

## Contractual Stipulations Under Classic Islamic Law and Current Marriage Contracts in USA



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**Abstract:** This article focuses on stipulations in a Muslim marriage contract with reference to the case of the United States of America (USA). Under classical Islamic work, the majority of Jurists (Jamhur) classify those stipulations as valid or invalid. Valid stipulations are permissible because those promote the objectives of the marriage contract. Invalid stipulations are prohibited for their inconsistency with the principles of Shari'ah. Yet another category of stipulations benefiting the women could be found in a marriage contract. Interestingly, this category is neither prohibited in clear terms nor is expressly allowed. After the conclusion of a marriage contract, Jamhur restrict the insertion of subsequent stipulations, while Hanbali School allows the addition of such stipulations provided it would be of extrinsic nature. In this context, this paper attempts to determine the role and status of stipulations in marriage contracts on the criterion of its beneficial nature for wives.

**Key Words:** Marriage, Contract, Stipulations, Classical Jurists, Additional Conditions, Women Empowerment

### Introduction

Whether Islamic law allows the addition of subsequent additional stipulations (The term *Shart* is a singular word used in the Arabic language. Its plural is *Shuroot*. It is used to refer to 'stipulation' or 'condition' in Islamic law. The words 'stipulation' or 'condition' is used interchangeably in this paper) to the already concluded marriage contract? In this regard, there exists a diversity of opinions among traditional schools of thought. Though the legal rights of wives vary from country to country, in general, the attached stipulations go in favor of women. Such Stipulations, as aforesaid, may be valid or invalid. Some jurists classify these stipulations as regular or irregular. Marriage is a sacred phenomenon, and it may contain various stipulations beneficial to spouses. As far as the benefits of the wife are concerned, diversity is found in the opinions of jurists regarding the insertion as well as deletion of stipulations in the already concluded marriage contract. The subject of these stipulations usually include: the right to work, right to education, equitable opportunities of men and women to initiate

separation, appropriate sharing in in-house responsibilities, equal living status, and the like.

Subject to consistency with Islamic law, At the time of marriage or even after marriage, the husband and the wife have free choice for inserting stipulations. Practically, stipulations are inserted at the time of concluding of the contract. Afterwards, the insertion of unreasonable stipulations is prohibited under Islamic law. Nevertheless, it is dependent on the parties that which stipulations they agree to insert? Stipulations may vary from case to case. Only those stipulations are permissible, which promote the objectives of the contract and are in conformity with Islamic Law. The violation of the principles of Islamic law is prohibited in all circumstances and parties are required to abide by the terms and conditions of the contract. Unreasonable stipulations, such as, non-maintenance of a wife by husband or divorcing of the previous wife are void. The underlying cause is that such stipulations weaken the marital relations and as such defy the basic objectives of the marriage contract.

On the other hand, stipulations pertaining to right to work, right to education and right to travel are valid, for they strengthen the marital ties.

Party to the contract may enforce valid stipulation made at the time of entering to the contract. Redundancy of the stipulation is not allowed. For instance, if the husband has put condition that property will be given to wife after few months of marriage. If, later on, he violates it, the other party may sue him for enforcement, and may request the court for cancellation of the contract, as a consequential relief. In general, under Islamic law, one person has title over the property. The person who has ownership and title may insert stipulation but subject to teachings of Islamic law. Islamic law expressly protected the property rights of women. There is consensus of traditional jurists that only such conditions can be inserted which are in conformity and consistency of the marriage contract. Any stipulation which contradicts with basic requirement of contract or prevents that which is legally permissible under Islamic law is prohibited ([Al-Hibri, 2005](#)).

Dr. Muhammad Munir wrote an excellent article titled: “*Stipulations in Muslim marriage contract with special reference to talaq-al-tafwiz provisions in Pakistan*”. Dr. Munir argues that, generally, there are three kinds of stipulations in Islamic law. First express stipulations that hold the husband responsible for maintaining the wife; second, invalid conditions which omit a condition in a marriage contract and third, the conditions which are neither prohibited nor allowed in *Shari’ah* but benefit the women ([Munir, 2005-06](#)).

