

Divorce under Islamic Law

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THE BACKGROUND

Woman is the foundation of the human society as she is the direct agent of life force and if the foundation is not solid or not properly maintained the whole building of the human life is bound to crack and dismember.¹ It was the Prophet of Arabia who effected a revolution in the life of women.² He brought drastic changes in the prevailing system of divorce. All his recorded sayings show that he looked upon the custom of divorce with extreme disapproval and considered its practice as calculated to undermine the foundations of the society. He repeatedly declared that nothing pleased God more than emancipation of slaves and nothing displeased him more than divorce.³

Among the Arabs, the power of divorce possessed by the husband was unlimited. They recognised no rule of humanity or justice in dealing with their wives. Such was the degrading and humiliating position of the women when prophet Hazrat Muhammed appeared. He raised their status. However, it was impossible under the then existing conditions to abolish the customs entirely. His mission was to lead an uncultured and semi-barbarous community to a civilized path. The custom was

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1. M. L. Batla and S. Batla, *Maintenance, Marriage and Divorce* (1978), pp. 1-5.
2. Begam, Sultan Jahan, "*Al-Hijab*" or *Why Pardah is Necessary for Islamic Injunction on Female Seclusion* (1968), p. 120.
3. Syed Ameer Ali, *Mohammedan Law, Tagore Law Lectures* (1929), pp. 7-9.

interwoven with the habits of the people and had become sanctified by the practice of ages.⁴

No doubt the position and status of women has varied from country to country, community to community and in the same country from time to time.⁵ But Islam has totally changed the status of women and has given a place of pride to them. Islam always avoided divorce, but allowed it only in such cases where peace or happy life or both became impossible for the parties. Tahir Mahmood⁶ has rightly pointed out that the true Islamic Law in fact stood for what is now known as the break-down theory. The Quran does not specify any matrimonial offence, the great Prophet laid down no 'bars' to matrimonial relief. The law giver of Islam did not want the matter to be taken to the court at all unless it became unavoidable. Unequivocally declaring divorce to be the "worst of all permitted things", and he wanted his people to keep away from it. However, where this worst was to happen unavoidably, he wanted husband or wife or both of them to act quietly and privately. This is the well-known tradition of the Holy Prophet:⁷

"...of all the things which have been permissible to men, Divorce is the most hated by Allah...."

"And fear God" (*vat Taqullah*) is the Quranic warning in connection with divorce. The Quran clearly warns husband not to do any type of injustice to the ladies to be divorced. It, further lays down:⁸

"...And their husband have greater right to take them back in the period, if they wish for reconciliation...."

These clearly indicate that Islam does encourage reunion of the husband and wife. It allows divorce only when it becomes essential.

4. *Ibid.*

5. M. Yasin, *A Social History of Islamic India* (1958), pp. 19-23.

6. Tahir Mahmood, *The Muslim Law of India* (1980), p. 95.

7. Peer Mahomed Ebrahim, *Light, Knowledge, Truth: Family Life in Islam* (1973), pp. 99-100.

8. *Ibid.* See also *Quran-Sura II* (Baqara).

In this paper an attempt is made to critically examine the divorce under the Islamic Law as it operates in India with particular reference to the State of Jammu and Kashmir. The study is based upon the judicial as well as extra-judicial cases of divorce, which have been collected from the different districts of the Kashmir valley. The study is not exhaustive but is illustrative and is based upon the random sampling of cases. Moreover, it is confined only to the "patterns and practices" of divorce, which are being followed in the State of Jammu and Kashmir. The study has not attempted to explore the causes leading to divorce or its evils.

DIVORCE: DIFFERENT FORMS

Islam from the very beginning recognised judicial as well as extra-judicial divorce. At present under the Muslim law there are the following distinct modes in which a marriage can be dissolved and the relationship of the husband and wife terminated.

(A) *Divorce by unilateral act of the husband*

The husband can unilaterally give divorce according to any of the forms approved by the Muslim Law. This is known as "Talak" and is usually translated as "Divorce".⁹ The pronouncement of talaq may be either revocable or irrevocable. The revocable form of "Talaq" is considered as the approved and the irrevocable as the un-approved form. A revocable form of "Talaq" gives a "locus poenitentias" to the man, but irrevocable form leads to undesirable consequences without giving him a chance to reconsider the question.¹⁰ This terminology itself may be an indication of the fact that divorce is not liberal under the Islamic Law.

This type of divorce can be further classified as under:-

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9. S. S. Akhtar Rizvi, *Family Life of Islam* (1972), p. 64.
 10. A. A. A. Fyzee, *Outline of Muhammadan Law* (1974), pp. 150-51; See also Firasat Ali and Furqan Ali, *Divorce in Mohammedan Law — The Law of Triple Divorce* (1983), p. 21.

- (i) "*Talaqal-Sunna*": This is in conformity with the dictates of the Prophet. It can be further sub-divided as:
- a) *Ahsan* : It is fully approved.
 - b) *Hassan* : It is approved.
- (ii) *Talaq-ul-Bidaat or Talaq-I-badai*: It may consist either in three declarations (the so-called triple divorce) or one irrevocable declaration which is generally in writing.

In order to check hasty action and leave the door open for reconciliation at many stages the right method of pronouncing divorce as taught in the Quran and traditions is that it should be pronounced only when it is inevitable and the wife is not in her menses. In other words, even if the dispute arises during the period of menses it is not right to pronounce divorce during that period but the husband should wait till she is clean so as to pronounce a single divorce, if he so likes. Then he should wait for the next monthly course and pronounce the second divorce, if he so wishes after she is cleansed. Thereafter he should wait for the next monthly course to pronounce the third and final divorce after she is cleansed. It is however better to wait and reconsider the matter after the first and second pronouncement, for in the case of one or two divorces, the husband retains the right to take her back as his wife after the expiry. But if divorce is pronounced for the third time the husband forfeits the right to take her back.¹¹

Talaq-ul-Biddat came into being during the second century of Islam when Ommayyad monarchs, endeavoured to find an escape from the strictness of the law of divorce and found a loophole to effect their purposes.¹² The neologic procedure of divorce is the one that contravenes the provisions of the Sunnat.¹³ In this form three pronouncements are made in a

11. Abdul Ala Maududi, *The Meaning of the Quran* (1972), pp. 159-60.

12. Firasat Ali and Furqan Ali, *supra*, n. 10.

13. Peer Mahomed Ebrahim, *Light, Knowledge, Truth: Five Schools of Islamic Fiqh*, Vol. 3 (1976), p. 87.

single *Tuhr* either in one sentence or three sentences. The ignorant people who pronounce divorce thrice at one and the same sitting, commit a heinous sin against law. The Holy Prophet has very severely denounced this practice.¹⁴ Hazrat Umar, the second Caliph after prophet Mohammad flogged the people who uttered *talaq* thrice at a time to break the marital bond when the malpractice became too frequent.¹⁵

Talaq-ul-Biddat is purely un-Quranic and against the Traditions of Islam. It has been denounced by the Prophet as well as by the Caliphs.¹⁶ But it is submitted here, that in India, particularly in the State of Jammu and Kashmir, it is the commonly followed form of divorce. In the Kashmir province this form has been used in majority of the cases. It is very interesting to note that out of 75 cases of *Talaq-ul-Biddat*, in 80.0 per cent of the cases, the husbands were educated. *Talaqal-Sunna* was exercised only in 16.66 per cent cases.

