

Utility of Marriage Stipulations to Remove Gender Inequalities and to Protect the Rights of Women

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Introduction

Marriage in Islamic law is in the nature of a contract. This has created a scope for inserting stipulations in a contract of marriage. The general trend of Islamic family law is to grant more rights to men. However, the *sharia* itself kept an option open for women to negotiate some of those marital rights and obligations by inserting stipulations in their favour. Thus, it is possible to bring a degree of gender balance utilizing the scope for negotiation of stipulations in a contract of marriage. The objectives of writing this article are three fold: firstly, to critically analyse different opinions of Imams about stipulations in order to determine the widest possible scope for stipulations; secondly, to review the modern legislation relating to marriage stipulations in different countries, and finally, to suggest some appropriate recommendations to better protect the interests of women.

Contractual nature of marriage

Marriage in Islamic law is treated as an '*ibadat*' or a good deed of religious nature. There is no doubt that the marriage under Islamic law has a religious overtone. However, in essence, it is basically a contract. Because, unlike in some other religious laws, such as Hindu Law or Christian law, marriage under Islamic law can take place by performing simple contractual formalities: offer and acceptance by competent parties. That is why the jurists have generally considered it to be a contract. It is true that there are some differences between a purely civil contract and a contract of marriage under Islamic law, but basically a Muslim marriage is a contract. It has been debated whether it is a purely civil contract or of contractual nature. For example, the Indian Supreme Court held in *Abdul Kadir v Salima* that a '[m]arriage among Muhammadans is not a sacrament, but purely a civil contract.'¹ While the Supreme Court of Pakistan in the famous *Khurshid Bibi*² case said that a marriage is a contract of civil nature. It is submitted that there is no controversy on one point: marriage in Islamic law is an agreement of contractual nature.

Scope for stipulations

Although a marriage in Islamic law is of contractual nature, the parties to a marriage do not enjoy absolute liberty to insert any stipulation whatsoever.

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¹ (1886) ILR 8 All 149.

² PLD 1967 SC 97.

Since, Islamic marriage has a religious overtone, so there are some limitations on the power of inserting stipulations in a contract of marriage. Thus, the power of inserting stipulations in a contract of marriage is regulated both by law and *sharia*. In other words, a stipulation cannot be inserted in a marriage deed violating either law or *sharia*. There are different opinions of Imams about the range of stipulations. A stipulation delegating the power of talaq to wife is generally accepted as permissible by all *madhabs*. However, there are some stipulations which are controversial. For example, a stipulation that the husband will not take a second wife is invalid in *Hanafi* school, although *Hanabali* school allowed such a stipulation.³ There are other such controversial stipulations like a stipulation that the husband will not prohibit his wife to do work or a stipulation that the husband will allow her to complete her study. This will be discussed in detail later in this chapter.

Obedience of a wife to her husband is the foremost legal effect of a marriage. But what are the parameters of the wife's obedience? For example, Will a wife be able to complete her study denying her husband's prohibition? Such parameters of obedience are possible to be fixed by the parties at the time of marriage by inserting stipulations. There may be another important type of stipulation by which husband's obligations may be defined or expanded. For example, a wife may insert a stipulation regarding management of matrimonial property (that the wife will get certain portion of the husband's property at the dissolution) if a divorce takes place without the consent of the wife. Or, if the husband pronounces a 'no-fault'⁴ divorce to his wife, then the wife will be entitled to get a certain amount of compensation.

History and practice

Unfortunately, in the modern time, there is not much practice of inserting stipulations in a contract of marriage. In the middle age, it was a common practice in some countries to negotiate different terms and conditions at the time of a marriage contract. In the modern time, in most of the Muslim countries, the parties to a marriage sign a formal deed of marriage provided by the statute. For example, in Bangladesh, a formal deed of marriage, commonly known as '*kabinnama*', has been provided by the statute. Clause 18 of the '*kabinnama*' has provided the parties an opportunity to negotiate a stipulation regarding delegation of the power of *talaq* to the wife. Clause 17 has created a scope for inserting any stipulation at the will of the parties to a marriage. In practice, the opportunity of inserting additional

³ Amira Mashhour, 'Islamic Law and Gender Equality— Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (2005) 27 *Human Rights Quarterly* 562, 576; with reference to Patricia Kelly, 'Finding Common Ground: Islamic Values and Gender Equity in Reformed Personal Status Law in Tunisia', in *Shifting Boundaries in Marriage and Divorce in Muslim Communities* (Special Dossier 1, Women Living Under Muslim Laws, 1996) 88.

⁴ This term has been used by many modern authors to mean a unilateral divorce by the husband where the wife has not been found to be guilty of any fault.

stipulations under clause 17 is used in very rare cases. Probably, the reason behind this lack of interest to insert stipulations as per individual needs of the spouse is lack of knowledge of the common people about the contractual nature of the marriage. People generally treat the '*kabinnama*' as a formal document that merely registers a marriage.

