

Fusing Legal Traditions: An Introduction to Iranian Contract Law

Mohammad Nayyeri

Abstract: Due to its hybrid nature and the dual influences of Islamic law and French law, Iranian contract law is particularly compelling for comparative legal studies. This article seeks to take a preliminary step in the comparative task and provide an introduction to the contemporary contract law of Iran, explaining how it emerged with the adoption of the Iranian Civil Code in 1928. Despite the significant influence of Islamic law, it is argued that the influence of French law and the adoption of a general theory and the principle of freedom of contracts have given Iranian contract law a distinctive identity. Exploring the experience of Iranian contract law in fusing elements of entirely different religious and secular legal traditions, and identifying and explaining the influences and the reception of various laws, can provide valuable insights for comparative analysis.

Keywords: Islamic law, Iranian law, French law, contract law, comparative law

1. Introduction

The Islamic law of contracts, developed over centuries and applied across vast regions of the world, constitutes an intricate corpus of law that has been subject of significant scholarly interest. As a vital comparative task, many scholars have sought to engage with its sources and explaining and comparing the major laws of contracts in Islamic countries using modern legal categories and concepts. Due to their most widespread and influential status, the focus of such endeavours has often been on the major Sunni schools and prominent Islamic countries, e.g., in the Arab world, and less so on ‘alternatives’ such as the Shi’a Iran.¹ Recognition of the importance of Iranian contract law, not merely as an outgrowth of Islamic law, but as a well-established system of laws in its own right, has remained relatively unexplored among comparativists, both Muslim and Western. Yet, Iranian contract law offers great rewards for the comparativist for its distinct characters among other legal systems.

¹ For example, see: Frank E. Vogel, ‘Contract Law of Islam and the Arab Middle East’ in K Zweigert and U Drobnig (eds), *International Encyclopedia of Comparative Law*, Vol. VII: Contracts in General, (Mohr Siebeck 2006), Ch. 7

Iranian contract law is a hybrid product of blending elements of entirely different legal traditions of Islamic law and French law with some elements of the classical Roman law tradition incorporated through the Napoleonic Code. The hybrid nature of Iranian contract law distinguishes it as a unique corpus of law which has been enforced in Iran over nearly a century, since the adoption of the Iranian Civil Code in 1928. It is in this attempt to fuse religious and secular legal traditions that the interest in Iranian contract law lies where the challenges and drawbacks experienced in the process and the outcome can be explored. From the perspective of contemporary comparative law, such an investigation would allow for the exploration of at least two distinct themes. On the one hand, the distinct features of the Iranian experience allow comparisons with other systems of the law of contracts, for example with the experiences of other Islamic countries. On the other hand, it is the exploration of the influences from other legal traditions, for example the reception of French law and the classical Roman law tradition, that makes Iranian contract law particularly interesting for comparative purposes. It is the latter comparative approach, and significance of Iranian contract law from that perspective, that is highlighted in this article.

Through the Islamic and Western legal influences which has been supported by a vast body of statutes, doctrines, and jurisprudential discussions, Iranian contract law has developed into a sophisticated system. Despite the significant influence of Islamic law on Iranian contract law, the influence of French law has enabled it to dispose of some outdated features and address certain deficiencies within Islamic law, thereby giving it a distinctive identity. Additionally, Iranian contract law derives further uniqueness from its foundation in the Twelver (*Ithna ashari*) Shi’a Islam, the official faith in Iran, distinguishing it from other Islamic countries. Importantly, despite the processes of Islamisation and radical changes to various areas of law following the 1979 Revolution in Iran, the structural patterns of substantive civil matters, particularly contract law, have largely remained intact, preserving much of the distinctive character of Iranian contract law.

This article aims to provide an introduction to the contemporary contract law of Iran and to highlight the influences of Shi’a Islamic law and French law, which, more than any other systems, lend Iranian contract law its distinctiveness. It is also argued that exploring such influences, for example the reception of French law in Iranian law through the borrowing of various norms and institutions such as the concept of contract and a general theory of law, can

lead to a deeper understanding of the legal systems examined, including Iranian contract law itself.

It must be emphasised, though perhaps needlessly, that this contribution does not aim to provide a comprehensive review or a complete overview of Iranian contract law, nor does it intend to identify its similarities and differences in comparison with other Islamic countries. Rather, it seeks to take a preliminary step in the second theme of comparative approach mentioned above, and highlight the broader influences and the reception of various laws in Iranian contract law, while demonstrating the potential grounds for conducting more thorough comparative inquiries. Obviously, this brief and partial account merely scratches the surface, offering only a glimpse into the discussions regarding the general framework and basic conceptualisations in Iranian contract law.

This article begins by briefly exploring the historical background of Iranian contract law in section 2, aiming to explain its connections and sources of influence and inspiration. Sections 3 and 4 will examine the extent to which Iranian law has attempted to break from the Islamic orthodoxy and embrace the general theory of contract and the principle of freedom of contracts, justifying the references to it as the Iranian law of contract. Section 5 then seeks to provide an overview of the conceptualisation of contract and how it is understood in Iranian law. This is facilitated by making references to concepts and principles in both Islamic law and French law, including the borrowing of the statutory definition of contract from French law and some distinctive elements of the classical Roman tradition incorporated through the Napoleonic Code. An example of the latter can be seen in the distinction between contracts of transferring ownership and contracts of promise. I will conclude with a few remarks to emphasise the significance of Iranian law for further comparative studies.

2. Historical Background

The idea of codifying comprehensive laws was among the goals of the revolutionaries during the Persian Constitutional Revolution (*Enghelāb-e Mashruteh*) which took place in the first decade of the 20th century. However, these efforts were halted due to controversies and political turmoil, compounded by the outbreak of the First World War which had devastating

consequences for neutral Iran (then called Persia). The momentum for codification was revived when Reza Shah Pahlavi, the founder of the Pahlavi Dynasty (the last royal dynasty in Iran), ascended to the throne in 1925.

Since the nineteenth century, Russia and Britain who held significant influence over Iran, effectively partitioning it so that Russia controlled the north and Britain the south, claimed special legal regimes for their citizens in Iran, known as Capitulation. These regimes would typically grant exemption for Russian and British subjects from the jurisdiction of local courts and subjected them to the jurisdiction of their own consular or diplomatic courts. This was primarily justified by the absence of secular laws and a modern judicial system in Iran at that time. If Iran were to establish secular laws and modern courts to enforce them, then a strong case could be made for abolishing the special privileges granted to foreign nationals. In such a scenario, both foreign and national individuals would be subject to the same laws. To address this issue, a new compilation of the Civil Procedure was adopted in 1927 and the law on the Organisation of the Courts of Justice was further revised. Additionally, a secular Penal Code had been adopted the previous year, and various basic commercial laws were already established.² So, given that the only missing major compilation was on the civil law, the government at the time, under Reza Shah Pahlavi, pursued the development of a modern Civil Code.³

On 26 April 1927, Ali Akbar Davar, the Minister of Justice who had received education in Switzerland and played a crucial role in the justice system reforms, inaugurated the new (yet incomplete) Judiciary in Tehran. On the same day, Reza Shah issued a decree to prepare the necessary conditions for the abolition of Capitulation within one year. A few days later, Minister Davar officially notified foreign governments of Iran’s decision to abolish Capitulation. He emphasised that this would take effect one year later, on 11 May 1928, providing a sense of urgency and an ambitious deadline for drafting of the Civil Code of Iran. Initially, the plan was to appoint foreign advisors to draft the Civil Code based entirely on translations and adaptations from European laws, like the new Turkish Civil Code adopted a year earlier in 1926, which was a complete adoption and a near literal translation of the Swiss

² Parviz Owsia, *Formation of Contract: A Comparative Study under English, French, Islamic, and Iranian Law* (Graham & Trotman Ltd 1994), 29.

³ Hamid Bahrami Ahmadi, *History of the Drafting of the Civil Code*, 24 Research Quarterly of Imam Sadiq University 33, (2004), 36.

Civil Code and the Swiss Code of Obligations. However, adopting a similar approach of full reception was rejected, and it was eventually decided that the Civil Code of Iran should be drafted by Iranian experts in compliance with Islamic jurisprudence.⁴ Later that year, members of the drafting committee were appointed mostly from among prominent Islamic jurists. The committee also included Mostafa Adl, a non-clerical legal expert who had received his education in Egypt and France.⁵

Given the fast-approaching deadline set by the King and the paramount importance of abolishing Capitulation, the drafting process prioritised topics pertaining to the laws of property, contract and tort. These areas were deemed critical for achieving the abolition of Capitulation, as the remaining sections primarily dealt with personal status which would fall under private international law. As a result, the first volume of the Iranian Civil Code, which comprised 955 articles, was approved by an Act of Parliament on 10 May 1928, only one day before the official abolition of Capitulation.⁶

An important resource for drafting the first volume of the Civil Code, particularly regarding contracts, was the renowned books of Shi’a Islamic jurisprudence.⁷ However, these were far from the only sources. As a lawmaker facing the challenge of drafting a new national law for the first time, it was natural for the drafters to look at how other countries have addressed similar issues. The neighbouring Turkey had adopted its secular Swiss-model Civil Code of 1926 only a year earlier, as part of Kemal Ataturk’s revolutionary transition to secularism.⁸ The drafters of the Iranian Civil Code, however, focused on the predecessor of the Turkish Civil Code, namely the Ottoman Civil Code (called *Mecelle* or *Al-Majella*), which was in force since 1877 until the creation of the Turkish Republic in 1923. For this, the drafters relied on a commentary on *Al-Majella* written in Arabic by a Lebanese jurist called Rustum Salim Baz.⁹

⁴ *Ibid.*, 39-40.