(B) *Divorce by agreement between the parties*

This mode of divorce is called *Khula* or *Mubarat*. It is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where however, both parties agree and desire a separation effecting a divorce, it is called *Mubarat*. The gist of these modes is that it comes into existence with the consent of both the parties particularly the husband because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to by the husband. In such a case the wife can repudiate herself in the exercise of the power and the divorce would be deemed to have pronounced by the husband.

14. *Supra*, n. 11.

15. S. A. H. Rizvi, *The Times of India* (August 25, 1983), p. 8.

16. See generally Maulana Sagir Ahmad Rahmani, *Talaq Ki Istamal Ka Tariqa* (1981), pp. 27-29 - (Urdu).

This mode of divorce is called *Tawfeez*.¹⁷ However, this form is in practice only in some exceptional quarters and that too in very highly educated families.

(C) *Judicial divorce*

This is by obtaining a decree from a Civil Court for dissolution of marriage under Section 2 of the Dissolution of Muslim Marriages Act 1939, which also amounts to divorce (under the law) obtained by the wife.¹⁸ It is also called as *Faskh* and refers to the power of a Muslim Kazi to annul a marriage on the application of the wife. The Quranic basis of the *faskh* is lying in Sura *Nissa*¹⁹ which begins with an appeal to the solidarity of the mankind, the rights of women and children and implications of the family relationship. It is provided that men are in charge of the affairs of women and should deal fairly with them. Women are likewise asked to be obedient to men, but if they do not behave themselves, men may admonish them, banish them to beds apart, and scourge them.²⁰ The Holy Quran²¹ also states further:-

“If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers,
If they wish for peace,
God will cause their reconciliation:
For God hath full knowledge,
And is acquainted with all things.”

Fyzee²² is of the opinion that the law of “*faskh*” is founded upon this Quranic injunction and traditions of the prophet like

17. See *Mst. Zohara Khatoon v. Mohd. Ibrahim*, A.I.R. 1981 S.C. 1243.

18. *Ibid*.

19. *Quran* - Sura IV, (Nisaa), See also A. A. A. Fyzee, *supra*, n. 10.

20. *Quran* - Sura IV (Nisaa), pp. 34-35.

21. *Ibid*.

22. *Supra*, n. 10 at 168-69.

the one cited by Ameer Ali, that the power of the Kazi or Judge to pronounce a divorce is founded on the express words of the Prophet:

“If a women be prejudiced by a marriage, let it be broken off.”

Fyzee²³ has further analysed the opinions of the classical jurists and has observed that in the course of centuries, the Schools of Islamic Law held widely divergent views regarding the interpretation of the basic text. He further pointed out that while it has been conceded that it was possible for the wife to obtain a dissolution, the schools could not agree either as to the grounds of *faskh* or as to the procedure to be followed. However, we submit here that the clear interpretation of the Holy Quran in this respect is that every effort must be made for reconciliation, and none of the spouse must be allowed to take undue advantage of the position of the other. The emphasis is on “peace” and it is only when peace is not possible, that they must go for the extreme measure-divorce. Moreover it has been rightly pointed out by Moulana Yusuf Ali²⁴ that the Holy Quran in this respect has laid down an excellent plan for settlement of family disputes, without too much publicity or mudthrowing or resort to the chicaneries of the law.

THE FASKH: ITS GROUNDS

The following can be pleaded as grounds for seeking *faskh*:-

(i) *Whereabouts of the husband not known*

Where the husband has disappeared and his whereabouts are not known for a period of four years or more, the wife can apply for *faskh*. A wife whose husband has been missing for a long-time, is deprived of protection, companionship, pleasure of

23. *Ibid.*

24. Abdullah Yousuf Ali, *The Meaning of the Glorious Quran*, Vol. I, (1938), p. 191. See also Tahir Mahmood, *supra*, n. 6.

his life and financial support. She is naturally put to great hardship on that account. It becomes necessary in such situation to seek for *faskh*. Practically every religion and society provide relief for a wife under such circumstances.

The Muslim Law about a missing person is based on tradition which the holy Prophet is reported to have said with respect to the wife of a missing person that she is his wife until such time as his death or divorce shall appear certain. Hazrat Ali, the fourth Caliph has followed this tradition and stated that wife in such circumstances shall wait till she receives news of her husband's death or divorce. Hazrat Umar the second Caliph is said to have subsequently adopted the view of Hazrat Ali.²⁵

At present the law relating to missing person is governed by the Indian Evidence Act. It has superseded Hindu Law as well as Muslim Law in this respect.²⁶ The Evidence Act,²⁷ provides for a presumption that a person shall be considered to have died if he has not been heard of for a period of seven years by those who would naturally have heard from him if he had been alive.

However, the Dissolution of Muslim Marriages Acts (Central as well as that of Jammu and Kashmir) have reduced the period of seven years to four years only. It is provided that a woman married under the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on the ground that whereabouts of her husband are not known for a period of four years. When a wife seeks *faskh* on this ground, the court shall give notice of her suit to all the heirs of her husband (as on the date of suit) and to his brothers and paternal uncles (whether heirs or not). Each of these persons will have a right to be heard.²⁸

When a decree for *faskh* is passed by the Court of Law, it shall remain in abeyance for six months. If during this period,

25. K. N. Ahmad, *The Muslim Law of Divorce* (1978), pp. 500-507.

26. The Indian Evidence Act 1872 (Act No. 1 of 1872), S. 108.

27. *Ibid.*

28. *Supra*, n. 6 at 99.

husband comes back and the court is satisfied of his willingness to perform his conjugal duties, the decree shall be set aside.²⁹ The law in Jammu and Kashmir,³⁰ provides that a decree passed on this ground shall not take effect for a period of one year from the date of such decree and if during such period the husband either appears in person before the court or satisfies the court through an authorised agent as to his whereabouts, the court shall set aside the said decree. However, there was no such a case pending in the courts of Kashmir.

