Chapter-2

THEORETICAL BACKGROUND AND LITERATURE REVIEW
Chapter 2

THEORETICAL BACKGROUND AND REVIEW OF LITERATURE ON THE PSYCHOLOGICAL WELLBEING AND QUALITY OF LIFE OF DIVORCED MUSLIM WOMEN

The first part of this chapter gives a vivid description of the theories which attribute to the study. It is on the basis of the theoretical perspectives, concepts and variables are developed. As mentioned above, there should be theoretical frame work for every study which acts as a foundation or background. In the second part of this chapter, the researcher has tried to consolidate the review done on the conceptual and empirical studies related to the topic on the Psychological Well-being and Quality of Life of Divorced Women.

2.1 Theories of Divorce

There are three theories of divorce viz. Guilt theory, the Mutual consent theory and the Breakdown theory (Qtd in Bindra, 1996).

1. **Offence or Guilt theory**

   Marriage is an exclusive union and if it is not an exclusive union, it ceases to be marriage. Adultery destroys the very foundation of marriage. Marriage also implies that parties will live with each other in harmony and mutual confidence. Basic assumption of marriage is that both the parties will live together. Thus, adultery, cruelty and desertion are destructive of the very foundation of marriage.

   Guilt theory is also known as Fault theory, which is the traditional theory of divorce. One of the partners to the marriage after solemnization of marriage has to prove that the other partner committed a matrimonial offence. This matrimonial offence has to be recognized as a ground for divorce in the law for dissolution of marriage.
In many Common Wealth Countries and in most states of U.S.A, the offence theory is considered to be the most appropriate basis of divorce. According to this theory, a marriage can be dissolved only if one of the parties of marriage has, after the solemnization of the marriage, committed some matrimonial offences. The guilt theory, on the one hand, implies a guilty party i.e. commission of matrimonial offence on the part of one of the parties to the marriage, and on the other hand, it implies that the other party is innocent, i.e. in no way a party to be responsible for the offence of the guilty party.

The special marriage Act, 1954 as amended by the marriage laws (Amendment) act, 1976 recognize eight grounds based on guilt on which either party may seek divorce and two additional ground on which wife alone may seek divorce, viz. rape, sodomy or bestiality of the husband. The eight grounds are: adultery, desertion for at least three years, respondent undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code 1860, cruelty, venereal disease in a communicable form, leprosy, incurable insanity or continuous or intermittent mental disorder (clauses (bb) and (dd) of section 32 of the special marriage Act, 1954 as amended in 1988) of such a kind that the petitioner can't reasonably be expected to live with the respondent and presumption of death (respondent not been heard of as alive for a period of seven years or more).

To sum up, the offence theory stipulates for two things, (i) a guilty party i.e. the party who has committed one of the specified matrimonial offence and (ii) an innocent party, who has been outraged and who has played no role in the criminality or the matrimonial offence of the other party, then it is natural to lay down that the other party should have no
complicity in the guilt of the offending party. If the petitioner’s hands are not clean, he can’t seek relief.

2. Consent Theory

After the installation of guilt theory as the basis of divorce in the west, it was realized that a marriage very often fails because of the fault or guilt of any party to the marriage. A married couple realizes that they are finding it difficult to pull on together; they have tried hard to make the marriage a success, but all their efforts have failed. It is not that they are wicked people or bad persons. They are average human beings who have, somehow or the other, not been able to pull on together. In such a case only alternative for them is to get out of the matrimony. The fault theory requires that one of them should be guilty of some matrimonial offences, then and then only the marriage can be dissolved. Thus, it was thought that divorce by mutual consent was the answer to this problem. It was asserted that freedom of marriage implies freedom of divorce. The parties who have the freedom to marry each other should have equal freedom to divorce each other.

Under Muslim law divorce by mutual consent is recognized in two forms: (i) Khul and (ii) Mubbaraat. The word Khul literally means to “Put-off”. In law it means laying down by a husband of his right and authority over his wife for an exchange (Basillie, 38. Eadaya 112). Khul, is a divorce with consent but at the instance of the wife in which she gives or agrees to give a consideration to the husband, and when they have done this, dissolution of marriage results (Fatwa-i-Alangiri I.669). It is evident that Khul is more in the nature of divorce by purchase, since giving some consideration by the wife for her release from the marital bond is an essential aspect of Khul.

In Khul the desire for divorce emanates from the wife while in mubbaraat aversion is mutual; both parties desire dissolution of marriage.
Mubbaraat denotes the act of freeing one another mutually, and the proposal for divorce may emanate from either spouse. But even in mubbaraat wife has to give up her dower or part of it.

It is apparent that both form of divorce by mutual consent confer a benefit on the husband, as he can make his wife agree to give up her claim to dower or give him some other property in consideration of his agreeing to release her. Otherwise he may not agree to divorce.

The main criticism of the consent theory is two-fold: (i) it makes divorce very easy, and (ii) it makes divorce very difficult. It has been said that divorce by mutual consent offers a great temptation to nasty and ill-considered divorces. More often than not, parties unnecessarily magnify their differences, discomforts and other difficulties, which are nothing but problem of mutual adjustments and rush to divorce court leading to irrevocable consequences to the whole family.

The other criticism of the theory is that it makes divorce very difficult. Since, divorce by mutual consent requires the consent of both parties and if one of the parties withholds his consent, divorce can never be obtained.

Thus, it became necessary to find an alternative to the consent theory also. But in countries like England where it was found difficult even to replace fault theory with consent theory, much less to introduce irretrievable breakdown of marriage theory, two modes were found to mitigate its rigor. Firstly some countries went on enlarging the fault grounds of divorce so much so that “incompatibility of temperament” or profound and lasing disruptions were made grounds of divorce.

The second course adopted was to give a very wide interpretation to same fault grounds. Cruelty was found to be most handy ground which could be mould into any shape. Some states of the United States of America
went to the extent of saying that if husband snored during the night thus disturbing the sleep of the wife, it amounted to cruelty. Gradually cruelty was given such a wide interpretation that it virtually amounted to recognition of breakdown theory of divorce.

3 Irretrievable Break down of Marriage Theory

The basic postulate of breakdown theory is that if a marriage has broken down without any possibility of repair (or irretrievably) then it should be dissolved, without looking to the fault of any party. To put it in different words: the problem that the modern world is facing is this: a marriage has broken down irretrievably, the parties are not willing to come together and co-habit as husband and wife. Then should we not recognize this fact of breakdown of marriage? Should we insist to find out the party at fault and insist that divorce will not be granted at his/her instance but at the instance of the other party, provided the latter is innocent? Or suppose, when both parties are at fault, then should we say that no divorce will be granted to any party? Or if we find out no party is at fault but marriage has nonetheless broken down, should divorce be refused in such a case? The break down theory holds the view that what we are concerned with is the fact of breakdown of marriage, if a marriage has broken down irretrievably, the divorce should be granted, as there is no perpetuating a structure from which substance has disappeared. It is not going to serve any purpose, even if we are able to find out the guilty party.

Thus the law recognizes an unhappy or ugly situation and say to the couple, or one of the parties to the marriage, petitioning for divorce; if you can satisfy the court that your marriage has broken down irretrievably, and that you desire to terminate a situation that has become intolerable to you, then your marriage should be dissolved whatever may be the cause. The
irretrievable break down of marriage divorce theory has been judicially discovered under Muslim law of India and Pakistan.

In 1971, Krishn Iyer J. of Kerala High Court said: “Daily trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream. In such a situation we have a breakdown marriage itself and the only course left open is for law to recognize what is a fact and accord a divorce. And a new look is given to the texts of Muslim law, and textual support has been discovered for this view. It is interesting to note that a Full Bench of a Pakistani High Court has put across the same theme though more guardedly. It is observed, “It is only if the judge apprehends that the limits of God will not be observed, (this is a Qranic text), that is, in their relation to one another, the spouses will not obey God, that a harmonious married state, as envisaged by Islam, will not be possible then he will grant a dissolution” (Belquis Fatima V. Majmul PLD 1959 (WP) Lah.556). And earlier, the same view was propagated by Tyabji C.J in Noerbibi V.Pir Bux (AIR 1950 Sind S.A. Fuller Passed has been quoted by Krishna Iyer J. in Abbobacker’s case). There is no merit in preserving intact the connection of marriage when the parties are not able to and fail to live within the limits of Allah…”.

There are two traditions from which support is sought for this view: (a) first is from prophet himself when one of his wives, Ashma asked for divorce from the prophet, the prophet granted her request.

(b) Once Jamila appeared before the prophet and said that though she had no complaints to make against Sabit her husband, as to his moral or religion, she could not bring herself to be whole heartedly loyal to him as a Muslim wife ought to be as she hated him, and there for requested the prophet to
grant her divorce, since she did not want to live in Kufr (disloyalty). The prophet enquired of her whether she was willing to give him back the garden and grant her divorce (*Bhukari*, 68:11). (This tradition is also quoted in support of Khul). The basic Quranic text in support of this proposition is “And if ye fear a breach between husband and wife, said a judge out of her family, if they are desirous of the agreement God will effect a reconciliation between them; for God is knowing and apprised of all” (*The Quran IV. 35*). There are a few more tradition which found it difficult to pull on together, approached the prophet, he said; “Let the case be referred to two Muslim arbitrators; and they shall see whether reconciliation or separation is desirable and their decision shall be binding upon them both”. On another occasion, the prophet pronounced: if a woman be prejudiced by a marriage let it be broken off.