⁵ *Ibid.*, 45.

⁶ *Ibid.*, 47.

⁷ For example, *Sharay’ e al-Islam* by Mohaqiq Helli, *Sharh Al-Lum’a* by Shahid Thani which serves as a comprehensive source on Shi’a jurisprudence, *Jawahir al-Kalam* by Mohammad Hassan Najafi, *Makasib* by Sheikh Mortaza Ansari, as well as further commentaries written on some of these works.

⁸ Vogel, *supra* note 1 at 130.

⁹ Bahrami Ahmadi, *supra* note 3 at 47.

But most notably, the drafting committee considered the French Civil Code, as well as the French-model earlier Civil Code of Egypt.¹⁰ This was likely influenced by the prevailing legal culture in the region that historically (from Ottoman times) had looked primarily towards France.¹¹ It must be noted that turning to French law was not unprecedented in Iran during the early 20th century, a period marked by initial efforts to modernise the Iranian justice system following the Constitutional Revolution. Several compilations, based primarily on French rather than Islamic law, preceded the adoption of the Iranian Civil Code. These French-influenced legislations, proposed by Hassan Pirnia, a prominent secular reformist and the then Minister of Justice, included, for example, the laws on the Organisation of the Judiciary and the Principles of Civil and Criminal Proceedings, which were adopted in 1911 and 1912.¹² Eventually, the articles of the Civil Code related to specific contracts were mostly derived from Islamic jurisprudence, while the introduction and sections on the classification of property and general principles of contracts were adapted from the French Civil Code, with necessary modifications made to ensure consistency with the principles of Islamic jurisprudence.¹³

The second drafting committee was established a few years later to draft the remainder of the Civil Code. It began its work in 1934 and produced the second and third volumes of the Civil Code. This time, they also took inspirations from Swiss law, facilitated by the presence of the Switzerland-educated Ahmad Matin-Daftari in the committee. The incorporation of Swiss law in the drafting of the second and third volumes of the Civil Code was expressly acknowledged by Justice Minister Davar during his address to the National Consultative Assembly. He specifically mentioned that the provisions related to citizenship, domicile, evidentiary standards, marital obligations, and family rights, were sourced from Swiss law, and aligned with Islamic law.¹⁴

The second and third volumes of the Civil Code, comprising 380 articles, were finally approved by the National Consultative Assembly on 30 October 1935. This marked the completion of the Iranian Civil Code with a total of 1335 articles. After the 1979 Revolution and the adoption of the Constitution of the Islamic Republic of Iran which emphasised the conformity of Iranian

¹⁰ One of the drafters, Seyed Mohammad Fatemi, mentions this in his biography that he used ‘in the order of: the French Civil Code, the Egyptian Civil Code, and the Ottoman Civil Code’, Bahrami Ahmadi, *ibid.*

¹¹ Vogel, *supra* note 1 at 131.

¹² Owsia, *supra* note 2 at 27.

¹³ Bahrami Ahmadi, *supra* note 3 at 47.

¹⁴ *Ibid.*, p. 48.

laws with Islamic law, the Civil Code was reviewed, but only a few articles were modified or removed.

3. Iranian Law of Contract or Law of Contracts?

Prior to the nineteenth-century codification of laws in Iran, matters of contracts were mainly governed by Islamic law. Discussions in traditional Islamic sources do not provide an all-embracing theory of contract law that is universally applicable to all types of contracts. Instead, they are almost exclusively confined to discussions of specific contracts (in Arabic: *uqud al-mu’ayyana*), such as sale, hire, and agency. This might be explained by the view that, like the classical Roman law, there is no Islamic law of contract, but rather merely a collection of laws pertaining to specific contracts. Both Roman and Islamic law feature mechanisms for giving effect to agreements that do not fit within established specific contracts, however, as some authors have explained, neither of those legal systems developed a unitary contract law.¹⁵ These authors argue that a law of contract—a unitary or general theory of contracts, as found, for example, in French law, English law, and Iranian law—does not exist in Islamic law.¹⁶

Instead of providing an overarching theory to underpin Islamic contract law, it could be argued that Muslim jurists provided individual contracts with their own unique rules¹⁷ developing what some authors describe as ‘a law of contracts’.¹⁸ This seems to be supported by fact that according to some jurists from different schools of Islamic law, the principle of freedom of contracts is not recognised in Islamic law,¹⁹ and that the list of specific contracts is eternally closed and cannot be added to. This is, however, disputed by some scholars and certainly is not applicable to Iranian law (further on this in the next section).

¹⁵ See: Owsia, *supra* note 2 at 152.

¹⁶ *Ibid.*, 163-164.

¹⁷ Ilias Bantekas, Jonathan G. Ercanbrack, Umar A. Oseni, Ikram Ullah, *Islamic Contract Law* (Oxford University Press 2024), 11.

¹⁸ See: Noel J. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham & Trotman, 1984) pp. 17, 23–31; Joseph Schacht, *Introduction to Islamic Law* (Oxford University Press, 1964), 144; Vogel, *supra* note 1 at 258.

¹⁹ For example, it is argued that, overall, Islamic law create an inhospitable climate to freedom of contracts, especially when the effect of its restrictive provisions is compounded with the revelation’s vehement, but irreducibly vague, further prohibitions of, e.g., *ribā* and *gharar*. See: Vogel, *supra* note 1 at 32.

The scepticism about an Islamic contract law is challenged by the fact that many Islamic jurists, in both Sunni and Shi’a traditions have for long engaged in discussions of general nature in the context of the various specific contracts. As observed by Al-Sanhuri, the renowned Egyptian jurist and principal author of the revised Egyptian Civil Code of 1948, while traditional Islamic jurisprudence lacked a general theory of contracts and focused on specific contracts individually, Islamic jurists would explore various rules of these contracts in order to identify the common principles that governed them all.²⁰ This is more clearly observable in relation to the contract of sale which is considered as the cornerstone of the Islamic law of contracts. It is indeed possible to infer certain general rules that are discussed under the contract of sale but are applicable to every type of contract covering a broad range of issues from the conditions of formation to the dissolution of contracts.²¹

There are also some Muslim jurists who recognised the shortcomings of the old-fashioned approach and began writing books with more attention to general principles of contracts. This practice was particularly followed by the Shi’a jurist Sheikh Mortaza Ansari (1781-1864) in his book *Makasib* (Trades), which is the most prominent book of its kind in the Shi’a tradition. Many commentaries are written on this book by subsequent jurists which have played a huge role in the development of the Shi’a law of contract. In all these books, while they still largely follow the traditional format and discuss the prototypical contract of sale, they tend to discuss many general principles of contract law and fundamental rules of obligations.²²

The said approach was taken to a whole new level by the drafters of the Iranian Civil Code and was pursued even further by contemporary legal commentators. Chapter One of Part Two of the Iranian Civil Code (articles 219-300) is dedicated to ‘Contracts and Obligations in General’. This is largely inspired by the French Civil Code where its relevant provisions were translated and modified to ensure compliance with Islamic jurisprudence. In the said chapter, the Iranian Civil Code addresses the issues and conditions that are relevant to all contracts, whether they are specific or non-specific, such as formation, performance, discharge of obligations and terminations. This is supplemented by the special provisions regarding the ‘specific contracts’

²⁰ Abd al-Razzaq Ahmad al-Sanhuri, *Masādir al-Ḥaqq fī al-Fiqh al-Islāmī* vol 1 (Jāmi‘at al-Duwal al-‘Arabīyah, Ma‘had al-Dirāsāt al-‘Arabīyah al-‘Āliyah 1959), Vol. 6, 1920.

²¹ Hossein MirMohammad Sadeghi, *Impossibility of Performance of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to Iranian and English Law*, (PhD Thesis, University of Liverpool July 1994), 16.

²² *Ibid.*, 17-18.

(*uqud-e mu’ayyan*) which will be discussed briefly in the next chapter and then in detail in Part II. This has been further advanced by legal commentators who have produced substantial works that deal separately with general principles of contracts and specific contracts in Iranian law.²³ It would, therefore, be entirely fitting to talk about the Iranian law of contract where a distinct theory of contract law has emerged.

4. Principle of Freedom of Contracts

Traditionally, Islamic jurists have generally taken an extremely narrow view of freedom of contracts. The majority of classical Islamic jurists have omitted to discuss the question of freedom of contracts and typically denied any possibility of admitting new contracts in addition to the specific nominate contracts traditionally recognised in Islamic law. This has resulted in serious debates as to whether freedom of contracts or contractual freedom (*liberte contractelle* in French) is recognised or can be considered as a general principle in Islamic law.