(ii) *Failure to maintain the wife*

Under the Muslim Law on marriage certain obligations are imposed on the parties and certain rights are vested in them. The rights and obligations arising out of marriage are reciprocal so that if either of the party fails to perform his|her duties, the spouse at fault shall no longer be entitled to the enjoyment of the rights vested in him|her. One of the rights of the wife is that she is entitled to maintenance from her husband while she is under obligation to look after the domestic comforts of the husband to make herself available to him. This obligation of the wife makes it necessary that she should live with the husband. Hence, if the husband fails to provide *Nafquah*, she can lawfully refuse to live with him.³¹

According to Islamic Law maintenance ordinarily means all those things which are necessary for the support of life, such as food, clothes and lodging.³² It should be in accordance with the changing standard of the society and in consonance with the status of the spouse.³³ Moreover, the concept of the maintenance also varies with the changing norms of the society. In this respect the observations of the Supreme Court of India in

29. *Ibid.*

30. The Jammu and Kashmir Dissolution of Muslim Marriages Act 1942 (Act No. 10 of 1942).

31. *Supra*, n. 25 at 710.

32. M. Hidayatullah, *Principles of Mahomedan Law* (1977), p. 345.

33. *Satgung v. Rahmat*, A.I.R. 1946 Sind. 48, See also Paras Diwan, *Muslim Law in Modern India* (1977), p. 84.

Sirajmohmed Khan Janmohmad Khan v. Hafizunnisa Yasin Khan and another,³⁴ are quite pertinent:

"After the International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in the society and are working for the complete emancipation of women by breaking the old shackles and bondage in which they were involved, it is difficult to accept a contention that the statutory provisions of the Code are meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend upon the sweet will and mercy of the husband."³⁵

The Dissolution of the Muslim Marriages Act provides that a woman married under the Muslim Law shall be entitled to obtain divorce provided the husband has neglected or failed to provide for her maintenance for a period of two years. Failure to maintain the wife need not be intentional. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or due to any other cause, the wife would be entitled to divorce.³⁶ These grounds no doubt beyond the control of the husband are immaterial to justify non-maintenance of the wife. Further, it is no defence that the wife is rich.³⁷ Here, the author is of the opinion that the income of the wife must also be taken into consideration at the time of granting maintenance. It is submitted that in the cases where the income of the wife exceeds that of her husband, the non-maintenance of such wife, should not be allowed as a ground for *faskh*.

34. A.I.R. 1981 S.C. 1972.

35. *Id.* at p. 1976 per Fazal Ali, J. The Court was construing the widening scope of the concept of maintenance under S. 125 of the Code of Criminal Procedure 1973 which was contained under section 488 of the old Code of 1869.

36. M. Hidayatullah, *supra*, n. 32 at 343; See also Tahir Mahmood, *supra*, n. 6 at 100.

37. *Said Ahmad v. Sultan Bibi*, A.I.R. 1943 Pesh. 73; See also Paras Diwan, *supra*, n. 33 at 84.

Here, the pertinent issue is, what is the impact of the wife's conduct upon her non-maintenance. There is undoubtedly a cleavage in judicial opinion on the issue. One view is that on the plain language of S. 2(ii) of the Act, the husband is bound to maintain the wife in all circumstances, even if she had no justification for living separately from him. The Sind High Court, in *Nur Bibi v. Pir Bux*,³⁸ laid down that faulty conduct of the wife is irrelevant in judging non-maintenance. Similarly, the Peshwar High Court, in *Said Ahmad Khan v. Sultan Bibi*,³⁹ laid down that the conduct of the wife would be irrelevant in granting *faskh* under S. 2(ii) of the Dissolution of the Muslim Marriages Act. It is argued that the clear words used in this section must be given effect to and a right in the wife to claim maintenance from her husband read irrespective of her conduct.⁴⁰

The above view has been followed by the Kerala High Court in *A. Yousuf Rawther v. Sowramma*,⁴¹ where justice Krishna Iyer observed:

“...a Muslim woman, under S. 2(ii) of the Act can sue for dissolution on the score that she has not as a fact been maintained even if there is good cause for it—the voice of the law, echoing public policy is often that of the realist, not of the moralist.”

The other view holds that where the wife is not willing to discharge her marital obligations towards her husband, she is not entitled to claim maintenance from him. The husband according to this view, is not bound to provide her maintenance wherever she goes, unless she can show some legal justification for not living with or not discharging her marital obligation to-

38. A.I.R. 1950 Sind. 8.

39. *Supra*, n. 37.

40. See *Mt. Akbari Begum v. Zafar Hussain*, A.I.R. 1942-Lah. 21, *Mt. Zainaba v. Ab. Rahman*, A.I.R. 1945 Pesh 51 and *Mt. Noor Bibi v. Pir Bux*, A.I.R. 1950 Sind. 8.

41. A.I.R. 1971 Ker. 261 at p. 270.

wards him.⁴² This view has been adopted by the courts in Bombay,⁴³ Allahabad,⁴⁴ Nagpur,⁴⁵ Rajasthan⁴⁶ and very recently by the High Court of Jammu and Kashmir.⁴⁷

Justice I. K. Kotwal has rightly pointed out while delivering the judgment in *Mst. Zoonah v. Mohd. Yakub Najjar*,⁴⁸

“Any obligation on the part of the husband to maintain his wife, necessarily postulates a corresponding right in the wife to claim it. It is more so, because the relations between the spouses arising out of a Muslim Marriage are contractual in nature. Under the Mohammadan Law, the husband is not obliged to maintain his wife, if she is not willing to live with him and discharge her marital obligations without any justification. S. 2(ii) cannot be interpreted to envisage an absolute and unfettered right in the wife to be maintained by her husband under all circumstances howsoever faulty her own conduct may be....”

The Jammu and Kashmir Dissolution of Muslim Marriages Act has minimised the possibility of controversy over the non-maintenance of wife, as a ground for *faskh*. The Act provides:⁴⁹

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42. *Mt. Khatijan v. Abdulla*, A.I.R. 1943 Sind. 65; *Mt. Badrulniss Bibi v. Syed Mohd. Yousuf*, A.I.R. 1944 All. 23; *Zaffar Hussain v. Akbari Begam*, A.I.R. 1944 Lah. 336; *Mt. Umatul-Hafiz v. Talib Hussain*, A.I.R. 1945 Lah. 56 and *Smt. Rakial Khatoon v. Mohd. Mukhtar Ahmad*, A.I.R. 1966 All. 548.
 43. See *Bai Fatma v. Mumna Miranji*, A.I.R. 1957 Bom. 107. See also Fyzee, A. A. A., *supra*, n. 10.
 44. *Shamim v. Ahmad*, A.I.R. 1947 All. 3 See also Tahir Mahmood, *supra*, n. 6.
 45. *Jamila v. Kasim*, A.I.R. 1951 Nag. 357 See also Tahir Mahmood, *supra*, n. 6.
 46. See *Mir Mohd. v. Bushra*, A.I.R. 1956 Raj. 102. See also Tahir Mahmood, *supra*, n. 6.
 47. See *Mt. Zoonah v. Mohd. Yakub Najjar*, A.I.R. 1983 J & K 78.
 48. *Id.*, p. 82.
 49. *Supra*, n. 30, S. 2(ii).