Now there are the following two breakdown grounds of divorce.

(a) Non-payment of maintenance by the husband, irrespective of the fact whether the failure has resulted on account of the conduct of the wife (This is based on the interpretation of clause(ii) of section 2, of the Dissolution of Muslim marriage Act, 1939)

(b) When there is “total irreconcilability between the spouses”, or, if we may use the term current in the modern matrimonial law of the western countries, the marriage has broken down irretrievably or beyond the possibility of repair” (*Aaboobecker v Manu 1971 KLT 663*) Here Krishna Iyer said: “Not some stresses and strains marring the matrimonial broadsheet, inevitable everywhere in the world, but deep incompatibility which threatens to burn up the bond together that is the lest” (at 671). The ground has been read by the learned Judge in clause (IX) of section 2 of the Dissolution of Muslim Marriage Act 1939.
Theories of divorce in Muslim law are based to some extent on the concept of marriage. True Islamic law stood for the breakdown theory of divorce. “The Quran did not specify the matrimonial offence; the prophet laid down no ‘bar’ to matrimonial relief.” (Sheikh, 1996). Modern breakdown theory of divorce does not want the court to go into the cause of the breakdown of marriages; the law giver of Islam did not want the matter to be taken to court at all, unless it becomes unavoidable. Divorce was declared to be the worst of all permitted things. And where divorce was unavoidable, it wants the aggrieved party.

2.2 Review of Literature

The review of literature has been scripted under the following sections.

2.2.1 Concept of Divorce and Allied Aspects
2.2.2 History of Divorce
2.2.3 Evolution of Divorce in Islam
2.2.4 History of Muslim Divorce in India
2.2.5 Divorce Rate in India
2.2.6 Divorce Rate in Kerala
2.2.7 Major Consequences of Divorce in India
2.2.8 The Quranic Verses on Divorce
2.2.9 Shariat
2.2.10 Women and Divorce in Islam
2.2.11 The Muslim Personal Law (Shariat Application Act, 1937)
2.2.12 Dissolution of Muslim Marriage Act
2.2.13 Family Court Act, 1984 (No.66 of 1984)
2.2.14  Marriage Laws (Amendment Bill) 2010
2.2.15  The Shah Bano’s Case
2.2.16  Quality of Life
2.2.17  Quality of Life of Divorced Indian Women
2.2.18  Psychological Well-being
2.2.19  Psychological Well-being of Divorced Women

2.2.1  Concept of Divorce and Allied Aspects

Oxford Dictionary of Sociology defined divorce as “the formal legal dissolution of a legally constituted marriage”. The condition necessary to terminate a marriage in divorce vary widely from culture to culture. In certain societies the rights of men and women in this respect are still highly unequal. But there appears to be a move in western societies towards an acceptance of the ideas of irretrievable breakdown of a marriage as suitable grounds for divorce. It should be noted that definition of what constitute marriage and divorce also widely varies and that in western societies divorce is increasing preceded by extended period of separation between partners, which renders legal procedure increasingly less relevant.

Divorce Rate

“In United States and Britain over the past two decades concern over rising of divorce rates has frequently reached the status of a moral panic, and it is often stated that, given continuation of the current rates over one in three marriages contracted will end in divorce” (Marshall, 1998).

Divorce rate is a measure designed to produce information on the comparative propensity to divorce in different populations. The crude divorce rate for a particular year is calculated by dividing the number of divorces occurring within a population over the year, by the average or
midyear population for that year expressed in times 1000. Divorce rate is sometimes used as an indicator of social stress in a society.

*The Rise of Divorce*

For many centuries in the west, marriage was regarded as virtually indissoluble. Divorces were granted in very limited cases such as non-consummation of marriage. One or two industrial countries still do not recognize divorce. Yet there are now isolated examples. Most countries have moved rapidly towards making divorce more easily available. For a divorce to be granted, one spouse had to bring charges (for example, cruelty, desertion or adultery) against the other. The first ‘no fault’ divorce laws were introduced in some counties in the mid-1960’s since then, many Western states have followed suit, although the details vary. In U.K, the Divorce Reform Act, which made it easier for couples to obtain a divorce and contained ‘no fault’ provisions was passed in 1969 and came into effect in 1971. The ‘no fault’ principle was further consolidated in a new bill passed in 1996.

Between 1960 and 1970 the divorce rate in Britain grew by a steady 9 percent each year, doubling within that decade. By 1972 it has doubled again, partly as a result of the 1969 Act, which made it easier for many in marriages that had long been ‘dead’ to get a divorce. Since 1980 the divorce rate has stylized to some degree, but remains at a very high level compared to any previous period. Around two-fifths of all marriages in the U.K now end in divorce.

*Why is divorce becoming more common?*

Several factors are involved to do with wider social changes. Except for a very small proportion of wealthy people, marriage today no longer has much connection with the desire to perpetuate property and status from generation to generation. As women become more economically
independent, marriage is less of a necessary economic partnership than it used to be. Greater overall prosperity means that it is easier to establish a separate household, if there is marital disaffection that used to be the case. The fact that little stigma now attaches to divorce is in some part the result of these development, but also adds momentum to them. A further important factor is the growing tendency to evaluate marriage in terms of the levels of personal satisfaction it offers. Rising rates of divorce do not seem to indicate a deep dissatisfaction with marriage as such, but an increased determination to make it a rewarding and a satisfying relationship.

Divorce in the proper and strict sense means the complete rupture of a marital bond. The persons divorced returning to their original state of being free to marry. Divorce represents the end of the hopes that two people had for each other; “it is the certificate that their relationship failed” (Sanctuary, Gerald and Whitehead, Constance 1970).

The concept of divorce may be understood as different from such terms as (a) separation (b) desertion and (c) annulment.

(a) Separation

Separation may be an informal preliminary step toward divorce, a temporary expedient to lessen the immediate conflict, or a legally recognized decision to live separately without divorcing. Marital separation means that the mates are deprived of normal marital association, affecting their health, security and happiness. The divorced and widowed may remarry but the separated may not.

(b) Desertion

Desertion, as the term is ordinarily employed means “the irresponsible departure from the home on the part of either husband or wife, leaving the family to fend for itself (Mabel, A; Elliott and Francis, E.
Desertion is an evasion of marital responsibilities and hence, we have no way ascertaining its true extent. A large share of desertion is never brought before any public agency. Many wives apparently feel the stigma of being abandoned and prefer not to report about their husbands.

Many of the consequences of desertion are similar to those of divorce. Emotionally the wife and children often suffer much more severely than in the case of divorce, for desertion entails a humiliating rejection of the spouses. The children feel especially hurt by a father or mother who cares so little about them as to leave them without support. The wife and mother in the family often find herself in serious economic straits. Desertion is popularly known as “the poor man’s divorce”.

\(c\) \textit{Annulment}

Annulment is a court decision that the marriage contained some legal flaw (coercion, fraud, unwillingness to consummate union, non age, bigamy etc). Nimkoff (1947) defines annulment as “a legal action that invalidates the marriage on the ground that it never legally existed and should not have occurred”.

When a judge issues an annulment decree his purpose is to return the couple to their previous status, with their pre-existing rights, re-established, as if the marriage had not taken place. Annulment is a judicial declaration that no valid marriage ever existed between the parties in question. In the United States, the most common grounds for annulment are mental incapacity, force, affinity, impotency, conviction of a felony and prior undisclosed marriage. The three most common causes are (i) fraudulent representation (ii) bigamy and (iii) under legal age.
2.2.2 History of Divorce

The History of Divorce with regard to various cultures and countries viz. Greco-Roman Culture, Medieval Europe, America, and Japan are given below.

Greco-Roman Culture

The ancient Athenians liberally allowed divorce, but the person requesting divorce had to submit the request to a magistrate, and the magistrate could determine whether the reasons given were sufficient.

Divorce was rare in early Roman Culture but as the empire grew in power and authority Roman Civil law embraced the Maxim “Matrimonia debent esse libera” (marriage ought to be free) and either husband or wife could renounce the marriage at will. The Christian emperors Constantine and Theodosius restricted the grounds for divorce to grave cause, but this was relaxed by Justinian in the Sixth century.

Medieval Europe

After the fall of the Roman Empire, familial life was regulated more by ecclesiastical authority than civil authority. “By the ninth or tenth century, the divorce rate had been greatly reduced under the influence of the Church”, (Kent 1896)” which considered marriage as a sacrament instituted by God and Christ is indissoluble by mere human action” (Dolman 1848).