Dr. Muhammad Munir in another article titled: “*Multiplying Zeroes: (In) Validity of Promises in Marriage Contracts under Pakistani Case Law*” (Munir, 2019), has nicely examined case law in Pakistan. He has examined and analysed crucial and less significant cases on stipulations. In terms of monetary compensation to a woman he argues that: “Safeguarding and protecting a battered woman or declaring stipulations that give her some monetary benefit from her ex-husband is within the public policy pronounced in Article 35 of the Constitution which obliges the State to protect the marriage, the family, the mother and the child”. “The decision of the Supreme Court in *Muhammad Bashir* (2008 SCMR 186), therefore, seems contrary to the letter and spirit of Article 35” ([Munir, 2019](#)).

He concludes that: “Islamic law does not prohibit the imposition of beneficiary stipulations for women, which include stipulation that in case of divorce or

arbitrary divorce by the husband, she will be paid a sum of money by the ex-husband. The legislation of many Muslim states, in fact, has provided that even if there is no such stipulation, the wife will be given a sum of money by the husband in the event of arbitrary divorce by the ex-husband. According to Islamic law and practice of some Muslim countries, courts can determine an amount to be paid to the ex-wife, in case she is not the cause of discord, which may be equal to one or two or even three years of maintenance amount for such a woman and that such an amount shall be over and above the amount to be given as maintenance for *iddat* period. The Tunisian legislation even provides that a woman may claim damages in case of material or moral injury as a result of unjust repudiation ([Munir, 2019](#).” He recommends that conflicting decisions concerning stipulations given by Superior courts may be reviewed by full-bench of the Supreme Court or annulled through legislation.

Dr. Muhammad Tahir Mansoori has also written an excellent book titled: *Family law in Islam, Theory and application* in which he explored systematic exposition of Shari’ah rules regarding Muslim marriage contract on which family unit is structured. He has also analyzed the status of stipulations under classical Islamic law and the current debate on stipulations. Moreover, modern legislations in the sphere of family law are also highlighted in detail. The book is useful for understanding Family law in Islam in theoretical and practical perspective.

In Pakistan, The Federal Shariat Court declares that: “. . .[nikah] is a social contract of very high status and conjoins a couple and the spouses in a sacred association, with mutual rights and obligations, to be performed in a spirit of love and affection that should last life long, as envisaged by *Ayah* No. 21 of *Sura* No. 30, *Ayah* No. 228 of *Sura Baqara* and *Ayah* No. 19 of *Sura-e-Nisa*. Therefore, anything, big or small, that may provide a cause for a breach in mutual love and trust is viewed seriously by Islamic Injunctions. In such situations, the Holy Qur’an enjoins upon all Muslims to take appropriate measures to save this sacred union from disruption. Reference in this connection may be made to Verse No. 35 of *Sura Al-Nisa*, already reproduced hereinabove. Since one of the reasons for such disputes may be intention of the husband to contract subsequent marriage of his choice. . .” ([Ishtiaq Ahmad v The State](#)).

For the purpose of this work, first, kinds of stipulations under classical Islamic law have been

analyzed; secondly, an attempt has been made for determining the status of the issue in classical writings of Islamic law. In this context, relevant provisions of Quran and Sunnah, opinions of Companions, and stipulations elaborated by classical Jurists have been elaborated. Thirdly, the question that can women insert conditions in the marriage contract, has been focused, and fourthly, position and status of such stipulations in USA has also been analyzed. The marital stipulations of women in USA are also analysed. Further, it also refers to US court decisions and explains the procedure of registration. Finally, conclusions are drawn up. At the end, a sample of Marriage certificate has also been attached.

The objective of this paper is to analyse the opinions of Classical Jurists and to understand the phenomenon of insertion of stipulations in a Marriage Contract. As far as limitations of this paper are concerned, it is limited to analyse the position of Classical Jurists and evaluate marriage stipulations in US. The next section analyses different kinds of stipulations under classical Islamic law.

## Different Kinds of Stipulations under Classical Islamic Law

Stipulations, in classical Islamic law, are known as *Shurut*. They are studied under the concept of *Aqad* (contract). It could be classified as under:

### *Shart Shar'i and Shart Ja'li*

*Shart* means stipulation and *Shar'i* means permissible under Islamic law. *Shart Shar'i* conditions are laid down by the *Mukallaf* (person capable to receive communication of Allah SWT). Hashim Kamali, states that condition which is laid down by Lawgiver is legal condition or *Shart Shari*. He used another terminology for these conditions, known as *Shart Ja'li*. He argued that condition stipulated by *Mukallaf* refers to improvised condition or *Shart Ja'li*. For instance, condition of witness in marriage is legal condition because it has been laid down by Lawgiver and condition agreed upon between spouses or parties is improvised condition or *Shart Ja'li*. Thus according to Kamali, stipulations are either *Shart Shar'i* or *Shart Ja'li* (Kamali, 2009).