Modern states have provided a formal deed of marriage for general convenience of the people. Even before the states provided the formal deed of marriage, a strong practice prevailed in some Muslim societies regarding negotiations of stipulations and concluding a marriage agreement at the end. For example, such a practice is found in Egyptian society even in the Ottoman period.

The contract of marriage prepared by the parties to marriage according to their individual needs was a much important document in Egypt. In describing the marriage contracts, Mona Zulficar summed up:

One element introduced by Islamic law was the validation of individualized optional stipulations in the contract. Court archives in Egypt demonstrate that marriage contracts were concluded according to the principles of Shari'a during the Ottoman period, and that these contracts included additional substantive conditions. It was common for marriage contracts in towns and cities to include conditions restricting the husband's right to take a second wife and providing for the wife's right to compensation, divorce, or both in case of breach of this undertaking or mistreatment. Contracts included the husband's commitment to support his wife's children from a previous marriage and not to be absent or depart from his wife for longer than an agreed period of time. In case of breach by the husband, the wife could seek and obtain a divorce (*tatliq*, judicial divorce) from the Shari'a judge without forfeiting any of her financial rights and might also be entitled to damages if it were so provided in the marriage contract.⁵

Thus, an interesting phenomenon of Egyptian marriage system was to confer certain power of divorce to the wife in the marriage agreement. This practice is found in Egyptian society as back as in the 3rd century AH, which seems to be a form of *talaq-i-tafwid* or delegated divorce, where the wife was not required to relinquish her financial rights unlike in a *khul*. Sonbol commented:

Comparing pre-modern contracts to those from the modern period shows how pre-modern women had much greater ability to negotiate marriage terms and thereby exert some control over their married lives. While both bride and groom could add conditions to the contract, they were more important to a bride, since a husband could get out of a marriage at any time, but a wife, to get out of a

⁵ Mona Zulficar, 'The Islamic Marriage Contract in Egypt' in Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Islamic Legal Studies Program-Harvard Law School, 1st ed, 2008) 231, 233-4.

marriage, usually had to give up her delayed dower and alimony and sometimes had to pay compensation. However, if a husband were in “breach of contract” for breaking a condition included in the marriage contract, the wife could receive a divorce while preserving her financial rights, she could sue for enforcement of those conditions, or she could negotiate a new marriage contract after divorce (sometimes in court and sometimes out of court). In renegotiation, new conditions could be added, usually in answer to problems that had plagued the marriage.⁶

However, subsequently, the marriage contract got a formal legislative shape in 1920. The most recent standard format of a marriage contract was issued in 2000 by the Egyptian Minister of Justice,⁷ which also provides a blank page to insert stipulations by the parties at their will. A marriage contract, thus, may contain different terms and conditions under which, especially, the rights of the wives would be more protected and the formal litigations on different matters could be avoided. Mona Zulficar gave the following examples of the conditions which can be inserted in a marriage contract:⁸ ownership of the assets of the conjugal home, the conjugal home,⁹ agreements to payments to the wife in case of divorce against her will, the wife’s right to work, continuing education or travel, agreements not to take a second wife, the wife’s right to divorce.¹⁰

⁶ Amira El-Azhary Sonbol, ‘A History of Marriage Contracts in Egypt’, in Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Islamic Legal Studies Program- Harvard Law School, 1st ed, 2008), 87, 90. She also cited there extracts from a few contracts, for example: “[...] promised (wa-sharat, lit. “took as condition upon himself”) to his wife Aisha that he would fear God and treat her well and provide her a good life with him, as ordered by God and according to the *sunna* (example) of the Prophet, to hold with good treatment or to let go in peace (*al-imsak bi-maruf aw al-tasrih bi-ihsan*). He [also] added the condition (*sharata*) that if he were to take any other wife, then her [i.e., the new wife’s] marriage (*uqdat al-nikah*, lit. “marriage knot”) would be in the hands of Aisha [...] to divorce her [i.e., the second wife] whenever she wished her to be divorced.”: at 94. She added that the ‘conditions included in early contracts allowed women much greater control within the marriage than is seen in later Ottoman contract records.’: at 94. She further said: ‘Conditions included in these early contracts, like their pre-Islamic counterparts, mostly favoured the wife, guaranteeing her an honourable dissolution of the marriage if her husband does not abide by her general expectations as well as by specific requirements she considered necessary.’: at 96.

⁷ Zulficar, above n 5, 252.

⁸ Ibid, 247-52.

⁹ A stipulation reserving the right of a divorced wife to use the conjugal home after the divorce takes place would better protect the interests of the divorced wives who become helpless after divorce.