The main arguments in favour of and against freedom of contracts are presented by Sunni scholars of the Hanbali and Zahiri schools, respectively. Those supporting freedom of contracts, typically from the Hanbali school, assert that it is the general principle, stating that all contracts and agreements are permissible unless explicitly prohibited under Islamic law. Ibn Taymiyya, the renowned 14th-century Hanbali jurist, adopts a firm stance on this:

The underlying principle in contracts and stipulations is permissibility [ibāḥa] and validity. Any [contract or stipulation] is prohibited and void only if there is an explicit text [from Qurān or Sunna] or a qiyās [analogy] (for those who accept qiyās) proving its prohibition and voiding.²⁴

In contrast, scholars mainly from the Zahiri school, which is known for its literalistic adherence of scriptures and strict reliance on the outward (*zāhir*) meaning of expressions in the Quran and Islamic sources, argue that all contracts and agreements are considered invalid unless explicitly

²³ Two most prominent examples of this are: Seyed Hossein Safaei, *Introduction to Civil Law: General Principles of Contracts* (First published 1970, Mizan 37th ed. 2022), vol. 2; Nasser Katouzian, *Civil Law Series: General Principles of Contracts* (Ganj-e Danesh 8th ed. 2022) vol. 1-5.

²⁴ Aḥmad ibn ‘Abd al-Ḥalīm Ibn Taymīyah, *Majmu’ Fatawa Shaykh al-Islam Ahmad ibn Taymiyah* (Maktabat Ibn Taymiyah 1978) Vol. 3, 474.

authorised under Islamic law.²⁵ They maintain that under Islamic law, contracts are confined to specific types, known as specific contracts (in Arabic: *al-uqud al-mu’ayyana*). Consequently, they assert that no new contract can be introduced beyond the existing ones. If an agreement, which has no precedent in Sharia, is recognised and enforced as a binding contract, they consider it a grave sin of heresy, as it involves *bid’a* (innovation) which is an attempt to add something to the religion that is not inherently part of it, and making impermissible what God made permissible and the reverse.²⁶

The disagreement is also observable in the attitude of the said jurists towards the freedom of the contracting parties to regulate their contractual relationships by means of ‘stipulations’ in the recognised specific contracts. Many jurists of various schools believe that the parties have no freedom to add any stipulations other than those prescribed by Shari’a. Relying on various sources in Islamic sources (e.g., *ḥadiths*) that entrench the orthodox position regarding additions to, variations from, or combinations of the specific contracts, many jurists oppose most stipulations and most combinations of contracts.²⁷ However, not everyone agrees. Hanbali jurists, in particular, have largely taken the view that for rights and obligations to be added to contracts as stipulations, they do not need to be explicitly prescribed by Shari’a. There exists, in their view, a residual space, not prescribed by Shari’a, wherein individuals can exercise their freedom to include additional rights or obligations through bilateral contracts and contractual stipulations, provided that they do not offend express rules of Shari’a.²⁸

The dispute is not limited to the Sunni tradition and is observable in Shi’a jurisprudence as well with some jurists showing orthodox views and scepticism towards freedom of contracts. For instance, the renowned Shi’a jurist Shahid al-Thani, expresses in his book that a particular contract called *muqarasa*, where one party provides land and the other party provides trees with the intention of sharing the profits, should be considered null and void. He argues that since Islamic law is divinely ordained and not man-made, the validity of a contract is contingent upon the permission of God, who is the ultimate lawgiver, and in this case, such permission is absent.²⁹ The scepticism can also be seen more generally in relation to ‘stand-alone

²⁵ Mohamed Elfatih Hamid, *The Role of Consent in the Formation of Contracts - A Comparative Study in English and Islamic Law*, (PhD Thesis, University of London 1971), 318; Vogel, *supra* note 1 at 63.

²⁶ Ibn Hazm, *Al-Ihkām fī Usūl al-Ahkām* (Dar al-Afaq al-jadida 1983) vol. 2, 321.

²⁷ See: Vogel, *supra* note 1 at 32 and 65.

²⁸ Hamid, *supra* note 25 at 323.

²⁹ Zain al-Din Ali, *Masalik al-Afham fī Sharh-e Sharaye al-Islam* (Dar al-Hoda 1895), vol. 1, 174.

stipulations’ (*shurut-e ebtedāei*) which are agreements that are made outside the scope of the traditional specific contracts. Sheikh Mortaza Ansari another prominent Shi’a jurist, in his authoritative book *Makasib* (Trades), rejects that they are binding, a view which he attributes to the majority of Islamic scholars.³⁰

However, while classical Shi’a jurists hold different positions on either side of the debate on the freedom of contracts, some contemporary Shi’a jurists have preferred the less restrictive approach and argued in favour of the principle. Some for example have challenged the orthodox view and argued that it contradicts the teachings of the Quranic verse ‘O believers! Fulfil contracts (*awfu bil-uqud*)’³¹ and the hadith that states ‘The believer is bound by their stipulations’.³² According to such views, these sources establish the obligation to fulfil contracts and it is applicable to all types of contracts including stand-alone stipulations and non-specific agreements. Other Shi’a jurists have also increasingly criticised those who restrict the scope of contracts in Islamic law to specific contracts. They accuse the orthodox views of disregarding common sense and emphasise that people in their everyday lives need to enter various types of contracts, some of which involve subjects that were not even known during the early days of Islam.³³ It is now considered to be the dominant view among contemporary Shi’a jurists that contracts are not confined to specific contracts but also other types of contracts that are not explicitly mentioned in Islamic Shari’a.³⁴

Notably, the latter more flexible view that prioritises intention over form and allows for greater freedom of contracts is the one adopted in the current legal framework of Iranian contract law. Adopting a modified version of the first part of article 1134 of the French Civil Code, article 10 of the Iranian Civil Code provides:

Private contracts are binding in relation to persons who have concluded them, provided that they are not contrary to express provisions of the law.

Article 10 represents a ground-breaking departure from traditional orthodoxy in Islamic law, where according to the latter it is necessary for an agreement to fit into a specific contract, or

³⁰ Sheikh Mortaza Ansari, *Makasib* (First published 1864, Majma’ al-fikr al-Islami 4th ed. 1993), 282.

³¹ Al-Ma’idah: 1.

³² For example: Seyed Mohammad Kazim Tabatabaei, *Urwat al-Wuthqa*, (1919, reprinted in 1957) vol. 2, 315.

³³ Mir Abdul-Fattah Maraqqi, *Al-Anavin al-Fiqhiya* (1830, reprinted 1996), vol. 2, 2-10.

³⁴ Sadeghi, *supra* note 21 at 23.

be framed as a contract of composition (*sulh*), or be attached as a condition to a specific contract (a contract stipulation: *shart-e zemn-e aqd*).³⁵ In sum, the Article explicitly recognises the principle of freedom of contracts and rejects the exclusive permissibility of only specific contracts, thus being described as ‘the touchstone of the general theory of contract’ in Iranian law.³⁶

It is argued that Article 10 applies not only to non-specific contracts but also to specific contracts, allowing parties to the latter to modify or even waive legal rights through agreement.³⁷ Furthermore, and contrary to the traditionally held position in Islamic law, any contractual stipulation is enforceable, irrespective of whether it is explicitly stated within the contract itself, or as self-standing agreement.³⁸

Various dimensions of the principle of freedom of contracts have been identified by legal doctrine and commentaries on Article 10. First, people are free to contract in any reasonable manner they wish and freely determine their results and effects. The fact that the Civil Code explicitly outlines the effects and conditions of some widely used contracts, naming them ‘specific contracts’ does not imply that people are obligated to fit their intentions into these forms or express them as conditions within one of these contracts. Second, a contract is established solely by mutual consent and does not require any specific form or ceremony. The parties are not required to use specific words when forming a contract, and the expression of intention does not need any additional formalities, such as the presence of witnesses or the drafting of a document. Third, the parties to a contract are bound by their contractual obligations, and courts have no vested power to cancel or alter a contract on the grounds of equity or fairness.³⁹

In terms of the limitations to the principle under Iranian law, as mentioned above, in addition to law and legal exceptions imposed, private contracts should not conflict with public order or morality.⁴⁰ It is also said that the freedom of the contracting parties under Article 10 is limited as they cannot use it to evade legal provisions. For example, they cannot ‘exchange an object

³⁵ Owsia, *supra* note 2 at 149.

³⁶ *Ibid*, 149.

³⁷ Nasser Katouzian, *Specific Contracts* (Ganj-e Danesh 16th ed. 2011), vol. 1, 4.

³⁸ See: Nasser Katouzian, *Praise or Management of Contract*, 25-26 Naqd va Nazar (January 2001), 279-280.

³⁹ Nasser Katouzian, *Juridical Acts* (Sherkat Sahami Enteshar 4th ed. 2011), p. 57.

