

**STIPULATIONS IN MUSLIM MARRIAGE: A
COMPARATIVE ANALYSIS BETWEEN BANGLADESH AND
MOROCCO**



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Date of submission:

**A research Monograph Submitted in Partial Fulfillment of the Requirement for the Degree
of**

LLM program, Department of Law, DAFFODILL INTERNATIONAL UNIVERSITY

LETTER OF APPROVAL

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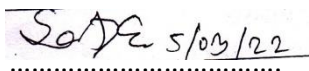
Subject: “Stipulations in Muslim marriage: a comparative analysis between Bangladesh and Morocco”

Dear Sir,

It's a great pleasure for me to submit Stipulations in Muslim marriage: a comparative analysis between Bangladesh and Morocco. While preparing this research Monograph Paper I have attempted my dimension best to keep up the required Standard. I trust that this research monograph will satisfy your desire.

I hereby do solemnly declare that the work presented in dissertation has been carried out by me and has not been previously submitted to any other institution. The work I have presented does not breach any copyright.

I, along these lines, supplicate and Hope that you would be sufficiently benevolent to this exploration paper for advancement.

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ACKNOWLEDGEMENTS

At the very beginning, I would like to thank Almighty Allah for his blessings, without which it was impossible to complete the work

I want to thank the respected supervisor Md. Safiullah, Assistant Professor, Department of Law, Daffodil International University. He always guided me whenever I was in difficulty or had a lack of understanding in my research writing. He has consistently guided and motivated me with his excellent knowledge, experience, and patience throughout the conduction of this study.

I want to thank all the Library Staffs of Daffodil International University for their online assistance and helping me to find out the relevant materials, Journals, and Articles.

Finally, I would extend my thankfulness on behalf of my parents. They have supported and motivated me for conducting all things which are related to education the whole time of my life.

I especially mention those persons and thanks to them who are helped to me for making this work in sooth, in a true sense without their support, this work could never have been finished properly.

I am also grateful to my entire classmates of master's in legal research Studies.

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Md. Mahmudul Hasan

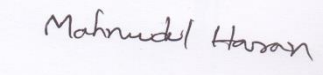
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DECLARATION

I hereby declare that the research paper entitled "*Stipulations in Muslim Marriage: A Comparative Analysis between Bangladesh and Morocco*" has been done by Md. Mahmudul Hasan (Id No: 212-38-427) in partial fulfillment of the requirement for the degree of LLM program from Daffodil International University. This research monograph has been carried out successfully under my supervision.



.....

Mr. Md. Safiullah
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LIST OF ABBREVIATION

PBUH	Peace Be Upon Him
MFLO	The Muslim Family Laws Ordinance
MPSC	Moroccan Personal Status Code
SFM	Muslim Family Status
BD	Bangladesh

TABLE OF CONTENTS

CONTENTS	Pages
Title Page	<i>i</i>
Latter of approval	<i>ii</i>
Acknowledgment	<i>iii</i>
Declaration	<i>iv</i>
List of Abbreviations	<i>v</i>
Abstract	<i>viii</i>
CHAPTER I PRELIMINARY CHAPTER	01-07
1.1 Background of the Study	<i>1-2</i>
1.2 Literature Review	<i>2-4</i>
1.3 Research Question	<i>4</i>
1.4 Research Objectives	<i>5</i>
1.5 Scope of the Study	<i>5</i>
1.6 Limitation of the Study	<i>6</i>
1.7 Importance of the Study	<i>6</i>
1.8 Research Methodology	<i>6</i>
1.9 Structure of the Study	<i>7</i>
CHAPTER II CONCEPTUAL FRAMEWORK OF THE STUDY	08-11
2.1 Concept of Stipulation under Islamic Law	<i>8-9</i>
2.2 Stipulations in a Marriage Contract that Reinforce the Normal Incidents of Marriage	<i>9</i>
2.3 Stipulations in a Marriage Contract that Vary the Normal Incidents of Marriage	<i>9-10</i>
2.4 Based on Legal Validity, Stipulations maybe Three Types Valid Stipulation Void Stipulation Invalidating Stipulation	<i>10-11</i>
2.5 Chapter Summary	<i>11</i>
CHAPTER III STIPULATIONS IN MARRIAGE UNDER SHARIA LAW	12-14
3.1 Stipulations in a Marriage Contract under the Holy Quran and Hadith	<i>12-13</i>
3.2 Different Opinions of Imams about Stipulations in the Marriage Contract	<i>13-14</i>
3.3 Chapter Summary	<i>14</i>

CHAPTER IV MARRIAGE STIPULATION: COMPARISION BETWEEN BANGLADESH AND MOROCCO	<i>15-18</i>
4.1 Stipulation in a Marriage Contract in Bangladesh with the Reflection of Sharia and Statutory Law	<i>15-16</i>
4.2 Stipulation in a Marriage Contract in Morocco with the Reflection of Sharia and Statutory Law	<i>16-18</i>
4.3 Chapter Summary	<i>18</i>
CHAPTER V CONCLUDING REMARKS	<i>19-23</i>
5.1 Findings	<i>19-20</i>
5.2 Recommendations	<i>20-22</i>
5.3 Conclusion	<i>22-23</i>
Bibliography	<i>24-27</i>

**STIPULATIONS IN MUSLIM MARRIAGE: A COMPARATIVE
ANALYSIS BETWEEN BANGLADESH AND MOROCCO**

ABSTRACT

This paper has been formed with a basic thought of stipulation in a marriage contract under sharia and statutory law. A Stipulation is a matter of contract inserted in the time of marriage deed. So the term stipulation is an essential mark or signs an indication. In a true sense, Islam authorizes a bride to stipulate any conditions in a marriage deed. But most of the Islamic scholars differed in determining the validity of such conditions upon their marriages to take place. One of the most controversial stipulations is that delegating the power of divorce to the wife in her marriage contract. The scope of the research paper is a stipulation regarding the marriage contract between Bangladesh and Morocco. Stipulation meant the only stipulation in the marriage field others will be treated as excluded. This paper has been conducted using a qualitative methodology. Therefore, this research made out a comparative analysis between Bangladesh and Morocco with the reflection of Sharia and the statutory law of the specific some modern states. This research tried to show out a present scenario of the status of Bangladeshi women regarding stipulation in a marriage contract by the using of example or representing the status of the Moroccan woman under the personal status code Mudawana, 2004. This because stipulation in a marriage contract in Bangladesh is an unfamiliar matter for the absence of crystal clear provisions regarding stipulation. And that's why we need to adopt specific clear provisions for the better protection of the wife. For enhancing the status of the woman in Bangladesh some recommendations are made out in the concluding chapters with referencing best practicing Muslim countries regarding stipulations in a marriage contract.