"...that she asked her husband to provide for her maintenance and he wilfully neglected or failed for a period of not less than two years to do so...."

Thus two aspects are important under the Act of Jammu and Kashmir. First, the wife must have asked for her maintenance and secondly, the husband must have wilfully neglected or failed to provide for maintenance. The section makes it clear that if the wife has not asked for maintenance or if the husband has not wilfully failed to provide for maintenance to his wife, then in such circumstances non-maintenance can not be taken as a ground for dissolution of marriage. In other words it appears that non-maintenance of the wife due to poverty, failing health, loss of work or imprisonment or any other cause will not entitle wife for a decree of *faskh*. Moreover, the faulty conduct of the wife will also disentitle her for maintenance and thus deny her right to seek *faskh* on the basis of non-maintenance. Thus in this respect the Central Dissolution of Muslim Marriages Act is altogether different from that of the local law of Jammu and Kashmir.

The view that the faulty conduct of the wife should be irrelevant sounds illogical. The voice of the law echoing public policy should be both realist as well as moralist and not only realist as has been emphasised by Justice Krishna Iyer. This writer is of the opinion that behaviour of the wife must be taken into consideration in order to decide whether she is entitled to maintenance.

In the present study, the majority of cases of *faskh* were based on the non-maintenance of the wives. Further, the study revealed that the husbands usually take undue advantage of the illiteracy and helplessness of the wives. First, the wives are compelled to leave the matrimonial home and then a notice is served on them to the effect that they must return to their matrimonial home within the stipulated period. In fact this demand is made only as a formality. The husbands never intend to take back the wives. In majority of the cases it will also be alleged that the wives have left the matrimonial home with all the ornaments and jewellery. Consequently husbands usually suc-

ceed in depriving the wives of their maintenance and thus defeat the object of law.

(iii) *Imprisonment of the husband:*

Under the Central Act if the husband has been sentenced for a period of seven years or upwards, the wife can apply for the dissolution of the marriage.⁵⁰ Same is the position under the local laws of the Jammu and Kashmir.⁵¹ However, no decree for dissolution can be passed until the sentence has become final.⁵² But there is no condition that the husband should have served any portion of the sentence or even that the sentence should have commenced before the wife applies for *faskh*.⁵³

In this context it is pertinent to point out, that under the Special Marriage Act,⁵⁴ a petition for divorce may be presented to the District Court either by the husband or the wife on the ground that the respondent is undergoing a sentence of imprisonment for seven years or more for an offence as defined under the Indian Penal Code.⁵⁵

Under the Dissolution of Muslim Marriages Act as well as its parallel Act in the State of Jammu and Kashmir, it is provided that imprisonment for seven years can be availed by the petitioner for seeking *faskh* only when the sentence becomes final. Here, in this respect the following issues are quite important:-

- a) The first point is, when does the sentence become final? Is it when the lower court has convicted and sentenced the respondent or when the appellate court has up-held the conviction and sentence of the lower court?

50. The Dissolution of Muslim Marriages Act 1939 (Act No. 8 of 1939), S. 2(ii).

51. *Supra*, n. 30.

52. A. A. A. Fyzee, *supra*, n. 10 at 173.

53. Tahir Mahmood, *supra*, n. 6 at 102.

54. The Special Marriage Act 1954 (Act No. 43 of 1954), S. 27(c).

55. The Indian Penal Code 1860.

It is submitted, that the imprisonment becomes final, when the appellate court has upheld the decision of the lower court or when the period for appeal has expired.

- b) Secondly, what should be the position, when the accused person remains under-trial for a long period ranging from three to five years or seven or more than seven years and is subsequently convicted for seven or more than seven years, with the benefit of set off under the Code of Criminal Procedure⁵⁶ enabling him to be out of prison before seven years are elapsed after final sentence?

It is submitted that the respondent must not be allowed to take the benefit of this section and a decree for *faskh* must be granted.

- c) Thirdly, what should be the position if the respondent has been sentenced to seven years imprisonment but there are chances that he can secure his release some time earlier on parole or on the benefit of remission etc.?

No doubt, the section is quite clear on this issue and does not leave a room for any doubt. But, this section is not in consonance with the modern correctional philosophy which aims at the resocialisation of the prisoners. In the cases where the prisoner is likely to be released earlier, the decree for *faskh* should not be granted. In such cases the wife must be asked to wait, at least for four years in order to get a decree for *faskh*. However, in our study there was not even a single case of *faskh* on the basis of imprisonment. But, in the Central Jail, Srinagar there was only one case of a life convict, whose wife had approached the court for seeking *faskh*.

(iv) *Non-Performance of the marital obligation*

The Muslim marriage is a civil contract and from it emerges rights and duties to both husband and wife. If the husband

56. The Code of Criminal Procedure 1973, S. 428.

has failed to perform, without reasonable cause, his marital obligations for a period of three years, it gives a cause of action for *faskh* to the wife.⁵⁷ The Dissolution of Muslim Marriages Act, does not specify "marital obligations" of the husband.⁵⁸ Fyzee⁵⁹ has rightly pointed out that it is very difficult to give an exhaustive list of the husbands' obligations arising on marriage. However, Ahmad⁶⁰ has identified some of the important obligations of the husband and wife which may be said to be illustrative.

In short the words, 'marital obligations' is a term of wider import and will include almost every thing which is essential for the continuance of the happy married life.

The Jammu and Kashmir Dissolution of Muslim Marriage Act⁶¹ provides a similar provision and entitles the wife to seek a decree for *faskh* when the husband has failed to perform marital obligations for a continuous period of three years.

(v) *Impotency*

The wife, under S. 2(v),⁶² can sue for the *faskh* on the ground of her husband's impotency, if she can prove:

- a) Her husband was impotent at the time of marriage; and
- b) He continues to be impotent even upto the time of filing the suit.

Muslim marriage is a civil contract,⁶³ and it is both *Ibadat* and *Muamlat*.⁶⁴ Consummation is a must for the completion of the Muslim marriage. If this very object of marriage is lost the

57. *Supra*, n. 50, S. 2(iv).

58. Tahir Mahmood, *supra*, n. 6 at 102.

59. A. A. A. Fyzee, *supra*, n. 10 at 173.

60. K. N. Ahmad, *supra*, n. 25 at 20-22.

61. *Supra*, n. 30, S. 2(iv).

62. *Supra*, n. 50, S. 2 (v).

63. *Abdul Kadir v. Salima*, (1886) 8 All. 149.