Another scholar Abdul Karim Zaidan split conditions into two categories, such as, legal condition and improvised condition. Legal conditions are those which are directly laid down by ALLAH Almighty who is the source of all knowledge. Example to that extent includes handing of property to the *Baligh* (an adult

person). This condition covers worship, felonies and all actions (Zaidan, 1986). Improvised conditions are those which are made by the persons concerned. Example includes all stipulations by parties. He further divides such category of stipulations as *shart ta'liq* and *shart taqyid*.

*Shart ta'liq* is the condition which is dependent on the happening of some event/action/thing. Example includes suspension of guaranty or suspension of divorce on the basis of certain occurrences. The dependent condition is known as *shart mu'alaq* and the relevant contract is known as *aq'd muallaq*. On the other hand, *shart taqyid* is the condition which qualify a contract. It is part and parcel of the contract. For example, wife's right to divorce in marriage contract (Zaidan, 1986).

Thus it is clear that, in general, conditions are either (i) given by ALLAH Almighty; and (ii) conditions agreed by parties in contract. Stipulations are also classified as valid or invalid. Valid conditions are those which are permissible under *Shariah* and invalid are those which are impermissible.

According to Majority of Scholars, such conditions are considered as illegitimate. The marriage contract cannot be affected by this condition. In existence of this condition, marriage remains valid. On the contrary, the Hanbali school of thought considered this condition as valid. According to this school, this condition is binding on parties. In order to understand the authenticity of stipulations in marriage contract, the relevant provisions of glorious Quran, Saying of Prophet (P.B.U.H), practices of companions and opinions of Muslim jurists are analyzed here-in-below.

The stipulations which are mentioned in glorious Quran and relied upon by commentators are as under:

## Relevant Ayas of Stipulations in Holy Quran

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

"you, who believe! Fulfill your contracts" (The Holy Quran 5: 1). Under this Ayat, the believers are required to complete contracts.

وَالَّذِينَ يَعْهَدُونَ عِندَ اللَّهِ إِذَا عَاهَدُوا

(...And those who fulfill their pacts when they make one...) (The Holy Quran, Al Bakarrah, 177). Under this Ayat, there is indication that believers accomplish their contracts if they start so.

وَأُوذُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا

“And fulfill your promise, because every question will be enquired into” (The Holy Quran, 17:34). This Ayat stresses for fulfilling of contracts. It is because it will be asked on the Day of Judgment. Another relevant verse is as under:

“And fulfill every engagement, for it will be enquired into (on the day of the Reckoning)” (The Holy Quran, 27:34). This Ayat also stresses on accomplishment of contracts because believers would be answerable on the Day of Judgment.

### Relevant Ahadith of Prophet (P.B.U.H) on Stipulations

1. “Muslims are bound by their stipulations unless it be a condition which turns prohibited into permissible and permissible into prohibited” (Shawkani, 2002). It provides that stipulations are important to be taken into account and Muslims are bound by their stipulations.
2. “Any stipulation that is not in the book of Allah is void” (Sahih Bukhari). It provides that except provided in the Holy Book, no other stipulation is allowed.
3. “The rights and obligations of Muslims should be according to stipulations and conditions which they have set for themselves, except any stipulation which legitimises an illegal thing or prohibits something legal” (Sunan Tirmidhi). It provides for fulfilling stipulations as compromised among Muslims.
4. “From among all the conditions which you have to fulfil, the conditions which make it legal for you to have marriage contracts have the greatest rights to be fulfilled” (Sahih Bukhari).

### Practices of Companions

1. Abd al-Rahman ibn Ghunaym narrates that a husband and wife came to Hazrat Umar (R.A). The wife asked for relief and complained that at the time of marriage, husband had promised to keep her in her paternal home, so he was bound to do that. Hazrat Umar (R.A) gave decision in favour of wife because condition was agreed upon at the time of marriage contract (Sunan Tirmidhi).
2. Another important report is that husband has promised to give house to woman but later it was denied. The case was presented to Hazrat Ali (R.A) for adjudication. He said that condition of ALLAH prevails over the

condition of parties or wife in particular (Sunan Tirmidhi). It means that the stipulation provided in the book of ALLAH Almighty is valid and stipulation inserted by parties cannot replace that.