Although divorce as known today, was generally prohibited after the tenth century, separation of husband and wife and the annulment of marriage were well known. What is today referred to as “Separate maintenance” (legal separation) was termed “divorce a Mensa et thoro” (“divorce from bed- and board”). The husband and wife physically separated and were forbidden to live or cohabit together; but their marital relationship did not fully terminate (Kent 1896). Civil Courts had no power over marriage or
divorce. The grounds of annulment were determined by Church authority and applied in ecclesiastical courts. Annulment was for Canonical causes of impediment existing at the time of the marriage.

The Church held that the sacrament of marriage produced one person from two, inseparable from each other. “By marriage the husband and wife are one person in law, that is the very being of legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything” (Blackstone 1984).

Secularization in Europe

After the Reformation, marriage came to be considered a civil contract in the non-Catholic regions and on that basis civil authorities gradually asserted their power to decree a “divorce a Vinculo Matrimoni”, or divorce from all the bonds of marriage. Since no precedents existed defining the circumstances under which marriage could be dissolved, civil courts heavily relied on the previous determinations of the ecclesiastic courts and freely adopted the requirements set down by those courts. As the civil court assumed the power to dissolve marriage, courts still strictly construed the circumstances under which they would grant a divorce. (Blackstone 1984) and now considered divorce to be contrary to public policy. Because divorce was considered to be against public interest, civil courts refused to grant a divorce of evidence revealed any hint of complicity between the husband and wife to divorce or if they attempt to manufacture grounds for a divorce. Divorce was granted only because one party to marriage had violated a sacred vow to the “innocent spouse”.

History of Divorce in America

Voltaire, a philosopher from France, has stated that since the practice of formalized marriage began, the concept of divorce bloomed. In the
Western World, the disagreements between married couples led to the need for a system of divorce.

During 17th century in United States, the fault based divorce procedure was in existence. Each state listed the grounds of divorce so that the injured or innocent spouse would get an actual divorce and thereby experience relief. Some of the reasons were the classic abusive and cruel treatment, impotence, adultery and desertion.

During the mid 1950’s in many cases there were no fault reasons to terminate the marriage. Some of the reasons were loss of sanity, instance of incompatibility and long term separation.

Practically, the above reasons were not adequate to grant a divorce. It was observed that during the period majority of individuals married more than once during their life.

During the 1970’s, the United States introduced no fault divorces. Some people in America developed an opinion that no fault laws would be harmful to institution of marriage. This sort of simple divorce would break all important bonds. The parties involved would face major financial, employment and family disruption.

During the 1980’s, the divorce rate in US reached its peak. 50 percent of the marriages terminated in divorce.

*Japan*

In the Edo Period (1603-1868), only husbands could divorce their wives by writing letters of divorce. But actually their relative or marriage arrangers often kept these letters and tried to restore the marriage. It was not allowed for wives to divorce their husbands. In 19th century Japan, at least one in eight marriages ended in divorce.
2.2.3 Evolution of Divorce in Islam

Pre Islamic background

Among the pre Islamic Arabs, the power of divorce possessed by the husband was unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce and again divorce as any times as they preferred. They could, moreover if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors while they themselves would go exempt from any formal responsibility of maintenance of legal punishment. (Convention on the Elimination of all forms of Discrimination Against Women (C.E.D.A.W).

Post Islamic background

The prophet of Islam looked upon these customs of divorce with extreme disapproval and regarded their practice calculated to undermine the foundation of society. It was impossible however, under the existing conditions of the society to abolish the custom entirely. The prophet had to mould the mind of an uncultured and semi barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorce parties three distinct and separate periods within which they might endeavor to become reconciled when all attempts at reconciliation prove unsuccessful, then in the third period the final separation became effective.

The reforms of Prophet Mohammed marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced Talaq to be the most detestable
before God of all permitted things for it prevented conjugal happiness and interfered with proper bringing up of children. It is also suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without cause. Dower to some extent restricts the use of this power. But experience shows the greatest suffering is endangered by the husband’s withholding divorce than by his irresponsible exercise of the right.

2.2.4 History of Muslim Divorce in India

On an all-India level, ‘The Special Marriage Act was passed in 1984, and Hindu Marriage Act in 1955 which legally divorce to Hindus and other communities who chose to marry under these acts. Divorce is a vexed question in Islamic law as administered in India. The recognized forms of divorce being Talaq, by Tafweez, Kula and Mubaraat Ilah, Zihar and Lian.

Since marriage in Islam is a contract, it may be dissolved at any time. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any reason. The presence of the wife is not even necessary for pronouncing a divorce or any notice need to be given for that purpose. There were diverge views as to whether a Muslim woman could obtain dissolution of marriage. This system of divorce by judicial rescission now took the form of Dissolution of Muslim Marriage Act, 1939. It was initiated by the Hanafi Ulema in India borrowing from Maliki laws as Hanafi law is reocgnised as ‘judicial divine’(Tyabji: Muslim Law, Ed IV,p.152).

The passing of this law benefited many women all over the country, for it procured for women a right to divorce under the different schools of law and made no discrimination against them. Sec.3 of the Dissolution of Muslim Marriages Act speak of the different grounds on which a woman
may obtain a decree of divorce from her husband, thus, entitling her to divorce in the first instance.

When it comes to increasing women’s access to divorce, the adoption by Hanafi jurisdictions of the relatively more liberal Maliki grounds for divorce represents a significant improvement. However, the interpretation of these provisions varies significantly, and judges wield quite a bit of discretion in their application.

The Special Marriage Act 1954, which is a secular law of the land, has curtailed the extra-judicial and unilateral right to divorce of the Muslim husband who has married under this act, with a result that Muslim women also get an equal right to divorce like her husband.

**2.2.5 Divorce Rate in India**

Acknowledging India’s respect for its culture and social ethics, one can guess that India enjoys a low divorce rate. The divorce rate in India ranks lowest among all the countries of the world. Statistics showed that only 1 out of 100 Indian marriages end up to a divorce which is quite low in comparison to America’s 50% of marriages turned out into breakups. The rate of divorce in India was even low in the previous decade, where only 7.40 marriages out of 1,000 marriages were annulled. The divorce rate in Indian villages is even lower in comparison to urban India.

“A survey states that over the past four years the divorce rate in Delhi, the capital city of India has almost doubled and is projected to be 12000 by the year 2008. In 2006, Bangalore the IT hub of India it was recorded that 1,246 cases of divorce was filed in the court that pertains to the IT sector exclusively. It has been estimated Mumbai has shot up to 4,138 in 2007 while cities that are acknowledged for their cultural richness and social values like Kolkata and Chennai, are no less behind. Agro based states like Punjab and Haryana are now seeing an increase of 150% of divorce rate
since the last decade. Kerala also known as the most literate state in India has experienced an increase in divorce rate by 350% in the last 10 years” (Wikipedia 2013). “There is a definite and alarming increase in the rate of divorce in India, especially in Mumbai, Delhi, Bangalore and Pune. In Delhi less than five judges handled divorce cases in 2005. Now more than 15 judges are handling such cases. The courts looking after divorce matters are extremely burden with work’’ Says Osama Suhail associate partner, Anz Lawz, a New Delhi based law firm (Mukerji & Hans 2013).

2.2.6 Divorce Rate in Kerala

As many as 46 divorce petitions, on an average, are filed across the family courts in the state every day. The 22 family courts recorded 16,917 cases last year. The increasing sense of job security among women and lifestyle changes are cited as the major factors contributing to this trend.

As per information obtained by the Kudumba Samrakshana Vedi, an organisation based in Alappuzha using the Right to Information Act, Thiruvananthapuram district tops the list with 2,547 cases split between its two family courts in the capital and Nedumangad. This was followed by Thrissur with 2,224 cases. G. Mohanan Pillai, general secretary of the Kudumba Samrakshana Vedi, told that a study conducted by the Vedi showed that more women gaining economic independence by getting jobs and becoming aware of individual rights was a major trigger for the increasing trend in divorces.

The IT sector is reporting higher numbers of divorces. The relatively lower number of divorces reported from places such as Wayanad was educative: the changes in life-style are leading to martial discords.

The total number of cases filed in the family courts during 2012 (including divorce cases and other disputes involving husband and wife), was 44,982 -- up from 42,436 cases in 2011. The data shows that the
number of family dispute cases in the state rose by nearly 100 per cent in the seven-year period of 2005-2012. The number of cases rose to 44,982 in 2012 from 28,431 in 2005.

In 2012, the maximum number of family dispute cases was reported from Thiruvananthapuram district (6,385 cases), followed by Trissur with 5,900 cases. Attending to the cases registered under Sec 498A IPC (cruelty by husband or relatives of husband), a total of 5,226 cases were registered at the magistrate courts in 2012, against 4,932 in 2011. Malappuram district tops the list in this category with 668 cases followed by Kollam with 661 cases (Abraham 2013).

2.2.7 Major Consequences of Divorces in India

**Economic**: There exists disparity in the economic consequences of divorce between men and women. Generally men are unaffected by the economic consequences of divorce. Women with children in their custody, have difficulty in providing food, clothing and shelter for themselves and their children. Usually parents arranged daughter’s marriage by providing dowry. In majority of case dowries are not returned after divorce.