64. Abdur Rahim, *The Principles of Muahmmadan jurisprudence* (1958), 327; See also S. K. Rashid, *Muslim Law* (1968), p. 53.

marriage may fail to fulfil its purpose and some time even become harmful. Islamic law lays great emphasis on the performance by the husband of the obligation to satisfy the natural desire of his wife to intimate with him at reasonable intervals and not to neglect this important obligations.⁶⁵

No doubt, consummation is one of the essentials of the Muslim marriage, but procreation of the children is not the sole object of marriage and spouses may marry simply for companionship and domestic comforts. For, it is laid down in the Quran: ⁶⁶

“And among His signs, Is this, that
He created for you mates from
among yourselves, that ye may
dwell in tranquillity with them.
And He has put love and
mercy between your (hearts)
Verily in that are signs
For those who reflect.”

This highlights the importance of the happy companionship between husband and wife. There is a special kind of love and tenderness and may from a certain aspect be likened to mercy, the protecting kindness which the strong should give to the weak. ⁶⁷

However, under the Muslim Law a marriage with an impotent person is not void but merely voidable. This is also the position under Hindu Law.⁶⁸ Impotency may be due to congenital constitution, weakness, old age, accident, disease etc. It can also be due to psychological cause which may have nothing to do with the husband's physical condition. In the former case he will be incapable for all women, but in the latter case his incapacity may be limited to some particular woman or women.

65. K. N. Ahmad, *supra*, n. 25 at 375.

66. *Quran* - Sura XXX, (Al Rum).

67. Abdullah Yousuf Ali, *supra*, n. 24, Vol. II at p. 1056.

68. K. N. Ahmad. *supra*, n. 25 at 377.

The Sunni jurists have taken a realistic view of the matter and recognize what may be called relative impotency. They consider that it is possible that a man may not be wholly impotent and unfit for all women, but may be incapable for intimacy with certain woman or women only.⁶⁹

In the present study it has been found, that in four cases the wives satisfied the court that their husbands are impotent and obtained the decree for *faskh*. But subsequently two respondents on their re-marriage were in a position to consummate their marriages. In the third case the respondent was found to be impotent by the two wives one after the another, but he was in a position to consummate with the third wife. The respondent in the fourth case was really impotent.

The notion of impotency is some what lenient for the husband under Shia Law as compared to Sunni Law. The Shia Law insists on absolute impotency so that a person shall be considered impotent only when he is absolutely incapable of sexual intercourse not only with regard to his wife but in respect of all women.⁷⁰ But Shia Law has taken a more realistic view. Impotency under it is not confined to mere disability for penetration as is the case under Sunni Law, but includes any cause which renders coition impracticable on account of some cause. In other words, a husband shall be considered impotent when the male organ is of such abnormal size as to render coition impossible without cervix pain to the wife.⁷¹

If the wife sues for *faskh* on the ground of impotency of her husband, she has to establish that respondent was impotent at the time of marriage and that he has since then been impotent upto the time of filing the suit.⁷² Dr. Qureshi,⁷³ has rightly pointed out that the Muslim Law of impotency is based on

69. *Ibid.*

70. Farb al Hasan Ja, *Shara-Islam* (1377), pp. 190-91.

71. *Ibid.*

72. Tahir Mahmood, *supra*, n. 6 at 102.

73. *Marriage and Matrimonial Remedies: A Uniform Civil Code for India* (1978), p. 201.

scientific principles and is quite descriptive, so much so that today all modern governments have adopted the principles of Muslim Law of impotency. In case of impotency as a ground for divorce, it is the duty of the court to give one year's time to the parties. If during this period the husband has sexual intercourse with his wife, it will be presumed that the husband is not impotent. If there is no sexual intercourse during this period then the court must pronounce dissolution. It has been rightly analysed that one year's time for sexual intercourse is quite sufficient a period to establish that the husband is not impotent. It is quite possible that due to the heat, cold, dryness or humidity the organ of a man may not function properly, and the period of one year seems to have been prescribed in view of this.⁷⁴

If the husband within the period of one year satisfies the court that he has ceased to be impotent, the decree for dissolution of marriage cannot be granted. The adjournment of the case for one year is only on the application of the respondent. If no such application is made the decree dissolving the marriage can be passed without any delay.⁷⁵ However, under the local laws of the Jammu and Kashmir,⁷⁶ the adjournment of the case is obligatory even if no application is made by or on behalf of the respondent in this respect.

If after the expiry of one year, the incapacity of respondent to consummate continues, the decree for *faskh* would be granted. But when the allegations of impotency by one party are countered by allegations of impotency of the other party, the court may have to resort to measures for reaching at the truth. It is often said that when the husband alleges that he has ceased to be impotent, but the wife asserts that he continues to be impotent, it is necessary for the wife in such circumstances to submit herself to the husband in order to test the truth of her husband's claim that he has ceased to be impotent. In this

74. *Ibid.*

75. A. A. A. Fyzee, *supra*, n. 10 at 174.

76. *Supra*, n. 33, S. 2(v)c.

respect, Mysore High Court⁷⁷ has held, that the wife shall not be compelled to submit herself to the husband.

It may be unfair to ask the wife to surrender her body in order to establish the potency or impotency of the husband⁷⁸ In this age of Science and Technology, there is no harm if help is sought for from the medical experts to establish the impotency.

(vi) *Insanity, leprosy and venereal disease*

The wife can seek *faskh* if the husband is suffering from insanity, leprosy or venereal disease.⁷⁹ The Dissolution of Muslim Marriages Act does not define insanity. The Muslim jurists have not differentiated the types of mental disorder and have used the word "Janun" in an exhaustive sense to include a lunatic, an idiot or a person of unsound mind. An insane person is one who is not of sound mind and who suffers from a disordered condition of the mind so that he cannot regulate his actions and conduct. This condition may develop at any time due to disease, accident, shock, etc. Further the change from reason to insanity may be gradual.⁸⁰ It has been rightly pointed out in an English case, *White v. White*,⁸¹ that the light of reason may fade gradually and imperceptibly so that people may not know or realise his condition until the darkness becomes obvious.

Insanity may be caused either due to some natural event or an accident. Under Maliki School, if husband is insane before the marriage, the wife is entitled to *faskh* and this right continues even when the marriage has been consummated. This, however, is subject to the condition that insane person should be violent or cause financial loss. If he or she is harmless, the

77. *Abdul Azim v. Fahimunisa*, A.I.R. 1969 Mys. 226; also see Tahir Mahmood, *supra*, n. 6 at 103.

78. *Supra*, n. 73.

79. *Supra*, n. 50, S. 2(vi).

80. K. N. Ahmad, *supra*, n. 25 at 353-360.

81. [1949]1 All E.R. 339.

other party has no cause for the *faskh*. Under the Shafi School, the spouse have right to the *faskh*, when the other spouse is insane or has some similar disease whether before or after the marriage. Consummation of the marriage shall not affect the right in any way. This rule is subject to the condition that the party should be unaware of the condition of the other spouse who suffered from the disease before marriage. Under Hanbali School, a spouse is entitled to the *faskh* when the other spouse suffers from insanity or other similar serious disease irrespective of the fact whether the disease was already present before the marriage or had appeared subsequently and irrespective of the fact whether marriage had or had not been consummated.⁸² Under Shia Law a marriage shall be liable to be dissolved when one of the spouses suffers from insanity. It is immaterial whether the spouse was afflicted with the disease before or after the marriage and whether before or after its consummation.⁸³

The Dissolution of Muslim Marriage Act has provided a sort of uniformity in respect of the insanity as a ground for *faskh*. What is required under the Act is that the insanity must be for two or more than two years.