KEYWORDS: STIPULATION/ MARRIAGE CONTRACT/ KABINNAMA/
MUSLIM FAMILY LAW

CHAPTER I PRELIMINARY CHAPTER

1.1 Background:

The stipulations in a marriage contract provide the scope of rights of the woman, which gives us both sharia and statutory law.¹ But this right of a woman most of the cases infringed by the husband dominated societies. There is no doubt that marriage under Islamic law has a religious overtone. It's a contract. Because it deals with simple contractual formalities: offer and acceptance by the competent person, that's why it is treated as a civil contract. Research should be conduct about stipulations in a marriage contract for clarification of the rights of the woman. Like as a stipulation delegating the power of talaq to wife is generally accepted as the permissible by all madhabs. But our societies are silent about it. However, the stipulation must be inserted according to the sharia law. That's mean all stipulation is not allowed under sharia law. For example, a husband will not take a second wife, this stipulation is invalid in Hanafi schools. But the Hanbali schools permits to insert of such type of stipulation in a marriage contract.² Other important stipulations should be highlight which is essential for the present world as a husband will not prohibit his wife's work or stipulations regarding a husband will permit his wife to complete her study. Whether sharia has provided open scope for stipulations in marriage contract but Bangladesh has no complete specific statutory law on the ground of stipulations in marriage contract except kabinnama. I observed in the present scenario of Bangladeshi women and also the government unconscious about such rights. In the case of stipulations in the marriage contract in Morocco has played an important role in the rights of the woman. Regarding stipulations, in a marriage contract, Morocco made a statutory provision s regarding the „property regime“ for illustration The Moroccan Family Code (Moudawana), 2004 the new family code adopted in Morocco. Regarding a property regime,³ Moroccan law may be a good example of making a statutory provision for purposes of stipulations in marriage contracts in Muslim countries.⁴ I am quite interested in stipulations in a marriage contract for the clarification of rights of the women

¹ Dr Muhammad Ekramul Haque, *Muslim family law*, stipulations in a marriage contract (1st edn. London College of Legal Studies 2015)

² Amira Mashhour says, A husband will not take a second wife, this stipulation is invalid in Hanafi schools. But the Hanbali schools permits to insert such type of stipulation in a marriage contract, Islamic law and gender equality?: A study of divorce and polygamy in sharia law and contemporary legislation in Tunisia and Egypt, *Humanrightsquarterly*, vol. 27, John Hopkins University (2005) <https://www.jsto.org/stable/20069797> accessed September 15, 2021

³ The Moroccan Family Code (Mudawana), 2004, Article 49

⁴ Knowing our rights women , family laws and customs in the Muslim world, (Women living under Muslim law, 3rd ed. London, 2006) 326

stipulations in a marriage contract, for establishing equal rights of the men and women. That's why I conducted this research on the comparative analysis of stipulations in a marriage contract between Bangladesh and Morocco under sharia law.

1.2 Literature Review:

Stipulation in a marriage contract is a scope for enhancing the protection of women's rights in the marriage field. Especially women will benefit from stipulating using such type of stipulation in a marriage contract. But this type of opportunity is absent in Bangladesh for lack of awareness and crystal clear statutory provision regarding stipulation in a marriage contract. My work w has been addressed on these issues by giving the example of Moroccan Family Law from a comparative perspective.

A more comprehensive description regarding stipulation in a marriage contract can be found in Muslim Family law (2015), a book by Professor Dr. Muhammad Ekramul Haque, In his book, Professor represents the present scenario regarding stipulation in a marriage contract under sharia and different statutory laws of the Muslim modern world. Dr. Muhammad Ekramul Stated Muslim marriage is a civil contract. And this contract created scope for women insertion of a stipulation in a marriage contract.⁵

Several studies show that Stipulations in a marriage contract is not a familiar topic in Bangladesh. But the standard marriage contract form (kabinnama) opened scope for insertion of some stipulation. Columns 17, 18, 19, and 20 specially ground for the insertion of stipulations.⁶ The real scenario of the people of Bangladesh is that they are not aware of the scope of stipulations in a marriage contract.

Many authors have recognized that Morocco's adopted new family code in 2004 was addressed as a great step forward for women's rights and as a model for Muslim countries. Morocco's new family code, commonly known as the Moudawana, introduced a range of measures that enhance women's equality in marriage,⁷ divorce, and other aspects of family life. The important feature of Moroccan law is the property regime. On that features a woman or a man has the right to insertion of stipulations in a marriage contract it is directed by the public notaries.⁸

⁵ Dr Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p.107

⁶ Dr Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015)

⁷ http://muslimmarriagecontract.org/family_laws.html>accessed on 16 July, 2020

⁸The Moroccan Family Code (Mudawana), 2004, Article 49

A recent study has been done by Professor Shahnaz Huda (2001). She stated in her article about the right to divorce of the women by the condition of insertion of a stipulation in her marriage contract with the permission of the husband that will be valid. But the fieldwork gave, most of the cases in Bangladesh the woman fail to insert the stipulation in marriage contract for their lack of proper knowledge regarding stipulation in a marriage contract.⁹

Quran and Hadith also encouraged us stipulations in a marriage Abdullah (b. Mas'ud) reported: We were on an expedition with Allah's Messenger (sm) and we had no women with us. We said: Should we not have ourselves castrated? He (the Holy Prophet) forbade us to do so He then granted us permission that we should contract temporary marriage for a stipulated period giving her a garment, and 'Abdullah then recited this verse: 'Those who believe do not make unlawful the good things which Allah has made lawful for you, and do not transgress. Allah does not like transgressors" (Al-Qur'an, 5: 87).¹⁰

Muhammad Munir stated, in his article the concept of the stipulation in marriage came to light in the eye of the society in Pakistan from the case of Muhammad Zaman v Irshad Begum. He contributed to the concept of a stipulation in a marriage contract in Pakistan.¹¹