**Social**: Even though Indians have the right to divorce, it is still highly a stigmatizing procedure. A divorced woman usually will return to her family, this may create economic burden in her family. Also a divorcee’s presence in the family adversely affects the marriage of other daughters.

Today in India both divorce and Remarriage are completely legal. Divorce was never associated with an increase in the emotional well-being of unhappy married spouses. Usually divorce can create new sources of distress. Divorce rate in India is not so much high compared to western countries but it does not mean that marriages, are more successful here. In Muslim communities men can divorce their wives just the pronouncement of “I divorce you” thrice. Recently Muslim Law Board has given right of divorce
to women. After divorce women is entitled to get her “mehar” for herself and her children’s subsistence.

Marriage as we see today faces many threats. It involves a most delicate and difficult adjustment of emotional and physical relationship with domestic and economic co-operation. It is facing pressures from different sources, particularly from inter-spousal relationship themselves, and the immediate environment.

In spite of the dicta and slogans supporting the indissolubility of marriage, there are factors, internal as well as external, working to undermine the stability of marital ties. Such a situation is termed as marital maladjustment or disharmony, which may be manifested in various forms, divorce being the final.

Mowrer, (1942) has mentioned that “family disintegration first impinges itself upon the attention of students of social problems in the form of the disruption of marriage relations expressed in divorce and desertion”. According to Burgess and Locke (1950) who have been pioneers in the study of family and sociology, “the most practical index of family disintegration for research purposes is divorce”. Certain redeeming aspects of divorce in India would be that it would help to liberate the women and in reorganizing the family. Instead of dragging a miserable family life, it is better to secure divorce, “Those who favored divorce did so as they had to bear one or the other of afflictions such as maladjustment in marriage, bigamy, a drunken, whimsical cruel or immoral husband, suppression by the husband, excessive sexual indulgence on the part of the husband when the woman is physically incapable of conceiving” (Kapadia, 1959). Horton and Leslie (1960) feel that “divorce and desertion are widely recognized as problems Marshall Clinard, (1965) has stated that: although many persons regard divorce as the only
index of family disintegration, it is but one of the many signs, since it represents the legal dissolution of the marriage, it certainly in the final one.

*Fonseca (1966)* who made a research on this subject came to the conclusion that “It can be safely asserted that separation, desertion and divorce as they represent various degrees of dissolution of the family are generally not favored in Indian society”. This is possibly due to the adverse effects of divorces.

According to *(Derrett, 1971)* divorce cases reflect a sick society, not a healthy one. They are not problems in all societies, as they do not exist in all societies”.

The impact of dissolution of marriage on the institution family and society is a matter of difference of opinion. “The relationship between husband and wife becomes strained more due to irritating nature of partner, illicit relations, chronic disease and poverty” *(Chaudhary, 1988)*.

According to *Pothen, (1996)* “divorce is an imperfect index of marital disorganization, because, there may be disorganization without divorce”.

### 2.2.8 The Quranic Verses on Divorce

Divorce is permissible in Islam as marriage is considered to be a contract. Divorce, it is true, ruins the relationship between two human beings and hence it is something to be avoided as possible. However in certain circumstances it becomes absolutely necessary. “When marriage is treated as a sacrament, as in Hinduism or Christianity it become indissoluble and hence divorce is not strictly speaking possible. But when marriage is treated as a contract, its dissolution and hence divorce become a natural concept” *(Engineer,1992)*. Though divorce can often be misused by the stronger party- and by men in a male dominated society-its total absence become
problematic when the relationship between husband and wife get strained beyond any possibility of reconciliation.

It would be appropriate to quote various verses on divorce from Quran. It will help us understand the concept of divorce in the Quran as well as related matters.

1. “If you fear a breach between the two appoint an arbitrator from his people and an arbitrator from her people. If they both desire an agreement, Allah will provide harmony between them”. (4:35)

2. “If a woman fears ill usage from her husband or desertion no blame as on them if they effect reconciliation between them. And reconciliation is better. And avarice is met with in (Men’s) minds. If you do well to others and keep your duty, surely Allah is ever aware of what you do”. (4: 128)

3. “But if they separate, Allah will render them both free from want out His ampleness. And Allah is ever Ample-giving, wise”. (4: 1300).

4. “Divorce may be (pronounced) twice; they keep them in good fellowship or let (them) go with Kindness. And it is not lawful for you to take any part of what you have given them, unless both fear that they can’t keep within the limits of Allah. Then if you fear that they cannot keep within the limits of Allah there is no blame on them for what she give up to become free thereby. These are the limits of Allah; these are the wrong-doers” (2: 229).

5. “So if he divorces her (the third time) she shall not be lawful to him afterwards until she marries another husband. If he divorces her, there is no blame on them both if they return to each other (by marriage), if they can keep within the limits of Allah and these are the limits of Allah, he makes clear for a people who know”. (2: 230).
6. “O Prophet, when you divorce women, divorces them for their prescribed period, and calculates the period; and keep your duty to Allah, your Lord. Turn them not out of their houses-nor should they themselves go forth-unless they commit an open indecency. And these are the limit of Allah. And who ever goes beyond the limits of Allah, indeed he wrongs his own soul. Thou knowest not that Allah may after that brings about an event”. (65:1)

7. “So when they have reached their prescribed time, retain them with kindness or dismiss them with kindness, and call to witness two just ones from among you and give upright testimony for Allah. Such is the admonition given to him who believes in God and the Last Day. And for those who fear God He (ever) prepares a way out”. (65:2)

8. “And when you divorce women and they reach their prescribed time, then retain them in kindness or set them free with kindness and retain them not for injury. So that you exceed the limits, And whoever does this, he indeed wrongs his own soul. And take not Allah’s messages for a mockery, and remember Allah’s favour to you, and that which he has revealed to you of Book and the Wisdom, admonishing you thereby. And keep your duty to Allah and know that Allah is the knower of all things. (2:231).

9. “And those of your women who despair of menstruation, if you have a doubt their prescribed times in three months, and of those, too, who have not had their courses and the pregnant women, their prescribed time is that they lay down their burden. Whoever keeps his duty to Allah, he makes his affair easy for him”. (65:4)

10. “O you who believe, when you marry believing women, then divorce them before you touch them; you have in their case no term which
you should reckon. But make provision for them and set them free in a goodly manner. (33:49).

11. “Lodge them (during *iddat*) where you live according to your means, and annoy them not to restrict them. And if they are pregnant, spend on them until they lay down their burden. If they suckle for you, give them their recompense and enjoin one another to do good; and if you disagree, another will suckle for him”. (65:6)

12. “Let him who has abundance spend out of his abundance and whoever has his means of subsistence straitened to him, let him spend out of what which Allah has given him. Allah lays not on any soul a burden beyond that which he has given it. Allah brings about case after difficulty”. (65:7)

13. “There is no blame on you if you divorce women while you have not touched them, not appointed for them a portion, and provide for them, the wealthy according to his means, and the straitened according to his means, a provision according to usage. (This is a duty of the doers of good”. (2: 236)

14. “And if you divorce them before you have touched them and you have appointed for them a portion, (pay) half of what you have appointed unless they forego or he foregoes in whose hand is the marriage tie and it is nearer to dutifulness that you forego. Nor neglect the giving of free gifts between you. Surely, Allah is seer of what you do (2: 237).

For divorced women maintenance should be provided on a reasonable scale. This is a duty of the righteous”. (2: 241). First of all divorces is discouraged. The Quran says that even if there is a breach between husband and wife efforts should be made to patch it up, failing which two arbitrators from both sides should be appointed. If they fail to bring about
reconciliation, there may not be any blame in divorcing. Secondly, the Quran says that if the husband has to divorce his wife he should not take back from her whatsoever he has given her even if it be a heap gold. This is in case the marriage has already been consummated.

In case the marriage has not been consummated and divorce becomes inevitable the husband can demand only half of dower which he had given to his wife. The Quran however exhorts him to forego that portion, saying it is righteousness to do so. As of right he can demand half of what he had given but it is better if he does not do so. If the man decides to take her back it should not be with the intention of causing physical or emotional injury to her but to keep her in kindness and with due honor and dignity. If he decides to divorce his wife, she should be kept in his own house during the period of ‘iddat’ and in same way as he keeps himself according to his status. If she is pregnant she should be kept with the husband until the delivery.

Thus we see that maximum provision has been made in the Quran for the divorcee, so that she does not suffer as far as possible, physically; since emotional suffering cannot always be avoided. Emotional suffering is sought to be minimized by advising the men to release her in kindness.

2.2.9 Shariat

In Islam ‘law’ is of divine origin. God is the Supreme Legislator and only He can make laws for regulating all human actions. In Islam law means the direction of God for regulating all the human conducts, spiritual moral or secular. God has laid down the path to be followed by human beings. These directions of God to men constitute the Shariat. Literal meaning of Shariat is “the path to be followed” by the human beings.