It is submitted that insanity under the Act must be given the same meaning which it carries under S. 84 of the Indian Penal Code.

The wife can, under the Act, also seek *faskh*, if the husband is suffering from leprosy. There is no time limit in this respect. Leprosy is infectious as well as contagious and a person can become infected with it either by infection through the breath of the victim or by contact. The affected part of the body becomes senseless and it becomes necessary for the other spouse to keep apart from the sufferer and so he or she is deprived of the satisfaction of the married life.⁸⁴

Under the Maliki School, the wife shall have the right to the *faskh* irrespective of the fact as to whether the disease

82. *Supra*, n. 25 at 360-363.

83. *Ibid*.

84. *Ibid*.

appears in the husband before or after the marriage and whether it is slight or has reached an advanced stage. However, if the wife suffers from the disease, the husband shall have a right to the *faskh* only if the disease dates back from the time before or at the time of marriage. The husband shall have no such right if the wife has contracted the disease after the marriage.⁸⁵ There are some differences among the jurists of various sub-schools of Muslim Law on this point.

Under the different laws in India venereal disease is a ground for judicial separation and *faskh*. The Muslim Law specifically lays down that a marriage may be dissolved by the husband, if the wife has been suffering from leprosy, scrofula and madness. However, it was said that Muslim wife did not possess power even to ask for dissolution of marriage. Consequently the Muslim wives suffered in many cases, due to wrong interpretations given by Muslim Ulemas. This disadvantage of the Muslim wives has been recognized by the Dissolution of Muslim Marriages Act,⁸⁶ which provides for the *faskh* if the husband has been suffering from the venereal disease.⁸⁷

The local law of Jammu and Kashmir,⁸⁸ unlike the Central Dissolution of Muslim Marriages Act does not provide venereal disease specifically as a ground for *faskh*. But, on the basis of analogy the jurists are of the opinion that a Muslim wife can seek *faskh* if the husband is suffering from the venereal disease.

(vii) *Option of puberty*

A Muslim marriage is normally governed by the same principle of law as applied to contracts entered into on behalf of minors. Thus, when a marriage is contracted for a minor by a guardian, he or she on attaining majority has a right under conditions to choose whether he or she is interested to continue

85. *Ibid.*

86. *Supra*, n. 50, S. 2(vi).

87. *Supra*, n. 73 at 219.

88. *Supra*, n. 30, S. 2(vi).

such contract or dissolve it altogether. This right of dissolution of marriage on attaining the age of majority is called *Khiyar-al-Bulugh* or option of puberty. A wife, under the central Act,⁸⁹ is entitled to the dissolution of her marriage if she proves the following facts:⁹⁰

- a) The marriage has not been consummated,
- b) The marriage took place before she attained the age of fifteen years; and
- c) She has repudiated the marriage before attaining the age of eighteen years.

Under this clause a Muslim female who was given in marriage by her father or guardian before she attained the age of fifteen years can seek a decree for *faskh* on the ground that she has repudiated the marriage, which remained unconsummated.⁹¹ The option of puberty is one of the safeguards which the Muslim Law provides against undesirable marriage. The basic idea underlying the doctrine of "option of puberty" is to protect a minor from an unscrupulous exercise of authority by his or her guardian for marriage.⁹²

Dr. Tahir Mahmood,⁹³ has rightly pointed out that the Dissolution of Muslim Marriages Act 1939, effects a substantive change in the classical law of option of puberty in as much as it fixes the age of puberty at the completion of fifteenth year. Justice Hidayatullah,⁹⁴ in this respect, has pointed out that the Act has abolished all the restrictions on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather. However, under the Jammu and Kashmir Dissolution of Muslim Marriages Act, the wife can not exercise the option of puberty, if she has been given in

89. *Supra*, n. 50, S. 2(vii).

90. M. Hidayatullah, *supra*, n. 32 at 297.

91. *Supra*, n. 6 at 103.

92. *Supra*, n. 25 at 139.

93. *Supra*, n. 6 at 103.

94. *Supra*, n. 32 at 297-298.

marriage by her father or father's father, unless such father or father's father has acted fraudulently or the marriage is to her manifest disadvantage.⁹⁵ In villages of the Kashmir valley it is common to give minors in marriage and in the majority of the cases it is even against their will. However, they are not aware about this very right conferred upon them.

(viii) *Cruelty*

Cruelty is also a ground for *faskh* under the Dissolution of Muslim Marriages Act 1939. The concept of cruelty depends on the standard of society and changes with the changing norms. It has been rightly pointed out that the concept of cruelty has been undergoing a change with the socio-economic conditions of our society.⁹⁶ In *Smt. Gurudev Kaur v. Sarwan Singh*,⁹⁷ the Punjab High Court observed, that the test that constitutes cruelty will have to be applied in the changed social conditions as they obtain today and not according to the rigid background of the tenets of the old texts of Manu.

One of the important objects of marriage is a happy companionship of the parties and for this purpose it is absolutely necessary that they should treat each other with kindness and affection. The spirit of Islamic Law does not approve of a marriage where instead of love and affection, there is hatred, ill-feeling and ill-treatment. In such circumstances Islam allows the severance of the relationship of the spouse.⁹⁸

The Prophet Mohammed emphasised kind treatment of the wives. He exhorted the people in his sermon at the last *Pilgrimage* and said.⁹⁹

“...you have taken them (your wives) only as a trust from God, and you have the enjoyment of their person

95. *The Jammu and Kashmir Laws*, Vol. III, (1972), p. 930.

96. *Supra*, n. 73 at 156.

97. A.I.R. 1959 Punj. 162.

98. *Supra*, n. 25 at 767-75.

99. *Ibid*.

by the word of God. So be fearful of Allah in regard to women and enjoin that they be treated well...."

In otherwords, Islam lays emphasis on the kind and affectionate treatment of the wives. But there is a question. Does the illtreatment of the wife by the husband confer a right to seek dissolution of marriage?

In order to answer this question it will be necessary to trace out its background under the different schools of Islamic Law.

The Hanafi Law does not provide for the dissolution of marriage on the basis of ill-treatment of wife. This usually created many difficulties to the wives and in many cases it was found necessary to give them adequate relief. The Maliki School requires that when the husband is guilty of ill-treatment even after admonition by the *Kazi* it will be a ground for dissolution of her marriage after completion of certain formalities. In case of Hanbali School, when the continuous ill-treatment of the wife is established, the marriage can be dissolved. Under Shia Law, if reconciliation between spouses is not possible due to ill-treatment of the wife by the husband, the divorce can be granted but it shall be valid only when the husband gives his consent. This requirement naturally worked out injustice to the wives.