¹⁰ Mona Zulficar said:

A wife’s right to delegated divorce (*isma*) is a legitimate right under the principle of Shari’a, and its inclusion in the marriage contract gives the wife the right to divorce herself before the marriage registrar, without recourse to the court. Moreover, it does not prejudice the husband’s right to divorce, contrary to popular belief. The legal effect of this condition is to confirm equal rights of termination for both the husband and the wife. This is a natural

Nature and types of stipulations:

As regards the contents of stipulations, they may be of two different types:

1. Stipulations that reinforce the normal incidents of marriage
2. Stipulations that vary the normal incidents of marriage

1. Stipulations that reinforce the normal incidents of marriage: There may be some stipulations which do not make any change in the existing bundle of legal effects of a marriage; rather they just reinforce or set some parameters of those effects. For example, stipulation regarding the time of payment of dower or stipulation regarding amount of maintenance. There is no legal restriction in making such types of stipulations as they do not bring any change in the existing *sharia* scheme. The legal status of such stipulations is that they are valid.

2. Stipulations that vary the normal incidents of marriage: There may be some stipulations that bring some changes in the normal incidents of a marriage. For example, a stipulation regarding non-payment of dower or maintenance. It is one of the normal incidents of marriage that dower will payable in a marriage. However, if there is any stipulation that says that no dower will be payable in the marriage, then such stipulation will be termed as a stipulation that varied the normal incidents of a marriage. The legal status of a stipulation that clearly varies the normal incidents of a marriage is void. However, there may be some stipulations that become valid although they vary the normal incidents of a marriage. For example, it is one of the normal incidents of a marriage that the wife will reside with the husband wherever the husband lives. But, if any stipulation is inserted in a contract of marriage that says that the husband will settle in a specific city and the wife will not be obliged to live with the husband except in that city, then such stipulation is valid and the husband cannot subsequently compel her to live in a different city. Thus, there are incidents of a marriage that can be varied and there are certain other incidents which cannot be varied. There may be another type of stipulation (which varies normal incidents of marriage) which is not only void rather that has an invalidating effect on the whole marriage, which is discussed below.

As regards legal validity, stipulations may be of three types:

1. Valid.
2. Void.
3. Invalidating.

reflection of the contractual nature of the marriage contract. If a contract is concluded based on mutual consent, it is natural to require termination by mutual consent or provide for a unilateral right of termination by either party. In addition, including this condition in the marriage contract would save the wife lengthy, costly, and strenuous procedures before the court—which could continue for as long as seven or eight years without success—or alternatively would save her the loss of her financial rights to deferred dower and financial maintenance as in the case of *khul'*.

1. Valid stipulation: Valid stipulations are those which reinforce *sharia* obligations or are not contrary to *sharia* principles. For example, fixing a date for payment of dower, fixing the amount and scale of maintenance of the wife, delegating divorce power to the wife. A valid stipulation is binding and there is no controversy about the enforcement of a valid stipulation.¹¹
2. Void stipulations: They are those which are contrary to *sharia* or vary such incidents of a marriage which cannot be varied. A stipulation that cancels a right granted by the *sharia* is a good example of void stipulation. For example, stipulations regarding non-payment of dower or maintenance. A stipulation to do anything that is prohibited by *sharia* or to abstain from doing anything that is compulsory to do under *sharia* also falls in this category. In case of a void stipulation, the marriage will remain valid except the stipulation. For example,¹² article 47 of the Moroccan Family Code (Moudawana), 2004 said:

All stipulations are binding except stipulations that contradict the terms and objectives of the marriage contract and legal rules; these stipulations are void while the contract remains valid.

3. Invalidating stipulations: An invalidating stipulation is void in itself and that also makes the whole contract void. Thus, this is not only a void condition; it at the same time has an invalidating impact on the contract of marriage. For example, a stipulation regarding duration of a marriage—if a marriage is constituted with a stipulation that the marriage is for 2 days or two months or two years, the stipulation is void and consequently the whole contract of marriage will be void.¹³ Sudanese law clearly mentioned that a stipulation prescribing a particular ‘time limit’ will invalidate the marriage.¹⁴

¹¹ For example Article 40(3) of the Kuwaiti family law of 1984 says: ‘If it is accompanied by a stipulation that does not conflict with its basis or its requirements and is not forbidden in law, then the stipulation is valid and must be fulfilled. If it is not fulfilled then the person who made the stipulation has the right to seek judicial dissolution (faskh).’ Qatar adopted the same law in 2006.

¹² Article 40(2) of the Kuwaiti family law of 1984 says: ‘If it is accompanied by a stipulation that does not conflict with its basis, but conflicts with its requirements, or is forbidden in law, then the stipulation is voided, and the contract is valid.’ Qatar adopted the same law in 2006.