The marriage contract also establishes further rights and duties for each spouse. Aside from the basic requirement of “mutual good treatment,” which is not legally defined, these rights and duties are differentiated by gender. They are also interdependent: a failure by one spouse to perform a specific duty may jeopardize his or her claim to a particular right.¹²

Kamrul Hossain argued in his article, the problem of inequality of women in Bangladesh is more social than legal.¹³

⁹ShanazHuda, 'Protectionofwomeninthemarriagecontract:anexploration,' vol,5:1&2(2001)<http://www.biliabd.org/article2520law/vol-5/shanaz%2520HHuda.pdf+%&cd=1&hl=bna&ct=clnk&gl=bd&client=firefox-b-d> accessed 28 October 2021

¹⁰Al-Qur'an, v. 87, "Those who believe do not make unlawful the good things which Allah has made lawful for you, and do not transgress. Allah does not like transgressors"

¹¹Muhammad Munir, 'Stipulation in a Muslim Marriage Contract with Special Reference to talaq al tafwid provisions in Pakistan,' in Eugee Cotran, Martin Law and Victor And Kattan, eds, 'yearbook of Islamic and Middle Eastern Law,'CIML, Centre of Islamic and Middle Eastern Law School of Oriental and African Studies, University of London, vol12, 2005-06, 235-262,237

¹²Welchman Lynn, 'Women and Muslim family laws in Arab states: A comparative overview of textual development and advocacy,'(2007)<doi.10.2307/j.ett46maz6.6> accessed 8 August 2020

¹³Kamrul Hossain, 'In search of equality: marriage related laws for Muslim women in Bangladesh' journal of international women studies, vol,5(1),96-113<https://vc.bridgewe.edu/jiwa/vol5/issi/6> accessed 23 October2020

Nannu Mian concluded in his article, Bangladesh there is no uniformity law relating to the Marriage Registration. The marriage registration form is the only space where women insert or protect their rights. Indeed it's urgent to enact such a law for both spouses amicable settling their conjugal problems.¹⁴

Norhoneydayatie Abdul Manap in their joint article (2013) defines the term stipulation in a marriage contract under Islamic law and Common law and discussed the contract of marriage. They said the contract is a source of obligation if it is constructed from a legal obligation.¹⁵

Many authors recognized all schools of law permit a wife to stipulate. In this regard Raihana Abdullah (2008) said, a wife has the power to stipulate any conditions in her marriage contract. For instance, stipulation regarding polygamy, stipulation regarding work, etc.¹⁶

Sameena Nazir and Leigh Tomppert said Women are permitted to ask for specific rights to be stipulated in the marriage contract, For instance, the right to work and study after marriage.¹⁷

1.3 Research Question:



What is the basic difference between Bangladesh and morocco stipulations in marriage under sharia law?

1. What is the scope in case of a stipulation in marriage contracts in the modern world?
2. What is the best practicing Muslim country in case of stipulations in marriage?
3. Does any difference between Bangladesh and Morocco in case of a stipulation in marriage contracts on the ground of statutory law?

¹⁴Nannu Mian, 'Modernizing Marriage Registration in Bangladesh'(2013)1(1), v.3 17, ISSN:2249-5894

¹⁵Norhonydaya Abdul Manap, 'Stipulations in Contract from Islamic and Malaysian Legal Perspective 'Journal of the Asian social Science, (2014), v10, n2, p112 ISSN1911-1925<http://dx.doi.org/10.5539/ass.v10n2p112> accessed 30 July, 2020

¹⁶Raihanah Abdullah, 'Inserting stipulation of polygamy in a marriage contract Muslim countries'(2008)<<https://doi:10.14421?ajis.2008.461.153-169>>accessed 20 July 2020

¹⁷Shatha K. Al-Mutta, 'U.U.E.' in Sameena Nazir and Leigh Tomppert (edn), Womens Rights in the Middle East and North Africa (1st edn, Freedom House, USA, 2005) p. 313, 318

1.4 Research Objective:



The objectives of the research are mainly in four heads: These are conducts-

1. To analyze the comparison between Bangladesh and Morocco in marriage stipulations under the Sharia law with different opinions of Imams.
2. To determine the widest possible scope for stipulations in the modern world.
3. To review the modern statutory law relating to marriage stipulations in Bangladesh and Morocco.
4. To suggest some appropriate recommendations to better protect the interests of women in mentioning the best practicing country in the world in case of marriage stipulations.

1.5 Scope of the Study:

The scope of the research has been drawn within inelastic issues

▪ Inclusion

The research work is initially conducted on a comparative analysis between Bangladesh and Morocco regarding stipulation in a marriage contract to establish and enhance the equal rights of the woman in the marriage field mentioning the example of Moroccan women status in a marriage contract under the light of sharia and some specific Muslim countries family law regarding marriage stipulation. Here stipulation meant the only stipulation regarding stipulation in a marriage contract under the specific provision of the said Muslim countries.

▪ Exclusion

In this research, the stipulation intends to include only marriage stipulation between Bangladesh and Morocco other areas will be treated as an area of excluded.

1.6 Limitation of the Study:

There is a dearth of literature on the comparative analysis between Bangladesh and Morocco stipulations in marriage under sharia law. This study did not include enough research articles published on the stipulation in marriage because it's not a familiar subject to the widest sense. Only a few books, article journals, and different opinions of the Imams are available.

The study did not contain enough primary data for stipulations in marriage except the Direction of Quran and Hadith, opinions of Imams, statutory law of the said countries as the time of writing this study is the peak time COVID-19 in Bangladesh.

1.7 Importance of the Study:

Stipulations in marriage are more important for women than men. In most the case, a husband enjoys the superior power on a wife. If a wife wants to make any change in the existing system of husband- a dominated country like Bangladesh, the wife can do inserting stipulations in her contract of marriage. If a wife inserted any condition in the marriage contract that the husband will permit her to engage in the legal profession. Otherwise, a husband could exercise his power to prohibit her from doing the job. Other such necessary things that are proper for the wife can do inserted under the area of law and sharia. By the study of this paper, a wife will be able to alert for his right which is given to her sharia and law of the countries. A law practitioner gathers a clear knowledge about stipulations in marriage. Students of law will more benefit on the ground of stipulations in marriage under sharia and statutory law.