⁴⁰ Article 975 of the Civil Code.

for a price’—the core definition of the contract of sale—and label it a ‘private contract under Article 10’ in an attempt to evade the mandatory provisions of a contract of sale.⁴¹

5. Conceptualisation of ‘Contract’ in Iranian Law

An important issue in exploring the recognition and existence of a general theory of contract in any legal system is the conceptualisation of ‘contract’. Like many other areas of Islamic jurisprudence, the fundamental principles of Islamic law of contracts were developed as interpretative techniques rather than theoretical abstractions. Consequently, the classical Islamic jurists did not attempt to define the term ‘contract’.⁴² This section aims to elucidate the conception of contract in Iranian law. It will begin by outlining the statutory definition of a contract, borrowed from French Civil Code, and the critical discussions about it in the literature. Following this, and seeking to go beyond the formal definition, the section will explain how contract is understood in Iranian law through delineating how it is distinguished from competing concepts, and through the various classifications of contracts.

5.1. Definition of contract

‘*Aqd*’ (plural: *uqud*) is originally an Arabic word that, in literal translation, means ‘to bind’, and is commonly used in Iranian law to refer to contracts. While the term ‘*aqd*’ holds historical and formalistic significance in Islamic law where it is associated with nominate contracts, it is frequently used interchangeably with *qarārdād*, a Persian term that does not carry the same connotation, denoting a contract.⁴³ Additionally, there is a third term, *mu’āmeleh*, an Arabic term used in Islamic law, which can be translated as ‘transaction’. It carries a business connotation and is often used for contracts involving an exchange of value. However, depending on the context, it, too, can also denote a contract in general.

⁴¹ Katouzian, *supra* note 37, Vol. 1, 6.

⁴² Bantekas *et al*, *supra* note 11, p. 10.

⁴³ *Aqd* and *qarardad* are said to correspond to the French terms *contrat* and *convention*, respectively; however, this distinction is blurred and diminished under Iranian law. *See*: Owsia, *supra* note 2 at 162.

Article 183 of the Iranian Civil Code provides the statutory definition of a contract: ‘Contract consists in the undertaking of something by one or more persons towards one or more other persons, and it is accepted by them’. Taking into account both its technical and literal meanings, the definition refers to the creation of a legal relationship between two parties that binds them together.⁴⁴ It has, however, been criticised by many legal commentators as inadequate and an unsuccessful transplant to mirror article 1101 of the French Civil Code which states: ‘A contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something’.

One obvious difficulty with the definition of Article 183 of the Iranian Civil Code is that it is unable to explain the nature of onerous contracts (*uqud-e mu'avvaz*) and is structured in a way that suggests only one party makes an undertaking while the other party merely accepts it, playing a passive role. However, in onerous contracts, the role of neither party is limited to accepting the undertaking of the other party. Each party, while accepting the undertaking of the other party, also assumes an undertaking towards the other. For example, it is argued that in a situation where a labourer commits to perform a certain task in exchange for a specified fee, he accepts the employer’s offer regarding the fee. In turn, the employer, while making an undertaking to pay the fee, accepts the undertaking of the employee to perform the task. The result of these mutual undertakings and the agreement of the two intentions regarding the exchange of the labour and the fee is a contract, and this concept is not reflected in article 183.⁴⁵

The article also appears to only define a contract of promise (*aqd-e ahdi*) and does not cover a contract that transfers ownership (*aqd-e tamliki*). In the latter type of contracts, the direct and primary effect of the contract is not creating obligations; that would be secondary such as the obligation to deliver the sold property and pay the sale price. Based on the appearance of this definition, if an agreement is made for the purpose of transferring ownership, or indeed modifying, terminating, or transferring an obligation, it would not be considered a contract. However, as some legal commentators have pointed out, a closer examination of the article indicates that this appearance is deceiving. This will be addressed in greater detail later.

⁴⁴ Seyed Hassan Imami, *Civil Law* (Islamiyah 4th ed. 2022), vol. 1, 159.

⁴⁵ Katouzian, *supra* note 39 at 31.

It is said that the drafters of the Civil Code failed to distinguish between the contract and the resulting obligation.⁴⁶ It must also be emphasised that, in Islamic law the effect of a contract has never been limited only to the creation of obligation. Therefore, it is suggested that the definition of article 183 is deficient and exemplifies a poor adaptation from the French Civil Code.⁴⁷ The shortcoming of the law has compelled the doctrine to develop more precise definitions of a contract such as: ‘correspondence of two mutual intentions made to create a legal effect’.⁴⁸

5.2. *Delimiting Contract and contract law*

5.2.1. Contract and unilateral juridical act

Contracts are primarily distinguished in Iranian law from unilateral juridical acts (*iqā’*, plural: *iqā’āt*). Contracts and unilateral juridical acts are both juridical acts that necessitate intention as an essential condition. More generally, the rules and principles concerning intention, consent, and capacity that are mentioned in relation to contracts also apply to unilateral juridical acts. The difference between them lies in the fact that a contract is a bilateral juridical act that necessitates the intention of both parties for its formation. In contrast, a unilateral juridical act, as the title implies, is a unilateral act, that only requires the intention and consent of one party for its realisation. For instance, under Iranian law, divorce is considered a unilateral juridical act performed by the husband. While a divorce can be amicable and motivated by the agreement of both spouses, the divorce itself is an action carried out solely by the husband in the final stage, and the intention or acceptance of the wife is not needed for its realisation.⁴⁹ Similarly, in a waiver of a debt by the creditor (*ibrā*), only the intention of the debtor is required to discharge the debt.⁵⁰

There is no doubt that a unilateral juridical act is recognised in Iranian law as a basis for legal obligation in certain cases. However, the legal status of a unilateral obligation is subject to debate, and there exists a general difference of opinion among legal scholars regarding whether

⁴⁶ *Ibid.*, 30.

⁴⁷ See: *ibid.*, 30-31; Imami, *supra* note 44, vol. 1, p. 161.

⁴⁸ Katouzian, *supra* note 39 at 32.

⁴⁹ Safaei, *supra* note 23 at 26.

⁵⁰ Article 289 of the Civil Code.

the sole intention of an individual can always give rise to an obligation for them. It is generally accepted in Iranian law that the unilateral intention of an individual, except in cases explicitly provided for by the law, cannot create an obligation. This position is supported by the argument that the Iranian legislator has explicitly considered the bilateral agreement of two intentions as a basis for obligation (Articles 10, 183, and 193 of the Civil Code); however, the same is not extended to unilateral juridical acts. It is contended that if the legislator intended to universally recognise unilateral juridical acts as a source of obligation, it should have expressly stated so, similar to its treatment of contracts.⁵¹ Therefore, it is concluded that a unilateral commitment, unless expressly mentioned in the law, lacks legal effect and does not legally bind a person. This appears to be the accepted view by the majority of Iranian legal scholars and Islamic jurists.⁵² For instance, it is stated that ‘in Islamic law, the notion that a unilateral juridical act can give rise to obligations and liabilities has not been accepted. A person cannot unilaterally bind themselves in relation to others solely through their own intention, even if this obligation stems from an intentional act.’⁵³ In other words, under Iranian and Shi’a Islamic law, unilateral juridical acts are restricted to specific and recognised cases; while non-specific and unrecognised unilateral juridical acts lack legal effect.⁵⁴

This is also consistent with the judicial practice of Iranian courts. In a unanimous opinion in 1989, the judges of Tehran Civil Courts stated: ‘Shi’a jurists and the majority of legal scholars do not consider unilateral commitment as binding. The Civil Code does not address this issue, and articles 10 and 219 of the Civil Code specifically pertain to contracts and agreements, not unilateral obligations and juridical acts. Therefore, from the perspective of the Civil Code, unilateral obligations do not appear to be generally binding [...] except in specified cases.’⁵⁵

5.2.2. Contract and torts

Under Iranian law, juridical facts (*vaqāye’e huquqi* mirroring the French *fait juridique*) are phenomena that regardless of the individual’s intention, result in legal consequences by the force of the law. This can be external events such as death or an intentional or negligent acts

⁵¹ Safaei, *supra* note 23 at 27.

⁵² *Ibid.*, 28; see also: Katouzian, *supra* note 39 at 22.

⁵³ Jalil Qanavati et al., *Contract Law in Imamiya Jurisprudence* (Samt Publications 2000), vol. 1, 99.

⁵⁴ *Ibid.*

⁵⁵ Youssef Noubakht, *Judicial Thoughts* (Tolid-e Ketab 2006), 343.

such as damaging someone else’s property, which entitles the owner to seek damages. The latter category of juridical facts, whether resulting from intention, negligence or recklessness, is addressed in articles 301-337 of the Iranian Civil Code, which are referred to as ‘forced liability’ (*zaman-e qahri*) or alternatively ‘extracontractual obligations’ clearly distinguishing them from contract law. Further provisions on this are also prescribed in the Civil Liability Act 1960. Extracontractual obligations under Iranian law can be divided into the following main categories:

- (i) Harm to others, in which case the law imposes a legal obligation on the wrongdoer to provide compensation and is referred to as ‘civil liability’ in the strict sense.
- (ii) Benevolent intervention or unjust exploitation, which covers situations where someone intervenes with another person’s affairs or benefits from and unjustly exploits another person’s property or actions. It encompasses topics such as undue payment, unjust enrichment, and management of another’s affairs.
- (iii) Usurpation (*qasb*), which is a trespass and involves the unauthorised possession or exercise of authority over someone else’s property.⁵⁶ It is a distinct category that does not fit solely into either of the previous two types and has both aspects: it causes harm and creates civil liability, while also leading to the unjust enrichment of the usurper at the expense of someone else’s property.⁵⁷

The key advantage of distinguishing contractual and extracontractual liability lies in the fact that in the former, proving the breach of contract is typically enough, while in the latter, it is often necessary to establish negligence on the part of the responsible person.⁵⁸

5.2.3. Contract and quasi-contract

In the Roman law tradition and Napoleonic law, a third source of obligation to encompass acts that did not fall under the primary sources of obligation, namely contract and delict. Quasi-

⁵⁶ Article 308 of the Civil Code.

