractual principles derived from classical jurisprudence. If a modern agreement serves legitimate interests and complies with fundamental religious norms, it is accepted on that basis. Thus, the prevailing doctrinal approach holds that innominate contracts are presumed valid unless contrary evidence proves otherwise. Contemporary Sunni scholars frequently rely upon general legal foundations—particularly the obligation to fulfill contracts—to affirm the legitimacy of innovative financial and commercial arrangements (Ansari, 1994).

Accordingly, Sunni jurisprudence, while preserving essential religious safeguards, possesses sufficient doctrinal flexibility to recognize contractual forms adapted to changing social and economic needs. The decisive condition remains the absence of conflict with definitive religious texts and the broader objectives of Islamic law, allowing the legal system to balance fidelity to tradition with responsiveness to contemporary realities.

7. Conclusion

In light of the extensive theoretical, jurisprudential, and comparative discussions presented in this article concerning the principle of non-enumerated contracts, it may be concluded that this principle represents one of the most fundamental and effective foundations of contract law within contemporary legal systems, particularly in jurisprudence-oriented societies such as Iran and Afghanistan. The conducted analysis demonstrates that the principle is not merely an abstract or theoretical rule; rather, it performs a decisive practical role in enabling legal systems to respond to emerging economic, social, and technological needs and effectively bridges the gap between the rapid transformations of modern life and traditional legal frameworks.

The first major finding of this study is that the principle of non-enumerated contracts possesses deep roots within Islamic jurisprudential sources and, contrary to some assumptions, is neither an imported concept nor solely influenced by Western legal thought. Examination of general religious directives, established jurisprudential maxims, and the perspectives of both Imami jurists and the majority of Sunni scholars indicates that Islamic law was not intended to restrict rational human transactions within rigid and predetermined contractual forms. Rather, by establishing general regulatory principles while prohibiting only harmful or illegitimate transactions, Islamic jurisprudence created a flexible framework capable of accommodating evolving commercial practices. From this perspective, the restrictive conception of contracts constitutes a minority view incapable of addressing the changing needs of Islamic societies.

The second important conclusion concerns the central position of this principle within Iranian positive law. The Iranian Civil Code, particularly through Articles 10, 219, and 223, has established a coherent legal structure for recognizing and enforcing emerging contracts. Article 10, as a manifestation of contractual freedom, explicitly recognizes private and even unnamed agreements as enforceable provided they do not conflict with mandatory law, public order, or morality. This clear legislative recognition provides judges and legal scholars with a strong foundation for substantive contractual analysis, allowing them to focus on the genuine intention of the parties rather than rigid formal classifications. Consequently, within Iranian law, the principle of non-enumerated contracts functions not only as an accepted doctrine but also as an active instrument for ensuring legal certainty, enhancing predictability in contractual relations, and supporting economic innovation.

The third conclusion derives from the examination of Afghan law. Although the principle is not explicitly articulated as an independent rule within the Afghan Civil Code, it has been implicitly accepted through general contractual provisions and reliance on Hanafī jurisprudence. The broad definition of contract, the absence of strict distinctions between nominate and innominate agreements, and the recognition of permissibility in transactions all indicate that the Afghan legal system possesses significant capacity to recognize emerging contractual forms. Nevertheless, the study reveals that the absence of explicit statutory formulation, limited development of coherent legal scholarship, and insufficiently consistent judicial practice have prevented this potential from being fully realized. Accordingly, in Afghanistan the principle remains largely situated at the level of jurisprudential foundations rather than a fully institutionalized legal doctrine and therefore requires further legislative clarification and judicial development.

A fourth major finding highlights the importance of the comparative approach in understanding the practical operation of the principle. Comparison between Iran and Afghanistan, alongside analysis of Sunni jurisprudence, demonstrates that despite structural and legislative differences, all three legal contexts converge on a shared foundation: recognition of party autonomy and rejection of strict confinement of contracts to traditional forms. The primary differences lie not in doctrinal foundations but in levels of legal clarity, coherence of judicial practice, and development of scholarly discourse. This conclusion suggests that the principal challenge facing Islamic legal systems regarding emerging contracts is not the absence of religious or legal legitimacy but rather the manner in which existing foundations are operationalized in practice.

From a functional perspective, the principle of non-enumerated contracts plays a crucial role in strengthening contractual justice. It allows judges to move beyond formal contractual labels and instead examine the substantive nature of the legal relationship, the shared intention of the parties, and the governing commercial custom. Such an approach prevents law from becoming excessively formalistic and inflexible and ensures that real social and economic agreements are not invalidated merely due to the absence of a predefined legal category. As a result, the principle promotes substantive justice, protects legitimate expectations, and reduces disputes arising from purely formal interpretations of contractual arrangements.

Finally, this article emphasizes the necessity of expanding and deepening jurisprudential and legal research concerning the principle of non-enumerated contracts, particularly in jurisdictions such as Afghanistan where the principle has not yet been systematically institutionalized within legal doctrine or judicial practice. It is recommended that legislators provide clearer statutory recognition of contractual freedom, courts adopt substantive analytical approaches in evaluating agreements, and academic institutions develop coherent scholarly literature in this field. Only through such coordinated efforts can contract law evolve alongside social and economic transformations and effectively respond to the complex and emerging needs of contemporary societies.

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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