1.8 Research Methodology:

The qualitative nature and comparative approach research methods are reflected in this paper. This qualitative research paper gathered several primary and secondary sources, like Quran and Hadith, national legislation, books, articles, journals, case laws, law reports, and websites regarding stipulation in a marriage contract. To conduct this research paper number of study materials and literature have been reviewed. Besides that for analysis of the relevant issues, mentionable documents, and literature regarding stipulation in a marriage contract in external countries in the modern world, especially Morocco have been taken into consideration. Along with these, the reformation of a few Muslim countries regarding stipulation in a marriage contract is considered a valuable source of information.

1.9 Structure of the Study:

This research is titled, „Stipulations in Marriage: A Comparative Analysis between Bangladesh and Morocco „which discusses the comparison between Bangladesh and Morocco regarding stipulation in a marriage contract. This study has consisted of six chapters. The first chapter has been the Preliminary Chapter. This chapter consisted of the Background of the study, Research question, Objectives of the study, Scope of the Study, Limitation of the Study, The importance of the study, Methodology, Structure of the study, and Bibliography.

The second chapter has been elaborated, Conceptual framework of the study, the concept of the stipulation, existing different types of stipulation regarding stipulation in a marriage contract will discuss. Moreover, it has been focused on the effects of a valid, void, and invalidating stipulation in a marriage contract arising due to the challenges in the existing legal framework.

The third chapter has been constructed on the core Discussions regarding stipulation in a marriage contract under Sharia law. In this chapter, the basic concepts regarding stipulation in a marriage contract has been discussed for a better understanding of the Quran and Hadith with the opinion of different Imams.

The fourth chapter has been presented a comparison between Bangladesh and Morocco regarding stipulation in a marriage contract. This chapter covered the present scenario of both countries regarding stipulation in a marriage deed.

The fifth chapter has been made a comparative analysis in the following countries regarding practices of marriage stipulation. Such as Turkey, Lebanon, Morocco, Tunisia, Bahrain, Jordan, Syria, UAE, Qatar, and Kuwait. This chapter also focused on the best practicing Muslim country regarding stipulation in a marriage contract.

And the Sixth chapter finally discussed the findings, recommendations conclusion of this research paper.

CHAPTER II

CONCEPTUAL FRAMEWORK OF THE STUDY

2.1 Concept of Stipulation under Islamic Law:

Divine law is the Fundamental source of Muslim marriage stipulation. Both the countries recognized Sharia law regarding marriage. State law does not create any inconsistent with the Quranic law. Rather state created a platform for application regarding personal family law in Bangladesh and Morocco. In the case of a Muslim personal family matter, sharia law is applicable in Bangladesh. However, the meaning of Quranic verses is not easy to understand. Those verses are interpreted by Islamic scholars. In a wider sense, all sharia law came into society by the interpretation of some Islamic jurists. They interpreted sharia law under the Quran and hadith. Although, all matter is not deal with the sharia law but the major matter of Muslim personal law conducted by sharia law in both countries.

Man-made law is changeable, the needs of society law may moving in his place. But the sharia law is fixed. It may be interpreted for the needs of society. But fundamental order from almighty Allah will never change. Stipulations in a marriage contract are the result of the interpretation of sharia law by the classical Islamic jurists. Although the matter of stipulation in a marriage contract is the outcome of classical law but the main basis is divine law.

In this study, problematic places are recognized by using classical law. The term stipulation in marriage is more practiced in morocco than in Bangladesh. Morocco has established some provisions regarding stipulation in a marriage contract by the use of classical law. So it can be said the stipulation in a marriage is the outcome by the classical law under divine law.

A Stipulation is a matter of contract inserted in the time of contract. So stipulations in a marriage contract are a matter of contract during the time of marriage which insertion of some rights according to sharia and domestic law especially will the benefits of the wife.

According to the Muhit dictionary, The term Stipulation (sharta) in Muslim is to obliged to something.¹⁸

18 Muhammad Muhit, ' Stipulation' <<http://www.muhitdictionary.com/definition/stipulation>> accessed 15 August 2020

Under the dictionary of Wasit, Stipulation is an arrangement of a condition above other tools such as whether or when.¹⁹

Islamic scholar Abdul Karim Jaidan said, Stipulation is an essential mark or signs an indication²⁰.

Hashem Kamali has been given the most popular definition of the term of stipulation. He said Stipulation is an evident and constant attribute whose absence necessities the absence of the hokum but whose presence does not automatically bring about these objects. For instance the presence of a valid marriage precondition of divorce, but it does not mean that when there is a valid marriage, it must lead to divorce²¹.

Muslim scholars define the term stipulation in a marriage is an extra command about such a lawful act. Which exists and depends on the existence of the stipulation and which non-existence is also due to the non-existence of the stipulation.²²

2.2 Stipulations in a Marriage Contract that Reinforce the Normal Incidents of Marriage:

There may be some stipulations that do not make any changes in the sharia or existing domestic laws regarding marriage, rather such stipulations reinforce or set out the parameters of inserting those stipulations. For more clarification, stipulation regarding the time of payment of dower or maintenance. The stated stipulation does not affect the marriage under sharia or domestic law that's why there is no legal restriction on making or inserting the above stipulation on marriage. The legal status of such stipulation is valid under the Sharia and domestic law.²³

2.3 Stipulations in a Marriage Contract that Vary the Normal Incidents of Marriage:

There may be some stipulations that make changes in the sharia or existing domestic laws regarding marriage, such stipulations will not reinforce under sharia or domestic law. For

¹⁹Wasit Muhammad, 'stipulation' <http://www.wasit.com/definition/stipulation> <<http://www.wasitdictionary.com/definition/stipulation>> accessed 16 August 2020

²⁰Abul Karim jaidan say, "Stipulation is an essential mark or signs an indication"

²¹Hashem Kamali, " stipulation is a evident constrant attribute whose absence necessities the absence of the hokum"

²² Norhonydaya Abdul Manap, 'Stipulations in Contract from Islamic and Malaysian Legal Perspective ' *Journal of the Asian social Science*, (2014), v1o, n2, p112 ISSN1911-1925 <<http://dx.doi.org/10.5539/ass.v10n2p112>> accessed 30 July 2020

²³Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and Modern Law* (1st edn. London College of Legal Studies 2015) p. 116-118

more clarification, stipulation regarding the non-payment of dower or maintenance. One of the major normal incidents of marriage is dower is payable. If anyone inserts the stipulation in marriage contracts that the dower is not payable such stipulation is treated as a stipulation that varied the normal incidents of marriage. The stated stipulation will affect the marriage under sharia or domestic law that's why there is not any scope on making or inserting the above stipulation on marriage. The legal status of such stipulation is void under the Sharia and domestic law.