⁵⁷ Nasser Katouzian, *Juridical Facts* (Sherkat Sahami Enteshar 6th ed. 2011), 10.

⁵⁸ *Ibid.*, 11.

contract created liabilities similar to those arising from contracts. However, in Iranian law, despite its partial affiliation with the Roman law tradition and influence from Napoleonic law, and while quasi-contracts are briefly mentioned by some legal commentators,⁵⁹ they are not recognised in law. Iranian law acknowledges extracontractual obligations, and there is no requirement for an obligation to arise from a contract or a similar act.⁶⁰ Moreover, it is argued that quasi-contracts bear no resemblance to contracts. In contracts, the essential element is the mutual agreement of two parties’ intentions to create the legal effect and obligation. In quasi-contracts, even if the act itself is intentional, the intention is not to create obligation; it is the law that imposes the obligation.⁶¹

As explained in the previous section, under Iranian law, such phenomena are classified as juridical facts and are discussed under extracontractual obligations, particularly those dealing with benevolent intervention in another’s affairs and benefiting from someone else’s property or actions. These are typically discussed under titles such as undue payment, unjust enrichment, and management of another’s affairs which give rise to extracontractual liability.

5.2.4. Contract and trust

There is no direct equivalent within Iranian law to the concept of trust as understood in common law systems, or the concept of ‘*fiducie*’ in French law. The absolute and all-embracing conception of ownership in Islamic law and Iranian law, is incompatible with the recognition of trust, where legal and beneficial ownership of a property can be separated as seen for example in English law. Perhaps the closest concept to trust in Iranian law is *vaqf* (endowment) which is defined in article 55 of the Iranian Civil Code as ‘the preserving (*habs*) of a real object (*eyn*), and dedication of its benefits for charitable purposes (*tasbil*)’. It entails the protection and preservation of a property in a manner that the use, enjoyment, and benefits of the property are devoted to a charitable and pious purpose in perpetuity. Unlike a trust, which is often utilised for commercial purposes, a *vaqf* is considered a religious practice, and is inalienable, irrevocable, and perpetual. It is possible for a person to create an endowment for the benefit of

⁵⁹ For example: Imami, *supra* note 44, vol. 1, p. 128; Katouzian, *supra* note 57 at 18.

⁶⁰ Katouzian, *supra* note 39 at 18.

⁶¹ *Ibid.*, 19.

certain individuals, such as the person’s children or other relatives,⁶² which is called special or private endowment (*vaqf-e khās*) and is in contrast to general or public endowment (*vaqf-e ām*). Yet, it is evident that despite its synergies with the trust, the two differ significantly in their nature and purpose.

The disparity between the two concepts is widely acknowledged, particularly in relation to ownership, duration, and legal personality. Firstly, in accordance with the Islamic law tradition, Iranian law requires *vaqf* to be perpetual, while Common Law systems like English law have a rule against perpetuities, which imposes limits on the duration of trusts. Secondly, in a trust, the legal ownership of the trust property is vested in the trustee, whereas in *vaqf*, many jurists maintain that no one, including the God, owns the *vaqf* property. Once a *vaqf* is established, the beneficiaries of the *vaqf* have no direct legal relationship with the principal (*vāqif*).⁶³

5.3. Classification of Contracts

Both the law and legal commentators have classified contracts from various points. Article 184 of the Iranian Civil Code provides a statutory classification of contracts: ‘Contracts and transactions are divided into the following categories: irrevocable (*lāzim*), revocable (*jāyiz*), optional (*khiyāri*), definitive (*munajjaz*), and suspensive (*mu’allaq*).’ The law neither explicitly states the basis for this classification, nor does it say whether it is an exhaustive list. It is criticised for grouping all the categories together. Additionally, the inclusion of ‘optional’ contract alongside ‘irrevocable’ and ‘revocable’ contracts is considered problematic, as an optional contract is a type of irrevocable contract.⁶⁴ Therefore, it would be more accurate to say that contracts are divided into irrevocable and revocable contracts in terms of dissolvability, and into definitive and suspensive contracts in terms of the manner of their creation. While this addresses the apparent deficiency of the article, it does not make up for the incomplete list. The classifications mentioned are not the only ones recognised in Iranian contract law.

In addition to the above classifications, other categories of contracts are implicitly mentioned in the Civil Code: onerous (*mu’avvaz*) and gratuitous (*qeyr-e mu’avvaz*), specific (*mu’ayyan*)

⁶² Article 70 of the Civil Code.

⁶³ See: Mohammad Jafar Jafari Langruodi, *Property Law* (Ganj-e Danesh 2009), 202.

⁶⁴ Mostafa Adl, *Civil Law* (AmirKabir 4th ed. 2006), 110.

and non-specific (*qeyr-e mu’ayyan*). A contract may also be correct (*sahih*) i.e., valid, or corrupt (*fāsīd*) i.e., void. Legal authors have also made various further classifications in order to bring order to the abundance of contracts and to clarify the characteristics of each group. Among these classifications are the followings: contracts of transferring ownership (*tamlīki*), contracts of promise (*ahdi*), consensual contracts (*rezāei*) and ceremonial contracts (*tashrifāti*). These categories will be explained separately below.

5.3.1. Specific and non-specific contracts

Contracts in Iranian law are divided between two categories: specific or nominate contracts (*uqud-e muayyan*) and non-specific or innominate contracts (*uqud-e qeyr-e muayyan*). A specific contract is a contract that falls under one of the specific titles in the law (including the Civil Code and other laws), and the legislator has specified its provisions due to its significance and prevalence. Examples of specific contracts include sale (*bai’*), hire (*ijareh*), deposit (*vadi’eh*), two types of borrowing and loan (*āriyeh*) and (*qarz*) corresponding respectively to the Roman *commodatum* and *mutuum*, donation (*hebeh*), agency (*vekalat*), partnership (*sherkat*), marriage (*nikah*), agricultural partnership (*muzāre’eh* and *musāqāt*), and profit-sharing (*muzārebeh*). In contrast, non-specific contracts are contracts that do not have a specific title in the law, which, as explained earlier, fall under article 10 of the Civil Code, and their provisions are governed by general principles of contract law.

The above arrangement is not dissimilar to that of many other legal systems, such as English law, which, as readers of the two volumes of ‘Chitty on Contracts’ will observe, is also divided into two parts, one containing a set of common general rules and the other special regimes for specific contracts. However, the current significance of the above classification under Iranian law, beyond imposing order and structure in the codification, is not quite clear. In any case, its importance is undoubtedly diminished compared to simpler times in the past when only a fixed number of specific contracts were considered binding under traditional Islamic law. As Katouzian has put it,

In their simple lives, previous generations only needed a certain number of these juridical acts, and it was sufficient for them to gather all the necessary titles and

*address the provisions of each one. However, as soon as the variety of contracts expanded beyond a fixed number, that old method was no longer viable, and it became necessary to establish rules that could encompass all juridical acts.*⁶⁵

Under contemporary Iranian law, owing to Article 10 of the Civil Code and the recognition of the principle of freedom of contracts as explained earlier, both specific and non-specific contracts, regardless of their form, are subject to the general rules of contracts. In this regard, there is no distinction between specific contracts and other contracts, and this remains unaffected even though the Civil Code has devoted hundreds of specific provisions (articles 338-807) to a fixed number of specific contracts.

5.3.2. Irrevocable and revocable contracts

Contracts under Iranian law are divided in terms of dissolvability and method of termination into irrevocable (*lāzim*) and revocable (*jāyiz* or *jāiz*). According to article 185 of the Iranian Civil Code, an irrevocable (*lāzim*) contract is a contract in which neither party has the right to set it aside unless in specified cases. It might be said that for a contract to have significant legal effect, both parties must be bound by their commitments and unable to willingly avoid its enforcement. Revocable contracts are recognised in the Iranian legal system, as will be explained shortly, but the possibility of revoking a contract is contrary to the general rule and is an exception. According to the principle stated in article 219 of the Civil Code, known as the presumption of irrevocability (*esālat-e luzum*), all contracts are presumed irrevocable unless the law permits their revocability.⁶⁶

Article 186 of the Civil Code defines a revocable (*jāyiz*) contract as one where ‘each party can terminate it at any time they wish.’ No specific reason is required to terminate a revocable contract, and the parties (or in some cases only one party⁶⁷) have the right to terminate it at any

⁶⁵ *Ibid.*, 25.