¹³ Article 40(1) of the Kuwaiti family law of 1984 says: ‘If the contract of marriage is accompanied by a stipulation that conflicts with its basis, the contract is voided.’

¹⁴ Article 42(2) of the Sudanese family law of 1991 says: ‘If the contract is accompanied by a stipulation that contradicts its purpose or intentions, then the stipulation is void and the contract valid, apart from the stipulation of a time limit which voids the contract.’

Stipulations in a marriage contract: opinions of different schools of law:

Stipulation is an area that has not been elaborated either in the Qur'an or in *Hadith* clearly. This led the jurists to be divided into manifold opinions on different points regarding stipulations. Among the four *sunni* schools, Imam *Ahmad Bin Hanbal* is the most liberal one regarding the freedom of insertion of stipulations in a contract of marriage. All other Imams adopted restricted views in the matters regarding the possibility of changing the normal incidents of a marriage by inserting stipulations in a contract of marriage.

We may categorize some stipulations as controversial. They are the stipulations which will 'benefit the wife, but are neither prohibited, nor expressly allowed in Islam.'¹⁵ It is termed as controversial because the *madhabs* differed sharply on the point of validity of such stipulations. For example, a stipulation that the husband will not take a second wife or that the husband will not compel his wife to live out of her matrimonial city. All *sunni* schools except the *Hanbali* treat such stipulations as invalid. The *Hanbali* school considers such stipulations, if are agreed by the parties to a marriage, as valid and completely binding.

The main argument of the majority opinion is a *Hadith* where the Prophet (PBUH) said: "Any stipulation that is not in the book of Allah (the Qur'a'n) is void."¹⁶ It is argued that '[t]he majority of scholars believe that the above-stated stipulations are not mentioned in the Qur'a'n and are, therefore, not binding.'¹⁷ In evaluating this argument, Munir concluded:

Thus forbidden postulations are those that are expressly outlawed by the Holy Qur'a'n. For instance, a man or a woman cannot stipulate that he or she will not have sexual relations with his or her spouse, or one put forward by a man trying to escape the obligation of maintaining his wife, and so on. Ibn Taymiyah (d. 728 A.H.) argues that something that is 'not in the book of Allah' implies that which is not expressly prohibited by the Qur'a'n.¹⁸ Thus things which are prohibited cannot be covenanted while *mubah* or permissible matters may be agreed upon and consequently they will be binding on both parties.¹⁹

¹⁵ Muhammad Munir, 'Stipulations in a Muslim Marriage Contract with Special Reference to talq al-tafwid provisions in Paksitan' (2005-2006) 12 *Yearbook of Islamic and Middle Eastern Law* 235, 237.

¹⁶ Abu 'Abd Allah Muhammad Ibn Isma'il al-Bukhari, *Al-Jami al-Sahih* (Maktabah Madaniyah), Vol 1, 1143-4, 1153-7, 1234, 1238-9.

¹⁷ Munir, above n 15, 237.

¹⁸ Taqi al-Din Ibn Taymiyah, *Al-Away 'id al-Rumania al-Fisheye* (Dar al-Narwhal al-Jeddah, 1980) 229.

¹⁹ Munir, above n 15, 240.

Thus, there is no harm in inserting a stipulation that is not clearly forbidden in Islam. There are some Quranic authorities in favour of the opinion of Imam *Ahmad ibn Hanbal*:

The Holy Qur'aⁿ states: "O you who believe abide by your contracts".²⁰ Abu Bakr al-Jassas al-Razi (d. 370 A.H.) quotes on the authority of 'Abdullah ibn 'Abbas, Mujahid, Ibn Jurayj, Abu 'Ubaydah and others that the Qur'aⁿic word Uqud mentioned in the above verse means promises and agreements,²¹ including those stipulations put forward at the time of *nikah*. He argues that any condition that a person promises to fulfil in the future is binding.²² This verse, being the basis of all contracts, prevails and therefore all obligations, when undertaken, should be carried out accordingly. The Hanbalis regard the above verse as the basis of the law of contract, thereby invoking the principles of both freedom of contract and *pacta sunt servanda*. Another Qur'aⁿic verse that is cited to support this view is: "And fulfil every engagement, for it will be enquired into (on the day of the Reckoning)" (27:34). These arguments are further supported by the following verse, "And fulfil the covenant of Allah when you have covenanted."²³ According to Qurtubi, 'ahd' mentioned above denotes 'common', encompassing any promises and commitments that person makes, whether it concerns business, relationships or anything else that is allowed in religion.²⁴

The established practice of the companions of the Prophet (PBUH) is also a strong argument in favour of *Hanbali* opinion:

'Abd al-Rahman ibn Ghunaym narrates that a couple came to 'Umar (the second Caliph) in his presence, and woman complained that her husband, having agreed at the time of their *nikah* to keep her in her paternal home, should now abide by it and not take her out of there. 'Umar consequently ruled in her favour.²⁵ (It should be noted that this event took place in Madinah and no Companion had objected to it, so it is considered *Ijma'* as well.)²⁶

It is argued that the adoption of *Hanbali* opinion instead of accepting the opinions of other Imams would make the relevant law more reasonable, especially for women who could improve their status utilizing the

²⁰ Qur'aⁿ, 5:1.

