

In the name of

Allah,

the Beneficent,

the Merciful

Al-Furqān

the bi-weekly electronic newsletter from the office of
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O Allah,

Bless

Muhammad

& his progeny

Optional Conditions In An Islamic Marriage Contract

Marriage: A Legal Contract

Since marriage is a binding contract (*'aqd*) in the Islamic laws (the *shari'a*), it depends on three essential conditions:

1. the proposal from the bride;
2. and the acceptance from the groom;
3. and the *mahr*.

Mahr means the consideration that the groom agrees to give to the bride. (See 4:4) It is the right of the bride and it is for her to specify or fix the *mahr*. The groom may either accept it or negotiate with her until they reach to an agreement.

Mahr is not a price being paid for the lady; it does not mean buying a wife. It is a symbolic gesture of man's true love for the woman whom he intends to marry. It doesn't have to be monetary or material; it can even be a service (e.g., teaching the Qur'an or provided for higher education or paying for the *hajj*, the pilgrimage to Mecca, etc). Moreover, the *mahr* can be immediate or deferred or partly immediate and partly deferred as agreed by both parties.

Besides the three conditions mentioned above, there are no more essential conditions attached to the Islamic marriage contract.

Optional Conditions

However, like any other contract (*'aqd*), there is room for optional conditions in the marriage contract as well.

The concept of optional conditions is not an innovation or "a revolutionary concept;" it has existed in the *shari'a* laws from the earliest days. Of course, its application in marriage contract has gained popularity in modern times. Shi'i scholars of the early days of *ghaybat*, like Shaykh at-Tusi (d. 460 AH) in his *an-Nihāyah*, *al-Khilāf* and *al-Mabsut*, as well as of the later days, like Sayyid

Muhsin al-Hakim (d. 1969) in *Minhāju 's-Sālihiyn*, have discussed the concept of "*shart dhimn al-'aqd* – a condition attached to the contract." Even the marriage contracts of India and Pakistan had provision for "*sā'ir shurut*—other conditions" which, nonetheless, was left blank by most couples.

By looking at the problems facing Muslims of our time, the contemporary mujtahidin have started highlighting the issue of optional conditions in the marriage contract. In the Islamic Republic of Iran, for example, marriage certificate comes in a booklet form with optional conditions printed within it for the bride and the groom to sign on the dotted lines after each condition if they wish to include it in their marriage contract.

Why Optional Conditions?

The imams of the Islamic centres, the Muslim counselors and social workers have observed that *some* men abuse the rights given to them in marriage relationship. In order to prevent such situations and equip women with mechanism within the parameters of *shari'a* laws, we have started recommending to potential brides and grooms to add a few conditions to their marriage contract.

Both parties can put whatever conditions they agree upon except a condition which goes against the *shari'a* laws.

The conditions that we recommend are mostly related to the right of divorce and division of property at the time of divorce.

1st Example: The Right of Divorce

Although marriage is sacred in Islam, it is also dissolvable. Divorce is allowed but as the last solution. However, the right of divorce has been given to the husband.

If a situation arises where the wife does not want to continue with the abusive relationship and the husband does not agree to give divorce, then the woman is stuck in that marriage. The Qur'ān is very clear that "either retain your wife in goodness or release them with kindness." There is no third option where a woman is just left "suspended, neither married nor divorced." Imam Ja'far as-Sādiq (a.s.) said, "When a man intends to marry a woman, he should say, 'I pledge by the covenant that Allāh has taken to retain [my wife] in goodness or to release [her] with kindness.'" However, there are certain men who do exactly the opposite—they leave their wives suspended.

How does the Muslim community deal with such situations? There are a variety of pressures which could be brought to bear upon the husband to divorce his wife:

- (1) family;
- (2) extended family;
- (3) community elders.

As a last resort, the woman could approach (4) the *mujtahid* (a Shi'a jurist) or his representative to intervene; and if he is convinced that the husband is being unjust, then he has the power to serve a notice to the husband and ask for his consent to divorce the wife. If the husband refuses, then the *mujtahid* can dissolve the marriage and pronounce the divorce even without the husband's consent.

In Canada, however, not all families have the extended family support to put such pressure; nor do we have a mechanism as a community (e.g., excommunication) to censure the man who is treating his wife unjustly. The only option is to approach the *mujtahid*; but that process, like any other judicial process, takes its own due time.

In order to make things easy and fast in solving such marital problems where an abusive husband is refusing to give divorce, we encourage the couples, at the time of marriage, to add certain optional conditions to the marriage contract as seen below:

The husband gives an irrevocable authorization to the wife to appoint someone as his representative (*wakil*) for divorcing her, after seeking approval of the resident 'ālim* or her father* or her brother,* in the following cases:

- 1. if the husband marries another woman without permission of the wife named in this marriage contract;**

- 2. if the husband ill treats and or physically abuses the wife to such an extent that it becomes extremely difficult for the wife to continue the marital relationship;**
- 3. if the husband abandons the wife and does not provide for her for more than six months continuously;**
- 4. if the husband divorces his wife in the civil court but refuses to give her the religious divorce.**

* These are various options in order to prevent emotions from clouding the decision-making process on this serious matter of life.