2.4 Based on Legal Validity, Stipulations maybe Three Types:

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

Valid Stipulation:

Valid stipulations are those stipulations which reinforce under the principles of the sharia scheme and also domestic law. For example, deligating divorce power to the wife, fixing the date of the dower payment, and fixing the amount and scale for the maintenance of the wife.²⁴ A valid stipulation is binding upon spouses and there is no controversy about the enforcement of a valid stipulation.²⁵

Void Stipulation:

Void stipulations are those stipulations which will not enforce under the principle of the sharia scheme. And such type of stipulations contrary to the sharia law. For example, stipulation regarding non-payment of dower or maintenance. If any person stipulated in a marriage contract which prohibited by the sharia law that stipulation will be treated as a void stipulation. In case of a void stipulation that the marriage will exist but the

²⁴Dr. Muhammad Ekramul Haque, Muslim family law: Sharia and Modern Law (1st edn. London College of Legal Studies 2015) p. 117

²⁵Article 40(3) 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 valid, and must be fulfilled. If it is not fulfilled then the person who made the stipulation has the right to seek judicial dissolution;

stipulation will be void.²⁶ Article 47 of the Moroccan Family Code (Moudawana) 2004 highlighted:

„All stipulation is 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“

Invalidating Stipulation:

Invalidating stipulations are those stipulations which will not enforce under the principles of the sharia law. Those stipulations are void of initio that means void of itself and these types of stipulations will make the whole contract of marriage is void. For example, A stipulation is inserted regarding the duration of the marriage. It might be two days, one month, one year, or another form of the duration of the marriage. This stipulation will be void and as the result of creating such stipulation the marriage will be void²⁷ and this stipulation will be treated as an invalidating stipulation under the sharia law. Sudanese law provided that stipulation prescribing a particular „time limit“ will invalidate the marriage.²⁸

2.5 Chapter Summary:

Chapter II focused on the conceptual framework of the study by the interpretation of divine and classical law. After that, a discussion has been made out about the concept of term stipulation. Then stated various kinds of stipulations. Which are accepted by the whole Muslim world. The above-stated kinds of the stipulation are more important for the brides, Kazi, marriage registrar, social worker, married women, and husband for learning and gathering knowledge regarding stipulation in a marriage contract. This chapter is headed by valid, void, and invalidating stipulations regarding marriage. If the stipulated conditions are not contradicted with the aim of marriage it will be a valid stipulation. On the other hand, if the stipulated conditions are contradicted with the aim of marriage it will be treated as a void stipulation, and invalidating stipulation is those which are not enforced under sharia law. This type of stipulation will make the whole contract void.

²⁶ Article 40(2) of the Kuwaiti Family Laws 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 void;

/Article 47 of the Mudawana 2004

²⁷ Dr. Muhammad Ekramul Haque, Muslim family law: Sharia and Modern Law (1st edn. London College of Legal Studies 2015) p. 118

²⁸ Article 40(1) of the Kuwaiti Family Laws 1984 says: if the contract marriage is accompanied by a stipulation that contradicts its basis, the contract is voided

/Article 42(2) of the Sudanese family law of 1991

CHAPTER III

STIPULATIONS IN MARRIAGE CONTRACT UNDER SHARIA LAW

3.1 Stipulations in a Marriage Contract under the Holy Quran and Hadith:

Stipulation in a marriage contract is a valid practice for the Muslim Ummah under sharia law. Islam permits a wife to stipulate some rights in a marriage contract, but the parameters of such rights are determined by the Islamic jurists under the Holy Quran and Hadith. They set out the Parameters. Stipulations aimed for the established equal rights for wife and husband. We know that stipulation is protecting measures for the women but these rights should insert accordance with the directions of the Holy Quran and Hadith.²⁹

The Holy Quran states, “ O You who believe to abide by your contracts”.³⁰ Abu Bakar al-Jassas al- Razi (d. 370 A.H.) quoted on the ability of „ Abdullah ibn Abbas“, Mujahid ibn Jurayj, Abu Ubaydah, and others explain that the Quranic word Uqud in the said above verse means promises and agreements that means stipulation in the current situation, including those stipulations put forward the time of marriage. He demonstrates that any condition that a person promises to fulfill in the future is binding. Said verse is the basis of the law of contract, thereby calling the principles of both freedom of contract and pacta sunt servanda. Another Quranic verse, that is cited support this view is: “And fulfill every engagement, for it will be enquired into (on the day of the Reckoning)” (27:34).³¹ These arguments farther supported by the following verse, “And fulfill the covenant of Allah when you have covenanted.” According to the Qurtubi, „ahd“ mentioned above denotes „ common“ encompassing any promises and commitments that a person makes, whether it concerns business, relationships or anything else that is allowed in religion.³²

²⁹Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p. 121

³⁰Al-Quran 5:1

³¹Al-Quran 27:34

³²Muhammad Munir, ‘Stipulation in a Muslim Marriage Contract with Special Reference to talaq al tafwid provisions in Pakistan,’ in Eugee Cotran, Martin Law and Victor And Kattan, eds, ‘yearbook of Islamic and Middle Estern Law,’CIML, Centre of Islamic and Middle Eastern Law School of Oriental and African Studies, University of London, vol12, 2005-06, 235-262,237

The holy Prophet (sm) also said in favor of stipulation in a marriage contract. “ Form among all the conditions which you have to fulfill the conditions which make it legal for you to have sexual relations (marriage contracts) have the greatest rights to be fulfilled. In other words, “The worthiest conditions to be honored are those that make women lawful for you.” Most of the Muhaddithin (Compilers of a Hadith) has quoted this hadith and consider it is binding authority.³³

Abd al- Rahman ibn Ghunaym narrates that a couple came to, Umar (the second caliph) in presence, and the woman complained that her husband, having agreed at the time of their marriage to keep her paternal home, should now abide by it and not take her out of there, Umar consequently ruled in her favor. It should be noted that this event took a place in Madinah and no companion had objected to it.³⁴