In Islam it is believed that a thing or an action may be either Good (husn) ie, morally beautiful or Evil (Kubh) ie, morally ugly. “What is morally
beautiful, that must be done and what is morally ugly must not be done: This is law or Shariat and nothing else can be law” (Fyzee: outline of Mughammedan Ed.IV). Therefore it may be said that shariat which is of divine origin, is the Islamic code of conduct for all the aspects of human life” (Sinha, 1999). Fiqh: Fiqh signifies ‘laws’ in the modern sense. Human intelligence or the knowledge of law is technically called Fiqh. Fiqh means the knowledge of one’s rights and obligations deduced from the words of God and His messenger. The fiqh is, therefore, a part of a secular law or the law proper which the authorities enforce for regulating human conduct.

The shariat, on the other hand, is the spiritual or moral code of conduct. “The path of shariat is laid down by God and his prophet, the edifice of Fiqh is, erected by human endeavor”. Fyzee observes then: “Shariat in the wider circle, it embraces in its orbit all human action; fiqh is narrower one and what are commonly understood on legal acts” (Fyzee, 1981).

If a Muslim abstains from doing what is prohibited and does what is directed in the shariat, he get spiritual benefits. Fiqh is therefore, concerned only with legal acts where as shariat also covers moral and religious acts. A significant feature of fiqh in the Muslim jurisprudence is that it stands for all the branches of positive law. It includes (i) the fundamental principles of positive law such as sources and rules of interpretation, and also (ii) the actual law as applied by the courts e.g. law of marriage or dower etc. However, Muslim jurists have frequently used the term shariat as equivalent to proper law or positive law. It is erroneous to call Muslim law as “Law of Muhammad’ because Prophet Muhammad was not a law-giver. In Islam it is believed that God alone is legislator; Muhammad is His messenger. The religion is Islam from which is derived the term ‘Muslim’. The religion based
personal law of a person whose religion is Islam should either be termed as ‘Islamic law or the Muslim law.’

2.2.10 Women and Divorce in Islam

In Islam marriage can be dissolved either by mutual consent or by either party to the contract. A woman can repudiate her marriage under a form of divorce known as Khula.

Divorce, ruins the relationship between two human beings and hence it is something to be avoided as far as possible. However, in certain circumstances it became absolutely necessary. While in most other societies marriage was a sacrament and a lifelong indissoluble bond, the Quran revolutionized the entire concept of marriage and made it a civil contract. Though divorce can often be issued by the stronger party or by men in a male-dominated society-its total absence can also become problematic when the relationship between husband and wife get strained beyond any possibility of reconciliation (Engineer, 1992). In Arabian society of pre-Islamic days, the women, did retain a degree of independence, the concept of marriage was contractual which Islam retained as it ensured a mere equitable partnership in the marital relationship. “It permitted divorces, but at the same time, it described it as most disliked of the permissible act” (Imam Hajar al-Asqualani, Bulugh al-Maram Benaras, 1982). “It should be noted that marriage or nikah has been described by the Quran as a strong covenant” (The Quran 4:21) The Quran says that when there is a rift between husband and wife, an attempt should be made to appoint a Hakam (arbitrator) “And if you fear a breach between the two, appoint an arbitrator from his people and an arbiter from her people, of they both desire an agreement, Allah will effect harmony between them (ibid, 4:35)

M. Indu Menon in her study, ‘the status of Muslim women in India’, a case study of Kerala 1981, stated that in a Muslim community, one major
factor which affects the status of women is the practice of divorce. Under Muslim Personal law, divorce is an easy matter for the husband as he enjoys an unlimited freedom to divorce his wife at his own will. In the words of Kapadia, (1958) “the dominion of man over his wife is further asserted by the fact that he is permitted to divorce his wife at his own pleasure and without justifying his action”.

Mohammedian Law permits the husband to divorce his wife without any misbehaviour on her part and without assigning any cause. This result in conferring on women an inferior status compared to their counterparts in other communities.

Though the prophet had given unlimited freedom to the man, he was not in favour of free divorce, as his aim was the stability of family. He pronounced *talaq* to be the most detestable of all the permitted things before God; for it prevented conjugal happiness and inferred with the proper bringing up of children (Ali, 1922).

The prophet also gave to the women the ‘right of obtaining, a separation on reasonable grounds’. But in practice this was not so easy. In India after the passage of the ‘Dissolution of Muslim Marriage Act of 1939’, woman also got the right to divorce her husband on the following grounds (1) husband unheard of four years, (2) failing to pay maintenance for four years, (3) sentenced to imprisonment for seven years (4) failing to perform marital obligation for three years, (5) impotency (6) suffering from insanity, leprosy or venereal disease, (7) wife being minor and marriage not consummated (8) husband’s cruelty.

In spite of all these restrictions, Muslim men still enjoy much freedom compared to women as far on concerned. According to Reuben, (1957) “no such privilege is accorded to the wife, an inequality which has had the consequence of gravely lowering the status of women in Islam”.

43
In the pre-Islamic Arab Society, the husband was free to divorce his wife whenever he felt doing so. There was no reciprocal right for the wife. Then generally believed that the women in pre-Islamic society were given an inferior position and they were treated as mere property. But Islam improved their position in many areas. The reform instituted by Prophet Mohammed effected a vast and marked improvement in the position of women. The Quran confers on the husband the pre-Islamic right to divorce his wife without assigning any cause and even without any misbehaviour on her part. But Mohammed counselled moderation on the part of men; he also conceded to women the right of obtaining a separation on reasonable grounds. The following procedure was prescribed for divorce; “when you divorce women, divorce them for their prescribed time and calculate the number of days prescribed and be careful of (your duty to) God, your Lord. Do not drive them out of their house, nor should they themselves go forth, unless they commit an open indecency”. (*George Sale: n.d*”560).

According to the principles of Islam, when widowed or divorced, a woman is at liberty to marry again. “Muslim law makes divorce a financial burden for the husband for he has to provide in strictly prescribed measure, at least for a limited time for the support of his former wife”. (*Ilse Lichtenstadter “n.d”. 128*)

During the regime of Akbar Dowry System was prevalent among Muslims, probably borrowed from Hindus. Divorce was commonly practiced during this period. The Muslim laws and customs allowed divorce conditionally. Muslim husbands used it more freely and liberally, polygamy was also prevalent among the Muslims, especially among the high class people even though Emperor Akbar prohibited this practice also by law.

“If you are a man you are free to kick your wife out of your life when by one stroke of the tongue- of a woman wanting to get rid of your
husband for whatever reason, you must prove in a court of law some serious allegation against him and wait for years to get a verdict in your favour if at all” (Mahmood, 2008). This is how people in India generally read Muslim law of divorce. The Muslim law of divorce is being misread and misused in this country. Muslim law in fact allows out of court divorce at the instance of a wife as much as at the instance of men-in the latter case it is called ‘talaq’, in the former ‘khula’. “Depriving Muslim women of their rights to out of court divorce under Muslim law is unreasonable, illogical and unjust as long as ‘similar rights of men are protected by the Indian court’ (Mohmood, 2008)

A marriage may dissolve:

1) By the act of God ie. Death of husband or wife or

2) By act of parties ie. Divorce

The basis of Islamic Law of Divorce is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. In this respect the Islamic concept of divorce is near to the modern’ Breakdown ‘theory of divorce rather than the ‘Guilt’ principle. Islam does not specify any matrimonial offence (guilt) as an excuse for divorce. The underlying principle of Islamic law of divorce is that divorce is allowed in cases where the marriage is to be broken because of incompatibility between the spouses. However, the Dissolution of Muslim Marriage Act 1939 is based on the guilt principle because wife may get a decree of nullity on any of the grounds (guilt of the husband) enumerated in it.

There are various modes of pronouncing talaq. But in every form of talaq the following essential elements viz .capacity and mutual consent must be present
Capacity – Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce *talaq*. It is not necessary for him to give any reason for his pronouncement. If a husband has attained the age of puberty and possesses a sound mind, he can pronounce *talaq* against his wife whenever he likes. This absolute right is given to him by Muslim law itself and does not depend on any condition or cause.

A husband, who is a minor or is of unsound mind, can’t pronounce *talaq*. *Talaq* by minor or insane husband is void and ineffective. However, if the husband is lunatic the *Talaq* pronounced by him during ‘lucid interval is void’. The guardian can’t pronounce *Talaq* on behalf of a minor husband. According to Tyabji, a guardian of a husband of unsound mind may pronounce *Talaq* on behalf of such insane husband if such *Talaq* is in the interest of the husband (*Muslim law. Ed.IV. P.153*). When insane husband has no guardian, the Kazi or a judge has right to dissolve the marriage in the interest of such husband.

The *Talaq* pronounces against a minor wife is void, and ineffective. Similarly in the wife’s knowledge of the proceedings of *Talaq* is necessary, it may be stated that *Talaq* pronounced against a wife of unsound mind is also void and ineffective.

Kinds of *Talaq*

A *talaq* may be effected either (1) orally or (2) by a written document called a *Talak*-name. But under shia law *talaq* must be pronounced orally in the presence of two witnesses. *Talaq* communicated in writing is valid only when the husband is not physically capable of pronouncing it orally.
A *talaq* may be affected in any of the following ways.

a) Talaq Ahasan (Most proper)

b) This consists of a single pronouncement of divorce made during *Tuhr* (period between two menstruation) followed by abstinence from sexual intercourse for the period of *Iddat*.

c) Talak Hasan:

   This consists of pronouncement made during three successive *Tuhirs*, no intercourse having taken place in between these periods. A Talaq Hasan becomes irrevocable and completed on the third pronouncement, irrespective of the *Iddat*.