Most of the Muslims in India and Bangladesh belong to the Hanafi School which as has been noted above does not allow dissolution on the ground of cruelty. This has really created difficulties for Muslim women and they were forced to live a miserable way of life. Some of them actually renounced Islam and adopted Christianity in order to get rid of their cruel husbands. It was due to this that the *Ulema* were aroused to a sense of duty towards the injured women,¹⁰⁰ and a provision has been now provided under the Dissolution of Muslim Marriages Act, whereby a Muslim wife, irrespective of the fact to

100. *Ibid.*

which sub-school she belongs is entitled to get *faskh* on the basis of cruelty.

The Dissolution of the Muslim Marriages Act, has enumerated the following acts as the main aspects of cruelty:

- a) Habitual assaults, i.e., physical cruelty or making life miserable, i.e., mental cruelty;
- b) Association with women of ill-repute or leading an infamous life;
- c) Attempting to force to lead an immoral life;
- d) To dispose off the property of the wife or preventing her from exercising legal right over it;
- e) Obstruction in the observance of religious profession or practice; and
- f) Unequal treatment of the wives, if he has more than one.

In our study we found that in the courts of the Kashmir Valley, there were 10 pending cases seeking for *faskh* on the basis of cruelty. The majority of them were based on 'habitual assaults' and one case was on the ground of 'association with women of ill-repute'.

(ix) *Residuary provision*

Lastly, the Act¹⁰¹ provides that the court can pass a decree of *faskh* on any other ground which is recognised as valid for the dissolution of marriages under the Muslim Law. This clause is meant to cover such cases which do not fall within any of the eight grounds provided under the Act. The courts in India under this clause are at liberty to pass a decree of *faskh* on any ground, which they deem to be valid for the purpose.

Khusro,¹⁰² has recently pointed out that the courts are

101. *Supra*, n. 50, S. 21(ix).

102. S. A. M. Khusro, "Muslim Wife's Right to Divorce: A Note on Proper Perspective", *Islamic and Comparative Law Quarterly*, Vol. III, No. 4, (Dec. 1982), 298-99.

reluctant to grant divorce to Muslim wives sought on various grounds as laid down in the Act. He points out that the courts can grant dissolution of marriage on grounds not mentioned in the Act. He has quoted an example of Jamila, wife of Thabit bin Qays, where the Prophet of Islam has granted divorce on the ground that husband was short-statured and extremely ugly.¹⁰³ He has further observed that the Indian courts, approached by Muslim wives for divorce under the residuary provision of the Act¹⁰⁴ should take this event as a guideline and act accordingly. We are in agreement with him in that the case of Jamila should be taken as an authority for giving liberal interpretation to the provisions of the enactment.

MUSLIM DIVORCE: PROCEDURE AND PRACTICE

It is commonly misunderstood that the 'Divorce under Islamic Law' is most liberal. But a thorough study of the procedure regarding the divorce makes it obvious that divorce is strict under Islamic Law and is to be resorted to only in exceptional cases. No doubt, a Muslim husband under all the Schools of Islamic Law can divorce his wife by unilateral action and without the intervention of the Court. Moreover, it is not necessary to provide for such a power in the marriage contract, but the husband derives it from the law itself. This unilateral and extra-judicial power has been given to the husband with a firm expectation that in the first place, he will ordinarily not exercise it at all and secondly, that if he finds it unavoidable to have recourse to it, he will exercise it with a sense of justice and rationality which are the basic demands of Islam from every God fearing person. It was never aimed at giving unbridled or arbitrary power either to the husband or wife.¹⁰⁵

Muslim law provides for *Talaqal-Sunna*, which is purely Quranic in its origin. *Talaq-ul-Biddat*, no doubt, has been denounced from time to time by the Prophet as well as all the

103. *Ibid.*

104. *Supra*, n. 50, S. 2(ix).

105. *Supra*, n. 6.

Caliphs. Tahir Mahmood¹⁰⁶ has rightly pointed out that the rules of divorce under Islamic Law are basically and primarily dissuasive in their nature, the main purpose being to dissuade the husband from exercising his power without careful and cool consideration. The rules for effecting divorce under Islamic Law are as follows:¹⁰⁷

- i. Two arbiters - one from the husband's family and another from wife's family must be appointed and every effort must be made for their reconciliation.
- ii. The husband who is going to divorce his wife must bear in his mind, that after the divorce is complete, he cannot ordinarily go for re-marriage with his divorced wife.
- iii. The husband should not divorce his wife, while she is in her menstrual period.
- iv. The husband who has made up his mind to divorce his wife and the chance for reconciliation is wanting, should pronounce talaq when his wife is free from menstruation. Then he should wait for second menstrual period and make another pronouncement when his wife is free from third menstrual period. After the third pronouncement only the divorce is complete.
- v. The husband has to pay the un-paid dower to his wife at the time of divorce.
- vi. The divorcee is entitled to her maintenance till her re-marriage; and
- vii. The divorcee is entitled to all the ornaments and gifts which she received at the time of marriage or before marriage either from the husband's family or from her own family.

These rules are provided to ensure that the marriage under Muslim Law must be dissolved only in exceptional cases.

106. *Id.* at p. 114.

107. *Id.*, p. 114 *et. seq.*

In practice, the Indian Muslims, generally speaking, in connivance with the so-called *Maulvies*, misuse the power and exercise it in an arbitrary manner which is usually quite un-Islamic. A study of such cases gives an impression as if one is governed by the pre-Islamic laws. In our study we found that the unscrupulous husbands usually divorce their wives in "written form" and send it by registered post. For this purpose, they usually seek help from the local *Maulvi* or lawyer or Petition Writer. The percentage of *Talaqal-Sunna* and *Talaq-ul-Biddat* in the different districts of Kashmir Valley from July 1982 to June 1983 is shown in the following Table:

Table No. 1

"TALAQAL-SUNNA" AND "TALAQ-UL-BIDDAT"

Sl. No.	District	<i>Talaqal-Sunna</i>		<i>Talaq-ul-Biddat</i>		Total No. of cases
		No.	Percentage	No.	Percentage	
1.	Srinagar	03	18.75	13	81.25	16
2.	Badgam	03	21.43	11	78.57	14
3.	Pulwama	02	20.00	08	80.00	10
4.	Anantnag	04	21.05	15	78.95	19
5.	Baramulla	02	11.76	15	88.24	17
6.	Kupwara	01	07.14	13	92.86	14
Total		15	16.67	75	83.33	90

The above table makes it clear that the commonly used form of divorce in Kashmir Valley is that of *Talaq-ul-Biddat* and *Talaqal Sunna* is exercised only in very few cases.