⁶⁶ Safaei, *supra* note 23 at 30.

⁶⁷ Some contracts are hybrid, meaning that they are revocable for one party and irrevocable for the other. An example is the contract of *rahn* (mortgage) which, according to article 787 of the Civil Code, is irrevocable for the mortgagor (*rahen*) but revocable for the mortgagee (*mortahen*).

time. Examples of revocable contracts include contracts of agency (*vekālat*) and deposit (*vadi’eh*).

Distinguishing between the irrevocable and revocable contracts is not only necessary for determining the extent of the rights and obligations of the parties, but it also has other legal implications to the point that it is considered as the most significant classification regarding contracts in Iranian law. One of the important implications is regarding the impact of certain juridical facts. For instance, an irrevocable contract remains valid even in the event of death, insanity, or bankruptcy of one of the parties, and the legal substitute or representative of the deceased or the interdicted or bankrupt person will be bound. In contrast, a revocable contract automatically terminates upon the occurrence of any of these events (article 954 of the Civil Code). For example, in a contract of agency, the death or insanity of the agent or principal terminates the contract (article 678 of the Civil Code). However, the death or incapacity of a buyer or seller does not remove the contractual obligations arising from the sale.⁶⁸

The revocability of revocable contracts is not considered an inherent characteristic in Iranian law. Therefore, except in cases where the law disallows it, the parties can convert a revocable contract into an irrevocable contract mainly by way of waiving their right to termination. Article 679 of the Civil Code regarding agency states: ‘The principal may dismiss the agent at any time unless the agency or non-dismissal is expressly stipulated in an irrevocable contract.’ Thus, if the contract of agency is formed as a contractual stipulation (*shart-e zemn-e aqd*) within an irrevocable contract (e.g., sale) or if the right to dismissal and resignation is waived within the same contract of agency, the contract becomes irrevocable,⁶⁹ which is the result of the principles of freedom of contracts and primacy of intention. It is said that the contract of agency is not unique and the same is applicable as a general rule to all revocable contracts.⁷⁰

It must be noted, however, that the said revocable contracts only become irrevocable regarding intentional termination by the parties. They do not lose their inherent characteristics such as termination as a result of death or insanity. A further common mistake that must be avoided is that the revocability of a contract does not imply the absence of obligations or non-bindingness of such contracts; in other words, an obligation is always binding, whether it is created by an

⁶⁸ Katouzian, *supra* note 39 at 38-39.

⁶⁹ Imami, *supra* note 44, vol 2, pp. 232-238.

⁷⁰ Katouzian, *supra* note 39 at 35.

irrevocable or revocable contract. Therefore, as long as a revocable contract has not been terminated, the obligations resulting from it are binding and enforceable.⁷¹

5.3.3. Consensual, real, and ceremonial contracts

A further classification of contracts under Iranian law is based on the method of formation of contracts. A consensual contract (*aqd-e rezāei*) is a contract that is formed solely through offer and acceptance, such as a contract of sale (article 339 of the Civil Code). In other words, what matters is the consent and intention of the parties, and the manner of its manifestation is insignificant and does not require any form or extra element. In contrast, a real contract (*aqd-e eyni*), or a contract *in re* in Roman law terms, is a contract that, in addition to offer and acceptance, its formation is contingent upon the actual receipt of the subject matter (*qabz*). Examples include an endowment (*vaqf*), mortgage (*rahn*), and donation (*hebeh*). For example, article 798 of the Civil Code states: ‘donation shall not conclude except by the acceptance and *qabz* by the recipient, whether the recipient is the donee or their agent...’.

The receipt of the subject matter (*qabz*) in a real contract (*aqd-e eyni*) is a condition of validity rather than irrevocability. The practical significance of this distinction lies in the impact of death and incapacity of the contracting parties on the validity of the contract, as well as in determining the ownership of separable benefits. Because receipt is a condition of validity in this type of contract, until it takes place, if either party dies or becomes incapacitated the contract is dissolved; in addition, the separable benefits (e.g., fruits of a garden) belong to the transferor. However, if receipt were a necessary condition, the contract would be deemed to have formed upon offer and acceptance and would be unaffected by the death or incapacity; the separable benefits would also belong to the transferee.⁷²

Alongside the consensual and real contracts, there is a further category of contracts known as ceremonial contracts that require specific formalities in addition to the consent of the parties. A ceremonial contract is defined as a ‘contract that requires the consent to be accompanied by

⁷¹ Mohammad Jafar Jafari Langruodi, *Property Law* (Ganj-e Danesh 2009), at 33.

⁷² See: article 830 of the Civil Code.

formalities or specific words; otherwise, it will have no legal effect and will not create any obligations.’⁷³

The dominant view, and the legal presumption, in Iranian contract law is that contracts are in general consensual, and the categories of real and ceremonial contracts are limited and exceptional. Referring to article 190 of the Civil Code⁷⁴, it can be argued that, in principle, the agreement of two intentions is both necessary and sufficient for the formation of a contract, and it does not require any formalities. This can also be inferred from other legal provisions for, except in rare cases, contracts are concluded by consent, and that words are merely a means of expressing intention, rather than a condition for the validity of the contract. Therefore, it can be said that in Iranian contract law, the principle is that ‘a contract is formed by consent, without the need for formalities or actual delivery of the subject matter which can only be considered as the effects and implications of the transfer of ownership and contractual performance.’⁷⁵ This inferential rule, known as ‘the presumption of consensuality’, is a result of the principle of the primacy of intention. Whenever there is doubt about the necessity of an additional element (e.g., formalities or actual delivery and receipt of the subject matter), it is relied upon and the consent alone is presumed sufficient.

Uncontroversial examples of ceremonial contracts include the sale of seized properties, which must be conducted through auction (article 114 of the Execution of Civil Judgments Act), the transfer of shares in a limited liability company which must be done through a notarised document (Article 103 of the Commercial Code), and transactions involving government properties that are typically conducted through auctions or tenders. In addition, the contract of insurance (article 2 of the Insurance Act), and collective labour agreements (article 140 of the Labour Act) cannot be conducted orally and must be in written form.

A contentious example is the sale of registered properties. According to Article 22 of the Registration Act, the government only recognises as the owner of the property the person to whom the property has been transferred and this transfer is also registered in the real estates Register...’. Some commentators interpret this as a validity condition, considering the sale of

⁷³ Katouzian, *supra* note 39 at 49.

⁷⁴ Article 190: ‘For the validity of any contract the following conditions are essential: (1) The intention of the parties and their consent; (2) The legal capacity of the parties; (3) A definite object to form the subject-matter of the contract; (4) The lawfulness of the cause of the contract.’

⁷⁵ Katouzian, *supra* note 39 at 49.

registered properties to be a ceremonial contract.⁷⁶ This is contested by other jurists who argue that following the 1979 Revolution contracts concerning registered properties that are made with an unregistered informal document are also considered valid.⁷⁷ Current judicial practice tends to give effect to such documents as potential evidence of the existence of the contract of sale, however a lawsuit will be required to seek recognition from the court and enforcing the unregistered transfer.⁷⁸

5.3.4. Contracts of transferring ownership and contracts of promise

Contracts under Iranian law are divided into two categories of contracts of transferring ownership (*tamliki*) and contracts of promise (*ahdi*), which is of particular interest for comparative studies. Although this distinction is not explicitly stated in the Civil Code, it is mentioned in article 825 in relation to testation which is listed among the specific contracts. Testation is divided into a testation of transferring ownership (*vasiyat-e tamliki*) and of promise (*vasiyat-e ahdi*). A testation of the former type results in the transfer of ownership, while the latter creates an obligation for the executor of the will (*vasi*) to fulfil its contents and for the beneficiaries to entrust the subject matter of the testation to the executor. The same distinction is said to apply to other contracts. A contract that leads directly to the transfer of ownership is referred to as a contract of transferring ownership (*tamliki*) such as the sale and hire which create a right *in rem* (*haq-e eyni*).⁷⁹ By contrast, a contract where ownership is to be transferred at a later stage, such as in a sale of fungible goods, or where no transfer of ownership is involved, such as someone entering into an agreement to build a house for another person or to transport goods from one place to another, is considered a contract of promise (*ahdi*) which gives rise to the creation of an obligation *personam* (*haq-e deyni*).⁸⁰ The latter contract may be considered, in English terminology, executory.⁸¹

⁷⁶ *Ibid.*, 50.

⁷⁷ Mehdi Shahidi, *Law of Obligations* (Majd 27th ed. 2022), 118; Safaei, *supra* note 23 at 50.

⁷⁸ *Ibid.*

⁷⁹ Article 338 defines the contract of sale as ‘the transfer of ownership of a specified goods in exchange for a known price’. In article 466, the contract of hire is defined as: ‘a contract whereby the hirer becomes the owner of the benefits resulting from the object hired.’

⁸⁰ Katouzian, *supra* note 39 at 47; Safaei, *supra* note 23 at 46.