**Sunni and Shia law as to Talaq Distinguished:-**

1) Under Sunni law a *talaq* uttered even under compulsion, fraud, under influence or paroxysm of anger is valid, while under shia law, interaction to divorce is a necessary element and consequently a *talak* pronounced under the foregoing circumstance is not recognized as valid and effective.

2) Under Sunni law it is not necessary that a *talaq* be pronounced in the presence of any witness while under Shia law it must be pronounced in the presence of two witnesses.

3) Under Sunni law a *talaq* may be effected either orally or writing unless the husband is not physically capable of pronouncing it orally.

**Divorce by Mutual Consent**

Muslim law, a divorce may take place also by mutual consent of the husband and wife. It may take place any time wherever the husband and wife feel that it is now impossible for them to live with mutual love and affection as it is desired by God. A divorce by mutual consent of the parties
is a peculiar feature of Muslim law. Under Hindu law there was no such provision before 1976. There are two forms of divorce by mutual consent (1) Khula (2) Mubarat.

(1) **Khula**

Literal meaning of the word *Khula* is ‘to take off the clothes’. In law, it means divorce by the wife with consent of her husband on payment of something to him. Before Islam the wife had no right to take any action for the dissolution of her marriage. But in Islam, she is permitted to ask her husband to release her (as he parts off his clothes) after taking some compensation.

Quran lays down about *Khula* in the following words:

“…….. and if you fear that they (husband and wife) may not be able to keep within the limit of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband) *(Quran Sura II, Ayat: 229).*

In the leading case *Munshee Buzlul Raheem V. Lutee futon Nissa*, [(1861) 8 Moore’s Indian Appeals 379 cited in Tyabji: Muslim Law Ed. IV. P. 182. ] The Privy council describes *Khula* form of divorce in following words: “A divorce by *Khula* is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give considerations to the husband for her releases from the marriage tie. In such case the terms of bargain are matters of arrangement between the husband and wife may as the consideration, release her dynmahir (due dower) and other rights or make any other agreement for the benefit of the husband”.

(2) **Mubarat**

*Mubarat* is also divorce by mutual consent of the husband and wife. In *Khula* the wife alone is desirous of separation and makes the offer,
whereas in *Mubarat* both the parties are equally willing to dissolve the marriage. Therefore, in *Mubarat* the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of divorce by *Mubarat* is the willingness of both the parties to get rid of each other. Therefore it is not very relevant as who takes the initiative.

Another significant point in *Mubarat* form of divorce is that both the parties are equally interested in the dissolution of marriage; no party is legally required to compensate the other by giving some consideration.

**Judicial Divorce (Faskh)**

By judicial divorce we mean a divorce by the order of court of law. Islam provides for the dissolution of a marriage by a Kazi or Judge. On the application of a wife if the marriage was found to be harmful or undesirable for her, the Kazi could dissolve the marriage. Faskh is rare and can be had only for definite reasons, such as that the husband is incapable of maintaining her or is incurably diseased or impotent.

**2.2.11 The Muslim Personal Law (Shariat) Application Act, 1937**

An act to make provision for the application of the Muslim Personal Law (*Shariat*) to Muslims

It is hereby enacted as follows:

1. **Short Title and Extent**  - (1) This Act may be called the Muslim Personal Law (*Shariat*) Application Act, 1937.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. **Application of personal Law to Muslim**. Not with standing any customs or usage to the contrary, in all questions (same questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or
any other provision of personal law, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trusts and trust properties and waafs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims, shall be the Muslim personal Law (Shariat).

3. Power to make Declaration-
   (1) Any person who satisfies the prescribed authority-
   (A) that is a Muslim, and
   (B) That he is competent to contract within the meaning of section II of the Indian Contract Act, 1872, and
   (C) that he is a resident of the territories to which this Act extends, may be declaration in the prescribed form and filed before the prescribed authority, declare that he desires to obtain the benefit of the precisions of this section, and there after the precisions of Section 2 shall apply to the declaring and all his minor children and their descendants as if in addition to the matters enumerated there in adoption, will and legacies are also specified.

4. Rule making power-
   (1) The state Government may make rules to carry into effect the purposes of this Act.
   (2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-
   (a) For prescribing the authority before whom and the form in which declarations under this Act shall be made.
‘(b) For prescribing the fees to be paid for the filing of declaration and for the attendance at private residences of any person in the discharge of his duties under this Act: and for prescribing the time at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this shall be published in the official Gazette and shall thereupon have effect as if enacted in this Act.

5. Dissolution of Marriage by court in certain circumstance-

Repealed by section 6 of the Dissolution of Muslim Marriage Act, 1939 (Act VIII of 1939) (Sinha, 1999)

2.2.12 Dissolution of Muslim Marriage Act

Firm union of the husband and wife is a necessary condition for a happy family life. A marriage may dissolve (1) by act of God i.e. Death of the husband or wife or (2) by act of the parties i.e. divorce. In Islam, divorce is considered as an exception to the status of marriage. The prophet declared that among the things which have been permitted by law, divorce is the worst. (Tyabji Muslim Law, Ed. IV, P.143). Divorce being an evil it must be avoided as far as possible. But sometimes the evil becomes a necessity when it is impossible for parties to carry on their union with mutual love and affection, it is better to allow them to be separated, instead of compelled them to live together in an atmosphere of hatred and sufferings.

Dissolution of marital alliance becomes impossible when it is a religious sacrament but the nuptial tie in Islam is a civil contract which may be several, though it is abhorred and considered as a necessary evil which is resorted to as a last measure. A man has greater rights than a woman in the matter of divorce in Islam. The man can of his own accord, divorce the wife
under certain conditions, even against her will, unless she has acquired this right by a *Sigha* (condition) of divorce at the time of *nikah*, she can then demand a divorce (*Khula*) from the husband but this is also subject to the approach of the husband. According to Muslims a divorce or dissolution of the marriage contract is meant for the purpose of avoiding evil consequences of an unhappy marriage. As Holy Quran says “Either retain them with the humanly or dismiss them with kindness”.

Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charge of adultery by the husband (*lian*), insanity or impotency of husband. But the Dissolution of Muslim Marriage Act, 1939, now lays down several other grounds (including *lian*). On the basis of any one of which a Muslim wife may get her marriage dissolved by an order of the court. The chart given below, presents a clear picture of various kinds of dissolution of a Muslim marriage.

### 2.2.13 The Family court Act, 1984 (No. 66 of 1984)

An Act to provide for the establishment of Family Courts with a view to promote conciliation and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. It was enacted by parliament in the thirty-fifth year of republic of India.

**Family Courts**

**Establishment of Family Courts**

1) For the purpose of exercising the Jurisdiction and powers conferred on a Family Court by this Act, state Government after consultation with the High Court and by notification,-

I(a) shall, as soon as may be after the commencement of this Act, a family court can be established for every area in the state comprising a city or town whose population exceeds one million.
(b) May establish Family Court in other areas in the state as it may deem necessary.

2) The State Government shall, after consultation with High Court specify, by notification, the local limits of the area to which jurisdiction of a Family Court shall extend and may, at any time increase, reduce or alter such limits.

3) Appointment of Judges

The State Government may, with the concurrence of the High Court appoint one or more persons to be the Judge or Judges of a Family Court. No person shall be appointed as or hold the office of, a Judge of a Family Court after he has attained the age of sixty-two years. Salary or honorarium and other allowances payable to and other terms and conditions of service of, a judge shall be such as the state Government may, in consultation with High Court.

4) Association with Social Welfare Agencies

The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purpose and subject to such conditions as may be specified in rules, with a family court of

a) Institution or organization engaged in social welfare or the representative thereof.

b) Person professionally engaged in promoting the welfare of the family.

c) Persons working in the field of social welfare and

d) Any other person whose association with a family court would enable it to exercise its jurisdiction more effectively in accordance with the purpose of this act.
5) Counsellors, officers and other employees of family courts

1) The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist family court in the discharge of its functions and provide the family court with such counselors, officer and other employees as it may think fit.

2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1) shall be such as may be specified by rules made by the State Government.

Jurisdiction

The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

(1) A suit or proceeding between the parties to a marriage for decree of a nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage.