The first condition might seem to be against the *shari'a* law which allows polygamy; but it is not so. The condition does not prevent the husband from marrying a second wife; it gives a right of divorce to the first wife if she wants to disengage herself from this triangle relationship.

By putting these conditions as part of the religious marriage contract, it becomes easier for women to get divorce when they are faced with such situations.

2nd Example: Property Distribution:

From the *shari'a* point of view, at the time of divorce, the wife is entitled to:

1. *Mahr*, if not already paid.
2. Her own property or belongings which she brought with herself at the time of marriage or whatever she acquired by way of earning or gifts or inheritance, etc.

In case of divorce, this leaves many women, especially the housewives, without any financial support. Unfortunately, the secular society as well as the Muslim community does not recognize the contributions of the "housewife." Women's liberation movement has degraded the status of the mother and the housewife as opposed to a "career woman." Her hard work in managing the household, and rearing of healthy and good children who grow up to be productive citizens is not adequately recognized or appreciated even by her peers in the women's liberation movement. The evolution of her title from "housewife" to "homemaker" has not yet elevated the status of the wife who chooses to stay at home, especially after the birth of her child.

From the Islamic point of view, a wife is not legally required to do the household chores and take care of her own children; it is the husband's

duty to provide for his wife and children. However, on a moral level, the wife is expected to help the husband in managing the household and taking care of the children. This difference on the legal and moral levels is so that a husband shouldn't think of his wife as a slave or a servant; he should appreciate the contribution of his wife in his life. That is the true partnership in marriage.

It is in this background that we propose the following condition in the marriage contract which provides for some financial compensation for the wife if the husband initiates the divorce.

If the husband initiates the divorce, then the husband will give to his wife one-fourth (or one-third or half*) of all the possessions that he acquired during the marriage period. In case of dispute about the cause for divorce, the Shi'a Ithnā-'ashari religious authority (the resident 'ālim or the marriage committee or the arbitration board) will determine whether the divorce was initiated by the husband or the wife.

* One-fourth or one-third or half are various options that both parties can agree upon.

Such a condition will hopefully discourage some brides from asking for exorbitant amount in the deferred *mahr* as a financial security. Let the *mahr* be a true consideration from the groom to the bride, and not a financial security certificate for after divorce.

Muslims, women and men alike, must realize that getting anything from one's spouse in form of spousal support or alimony through civil courts will not make it legitimate from the religious point of view. It will be considered *ghasbi*, usurpation.

Such spousal support or alimony can become religiously legitimate only if the issue of division of property was included in the Islamic marriage contract.

It must be clarified that the issue of child support is different from the spousal support issue: a father is still responsible for providing for the child even when the mother has the custody.

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Other Remarks on Optional Conditions:

Although we do not encourage intra-faith marriage (i.e., marriage of a Shi'a Ithna-'Ashari to a Muslim from other sect), if a Shi'a Ithna-'Ashari lady decides to go through such a marriage, then, it is essential to get the right of divorce "if she or her children will not be allowed to practice the Shi'a rituals and rites."

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Question: Are these optional conditions only valid if they are added to the *'aqd* at the time of marriage or can a couple write up such an agreement even after the marriage? Would such an agreement be valid from religious perspective?

Answer: Yes, any couple who agree on such or other conditions —as long as those conditions do not contravene the *shari'a*— can write such an agreement and that will be as valid as a contract signed at the time of the marriage.

A final note: The issue of optional conditions can be very sensitive —more so since it is not common in our communities— therefore, it is absolutely important to discuss and study the issue much before the actual marriage and not at the time of marriage ceremony.

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For a sample of the Islamic Marriage Contract, you may refer to www.jaffari.org.

In a famous *hadith*, `Umar ibn Hanzalah asked Imam Ja`far as-Sadiq (peace be upon him) about the legality of two Shi'as seeking a verdict from a non-Muslim judge in a dispute over a debt or a legacy. The Imam's answer was that it was absolutely forbidden to do so. Then Ibn Hanzalah asked what the two should do, and the Imam replied:

"They must seek out one of you who narrates our traditions, who is versed in what is permissible and what is forbidden, who is well-acquainted with our laws and ordinances, and accept him as judge and arbiter, for I appoint him as judge over you. If the ruling which he based on our laws is rejected, this rejection will be tantamount to ignoring the order of Allah and rejecting us is the same as rejecting Allah, and this is the same as polytheism."