### Stipulations in Fiqh Literature: Opinions of Hanafis, Malikis, Shafi's and Hanbalis

Under Islamic law, the classical jurists are unanimous on insertion of valid stipulations, such as maintenance of wife, non-confiscation of wife's property and good treatment of wife by husband (Samara, 1987). Among classical Islamic jurists, there is no difference of opinion for validity of such like stipulations. However, classical jurists divide stipulations into categories and in different ways. For example, The Hanafi School of thought recognizes those stipulations as valid which are permitted by *Shariah* in express terms. These are also enforceable in court of law in the case of violation. Other stipulations have no legal value according to them. However, once the contract is concluded between the parties then its protection and preservation by the parties is necessary. Any stipulation which nullifies the teaching of *Shariah* is considered as invalid stipulation having no legal value.

According to Malikis and Shafis, stipulations are divided broadly into three categories, namely (i) valid stipulations which are general and basic to the marriage contract and permissible under *Shariah*; (b) Irregular stipulations which may be cancelled because contrary to the rules, with having no effect on validity of marriage contract and (iii) Void stipulations which are void *ab initio* (Samara, 1987).

The Hanbalis jurists divide stipulations into valid and invalid stipulations and subdivide these stipulations by taking into account their nature and effect on the contract. They allow insertion of additional stipulations to the marriage contract if such stipulations are agreed upon between the parties (Musa, 1955). According to them, valid stipulations are those which are in conformity with the requisite or requirements of the contract. They consider that such stipulations must not affect the objective of marriage contract and the parties shall keep it at every cost. These are binding on the parties. However, if such stipulation is contravened, then the other party has the right to dissolve the marriage through Court. For example, stipulation that husband has to provide maintenance to his wife in well manner. As far as invalid stipulations are concerned, the Hanbalis

maintain that such stipulations are void in principal. The contradictory stipulations also fall in this category, such as, wife having no dower.

Muhammad Tahir Mansoori summarized the opinion of Muslim jurists in the following way. According to Hanafi jurists' conditions are divided into valid and irregular conditions ([Ibn-Abidin, 1982](#)). The Valid conditions derives legitimacy from the permissibility rule of *Shariah* and strengthen purpose of marriage contract, such as, accommodation given to wife by husband and immediate payment of dower, *talaq-e-tafwiz* etc. On the other hand, irregular conditions are repugnant or inconsistent to injunctions of *Shariah*, such as, husband may not take second wife. Such conditions do not affect the contract ([Mansoori, 2006](#)).

Maliki jurists divided conditions into valid and invalid stipulations. Valid conditions are subdivided into proper and improper conditions. Improper condition is not contrary to the purpose of contract but create hardships for the husband, such as, husband will not take women out of her hometown etc. Invalid conditions are those which are contrary to Shari'ah ([Mansoori, 2006](#)). Shafi jurists considered stipulations as valid and void. Valid are binding on parties, whereas invalid conditions are not binding ([Mansoori, 2006](#)).

Irrespective of the majority of jurists, Hanbali jurists have divided conditions into valid and invalid conditions ([Ibn-Qudamah, 1985](#)). Invalid conditions are divided into two kinds. Conditions which do not affect the contract, such as, husband will abstain from sexual intercourse or financial responsibility will be on the shoulders of the woman. Such condition will be invalid. On the other hand, conditions which affect validity of contract and render it invalid, such as, specific time period for marriage contract ([Mansoori, 2006](#)).

Thus it is argued that the Hanbali school of thought is more liberal for insertion of stipulation in marriage contract whereas the majority of jurists are restrictive on the admissibility of extrinsic stipulations. Keeping in view the status of stipulations under classical Islamic law, it is necessary to examine insertion of stipulation by wife.