   A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

   a) A suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them;

   b) A suit or proceeding for an order or injection in circumstances arising out of a marital relationship;

   c) A suit or proceeding for a declaration as to the legitimacy of any person;

   d) A suit or proceeding in relation to the guardianship of the person or the custody of or access to any minor.
2.2.14 Marriage Laws (Amendment) Bill (2010)

On 26th August 2013, Rajyasabha of our country approves a bill to make divorce friendly for women as it provides for the wife getting a share in the husband’s immovable property after ‘irretrievable breakdown’ of marriage. This Marriage Laws (Amendment) Bill seeks to empower the courts to decide the compensation amount from the husband’s inherited and inheritable property for the wife and children, once the marriage legally ends. Under the new bill, a provision has been made to restrict the grant of decree of divorce on the ground of irretrievable breakdown of marriage, if the court is satisfied that adequate provision for the maintenance of children born out of the marriage has not been made consistently with the financial capacities of the parents. Replying to the debate on the bill, Law Minister Kapil Sibal said it is a ‘historic piece of legislation’ in a patriarchal society like India where women who constitute 50 per cent of the population, own only two per cent of the assets. He said divorce is gender “neutral” as either the wife or husband can seek divorce. However, the right over property will not be gender neutral as the wife can lay claim on husband’s immovable property.

2.2.15 The Shah Bano’s Case

The Shah Bano’s case refers to the events that followed from a criminal appeal in the Supreme Court of India by appellant Mohammed Ahmed Khan against respondents Shah Bano Begum and other in 1985. The appeal was a response to an application filed by Shah Bano, a divorced Muslim Woman, for maintenance under Section 125 of the Code of Criminal Procedure (CrPc).

Shah Bano was married to Mohammad Ahmed Khan in 1932, had bore his three sons and two daughters, and was driven out of her matrimonial home in 1975. In April 1978, she filed an application against
her husband asking for maintenance and in November 1978 she was divorced by him by an irrevocable *talaq* permitted under the personal laws of Muslims. He defended himself against Shah Bano’s petition for maintenance by stating that she had ceased to be his wife after the divorce, that he had paid a maintenance allowance for two years and deposited a sum of Rs. 3000 by way of dower as per Muslim personal law during the period of *iddat*. (This is normally three menstrual cycles or the passage of three lunar months for post-menopausal women). The Judicial Magistrate of the concerned High Court did, however sanction a small sum, to be paid as maintenance in terms of section 125 of the Criminal Procedure Code and following a revised petition, the sum was raised nominally, it was then that the husband appealed to the Supreme Court.

The Supreme Court ruled that a woman unable to maintain herself was entitled to take recourse to section 125 of the Criminal Procedure Code that requires husbands with sufficient means to pay maintenance to wives or ex-wives who are unable to support themselves. The ruling was based on the understanding that Muslim personal laws which limits the husband’s liability to provide maintenance to a divorced woman for a period of *iddat* does not deal with a situation of destitution, the Prime concern of the provisions of the criminal procedure code.

The judgment provoked widespread consternation in the Muslim community in the country. The Ulema (Muslim clerics) condemned the judgment and accused an attempt to undermine the *Shariat*, the source of Islamic law. A large number of Muslims took to the streets to register their protest, accusing the Supreme Court of trespassing on their domain.

Towards the end of 1985 the fundamentalists persuaded Shah Bano to hold press conferences, where she put her thumb impression on the statement demanding that the Supreme Court withdraw its verdict as it
amounted to interferences in the Muslim Personal Law (Engineer, 1987). However, even in this fundamentalist tide grew, a large number of Muslims saw no conflict between the Supreme Court verdict and Islamic principles significantly, it has been noted that many Muslim women were affected by the tide and supported the demand for maintenance rights provided under the CrPC.

2.2.16 Quality of Life

Wikipedia, the free encyclopedia the term Quality of Life (QOL) is used to evaluate the general well being of individuals and societies. The term is used in a wide range of contents including the field of international development; health care and politics. Quality of Life should not be confused with the concepts of standard of living, which based primarily on income instead of, standard indicators of the Quality of Life include not only wealth and employment, but also the built environment, physical and mental health, education recreation and leisure time and social belongingness of life.

Researchers at the University of Toronto's Quality of Life Research Unit define Quality of Life as “The degree to which a person enjoys the important possibilities of his or her life”. Their Quality of Life Model is based on the categories “being”, belonging and “becoming” respectively.

A study by Vicki Garvin, Neil Katter and James Hansl, in the title “Divorced Women: individual differences in stressors, mediating factors and adjustment Outcome”, examined individual differences in exposure and response to stress in a sample of 56 divorced mothers. Compared with normative data, the sample reported significantly more negative life events, more psychiatric symptoms and social adjustment. When marriage end in divorce, the partners typically experience, acute emotional distress. Intense anger, depression, diminished self-esteem, heightened anxiety and feelings of betrayal and abandonment are common (Kelly, 1982, Walterstein Blake
slee, (1990). In another study it is found that even years after the marital separation, a significant minority continue to report high rates of depression, unhappiness, loss, anger and sexual dissatisfaction (Bloom, Hodges, Kern & Mcfaddin, 1985; Wallerstein of Blakeslee, 1990). The study examined individual differences in stressor, mediators and adjustment outcome within a sample of divorced women, comparing the relative well being of divorced single women with that of divorced remarried women focusing on those mediating factors that are potentially modified.

The term quality of life (QOL) references the general well-being of individuals and societies. According to ecological economist Robert Costanza: While Quality of Life (QOL) has long been an explicit or implicit policy goal, adequate definition and measurement have been elusive. Diverse "objective" and "subjective" indicators across a range of disciplines and scales, and recent work on subjective well-being (SWB) surveys and the psychology of happiness have spurred renewed interest.

Also frequently related are concepts such as freedom, human rights, and happiness. However, since happiness is subjective and difficult to measure, other measures are generally given priority. It has also been shown that happiness, as much as it can be measured, does not necessarily increase correspondingly with the comfort that results from increasing income. As a result, standard of living should not be taken to be a measure of happiness. Happiness is sometimes considered related to the concept of human security, though the latter may be considered at a more basic level and for all people.

Women are often hit harder than men, as they try to navigate new lives with fewer financial resources, more child-care responsibilities and the challenge of dating again.

Stacy Schneider (2008), a lawyer and author of the 2008 book "He Had It Coming: How to Outsmart Your Husband and Win Your Divorce,"
says women mistakenly wait to make a clean break from their husbands before they figure out their finances. She sees many women emotionally "going to pieces" and "wimping out" when it comes to protecting their property rights.

Another earlier study from Iowa State University's Institute for Social and Behavioral Research showed that divorce had no immediate effects on a woman's physical health, but had lingering effects on her mental health that led to illness a decade after divorce. The incidence of physical illness is 37 per cent higher in divorced women than in married ones after a decade. Researchers said that social isolation and comparatively poor job opportunities after divorce could be responsible for the illness reported a decade later. A woman from Texas, who did not want to be identified, told ABC News that hardest part of divorce was being a single working mother with a 2-year-old. "While, of course, there's huge financial stress, I find the emotional stress to be greater". "First, it's the lack of time to raise my son as I'd hoped and dreamed, the guilt and inadequacy associated, and the worry of future effects it may have on him...to have such limited bonding time with his mother."

2.2.17 Quality of Life of Divorced Indian Women

In Indian scenario those who are separated from their husbands, find tough to get rid of the bias from society. Families may support them but they may still feel that the life of a lady is incomplete without serving a man. Divorced Indian women are more prone to sexual harassment as they are more vulnerable to an Indian ill adjusted man. The problem with the perception of breaking one’s marital vows in our country is that it should be treated as the last resort. Economically, divorce is harder on the woman as the need to work is strenuous to gain a solid financial standing.
Living in our society today as contemporary people, we have come a long way. There is a drastic shift from the traditional upbringing of women in India, that focus solely on how to keep a family together, rear children selflessly, and be at the beck and call of the ‘male master’ of the household.

What is great is that even those with children are breaking out of this restrictive mould. With increased liberation, the ability for single mothers to care the children are more without any external help. The fear of survival without husband does not haunt the females in the country as it did a decade ago. Divorced women in India are also getting more support from their families, now than they did earlier, where many were shunned from their maternal home for even suggesting separation.

The attitude with respect to divorce is slowly undergoing a metamorphosis, to usher in a bright future with more practical society.

2.2.18 Psychological Well-being

Psychological well-being refers to both a theory and measurement scales designed and advocated primarily by Ryff (2005). In her seminarl paper, "Happiness is everything, or is it? Explorations on the meaning of psychological well-being." she contrasts this with subjective well-being or hedonic well-being. Ryff attempted to combine different conceptions of well-being from the ancient Greek to the modern psychological such as theories of Individualization from Carl Jung, Self-actualization from Abraham Maslow and others. The components of psychological well being are self acceptance, personal growth, purpose in life, environmental mastery, autonomy and positive relations with others.

In the present study the aspects of personal growth, environmental mastery and positive relations with others of divorced women are more focused.
2.2.19 Psychological General Well Being of Divorced Woman

Despite advances in standard of living of the population, the condition of widows and divorced women remains deplorable in society. The situation is worse in developing nations with their unique social, cultural and economic milieu, which at times ignores the basic human rights of this vulnerable section of society. A gap exists in life expectancies of men and women in both developing and developed nations. This, coupled with greater remarriage rates in men, ensures that the number of widows continues to exceed that of widowers. Moreover, with women becoming more educated, economically independent and aware of their rights, divorce rates are increasing along with associated psychological ramifications. The fact that widowed/divorced women suffer from varying psychological stressors is often ignored. It has been concluded in various studies that such stressors could be harbingers of psychiatric illnesses (e.g., depression, anxiety, substance dependence), and hence should be taken into account by treating physicians, social workers and others who come to the aid of such women. A change in mindset of the society is required before these women get their rightful place, for which a strong will is needed in the minds of the people, and in law-governing bodies.