3.2 Different Opinions of Imams Regarding Stipulations in the Marriage Contract:

Stipulations a matter that is not as described clearly in either Quran and Hadith. Rather the matter of stipulation is crystal clear by the opinion of the Islamic jurists. But jurists are divided regarding the insertion of stipulations. The area of a stipulation in a marriage contract is directed by the different imams of the Sunni schools. The four major imams of the Sunni schools are providing their opinion about the stipulation in a marriage contract. Imam Ahmad Ibne Hanbal held the most liberal view inserting stipulations in a marriage contract. And the other three most popular Imams are held restricted views with the present customs inserting stipulations in a marriage contract.³⁵

Based on the different opinions of the imams we may categorize some stipulation nature is debatable. But the matter of stipulation takes place in a marriage contract will benefit the wife. Some stipulations are neither prohibited, nor expressly allowed in Islam. It is termed as controversial because the different opinions clearly on the point of the validity of such stipulations. The termed controversial on the ground of stipulation in a marriage contract may clear by an example, If a wife stipulated that her husband will not take a second wife or husband will not compel to her to live out of her matrimonial city. Imam Ahmad Ibne Hanbal considers such stipulations binding upon them if the parties are

³³ Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p. 119-123

³⁴ Tirmidi, *Kitab al-nikah*, Abu 'Isa Muhammad ibn 'Isa al-Tirmidhi, Sunan (Lahore Maktabah, n.d), vol. 1, p.347

³⁵ Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p.119

agreed. But the other three Sunni imams consider such stipulations are not valid under Islam.³⁶

The principal argument of the majority scholar opinion is on the Hadith. The Prophet (sm) said: Any stipulation that is not in the Quran, that is invalid. It creates an argument on the above-stated that stipulation does not take place in the Qur'an and is not binding. In evaluating this argument, Professor Dr. Muhammad Ekramul Haque and Munir concluded: Thus forbidden postulations are those that are expressly outlawed by the Holy Quran. For instance, a man or a woman can not 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.³⁷ Ibn Taymiyah(d. 728 A.H.) argues that something that is not in the Quran implies that which is not expressly prohibited by the Quran. Thus things which are prohibited can not be covenanted while mubah or permissible matters may be agreed upon and consequently, they will be binding on both parties.

3.3 Chapter Summary:

On the above discussion of chapter III, it is crystal clear that the stipulation in a marriage contract is valid if that stipulated under the Quran and Hadith. And those stipulation is the output of the analysis of Islamic scholars' of different schools of jurisprudence which need societies for establishing an equal platform of both spouses. Hanbali school experts Ibn Taymiah argued an important basis for the stipulations. His argument is which are not directed in the Quran and if it is not prohibited expressly that is valid under the Quran

³⁶Amira Mashhour says, A husband will not take a second wife, this stipulation is invalid in Hanafi schools. But the Hanbali schools permits to insert such type of stipulation in a marriage contract, Islamic law and gender equality?:A study of divorce and polygamy in sharia law and contemporary legislation in Tunisia and Egypt, Humanrightsquarterly, vol.27, JohnHopkins University(2005)<https://www.jsto.org/stable/20069797> accessed July 15, 2020--

³⁷Dr Muhammad, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015)p. 119-124 Muhammad Munir, 'Stipulation in a Muslim Marriage Contract with Special Reference to talaq al tafwid provisions in Pakistan,' in Eugee Cotran, Martin Law and Victor And Kattan, eds, 'yearbook of Islamic and Middle Eastern Law,' CIML, Centre of Islamic and Middle Eastern Law School of Oriental and African Studies, University of London, vol12, 2005-06, 235-262,237

CHAPTER IV

MARRIAGE STIPULATION: COMPARISON BETWEEN BANGLADESH AND MOROCCO

4.1 Stipulation in a Marriage Contract in Bangladesh with the Reflection of Sharia and Statutory Law:

Bangladesh is a multireligious country. It has four major religions. Islam, Hinduism, Christianity, and Buddhism. In Islam marriage is conducted by the sharia law in Bangladesh. In the case of *Abdul Kadir v Salima and Another*,³⁸ Mahmood J observed:

“A marriage among Muhammadan is not a sacrament, but purely a civil contract”. Given the above case, Muslim marriage is a combination of sharia and contract law.³⁹

So the Muslim marriage in Bangladesh is a civil contract. It must be registered under the statutory law of Bangladesh for future benefits or enforcement of the rights and obligations of the contract of marriage. Section 3 of the Muslim Marriages and Divorce (Registration) Act, 1974 provided-

Notwithstanding contained in any law, custom, or usage, Every marriage solemnized under the Muslim law shall be registered by the provision of this Act.⁴⁰

A vast majority of women in our society are vulnerable, the bridegroom is always upper hand in the society and their wish highlighted in the marriage contract. A bride is only capable of being given their positive consent on the proposal or behalf of the bridegroom. According to the nature of patriarchal society, the bride gives their consent on behalf of the bridegroom without representing any argument on the stipulation in a marriage contract. Whereas sharia itself created a fairground for the stipulation in a marriage contract but the customs are created inequality in inserting such rights in the form of a stipulation in a marriage contract.

In Bangladesh, not mentionable any statutory law regarding stipulation in a marriage contract except kabinnama. The peoples of the Muslim community in Bangladesh are not aware of the stipulation in a marriage contract, not only that the lawyer has not proper knowledge about the insertion of a stipulation in a marriage contract. However,

³⁸*Abdul Kadir v Salima and Anr* (1886) ILR 8 All 149

³⁹Mahmood J, observed “A marriage among Muhammadan is not a sacrament, but purely a civil contract”. Given the above case, Muslim marriage is a combination of sharia and contract law”

⁴⁰The Muslim Marriages and Divorce (Registration) Act 1974' s 3

Kabinnama provided limited scope for inserting stipulation in a marriage contract. Those scopes are given below⁴¹

Columns 17 placed in kabinnama, where both parties will free to insert description of the special conditions according to sharia law if there is any. After that Columns 18 of the kabinnama is especially contained for the insertion of stipulation regarding delegating the power of divorce to the wife. Columns 19 of the kabinnama is a place where the husband's power to talaq curtailed in any way. And finally columns 20 of the kabinnama is contained for insertion of stipulation regarding dower, maintenance and wife allowance or other financial matter which creates for the consequence of a marriage contract.⁴²

So Bangladesh is living in a place where the term stipulation in a marriage contract is unknown in the light of statutes made in a different country like Morocco.