### Can Wife Insert Stipulations?

The preservation of family is also one of the objectives of *Shariah*. In this regard, Islamic law protects the rights of contracting parties, and spouses are no exception to this rule. In general, according to the

majority of the Jurists wife can insert stipulations permissible by *Shariah* at the time of contract. Both Husband and wife have this right as a general rule. The Jurists have disagreement on the determination of validity of inserted stipulation. Both parties are required to insert stipulations which are accepted to them and are according to the teachings of Islamic law. Any other stipulation which affect the marriage is invalid. For example, insertion of stipulation by wife in order to prohibit husband for second marriage is allowed by Jurists.

In the case of Polygamy, the majority maintain that prohibition is invalid. The argument of the majority of jurists is that the Holy Quran has allowed polygamy as a general rule subject to fulfillment of certain conditions. The insertion of this stipulation negates the teachings of the Holy Quran. It seems that the majority is restrictive on insertion of stipulations by wife. As a general rule, the majority agree that wife can insert valid stipulations. However, according to Hanbalis, insertion of this stipulation do not prohibit the husband for the second marriage.

The insertion of stipulation by wife also varies in its nature and effect. For instance, all jurists are agreed upon invalidity of stipulation, such as, if prospected wife requests husband to divorce the previous wife. All jurists maintain that such stipulation has no legal value and is considered as void. This is the position of classical Islamic Jurists.

It is important to note that various countries, especially Middle Eastern countries have reformed their legal systems in relation to insertion of stipulations by wife. In general, wife is allowed to insert stipulation or stipulations in the marriage contract. For example, in terms of insertion of stipulation against polygamy by wife is practiced in some regions. In the Muslim societies which live in the Middle East have practices to insert stipulations, such as, wife may insert stipulation that husband is not allowed to marry another woman. However, this practice differs in Muslim countries ([Welchman, 2000](#)). The practice of insertion of stipulation against polygamy is recognized and followed in many Middle Eastern countries ([Fluehr-Lobban, 1986](#)). The practices of South East Asian countries where Hanafi's and Shafi's are in majority are different. It is very rare to insert stipulation against polygamy in this region.

The practice of inserting stipulation against polygamy is followed as well, and in the case of violation of stipulation by the husband, the wife is

entitled to get divorce on the basis of violation of stipulation. If wife reverses its stipulation then marriage contract will have no effect ([Abdal-Rehim, 1997](#)). Thus for inserting stipulation against polygamy, majority of Jurists is restrictive. The Hanbalis are somewhat liberal and allow insertion of stipulations by wife. However, all Jurists agree that insertion of stipulations must be in conformity with the teachings of *Shariah*. The next section analyses that can contracting parties insert additional stipulations in a marriage contract.

### Can Contracting Parties Insert Additional Stipulations?

Under Islamic law, the marriage contract is designed to protect the interests of both husband and wife. Stipulations which are valid and permissible according to the teachings of *Shariah* can be inserted at the time of the contract. Islamic law gives right to both parties. However, along with rights both parties have responsibilities and duties too. Stipulations which must be fulfilled may be inserted in the marriage contract. The breach of stipulation by both parties is not permissible. In this context, Prophet (P.B.U.H) said that: "The condition which most deserves to be fulfilled is that by means of which intimacy becomes permissible for you (Sahih Bukhari)". The basic rule for insertion of stipulations in a marriage contract is that they are valid save as proof is shown for their invalidity. It is obligatory on both parties to fulfill the stipulation upon which they were agreed. Islamic law stressed on fulfillment of covenants made between parties. The evidence to that extent is enumerated by the Lawgiver. ALLAH Almighty says in the Holy Quran that:

"And fulfill (every) covenant. Verily, the covenant will be questioned about (The Holy Quran, al-Isra' 17:34)".

Another saying in the Holy Quran is that:

"O you who believe! Fulfill your Covenants (The Holy Quran, Al-Maidah 5:1)".

The sayings of Prophet (P.B.U.H) also states that: "Whoever stipulates a condition that is not in the Book of Allah it is not valid, even if he stipulates a hundred times (Sahih Bukhari)".

Another saying states that: "The Muslims are bound by their conditions, except a condition that forbids what is permissible or permits what is forbidden (Al-Tirmidhi)".

In terms of fulfillment of valid stipulations, Ibn Qudaamah maintains that wife has right to cancel the marriage if agreed upon stipulation is not fulfilled by the husband. For instance, if husband is unwilling to take her out or to his father's home, or husband shows unwillingness for travelling with her or is cruel then the right of the wife is accrued because husband was obliged to fulfill stipulation and he did not do so. It was narrated by Umar, Sa'd ibn Abi Waqas (R.A) and Amr ibn al-Aas (R.A) ([Ibn Qudamah, 1985](#)).