Divorce rate, worldwide has been increasing steadily (Wikipedia, 2008). As women become more independent financially, their acceptance levels come down in direct proportion to their financial stability (Dobson, 2006). They become more vocal and are willing to sacrifice their family for the sake of independence. Although it is not a good sign for the society as a whole, which has to depend on family structure, it is inevitable. However, it would be wrong to even hint that only women are responsible for this alarming trend. Many a times continuing in an abusive and unsatisfying marriage has had greater effect on the psyche of spouses and children.
rather than opting to be parted amicably or through court (Goldstein, 2008).

Several reasons have been cited for opting out of marriages these days—increasing violence, cruelty, character assassination, alcoholism, problems of adjustment especially in a joint family, growing individualism of the wrong type, extramarital affairs and the undesirable impact of the outside world in terms of falling values and lack of role models (Thara, 2002).

From a large number of potential life events, divorce has been rated as one of the most stressful, with a large general impact on the life situation of those who experience it (Dohrenwend et al., 1978; Holmes and Rahe, 1967; Gahler, 2006). Empirical studies also repeatedly show that marital dissolution is associated with a number of social problems. For example, divorcees have smaller social networks and are more likely to lack social support (Gahler, 2006). Also, they more often experience negative life events and physical and psychological ill-health. Furthermore, divorced women are likely to be exposed to economic hardship (Johnson and Wu, 2002; Lorenz et al., 1997). Women report more marital complaints and report them earlier than do men. It has been shown that men are more likely than women to remarry, and they do it quicker (Bernhardt, 1995; Cherlin, 1992; Whitehead and Poenoe, 2006).

Divorcees have been shown to exhibit substantially higher admission rates in psychiatric clinics and hospitals than individuals in intact couples, and they more often suffer from anxiety, depression, anger, feelings of incompetence, rejection and loneliness (Gahler, 2006; Kendlar et al., 2003). The divorced also exhibit a higher mortality risk, particularly behaviour-related mortality such as suicide, motor vehicle accidents and homicide; and they more often die from coronary disease and cirrhosis of the liver, a cause
of death that is often a consequence of alcohol abuse (Weitoft et al., 2004).

Although Booth and Amato (1991) and Lorenz et al (1997) show that the level of psychological distress was significantly higher for individuals immediately after divorce than in the following years, Mastekaasa (1995) found no difference in psychological distress whether the divorce took place 0 to 4 or 4 to 8 years earlier, and concludes that divorce implies “permanent strain” in the individual (Avison et al., 2007).

Furthermore, studies repeatedly show (Daniels-Mohring and Berger, 1984; Rands 1988; Terhell, 2004) that divorcees, in addition to the lack of a partner, generally have smaller social networks (i.e., a smaller number of potential providers of social support) than do individuals living with a partner. This is an important finding given that network size seems to be positively correlated with the emotional adjustment of divorcees (Wilcox, 1981; Terhell, 2004).

Divorce affects the well-being of women and men in different ways. For example, men have higher incomes after divorce, which would predict lower levels of distress. Women's lives are also changed in other ways that may affect their psychological well-being in a more negative way; they have the main custody of children, if any, and are more likely to experience task overload (Gahler, 2002). It has also been argued that women invest more in the family, take larger responsibility for the marriage, and therefore perceive divorce as a greater failure than do men (Kurdek, 1990; Hung et al., 2004).

Women are also more likely to have access to social support outside the family, where as men are more dependent on marriage for social support. Results from studies on gender differences in psychological health following divorce are, hence, far from conclusive. Although some studies have found that women's psychological well-being is more negatively affected by a divorce (Kurdek, 1990; Siu-Kau, 1999; Williams and Dunne-Bryant, 2006),
others have found the opposite (Gove, 1972; Lillard and Waite, 1995; Walker, 2005), and yet others have found no gender differences (Johnson and Wu, 2002).

Thus, reviews often conclude that the empirical evidence on gender differences is inconclusive or inconsistent (Kitson et al., 1989; Kitson and Morgan, 1990; Raschke, 1987; Kalmijn, 2005). Simon (2002) notes that the conclusion depends on the indicators of mental health. Although women exhibit higher levels of depression following divorce, men report a significant increase in alcohol abuse.

Following divorce, women more often receive custody of children, and they lose a resource (the partner) who previously contributed to the household maintenance. According to the “role accumulation” (Moen, 1992) or “role expansion” perspectives (Cohen et al., 1990), gainful employment improves women's psychological well-being (Azar and Vasudeva, 2006). Work experience may be positively correlated to self-confidence, and fellowship with colleagues increases the social network and gives a broader anchoring in life. Employment is also assumed to be a source of personal identity and fulfillment (Frankenhaeuser, 1993; Moen, 1992; Azar and Vasudeva, 2006).

However, despite gainful employment, women are still expected to contribute significantly to domestic work. The fact that gainful employment often does not imply a corresponding decrease in domestic obligations, however, has given rise to competing views, that is, the “role strain” (Moen, 1992) or “role overload” (Cohen et al., 1990) perspectives. Here, it is assumed that employment has an injurious effect on women's psychological well-being because it demands time, energy and concentration in addition to what is already used for domestic tasks. It is reasonable to assume that the combination of market and household work is particularly difficult for single
mothers (McLanahan and Adams, 1987; Moen, 1992; Stoltz, 1997; Robbins and McFadden, 2000).

A study from Iowa State University’s Institute of Social Science and Behavioural Research showed that divorce had no immediate effect on woman’s physical health, but had lingering effects on her mental health that led to illness, a decade after divorce. “The incidence of physical illness is 37% higher in divorced women than a married ones after a decade” (Rosen, 2005). Researchers said that social isolation and comparatively poor, job opportunities after divorce could be responsible for the illness reported a decade later. In the above mentioned study it is reported that one woman from Texas who did not want to be identified, told ABC News, that the hardest part of divorce was being a single working mother with a two year old child. “While, of course, there is huge financial stress, I find the emotional stress to be greater”.

After divorce overall economic quality of a woman decreases. Women often opt for careers that they feel will be more conducive to motherhood. Working lower paying jobs because of the fewer hours they require.

A study published in the online “divorce/divorce-advice for women” it is found that on an average, women who divorced see their standard of living drop by 45%, while the standard of living for the average man increases by 15% after divorce. For women and men divorce is a live altering, highly emotional events. In the above mentioned study experts says that the toughest times for women lie in the months and year after a divorce take place- when many women find themselves, struggling with self-esteem, and changes in financers.

A study on “The Psychological Well Being of Divorced and Widowed Men and Women an empirical analysis” by Walter R. Gove Hel
Choon Shri Published in the Journal of Family issue in March 1989. The data from national stratified probability sample in which the divorced and widowed, particularly divorced and widowed males were over sampled seven different indicators of psychological well-being were used. Compared to married and to a lesser extent they never married, the psychological well-being of divorced and widowed is poor.

The results of study conducted on heterogeneous sample for 70 divorce mothers in Israel by (Baun et.al 2005) shows changes in self-concept after divorce. The study further reveals that for majority of women, interest in life, had initially declined while minimum percentage revealed that their interest in life had actually increased.

Lorenz et.al (2006) in a study, “The Short Term and Decade- Long Effects of Divorce on Women’s midlife Health” hypothesized that divorce immediately increases psychological distress. According to centre for disease control and prevention it is reported that in America probability of first marriage ending in divorce within 5 years is 20%. After a decade, chances of divorce are 33%. By the 3rd time around, about 73% will dissolve. It is also reported that women are often hit harder than men, as they try to navigate new lives with fewer financial resources more child care responsibilities. According to Stacy Schneider (2008) “She sees many women emotionally ‘going to pieces’ and ‘wimping out’ when it comes to protecting their property rights”.

A study conducted by Nadia Hussain Mattoo and Yasmeen Ashai (2012) On Impact of Divorce upon the attitude and social relations of women in Srinagar District reveals that some of the effects of divorce associated with divorce include academic, behavioral and psychological problems. The study results show the relationship of work status with the married life, reasons for divorce, and attitudes towards divorce, residence
and source of income. About feelings after divorce, a large percentage of women were depressed and a minimum thought that they were a failure.

From the study it is concluded that cruelty is the main reason of divorce and maximum women are emotionally traumatized and depressed after divorce. Little attention was paid to self by them and thereby self worth had also decreased. Yet decision of divorce is not regretted and they rarely think of reconciliation and remarriage.

**Conclusion**

Marriage is not only the principal building block of society but also it occupies a key place in human life. Although cultural, social, religious and familial barriers to divorce remain strong in India, the divorce is rising at alarming rate. The review of various studies of researchers and academicians reveals that when marriage end in divorce, women experiences more emotional distress than men, which is an indicator of poor psychological well-being and quality of life.