⁸¹ Owsia, *supra* note 2 at 171

As it was evident from previous discussions, Iranian contract law has been influenced by two fundamentally different legal traditions: Islamic law and classical Roman tradition through the Napoleonic Code (i.e. the French Civil Code). This dual influence, as highlighted here by the dichotomy between the contracts of transferring ownership (*tamliki*) and contracts of promise (*ahdi*), has resulted in some inconsistencies and vague provisions in the Iranian Civil Code. For instance, if a contract, as defined in article 183 of the Iranian Civil Code (see 5.1. above), is interpreted solely as creating obligations for the parties, then the existence and possibility of a contract that creates ownership instead of an obligation might become doubtful. Depending on which root of the Iranian contract law is prioritised, legal commentators are split on this in their analysis.

Some commentators have insisted on approaching this from the perspective of the Roman law tradition and argued that contracts create obligations and rights *personam* (*huquq-e deyni*) only or primarily. Following the viewpoint of some French commentators, they argue that even in contracts of transferring ownership (*tamliki*), what is actually created is an obligation, but it is instantly and automatically performed upon creation, leading to a transfer of ownership.⁸² However, this view has faced criticism from other commentators who have prioritised the roots of the Iranian Civil Code in Islamic law. They argue that contracts of transferring ownership (*tamliki*) are explicitly recognised under Islamic law and have a different juridical effect compared to contracts under Roman law. For them, the appearance of article 183 is deceiving and should be understood in light of Islamic jurisprudence. They contend that there is no need to subscribe to the view that a contract primarily creates an obligation and then secondarily transfers ownership. A contract, in their view, can primarily and directly transfer ownership.⁸³ This seems to be the view adopted in Article 362(1) of the Iranian Civil Code, which contrary to Roman law, is said to recognise, the efficacy of the contract of sale to transfer the ownership.⁸⁴ It provides that: ‘Forthwith upon the conclusion of sale [of a specific object for a specific price] the purchaser becomes the owner of the object sold and the seller the owner of the price’.

Regardless of the said disagreement, which appears to be purely academic, legal scholars agree that the consequences and rules governing contracts of transferring ownership and contracts of

⁸² Safaei, *supra* note 23 at 46.

⁸³ Katouzian, *supra* note 39 at 47-48.

⁸⁴ Owsia, *supra* note 2 at 171

promise are different. For instance, in a contract of transferring ownership, it is a requirement that the subject matter of the contract exists at the time of the contract; otherwise, the contract is considered void (Article 361 of the Civil Code). However, in a contract of promise, it is possible for the subject matter of the contract to not exist at the time of the contract and come into existence afterwards. Furthermore, a contract of transferring ownership establishes a right *in rem* (*haq-e eyni*) for the beneficiary (i.e., owner), which is valid and enforceable against everyone, and it includes the right of pursuit. This means that the holder of the right can pursue the subject matter of the right anywhere and claim it back from any possessor. In contrast, a contract of promise only creates a relative and *personam* right, which the holder of the right can enforce it only against the party who has made the promise.⁸⁵

5.3.5. Suspensive and definitive contracts

In Iranian contract law, a further distinction is made between contracts that contain a suspensive condition, which makes the effect of the contracts dependant on a future, uncertain event (*aqd-e mu’allaq*), and contracts that their effect is definitive and not suspended or conditional on any such other event (*aqd-e munajjaz*).⁸⁶ The term used for the former type of contracts under Iranian law (i.e., *aqd-e mu’allaq* which is an Arabic term literally translated as suspensive contract) is criticised and it is suggested that it would be more accurate to follow the French Civil Code⁸⁷ and refer to it as ‘conditional obligation’.⁸⁸

In a contract that contains a suspensive condition, the parties express their definitive intention but suspend its effect until the occurrence of a condition. For example, if a man says to a woman, ‘I sold you my house on the condition that you marry me’, assuming the woman accepts the offer, ownership will be transferred only when the marriage takes place between them. Therefore, the contract does not differ from other contracts in the stage of formation and agreement, and it is the creation of its effect and the obligations that is subject to a future external event. In contrast, in a definitive contract the effect of the contract and obligations of the parties are not dependent on any other event and are created with their agreement.⁸⁹

⁸⁵ Safaei, *supra* note 23 at 46.

⁸⁶ Article 189 of the Civil Code

⁸⁷ Former article 1184, and current 1304 in the new French Civil Code.

⁸⁸ In French: ‘*obligation conditionnelle*’; *see*: Safaei, *supra* note 23 at 35.

⁸⁹ Katouzian, *supra* note 39 at 37.

Islamic jurists and Iranian legal authors have distinguished between two types of suspension. Firstly, there is a suspension in the intention to create the legal relation which is made contingent upon a future uncertain condition. This is called suspension in creation (*ta’liq dar inshā*), and it is considered null and void *ab initio* because it means no creation at all. Secondly, there is a suspension in what is created i.e. the effect (*ta’liq dar munsha’*), meaning that there is no suspension in the intention to create the legal relation, but rather a suspension in the realisation and the effects of the contract. In such cases, the contract is formed at the time of offer and acceptance, but the effects (e.g., transfer of ownership in a contract of sale) is conditional upon a further event.

Article 723 of the Civil Code prescribes obligations of the latter type, stating that:

Within an irrevocable contract, someone may undertake the payment of another person’s debt. In that case, suspension of the obligation will not render the contract void: for example, if someone suspends their obligation making it dependant on the debtor’s refusal to pay the debt.

This is a clear example of a contract that contains a suspensive condition making the obligation to pay another’s debt dependant on a future, uncertain event i.e. the debtor refusing to pay their own debt. The suspension pertains only to the effect rather than the creation of the obligation, and therefore, it is considered valid under Iranian law. Based on article 10 of the Civil Code (the principle of freedom of contracts) and the presumption of validity of contracts, there is no reason to invalidate this type of contract unless explicitly declared invalid in law.⁹⁰ For instance, the Civil Code has made explicit exceptions in relation to the contracts of guarantee (*zaman*) and marriage (*nikah*), declaring them void if their effect are made dependant on a future, uncertain event.⁹¹

Before the realisation of the subsequent condition, the fate of the contract’s effect is uncertain. This is because if the condition is realised, the effect and obligations arising from the contract will be created. Conversely, if it becomes clear that the subsequent condition will not be

⁹⁰ See: Imami, *supra* note 44, vol. 1, pp. 164-170; Safaei, *supra* note 23 at 34-35; Katouzian, *supra* note 39 at 37-39.

⁹¹ Articles 699 and 1068.

realised, the contract will have no effect. Therefore, during the period after the formation of the contract and before the subsequent condition is realised, the creditor has no right to demand it. Similarly, if the subject matter of the contract is the transfer of ownership (e.g., in a contract of sale), the buyer’s right of ownership has yet to be actualised. Nonetheless, the rights that arise as a result of such a contract have their own legal implications: they can be transferred and will generally pass on to the heirs; neither the seller nor the buyer has the right to unilaterally terminate the suspended contract unless there are legal grounds; and the seller can also exercise their lawful rights in their property pending the condition and can take actions necessary to preserve their rights provided that it does not conflict with the rights of the buyer.⁹²

5.3.6. Onerous and gratuitous contracts

Depending on the absence or presence of exchange, contracts under Iranian law are divided into two main categories: onerous contracts or alternatively contracts of exchange or value (*mu'avvaz*), and gratuitous contracts or alternatively contracts of benevolence (*gheyr-e mu'avvaz*).

In onerous (*mu'avvaz*) contracts, e.g., sale and hire, each party gives something (called *evaz* e.g. sale price or rent)⁹³ in exchange for obtaining something else (called *mu'avvaz* e.g. goods or the usufruct of the hired property) from the other in return. In other words, there is a *quid pro quo* relationship.⁹⁴ It is also noted by some commentators that in this type of contract, there are always two obligations and while each party is an obligor to the other, they are at the same time obliged to each other. For example, in a sale contract both the seller and the buyer incur obligations towards each other: the seller is obliged to deliver the sold item and is a creditor for the sale price, while the buyer acquires the sold item in return for the debt i.e. the obligation to pay the sale price.⁹⁵ It is worth noting that the value of the two exchanged subjects does not need to be equal; and a difference in value is not a reason to declassify the contract as onerous, unless the *evaz* is so insignificant and low in value that it is not considered of value by custom

⁹² Katouzian, *supra* note 39 at 39; Safaei, *supra* note 23 at 35.

⁹³ Note that this should be distinguished from, and not confused with, the doctrine of consideration in English law. Therefore, ‘*evaz*’ is not translated as ‘consideration’ here to avoid any confusion.

⁹⁴ Safaei, *supra* note 23 at 40.