In terms of stipulating against polygamy, some scholars argue that it is permissible. At the same time, some scholars disagree on the basis of what ALLAH Almighty has endowed to husband and elaborated in express terms. Husband has right given by the Lawgiver subject to certain conditions. They relied argument on the wording of Holy Quran which states that:

"then marry (other) women of your choice, two or three, or four (The Holy Quran, al Nisa' 4:3)". It means that the husband has the choice to marry another woman provided if he do justice and remain equal.

The Hanbali Jurists allow insertion of additional stipulations but it should be agreed upon between parties and subject to the teachings of *Shariah*. As compared to the opinions of the majority of jurists, it seems that Hanbalis are more liberal on this issue.

Ibn al-Qayyim maintains that fulfillment of the stipulations agreed upon is compulsory on parties and focus must be given to it. The agreed upon stipulations deserves fulfillment. He also argued that a marriage contract is a mutual agreement between the parties. He maintains that the purpose of marriage contract will be defeated if parties are unwilling to fulfill stipulations. Thus according to Majority of Jurists, parties to the contract are restricted to insert additional stipulations, whereas the Hanbali jurists allow insertion provided that it must be agreed upon by parties and subject to the teachings of *Shariah*. The Hanbali Jurists are liberal and holds that parties to the contract may insert additional stipulations provided that such stipulations should be agreed upon by parties. In line with the above discussion, the next section analyses the debate on stipulations from the perspective of the USA. It highlights an overview on current debate, contractual stipulations, marital practices in USA and marriage and US Courts.

## Current Debate on Stipulations in USA: An Overview

In the USA, different states have their own legal requirements for a marriage contract ([Atkinson, 1996](#)). However, various aspects, such as capacity, consent, age etc are considered. Obtaining a Marriage license by the parties is essential before the ceremony ([Cherlin, 2009](#)). Registration of marriage is also necessary (Macfarlane, 2012).

Additional stipulations in marriage contract are optional and not obligatory. These include: *Talaq-e-tafwiz* stipulation (delegation of right to divorce to wife) and monogamy as condition. Such additional conditions are subject to little public awareness because most of stipulations have no place in Islamic law. Even most of the provisions are contrary to Islamic jurisprudence and domestic laws in Muslim countries ([Qureshi & Milier, 2009](#)).

In USA women are educating in order to aware them about their basic rights. Women empowerment is focused, and as a result, many women are educating themselves how to use additional stipulations in a marriage contract. This is, as a matter of fact, done by activities of different NGOs and activists. The noteworthy NGO in the USA is Karamah who used to draft new marriage contracts, claiming that in such a contract, the rights of women are protected.

The purpose of such activists is to benefit women. They consider that women are disintitled for insertion of stipulations in marriage contract. However, in practice, it depends on the intent of the parties to the contract and the nature of the stipulation. Islamic law allows insertion of stipulations which are permissible and valid and do not nullify the basics of marriage contract ([Welchman, 2004](#)). John Esposito maintains that the intention of the marriage contract is to raise the women's status because women are party to the contract and can insert additional stipulations. In the USA, usually contracts are drafted by taking into considerations of women because there is growing debate on women's empowerment.

New Muslim marriage contract includes stipulations, such as, not to marry additional wives, provision for availability of servants for wife, delegated right to divorce and no restrictions on visit to relatives ([Qureshi & Milier, 2009](#)). In USA additional stipulations are inserted in order to empower women and to give her freedom. Moreover, in case of dispute between parties, the law of USA will be applicable which is very clear that women may be honored and

protected in all circumstances. For instance, if husband marries another woman, then such action is prohibited under USA law. However, some contracts also include stipulations for remedies in the case of violation of existing stipulation. Thus it appears that parties may insert additional stipulations to a marriage contract which are permissible according to *Shariah*. The practice of women in the USA shows that they may also insert additional stipulations which benefit them. In USA, certain marital practices are as follows:

## Marital Practices in the USA

In the USA, the parties are required to fulfill legal requirements for marriage. Parties are required to perform valid marriage as per law. States may adopt different procedures for enforcement of relevant laws ([Atkinson, 1996](#)). However, essentials of marriage in all states are common, such as, such as the consent, capacity, and age of each person for a valid marriage. If a couple moves from state A to state B, recognition of such marriage can be endorsed by state B provided that all legal requirements should be fulfilled by parties ([Cherlin, 2009](#)).