²¹ Abu Bakr al-Jassas, *Ahkam al-Qur'aⁿ* (Matba' at Awqaf al-Islamiyah, 1916) vol 3, 283-4.

²² Ibid, 285.

²³ Qur'aⁿ, 16:91.

²⁴ Qurtubi, *Ahkam al-Qur'aⁿ*, vol 6, 32.

²⁵ Abu 'Isa Muhammad ibn 'Isa al-Tirmidhi, *Sunan* (Maktabah madaniyah) vol 1, 347.

²⁶ Munir, above n 15, 239.

opportunity to insert some stipulations in their marriage contracts. In justifying this opinion, Amira argued:

It is odd that today Muslim revivalist groups use interpretations of law from various medieval legal schools (sing. *Madhhab*, pl. *Madhahib*) as if they constitute “the” sharia, unchanged and unaltered. This is odd because even though pre-modern qadis practicing in Sharia courts belonged to various *madhhab*, they considered the *madhhab* to which they belonged as a guide, and not as providing the ultimate ruling. ... Today, however, conservative traditional practices and existing personal status laws are being defined as “Islamic” and discussions are confined within *fiqh* discourses.²⁷

It is worth mentioning here that even the stipulations about which there is no controversy they are also usually not inserted in the marriage contract due to lack of awareness of women about their rights in a patriarchal form of society. For example, the provision for wealth management or compensation to be paid by the husband in case of a ‘no-fault divorce’ pronounced by the husband.

A brief review of different countries’ statutory laws regarding stipulations in a marriage contract

The first codified provision regarding stipulation is found in Turkey, which was enacted in 1917. Section 38 of the Ottoman Law of Family Rights provides:²⁸

Where a woman stipulates with the husband that he would not marry another wife and that if he does so she or the second wife would stand divorced, the contract of marriage shall be valid and the condition enforceable.

Thus, it appears that the above provision was about one specific stipulation regarding prohibiting the husband’s right to polygamous marriage, in contravention of which either of the two marriages will be void. However, the classical *Hanafi* jurists have not considered such a stipulation as valid. Because, it takes away a right of the husband allowed by the *sharia* and it irrationally imposes the possibility of divorce on the second wife. This law was subsequently abolished in Turkey, although such a provision still stands in Lebanon. In Morocco, the law of 1957 and 1958 incorporated such type of provision in a little bit different way, which said that in contravention of such a stipulation against the polygamous marriage, the wife will have the right to terminate the marriage.²⁹ According to article 40 of the

²⁷ Sonbol, above n 6, 89.

²⁸ This was repealed subsequently in Turkey.

²⁹ Article 31 of the Moroccan Code of Personal Status (book 1 and 2 of Mudawwanah) of 1957 and 1958 has a similar provision: “A woman has a right to stipulate in the marriage contract that her husband should not take any co-wives, and that if the

Moroccan Family Code (*Moudawana*), 2004 polygamy is 'forbidden when the wife stipulates in the marriage contract that her husband will not take another wife.' Tunisian law of 1956 allows both spouses to insert lawful stipulations contravention of which 'will give rise to the possibility of a petition for dissolution through *talaq*.'³⁰

Article 19 of the Jordanian law of 1976³¹ declared a marriage stipulation to be valid on satisfaction of four conditions: (i) that the stipulation is of benefit to one of the parties, (ii) that is not inconsistent with the intention of marriage, (iii) that does not impose something unlawful and (iv) that is registered in the contract document. Jordanian law thus openly declared that both husband and wife can take the advantage of inserting some additional stipulations within the legal framework.

In particular, article 19(1) has elaborated wife's right to insert stipulations. It says that any beneficial stipulation for a wife, which does not violate either law or the right of the other, is valid, and enforceable. If the husband does not fulfil any of those stipulations, the contract of marriage will be dissolved on the application made by the wife and the wife will get all matrimonial rights. The law has provided a few examples of such enforceable stipulations: he shall not remove her from her own city, shall not contract a polygamous marriage, delegation of power of *talaq* to the wife. It is not clear whether she can stipulate regarding doing a job after the marriage. But, article 19(2) clearly mentioned that the husband will be able to insert

husband does not comply with that to which he has bound himself, the wife shall have the right to demand that the marriage be terminated."

³⁰ Article 11 of the 1956 law.