4.2 Stipulation in a Marriage Contract in Morocco with the Reflection of Sharia and Statutory Law:

Morocco is an Islamic country. Islam existed at center stage in Moroccan political and social life. Morocco got independence from the French in 1956. It was very pleasant for the Moroccan people. After the independence Morocco back to his own identity. Morocco made the “Alal Al Fassi” personal family status law.

Custom created in all portions of the world inequality between men and women. Contracting that notion that women have no rights or have but inferior to men. The Holy Quran came out with a plain and unambiguous declaration in sura Al-Baqara verse 2:⁴³

“And women shall have rights; Similar to those against them (Men) According to what is equitable.

A simple reading of instant Holy verses makes it clear beyond all doubt that the rights of the women against their men are similar to those which the men have against their women. It also follows from the holy verse that spousal relations also stand on equal footing and subjecting them to different significance amounts to an implicit negation of supreme command express in the instant holy verse.

⁴¹Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p. 136

⁴²Kabinnama, Column 17-20

⁴³Al-Quran 2:2

After one year, Mudawana takes place in Morocco. The Mudawana was established according to Maleki School. Article 3 of the Moroccan constitution stated:

Islam is the religion of the state, but guarantees to all the free exercise of belief⁴⁴

The state has obliged to provide all kinds of protections for men and women in juridical, social, and economic aspects and preservation. According to the rule contained under section 101 of the personal status code 1957:

Maintenance of iddat shall neither laps nor the husband shall be relieved of it unless there is an agreement to the contrary in the contract of khula.⁴⁵

The Maliki school of khula is enforced in Morocco code of personal status: a wife has the power to divorce own her husband, but the condition is that she must be aged at 21. Children are not allowed to exercise too these powers.

According to the rule contained under section 31 of the personal status code 1957:

A woman has the right to stipulate in the marriage contract that her husband should not take any more wives and that if the husband does not comply with that to which he has found himself the wife shall have the right to demand that the marriage be terminated⁴⁶

In 2004 Morocco reformed the personal status code (Mudawana) for enhancing the rights of the women. Moroccan peoples believe that and practices the proper rule of Islam in all spheres of life.

Reformation of the personal status code constituted the first step in establishing rule of law. By establishing a personal status code Moroccan women occupy more prominent positions in the society and that has enabled them to participate actively in different areas of life.

In Mudawana, a great challenge made up by the scope or providing, A woman has no legally bound to her husband through these rights against the husband, worldwide customs that wife is an absolute duty to obey her husband. The Mudawana 2004 version is the core source is Islamic law.⁴⁷

Which declares, on couples to engage in consultation

⁴⁴Article 3 of the Family Status Code (Mudawana) 2004

⁴⁵Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p. 124-135

⁴⁶Article 31 of the Family Status Code 1957

⁴⁷Article 3 47 of the Family Status Code Mudawana 2004

A dialogue, and understanding the fulfillment of their mutual obligations, Quranic injunction of fair treatment, consultation, and dialogue

And instruction calling on Muslims disobey illegal commands, including those issued by parents and husbands. 17:93⁴⁸

According to Article 13(3) of the Mudawana 2004-

The legal capacity of the stipulation is that they must be reached at age 18.⁴⁹

In previous, the husband is solely responsible for family maintenance. But Mudawana creates husband and wife jointly responsible for family maintenance.

Polygamy has generated much debate:

The husband needs not to any permission to enter into a second marriage from the court. The wife can stipulate that the husband may not enter into a second marriage if the husband does so, the wife may be entitled to a divorce. There must be sufficient resources to provides both families to treat both families equally.⁵⁰

All stipulation is binding except stipulations that contradict the terms and condition of the contract of marriage⁵¹. From a comparative perspective Morocco is more developed and the status of the woman of the Morroco than Bangladesh.

4.3 Chapter Summary:

This chapter consisted of intending to make a comparative analysis between Bangladesh and Morocco in the light of the standard marriage contract (Kabinnama) of BD and the Family status code of Morocco the book of Mudawana 1 and 2 and the final reformed version of Mudawana, 2004. Bangladesh has no statutory law regarding stipulation in a marriage contract except kabinnama. But kabinnama provides some scope for the women inserting stipulation regarding stipulation in a marriage contract. On the other hand, The Mudawana Family status code of Morocco is provided many scopes regarding stipulation in a marriage contract with the light of Hanbali madhabs under the Quran and Hadith, Such as delegating the power of talaq to the wife, Property regime, stipulation regarding the study, residence and working, etc. Moroccan woman status is very strong than Bangladeshi women on the grounds of a stipulation in a marriage contract.

⁴⁸ Al-Quran 17:93

⁴⁹ Article 13(3) of the Mudawana 2004

⁵⁰ Dr. Muhammad Ekramul Haque, *Muslim family law: Sharia and modern World* (1st edn. London College of Legal Studies 2015) p. 132

⁵¹ Article 47 of the Mudawana, 2004

CHAPTER V
CONCLUDING REMARKS

5.1 Findings:

The result of the comparative analysis that represents Bangladesh and Morocco's woman status regarding stipulations in marriage contract practices are different from each other. Some findings elaborated in below light of Muslim modern statutes of the above-stated countries regarding stipulation in a marriage contract-

- Moroccan women stipulated rights in the marriage contract protected by the Mudawana 2004. On the other hand, Bangladesh has no such type of crystal clear law except kabinnama regarding stipulations in a marriage contract. That's why in most of the cases women lost their marital rights in the field of Marriage. They will not be entitled to proper protection from the law.
- In a true sense, the Bangladeshi woman is more neglected regarding the insertion of stipulations in a marriage contract than the Moroccan woman behind the main reason is that Bangladesh is a Husband dominated country. Parents are concerned about the dowry of the marriage, even they did not notice the standard marriage form. This type of concern of the bride families makes the women as a commodity. In such a way women fell into the form of negligence in society.
- Lack of awareness of the bride, not only that lawyer has no enough knowledge regarding stipulation in a marriage contract is another reason for creating such a scenario in Bangladesh. On the other hand, the Moroccan bride is more updated regarding their marriage stipulation rights than Bangladesh.
- Experts said that local officials regarding marriage, For instance, Marriage registrar and Kazi has not enough Knowledge regarding stipulation in a marriage contract. In the case of the Morocco marriage conducted in presence of public Notaries. We knew that in Bangladesh Assistant Judge court is treated as Family court. In most of the cases, women's rights are violated in this court. Because of the lack of review family courts and for a long time in the trial.
- Personal Law of Bangladesh has been created more opportunities for the Husband regarding divorce than a woman. A woman has only a chance to in a limited way

like judicial divorce or insertion of the stipulation in a marriage contract for the precondition of that when husband delegate that power of divorce to the wife.