In general, some marriage couples used to sign contract simply by taking into consideration stipulation regarding *Mahr* (Dower). However, some marriage couples used to insert other stipulations as well ([Welchman, 2004](#)). Some of them celebrate marriage ceremony and couples are encouraged to celebrate marriage ceremonies. Couples are allowed to make a wedding party for a short span of time. After the signature of the parties, the marriage becomes legal/binding (Al-Khateeb, 2012). The following cases are noteworthy on stipulation of *Mahr* (i) *Afghani v. Ghafoorian* (2010 - VA) In this case the Court has ordered the husband to pay the wife 514 Gold coins in order to enforce the terms and conditions of a marriage contract; (ii) *Chaudhary v. Ali* (1995 - VA) The Court has ruled out that non-disclosure of assets of the husband, non-disclosure of independent counsel favouring wife in *NikahNama* was not an enforceable prenuptial agreement and (iii) In re Marriage of *Dajani* (1988 - CA) The court, in favor of the Husband, found the mahr provision of a foreign marriage contract void and against public policy when the beneficiary of the provision initiated divorce (Al-Khateeb, 2012).

It is important to note that, in the case of divorce, the American Imams used to counsel the couples for reconciliation. Even in abuse cases, the Imams assist couple to live together in a best husband/wife

relationship/environment. They also try to make efforts for keeping couples together. In this respect, awareness has also been created among couples to know about responsibility and sanctity of a marriage contract by Advocates and community members. It is important to consider various aspects of marriage in US Courts.

### Marriage and the US Courts

In the USA, various scholars and researchers have conducted surveys in relation to judging Islamic family law in US Courts (Sizemore, 2011). The treatment of Islamic family laws in US Courts are either as simple enforceable contracts or as prenuptial agreements. The judges in US Courts place reliance on previous judgments, US legal principles, precedents and hire experts for expert opinion while determining enforceability of marriage contract.

The marriage couple is required to obtain a license from a Court before performance of marriage ceremony. It is requirement in the states of USA. The marriage couples face practical problems in the case of unregistered marriage or separation. Such as, the parties are unable to take any financial relief or equitable property division. Legally married couples have access to remedies and beneficial for parties (Macfarlane, 2012).

Such license can be issued by Judge or law clerk. After obtaining a marriage license, Muslim couple may join unions led by religious leader or Imam. Such practice is followed by majority Muslims in USA. It is noteworthy that without having a marriage license, the state where the couple is residing and other states may declare marriage void. Couples having Imam's solemnization only may be recognized by states. All marriages concluded outside the USA are valid subject to conformity of laws of that jurisdiction with US laws (Oman, 2011). In the USA, the couples after divorce seek remedy for enforcement of *Mahr* clause in the agreement. Wives also seek remedy for deferred *Mahr* and protected property. However, Asifa et. al maintains that: "Stipulations in Islamic marriage contracts related to compliance during the life of the marriage, such as agreements regarding gender roles or domestic chores, are generally considered to be personal service agreements; and since there is judicial preference not to interfere with ongoing marriages, such stipulations are rarely enforceable (Quraishi & Miller, 2004)".

### Overview of Certain Stipulations

There are various stipulations that can be incorporated by parties in a Marriage contract. The parties to the contract with their consent add/delete stipulations according to law. Parties may consult an attorney for inserting stipulations once agreed upon. The conditions common to the parties are as follows:

1. **Equality:** Equality clause is usually added by parties in a Marriage contract. However, Muslim Jurists have different viewpoint on this clause.
2. **Conflict Resolution:** In the case of conflict between parties, there is a conflict resolution mechanism. Parties may propose conflict resolution mechanism in marriage contract. Usually parties choose for mutual consultation, arbitration, negotiation or Courts and other similar ways.
3. **Domestic Duties:** Parties to contract may specify domestic duties, such as cooking, cleaning, laundry etc. Many women add a requirement to hire household help.
4. **Education:** Most of the Scholars agree on education of both parties (Esposito & DeLong-Base, 2001).
5. **Work:** A work clause of woman may be added to protect women's rights.
6. **Domestic Violence:** Under Islamic law, domestic violence and abuse is prohibited ([Al-Hibri, 2005](#)). Spouses may add clause for not using force, coercion or violence against each other ([AlKhateeb, 2012](#)).