³¹ Article 19 of *the Jordanian law of Personal Status No 61 (1976)*: If a condition is stipulated in the contract that is of benefit to one of the parties, is not inconsistent with the intentions of marriage, does not impose something unlawful and is registered in the contract document, it shall be observed in accordance with the following:

1) if the wife stipulates something to the husband that brings her a benefit that is lawful and does not infringe upon the right of the other, such as if she stipulates that he shall not remove her from her [home] town, or shall not take another wife during their marriage, or that he shall delegate to her the power to divorce herself, this shall be a valid and binding condition, and if the husband does not fulfil it, the contract shall be dissolved at the application of the wife, and she may claim from him all her matrimonial rights;

2) if the husband stipulates to the wife a condition that brings him a lawful benefit and does not infringe upon the rights of the other, such as if he stipulates that she shall not go out to work, or that she shall live with him in the area in which he works, this shall be a valid and binding condition, and if the wife does not fulfil it, the contract shall be dissolved at the application of the husband and he shall be exempted from paying her deferred dower and maintenance during the *idda* period;

3) if the contract is constrained by a condition that contradicts the intentions of marriage or imposes something unlawful, such as if one of the spouses stipulates that the other shall not live with him/her, or that they shall not share marital intimacy, or that one of them shall drink alcohol, or shall break off relations with their parents, then the condition is void while the contract remains valid.

a stipulation regarding her abstinence to do any work outside home. It submitted that analysing both articles 19(1) and (2) it may be concluded that a wife also would be able to insert a stipulation that she will go out for work after the marriage.

It is interesting to note that the Jordanian law created a scope for a husband to insert some stipulations and if the wife violates any of those stipulations then the marriage will be dissolved on an application made by the husband where he will not have to pay the 'deferred dower' to his wife. This is a different type of statutory protection given to husband, by which a husband may evade paying a portion of the dower money to his wife. It is submitted that such a statute is controversial. Because, dower is the foremost legal effects of a marriage, which is payable after the marriage takes place. It is illogical to connect the payment of dower to the dissolution of a marriage by the husband. The Jordanian law of 1976 is an example by which a husband may enjoy an extra benefit of evading dower under the statutory protection in the name of violation of a 'stipulation' by the wife. It is worth mentioning here that a husband always reserves the right to divorce his wife for 'fault' or 'no-fault' on her part. Thus, it is a harsh law that deprives a divorced woman from getting her already established legal entitlement to some financial benefits.

The Syrian law of Personal Status (1975) incorporated general provisions on stipulation, which is different from the above countries in the sense that no stipulation can be inserted which restricts 'the freedom of the husband in his lawful personal affairs.' Other conditions are similar to Jordanian conditions.

In Algeria,³² either of the parties may stipulate regarding wife's work after the marriage. Thus, a woman may reserve the right to do work after her marriage. Mauritanian law seems to be more elaborate for women, which expressly allowed women to insert stipulations regarding their work and study. Article 28 of the Mauritanian law of 2001 says:

The wife may stipulate that her husband shall not marry another woman, that he shall not absent himself for more than a given period, that he shall not prevent her from pursuing her studies or from working as well as any other condition not contrary to the permanence of the marriage contract.

The wife may ask for a judicial dissolution on failure of the husband to comply with any condition totally partially. In addition she may sue for a 'gift of consolation (*muta*)' the value of which is at the discretion of the judge.³³ The laws of UAE, Qatar and Kuwait have clearly mentioned all three types of stipulations: valid, void and invalidating.³⁴

³² According to article 19 of the law of 1984 as amended in 2005.

³³ Article 29 of the law of 2001.

³⁴ Qatar 2006: Article 53: If the contract of marriage is accompanied by a stipulation that contradicts its basis, the contract is voided. If it is accompanied by a stipulation

Islamic law generally recognized the concept personal ownership of one's own property. Thus, personal ownership of one's own property is not lost even upon a marriage. However, the contractual nature of marriage created a scope for negotiating the division of property during the continuance of marriage or on divorce. Since the husband can control the movement of the wife (including her option for doing work), it is a good opportunity for a wife to negotiate some proprietary rights on the husband's property. Such an arrangement would act as financial security in case of dissolution of the marriage. Deciding about the division of the property and their control at the time of marriage is generally known as 'deciding a property regime.'³⁵ There are some countries that have made statutory provisions regarding the 'property regime.' For example, the Moroccan Family Code (*Moudawana*), 2004, the new family code adopted in Morocco, included provision regarding stipulation on division of property between husband and wife. This is an

that does not contradict its basis but contradicts the requirements of the contract, or is forbidden in law, then the condition is voided, but the contract is valid. If it is accompanied by a stipulation that contradicts neither the basis nor the requirements of the contract, the stipulation is valid and shall be fulfilled. If it is not fulfilled, the person who made the stipulation has the right to seek judicial dissolution. Article 54: The right of judicial dissolution lapses if the one so entitled waives it explicitly or implicitly.