- Lack of social assistance and awareness, For instance, Academic research gap, lack of study in educational institutions, lack of presence of media, lack of seminar, lack of talk show, and lack of government and non-governmental organization programs regarding stipulation in a marriage contract.
- Mis-representation of religious concept by those village and town peoples who have not proper and enough bits of knowledge regarding stipulation in a marriage contract. It is a major problem in Bangladesh. They make a fotoa sometimes willingly or unwillingly for the protection of their interest in the society.

5.2 Recommendations:

Stipulation in a marriage contract is the scope for the insertion of some specific rights by the law. Sharia and statutory laws created such stipulation for enhancing the equal rights of the woman. But the woman of Bangladesh is unaware of the stipulation in a marriage contract. On the consideration of the above discussion following recommendations have been made for the better protection of the rights of women in Bangladesh.

- Bangladesh government should have to make clear statutory law regarding stipulation in a marriage contract. The following matter regarding stipulation in a Muslim marriage contract should be focused and which need to pass by a frame of a statutory provision in Bangladesh. Creates an option for insertion of the stipulation, Condition for the valid stipulation, Description of a void stipulation, Impact of the void stipulation, Scope of a stipulation for the spouses, and some example of regarding marriage stipulation should be included.
- Review all family courts, appellate procedures in case of aggrieved, drawn line to minimize delays determination of divorce maintenance, compensation for the consequence of divorce and power to interim order before the final order for protection and enforcement rights of the woman which she inserted her marriage contract.

- Full recognize the concept of property regime is equal between spouse's financial and non-financial matters to the wife in the time of dissolution of the marriage for the protection of those rights which stipulated in the marriage contract.
- Initiate nationwide awareness regarding stipulation in a marriage contract in a variety of electronic media and other formats. It may be introduced by conducting a seminar, talkshow, newspaper reports, educational programs in institutions, etc.
- Ensure access to equal rights of divorce by the use of the insertion of the stipulation in a marriage contract. Where sharia itself created those rights for the women. So the government of Bangladesh should have special concentration regarding divorce.
- Undertake social assistance programs by the institution of government and non-government for women's awareness rights regarding stipulation in a marriage contract. For instance, marriage stipulation related ascertainable slogan may add in national women's programs.
- Bangladesh's government should take some additional measures regarding marriage stipulation with the standard form of marriage (Kainnama). The Kazi or marriage registrar should have to readout the stipulations regarding marriage in front of both spouses for their reminds. Finally, I providing some recommendations in light of expert's opinion on the grounds of the stipulation in a marriage contract. The following stipulations list may include in the provision of statutory law and also in form of a standard marriage contract.

Stipulations regarding dower: It is mentioning too that, The wife may insert stipulation in a marriage contract regarding the time of payment and mode of deferred dower

Stipulations regarding rights and obligations: Both spouses need mutual consent regarding the insertion of stipulations in a marriage contract of any householding, location of the residence after marriage, and care of the child after marriage.

Stipulations regarding the work: The wife will be able to stipulate regarding work outside of the house after the marriage takes place.

The stipulation regarding the study: A wife may insert stipulation in her marriage contract regarding study completion after marriage.

Stipulations regarding property regime: A bride will be able to control and distribute property after if insert stipulation regarding property regime.

Stipulations regarding Polygamy: The wife will restrict her husband to take a second wife in her life if that stipulates in the marriage contract.

Stipulations regarding the power of divorce: If the husband delegates the power of divorce to the wife, she may divorce her husband. So the wife has scope for a stipulation regarding divorce.

Stipulations regarding compensation on divorce: If the husband gives divorce to his wife, no-fault made out by the wife in such a case wife may be entitled to compensation for that divorce if she stipulated stipulation regarding compensation of divorce in a marriage contract.

5.3 Conclusion:

A Muslim marriage is a civil contract or civil contractual nature. The most important and absolute feature of Muslim marriage is contractual nature. This feature of the Muslim marriage created scope for the insertion of stipulations in a marriage deed.

In practice, Islamic law granted more rights to the husband than the wife. However, for enhancing the status of the Muslim wife sharia law itself provide some scope of insertion of a marriage deed. With the reflection of sharia law, some countries adopted statutory law regarding stipulation in a marriage contract. Thus, the rights of women expanded in a patriarchal society in the lives of both spouses.

Among all madhabs, the Hanbali madhab approach is more liberal than other madhabs regarding stipulation in a marriage contract. Most of the Muslim countries enacted statutory law regarding stipulation in a marriage contract following the principle of Hanbali madhab.

So, Bangladesh may enact said statutory law regarding stipulation in a marriage contract with the light of Hanbali madhab for enhancing equal rights of both spouses. And by the creation of such kind of law may provide possible better protection to the wife.

In patriarchal societies, a wife is also neglected and they do not enjoy the actual rights, freedom, and liberty even legal rights which are given sharia itself. Sharia law provided to the wife insertion of such stipulations on their discretion too. The state will provide to list of possible stipulations with a marriage contract for establishing an equal opportunity for the wife and the wife may able to insert stipulation regarding marriage with her own choice. This work of a state will create a fair platform for exercising the rights of the bride and also married women under the field of sharia and statutory law.

Needs and suggestion for further research. Extensive is needed to study on the grounds of a stipulation in a marriage contract with the light of modern Muslim family law. Kabinnama provided some scope for the insertion of stipulations in a marriage contract. But the kabinnama is not crystal clear. So now is urgent to enhance equal rights protection of Muslim brides and married women to pass a statutory provision regarding stipulation in the marriage field.

The writer purposes the following types of research for enlarging the understanding of the insertion of the stipulation in a marriage contract, and its commitment effects on the stipulation in a marriage contract. The study will be conducted as a part of establishing equal rights for women in the field of marriage. Cooperative research maybe conducts along with teachers regarding stipulation in the field of marriage under the family law.

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