### Conclusions

From the preceding discussion, it may be concluded that under classical Islamic law, stipulations in broader terms consist of (i) Valid stipulations and (ii) invalid stipulations. Valid conditions are endowed by the Lawgiver and are binding on the parties, whereas invalid stipulations are neither in conformity with teachings of *Sharia'h* nor permissible. Parties to contract may insert stipulations in the marriage contract provided if those stipulations are in conformity with the teachings of *Shari'ah*. Some Scholars classified stipulations as valid stipulations or



irregular or void stipulations. Void stipulations are also impermissible. Thus, in general, under classical Islamic law, there are two kinds of stipulations in marriage contract, such as valid and invalid stipulations.

According to the majority of Jurists, there is no disagreement on the validity of valid stipulations. However, difference of opinion occurs in terms of validity of irregular or void stipulations or which benefit women. Majority of Jurists are restrictive on the admissibility of additional stipulations and provide arguments. However, Hanbalis are of the view that additional or extrinsic conditions may be inserted subject to the explicit prohibition by Quran or *Sunnah*. Actually, Hanbalis allow those stipulations which are neither elaborated in express terms nor lead to anything which is forbidden permissible. They also recognize insertion of additional stipulations by wife or parties if these are agreed upon. According to them, the wife may dissolve the marriage contract if stipulations are not fulfilled. Thus criteria of fulfillment of stipulations must be followed by the parties in the marriage contract.

After analysis of the opinion of jurists, it appears that seems that Hanbalis are not restrictive rather liberal on this issue. Muslim Jurists are unanimously agreed upon that which is contradictory or nullifies purposes or objectives of marriage contract. These stipulations have no legal value in the eye of law because these are not in conformity with the injunctions of Islam. Examples of these stipulations include: non-maintenance of wife by her husband, no provision of dower for wife, putting financial responsibility only on wife etc. These are regarded as null and void, having no effect. The crux of the matter is that majority of jurists is restrictive on insertion of additional stipulations, whereas Hanbali scholars are too liberal in this case and allow additional stipulations. The Hanbali Jurists show liberal approach towards additional stipulations. However, such stipulations must be agreed upon between the parties. In case of conflict between the parties redressal can be taken from the Court of law or as per provisions of an agreement.

The preservation and protection of family is one of the objectives of Islamic law (*Maqasad-ul-Sharia'h*)

and in no way deviation is permissible. Any stipulations which go against the objective are considered as null and void. In practical terms, for those who accept insertion of stipulations, gives wife option to cancel the marriage contract in the case of violation of the stipulation and for those who limit on additional stipulations consider such stipulations neither binding on parties nor valid at all.

The samples of *Nikanamas* (draft of marriage contract) vary from country to country but all *Nikanamas* are aimed to protect matrimonial bond and family unit. In USA new samples or forms of *Nikanamas* are used to protect the interests of women. Women may insert stipulations in marriage contract concluded. Marriage contracts are designed in this way and new stipulations may be added by wife. However, it is regarded as a tool for women empowerment. Many Muslim women organizations and activists are focusing on the draft of marriage contract (including stipulations), which is agreed between parties and use it as to preservation and protection of basic human rights.

Such marriage contracts are designed on the wishes of contracting parties and in particular, women. On the other hand, it is well established that contracting parties are not allowed to insert conditions which are repugnant either to (i) the purpose of the contract or (ii) the injunctions of *Shari'ah*. Further, any condition which gives benefit to one party at the cost of other party is invalid. It is argued that there is a growing need of public awareness in this regard in order to avoid those stipulations which harm matrimonial bond. Stipulations may be inserted subject to the injunctions laid down by *Shari'ah* which are clear on the subject. Marital practices in the US show that stipulations in a marriage contract can be added if such stipulations are being agreed upon by the parties. The decisions of Courts for benefiting women are worthwhile. In the case of conflict between the parties, the provisions of agreement will prevail. The matter can be resolved through Court or by other informal ways, such as conciliation, negotiation, arbitration, or any other method on which parties agree.

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