Kuwait 1984: Article 40(1) If the contract of marriage is accompanied by a stipulation that conflicts with

its basis, the contract is voided. (2) If it is accompanied by a stipulation that does not conflict with its basis, but conflicts with its requirements, or is forbidden in law, then the stipulation is voided, and the contract is valid. (3) If it is accompanied by a stipulation that does not conflict with its basis or its requirements and is not forbidden in law, then the stipulation is valid and must be fulfilled. If it is not fulfilled then the person who made the stipulation has the right to seek judicial dissolution (faskh).

UAE: Article 20: (1) Spouses shall fulfil their stipulations, apart from a stipulation that makes what is prohibited (haram) lawful (halal) or makes lawful what is prohibited. (2) If a stipulation is made that contradicts the basis of the contract of marriage, the contract is voided. (3) If the stipulation does not conflict with the basis of the contract but conflicts with its requirements or is prohibited by law, then the stipulation is voided, and the contract is valid. (4) If a stipulation is made that does not conflict with the basis of the contract nor with its requirements, and is not prohibited by law, then the stipulation is valid and shall be fulfilled. If the person to whom the stipulation is made violates it, then the person who made the stipulation is entitled to seek judicial dissolution, whether this be from the side of the wife or the husband; the husband shall be exempt from paying the maintenance for the idda period if the violation is from the part of the wife. (5) If one of the spouses stipulates that the other shall have a particular quality and the opposite transpires, then the person who made the stipulation shall be entitled to seek judicial dissolution. (6) In the event of denial, no stipulation shall be considered unless it is written in the documented contract of marriage. (7) The right of dissolution lapses if waived by the person so entitled, or by explicit or implicit consent to the violation. The passage of one year after the occurrence of the violation with the stipulating party's knowledge thereof shall be considered implicit consent, and similarly with [the right to] final talaq.

³⁵ <<http://muslimmarriagecontract.org/familylaws.html>>.

important stipulation by which a wife can reserve a right to her husband's property even if divorce takes place. Article 49 of the 2004 Code says:

Each of the two spouses has an estate separate from the other. However, the two spouses may, under the framework of the management of assets to be acquired during the marriage, agree on their investment and distribution.

This agreement is indicated in a written document separate from the marriage contract.

The Adouls (public notaries) inform the two parties of these provisions at the time of the marriage.

In the absence of such an agreement, recourse is made to general standards of evidence, while taking into consideration the work of each spouse, the efforts made as well as the responsibilities assumed in the development of the family assets.

One remarkable feature of the present Moroccan law is that it directed the public notaries to inform the spouses that the law has given them a scope to decide about the 'property regime.' This information to be provided in the marriage ceremony serves an important purpose: the ignorant spouses will be able to know that they got this option legally, and it will act as a good reminder for them who knew about that. In Iran, '[t]he standard marriage contract includes an optional clause stating that wealth accumulated during the marriage will be divided in half on divorce.'³⁶ The laws of Philippines, Cameroon and Senegal also provided a scope for deciding 'property regime' by the parties, in the absence of which settlement the statutes provided some specific guidelines for distribution of the matrimonial property.³⁷ Tunisian law also allowed stipulations regarding both person and property, on contravention of which the other party can apply for dissolution of marriage.³⁸ Turkish law has given an option to the spouses to settle the 'property regime' and has provided an option to choose anyone from three different options.³⁹

³⁶ *Knowing Our Rights: Women, family, laws and customs in the Muslim world* (Women Living Under Muslim Laws, 3rd ed, 2006) 326.

³⁷ *Ibid.*

³⁸ The Code of Personal Status (CPS), adopted in 1956 and came into force in 1957.

³⁹ Turkey: Under A. 186-237 of the CC, a couple has the option of choosing between three different property regimes upon marriage: separation of goods (each party owns the goods and property that are registered in his/her name prior to and throughout the course of the marriage), union of goods (all goods and property owned by each party prior to and during the marriage are considered joint property of the couple); aggregation of goods (through a prenuptial agreement both parties decide upon which goods will constitute the joint property of the couple). Under A. 170, where a couple has not specified a property regime applicable to their marriage union, they are automatically considered to have accepted the separation of goods property regime.