⁹⁵ Katouzian, *supra* note 39 at 41; compare with the views that argue this is a separate classification: Safaei, *ibid.*, 40-41.

but rather a trick to pretend the existence of an *evaz*. For example, selling a house for a lump of sugar or selling a garden in exchange for the produce of the same garden for one year following the sale.⁹⁶

In contrast, in a gratuitous (*qeyr-e mu'avvaz*) contract, even though there are two parties and the legal relation is bilateral, one party commits to an action or gives something for free to the other party without the other party giving anything or making any promise in return. For instance, in a contract of donation (*hebeh*), the donor gifts a property to the recipient without any thing or obligation from the recipient in return. Therefore, in gratuitous contracts, the *evaz* lies only on one side, and the role of the recipient is limited to accepting the ownership or the other party’s debt or obligation.⁹⁷

The classification is pertinent and has numerous effects, notably the interdependence of the two subject matters and the resulting implications in transactions. In onerous (*mu'avvaz*) contracts, since the intention of each party is to acquire the thing that the other party undertakes, a relationship is established between the two obligations, where the existence of each is dependent on the other. This reciprocal relationship has significant implications for the two parties, which are absent in gratuitous contracts. For example, if the obligations arise simultaneously, and unless agreed otherwise, each party retains the right to withhold performance until the other party’s relevant counter-performance. This is known in Islamic and Iranian law as *haq-e habs* (translated as the right of retention).⁹⁸ However, in a gratuitous contract, the only recourse for breach of the obligation is to seek compulsory enforcement from the court.⁹⁹

This brings us to a related concept of comparative significance: the notion of ‘*cause*’, as elaborated in French contract law and referenced in Article 190 of the Iranian Civil Code. Following the pattern of Article 1108 of the French Civil Code, the Iranian law requires the lawfulness of the cause (*jahat*) among the essential conditions for the validity of a contract. However, some commentators argue that Iranian law has adopted a mixed approach influenced

⁹⁶ Katouzian, *supra* note 39 at 41.

⁹⁷ *Ibid.*

⁹⁸ Article 377 of the Civil Code; Katouzian, *supra* note 23, vol. 4, pp. 79-83. This is similar to, though distinguishable from ‘*exception d’inexécution*’ in French law and the ‘exception of non-performance’ in English law.

⁹⁹ Katouzian, *supra* note 39 at 42.

by both Islamic law and French law, with Islamic law potentially having a more significant influence.¹⁰⁰ In any case, the theory of cause under Iranian law has remained underdeveloped, leading to significant confusion and controversy.

The root of the confusion and controversy can be traced to the distinction, and arguably the failure of some theorists to distinguish, between two concepts: (1) the cause of the contract (in Persian: *jahat-e mu’ameleh*, literally translated as the cause of the transaction; in French: *cause du contrat*); and, (2) the cause of the obligation (in Persian: *jahat-e ta’ahhud*; in French: *cause de l’obligation*). While the former (the cause of the contract) is a subjective matter, tied to the personal motivations of the contracting party, the latter (the cause of the obligation) is an objective matter, independent of those personal motivations.

The cause of the obligation is the reason for which the contracting party has undertaken the obligation. In other words, it can be defined as the direct, immediate, and determining purpose for which the obligor has accepted the obligation towards the obligee, which aligns with classical theories in French law and the approach adopted by the drafters of the Napoleonic Civil Code.¹⁰¹ From this perspective, the cause of the obligation in any given type of contract remains constant and does not vary according to circumstances. For example, in a sale, the seller undertakes to deliver the object to the buyer in exchange for receiving something as the price, and the buyer undertakes to pay the price in exchange for receiving the object. Generally speaking, in onerous (*mu’avvaz*) contracts, the obligation of one party serves as the cause for the obligation of the other party, making these obligations reciprocal and interconnected.

According to Article 1108 of the French Civil Code, which is the basis for Article 190 of the Iranian Civil Code, the cause of obligations is considered one of the conditions for the validity of a contract. Article 1131 of the French Civil Code also addresses this issue: ‘An obligation without cause, or based on a false cause, or an unlawful cause, can have no effect’. Article 1133 regarding an unlawful cause states: ‘A cause is unlawful when it is prohibited by law or is contrary to public morals or public order’. Importantly, the Iranian Civil Code has not fully imported these provisions. Unlike the French Civil Code, Iranian Civil Code (in articles 190

¹⁰⁰ Seyyed Hossein Safa’i, ‘*Nazariyeh-ye Jahat dar Gharardadha (1)*’ [Theory of Cause in Contracts (1)] (1971) 8 *Journal of the Faculty of Law and Political Sciences*, p. 47.

¹⁰¹ Safaei, *supra* note 23 at 149.

and 217), makes no reference to the objective cause of the obligation, rather it refers to the subjective cause of the contract.¹⁰²

In Iranian law, the cause of a contract is a personal and variable factor that motivates each of the parties to engage in the transaction. For instance, one person buys a house to live in it; another buys a house to sell it and make a profit; a third buys a house to rent it out; a fourth buys a house to gift it to someone; and a fifth buys a house to convert it into a gambling den or a brothel, and so on. It is argued that if the cause enters into the parameters of the contract, for instance, if it is explicitly stipulated in the contract, it will undermine the validity of the contract.¹⁰³ This is demonstrated in article 217 of the Civil Code which states: ‘In a transaction, it is not necessary to specify the cause; however, if it is specified, it must be legitimate; otherwise, the transaction will be void.’ Therefore, it is possible for the contracting parties to omit mentioning the cause of the transaction altogether: someone buying a house does not need to state the purpose for which they are purchasing it; however, if the purpose is specified in the contract, or otherwise if it is known to the parties or in any way enters the sphere of the agreement,¹⁰⁴ the contract will be void. On this, Iranian law appears to have been more significantly influenced by Islamic law, rather than by French law.¹⁰⁵ Indeed, Iranian commentators have found the classical French theory of the ‘cause of obligation’ to be so problematic and unhelpful that they have commended the drafters of the Iranian Civil Code for choosing not to incorporate it.¹⁰⁶

While some authors emphasize that the results derived from the French theory of the cause of obligation are more or less recognised in Islamic law, they agree that in Islamic law, the cause of obligation is not considered one of the essential elements or conditions of the contract. While an agreement between two parties for an unlawful purpose results in the invalidation of the contract (such as selling grapes for making wine), there is no sign of the theory of the ‘cause of obligation’ in Islamic law.¹⁰⁷ The purpose and motivation of parties has been prominently discussed by Islamic jurists under titles of illegitimate intent and prohibited purposes (*qayat*

¹⁰² *Ibid.*, 150

¹⁰³ *Ibid.*, 149.

¹⁰⁴ *Ibid.*, 150.

¹⁰⁵ Seyyed Hossein Safa’i, ‘*Nazariyeh-ye Jahat dar Gharardadha (1)*’ [Theory of Cause in Contracts (1)] (1971) 8 *Journal of the Faculty of Law and Political Sciences*, p. 47.

¹⁰⁶ Katouzian, *supra* note 39 at 142-146.

¹⁰⁷ *Ibid.*, 146.

muharrama). However, it did not develop into a theory of cause that reflects the subjective intent of an individual in Islamic jurisprudence nor was it required for a valid contract.¹⁰⁸

Arguably, instead of endorsing the subjective cause of obligations, Islamic law, and by extension Iranian law, have recognised the principle of the interdependence or equivalence of obligations in onerous contracts. Some authors have described this view as reducing the ‘theory of cause’ to a theory of ‘equivalence’.¹⁰⁹ This interdependence or equivalence has significant implications in both Iranian and Islamic law. If the subject matter of one party's obligation is impossible (e.g., constructing a house in an hour), unlawful (e.g., resulting in *riba*, often translated as usury or interest, referring to any excess amount paid over and above the lent money), or uncertain (e.g., ambiguities or excessive speculative uncertainty in contractual terms and conditions, known as *gharar* in Islamic law), the contract will be deemed null and void.¹¹⁰

6. Conclusion

This article singled out Iranian contract law because it holds significant importance from multiple perspectives due to the dual influences of Islamic law and French law in its development, making it particularly compelling for comparative analysis. The article sought to take a preliminary step and explained how the modern contract law of Iran emerged with the adoption of the Iranian Civil Code in 1928. It incorporates many aspects of Islamic law and shares many concepts and classifications, while its array of specific contracts closely mirrors Islamic specific contracts. However, despite the significant influence of Islamic law, the influence of French law incorporating aspects of the classical Roman law tradition, including on the conceptualisation of contract, and the adoption of a general theory and the principle of freedom of contracts, have given Iranian contract law a distinctive identity.

From this perspective, Iranian contract law represents a *response* to the challenges that the modern world poses to a traditional religious system; it is an *experiment* aiming to forge a new

¹⁰⁸ Bantekas *et al*, *supra* note 11, 96.

¹⁰⁹ *Ibid*.

¹¹⁰ Seyyed Hossein Safa’i, ‘*Nazariyeh-ye Jahat dar Gharardadha (2)*’ [Theory of Cause in Contracts (2)] (1971) 9 *Journal of the Faculty of Law and Political Sciences*, p. 75.

order by fusing distinct legal traditions and, partially, breaking from the past orthodoxies; it is a *reflection* of the ambitions, preferences, and biases of its developers, and it is a living *record* by which its successes and failures as a body of law can be measured. Exploring these features and identifying the influences behind them from other legal traditions such as Islamic law and Roman law, especially the reception of various laws such as the borrowing of rules and institutions from French law, can provide valuable insights for comparative legal studies. This can lead to a deeper understanding of the legal traditions and legal systems examined, especially Iranian contract law itself.