Utility of stipulations in a contract of marriage: a mechanism to improve the status of women

The scope for inserting stipulations is more important for women than men. In most of the areas, a husband, in contrast to a wife, enjoys absolute and superior power. If a wife wants to make any change in the existing scheme of husband dominated system, she can take the opportunity by inserting stipulations in her contract of marriage. For example, if it is inserted in the marriage contract that the husband will permit her to engage in legal profession, then the husband cannot prohibit her after their marriage to engage in the legal profession. Otherwise, husband could exercise his power to prohibit her to doing the job. Because, a husband acquires a right to control the movement of his wife and the wife must be obedient to her husband. Thus, the scope for inserting stipulations is a great opportunity for women to protect their interests against the excessive power of husbands under the *sharia* law. Thus, *Nasir* rightly commented: 'Within the framework of spousal relations, special stipulations may seek to clarify or modify the parameters of the wife's duty of obedience, or to expand the obligations on the husband.' One such important stipulation is regarding division of property acquired during the marital life. For example, a wife may stipulate that in case the marriage is dissolved by the husband unilaterally without any fault on her part, the wife will get a portion of the property of the husband acquired during their marital life. Such a stipulation, although does not violate the traditional *sharia* law, can protect the financial interests of women who are divorced without any fault on their parts.

Statutory laws regarding 'stipulations' in Bangladesh

In Bangladesh, there is no statutory provision on stipulations. However, in the standard marriage contract form⁴⁰ (which is known as *kabinnama*) there is a scope for insertion of some stipulations. The relevant clauses merely provided to insert stipulations without mentioning any other provision on validity or invalidity of stipulations. The *kabinnama* is also is totally silent about the effect of contravention of those stipulations. Column 18 of the *kabinnama* is about delegation of power of *talaq* by the husband to his wife and column 19 is about whether husband's power of *talaq* has been curtailed in any way. Column 20 is about whether any deed has been made relating to dower, maintenance, wife's allowance, etc. Column 17 is the place where both parties may insert stipulations, which says: 'Description of special conditions, if there is any'.

The reality in Bangladesh is that people are generally not aware about the scope of insertion of stipulation in the column 17. The matter of stipulations is not a much focused issue in Bangladesh even among the lawyers. In the light of the statutes made in different countries, Bangladesh should make some statutory provisions regarding stipulations in a contract of marriage. For example, a statute should be passed which will include, inter alia, the following: option for insertion of stipulations, conditions for valid

⁴⁰ *The Muslim Marriages and Divorces (Registration) Rules 1975*, form E.

stipulations, criteria for stipulations to be void, impact of void stipulations, legal effect of contravention of a valid stipulation, scope of stipulations by husband and wife and examples of a few stipulations in order to make the theories clear. In addition, considering the socio-economic condition and the general needs of the women in Bangladesh, the government should prepare an optional list of stipulations which will be accompanied with the '*kabinnama*' as an annexure. At the same time, the *Kazi* or the marriage registrar should be directed to readout the document with a reminder to the parties that they can insert some stipulations if they like. I am recommending the following matters, inter alia, to include in such a list of stipulations:

- Stipulation regarding dower: It will include the mode of payment of dower and the time for payment of deferred dower.
- Stipulation regarding rights and obligations: It may include, inter alia, the requirement of mutual consultation regarding all family affairs including fixing a location for residence, sharing household activities and taking care of the children.
- Stipulation regarding work: The wife may reserve her right to be allowed to go out for work.
- Stipulation regarding study: That the husband will allow his wife to complete or continue her study.
- Stipulation regarding 'property regime': Stipulations regarding control and distribution of matrimonial property.
- Stipulation regarding polygamy: The wife may insert a stipulation that will restrict the husband to contract a polygamous marriage.
- Stipulation regarding power of divorce: Whether husband has given any power of divorce to his wife. At the same time whether husband's power of *talaq* has been restricted by some limitations.
- Stipulation regarding compensation on divorce: If the husband pronounces a 'no fault' divorce to his wife unilaterally, then the wife will entitled to get an amount of compensation.

Conclusion

Marriage in Islamic law is of contractual nature. This unique feature of Muslim law created a scope for insertion of stipulations in a contract of marriage. Islamic family law, generally speaking, granted more rights to a husband in contrast to a wife. However, Islamic law kept an option open for the parties to marriage to insert some stipulations. Thus, the opportunity to insert stipulations can be utilized more by women in order to limit their 'obedience' or expand their horizon of rights during their marital lives. Among all *madhabs*, the *Hanbali* seemed to be the most progressive. Many Muslim states adopted different statutory laws on stipulations. In the light of *Hanbali madhab* and modern statutes, it is possible to enact a suitable law regarding stipulations in Bangladesh, which would be able to better protect the rights of married women in Bangladesh. In a patriarchal form of society where women are generally neglected and do not enjoy real freedom and liberty even to enjoy their legal rights, it is preferred that instead of

completely leaving the matter of inserting stipulations on the discretion of the women, the state will provide a list of possible stipulations with the deed of marriage, from where a woman (to be wife) would be able to choose and insert stipulations of her own choice. This will also help to create social morality in favour of giving married women a real opportunity to improve their status even within the traditional *sharia* framework.