In the State of Jammu and Kashmir, a significant number of Muslims approach the courts to seek a decree of *faskh*. The following table shows the number of cases of divorce pending in the Courts of Jammu and Kashmir from the year 1975 to 1982 under the Dissolution of Muslim Marriage Act and Hindu Marriage Act.

Table No. 2

AREAWISE DIVORCE CASES IN JAMMU AND KASHMIR

No.	Area	1975	1976	1977	1978	1979	1980	1981	1982	Total
1.	High Court	..	..	..	01	04	01	10	6	22
2.	Poonch	..	..	..	..	..	01	..	..	01
3.	Leh	..	..	..	..	..	..	..	..	Nil
4.	Pulwama	..	..	..	01	..	04	08	16	29
5.	Rajouri	..	..	..	01	..	06	01	06	14
6.	Anantnag	..	..	..	03	04	08	33	50	98
7.	Jammu	..	..	02	03	08	27	80	102	222
8.	Kathua	..	..	..	..	..	..	08	20	28
9.	Badurwah	..	01	..	..	01	03	05	12	22
10.	Badgam	..	..	..	..	01	03	07	21	32
11.	Baramullah	..	01	..	..	02	05	10	25	43
12.	Srinagar	..	..	..	01	09	07	17	19	53
13.	Kupwara	01	..	..	01	..	02	12	27	43
14.	Udhampur	..	..	..	04	01	05	28	82	120
Total		01	02	02	15	30	72	219	386	727

The above figures show that the divorce rate both among Muslims as well as Hindus in the State of Jammu and Kashmir is on the increase as we proceed from the year 1975 to 1982.

Out of the 22 High Court cases, seven cases are under the Dissolution of Muslim Marriage Act and one is under the Hindu Marriage Act. In Leh there was no case of divorce. It is pertinent to note here that in Leh district, there is Kargil Tehsil which is mostly populated by Shia Muslims. There the Shia Muslims, whenever it is inevitable for them, resort to *Talaqal-Sunna* only. The cases under the dissolution of Muslim Marriage Act in different districts were as are shown against them. Pulwama - 18, Anantnag - 75 and Baramullah - 39. In Badgam and Kupwara all the cases were that of Muslims whereas in Rajouri and Kathua all the cases were that of Hindus under the Hindu Marriage Act.

No doubt, the State of Jammu and Kashmir is mostly populated by Muslims who are by and large governed by their customary law. But majority of them have misconceived the spirit underlying the divorce laws and usually resort to it in an arbitrary and cruel manner creating hell of problems for the Muslim wives. In some cases the wives are left without any divorce and are compelled to stay with their parents. In the present study, in some cases the wives were left with their parents without any maintenance and in 3 cases even with children. But among the Kashmir Gujar Bakarwals, the normal expectation is that a marriage will remain intact so long as both the parties to it are alive, but in keeping with Islamic Law, there is a provision for divorce. This provision among Bakarwals exists more in theory than in practice. The divorce is disapproved by the Bakarwal community and tends to lower the reputation of the family.¹⁰⁸

DIVORCE: SOME REFLECTIONS

In the preceding sections of this paper it has been discussed at length that *Talaq-ul-Biddat* is not in accordance with the Quranic injunctions nor in conformity with the well established traditions. The Quran has emphasised on reconciliation and the great Prophet of Islam has not only denounced divorce but has repeatedly said that it is the most hated by Allah. Nevertheless, the provisions have been provided for divorce, but such provisions have to be utilized only in the exceptional and inevitable circumstances where reconciliation is out of question. It has been rightly pointed that the structure of the Islamic law of divorce is based on the so-called 'breakdown theory' now being adopted by modern laws on matrimonial disputes. It allows dissolution of marriages at the instance of husband (by talaq) or the wife (by Khula) and by mutual consent (by mubarat) - subject, in each case, to such "ifs" and "buts" that

108. R. P. Khatana, "Marriage and Kinship among the Gujar Bakarwals of Jammu and Kashmir" in Imtiaz Ahmad (Ed), *Family, Kinship and Marriage among Muslims in India* (1976), p. 101.

in modern legal terminology can be best translated into nothing but "irretrievable breakdown".¹⁰⁹

However, in the present study it has been found that majority of the Muslims circumvent the procedure laid down in the Quran, and usually resort to a short-cut - *Talaq-ul-Biddat* which law is grotesquely caricatured. The 'Triple Talaq' of Islamic law - which were visualised as steps taken on three different occasions in life - are being misused as a formula taking the form of *talaq, talaq, talaq* . . . making the divorce irrevocable from the very beginning and ordinarily leaving no room for remarriage.¹¹⁰ Muslims in majority of the cases also take undue advantage of polygamy which in its turn has impact upon the law relating to divorce. But so far as the spirit of Islamic injunction is concerned monogamy has been recommended as the noblest form of the married life. The main condition imposed upon polygamy by the Prophet is to do equal justice to all the women, which is humanly impossible save by superman life himself.¹¹¹

It is the Islam, which has not only enhanced the status of women but has changed it altogether. In the pre-Islamic period, women were regarded as men's chattels and in Arabia the female babies on their birth were buried alive.¹¹² But the Islam has taken them from darkness to light and has given them equal status to that of men.

In a seminar on "Status of Women in Islam", it has been pointed out, that there is a general impression in the country and even out-side that the status of women in Islam was subordinate or inferior to men.¹¹³ In this respect it has been rightly

109. Tahir Mahmood, "Halala: A Misunderstood Concept of Muslim Law. (Reflections on B. R. Chopra's Film Nikah)," *Islamic and Comparative Law Quarterly*, Vol. II, No. 4, (Dec. 1982), 300-301.

110. *Ibid.*

111. *Supra*, n. 5 at 207.

112. Rafiq Zakaria, "Status of Women in Islam", *Muslim India*, No. 8 (August 1983), 307-368.

113. *Ibid.*

pointed,¹¹⁴ that it is neither fair nor correct. In fact it is travesty of both history and facts to make such a charge. One has only to take into account what was the position of women in the seventh century to realize the respectability and equality that Islam gave to women. Moreover, the Quran is the first and main source of Islamic Law. It is the basis of the whole super structure of Islam and undoubtedly no Muslim will tolerate any tampering with its text. The Quran deals both with the situations that arose when it was revealed and with fundamental rules and principles which are to govern Muslims for all the time to come. It is in that spirit that Quran is to be understood. It provides the key to the solution of all our problems.

It is submitted that the Muslim Law relating to matrimonial relations, particularly divorce, must be modified in accordance with the pressing demands of society, in order to check the misuse and arbitrary exercise of power of divorce by unscrupulous husbands. Moreover, the family law has been modified in a number of Muslim countries. Egypt made some desirable modifications in its "Law of family rights" in 1953, and Syria also in its "Law of personal status" in 1953, restricting liberty of the husband in those matters permitted to him by law. In the year 1959, a similar "Law of Personal Status" was promulgated in Iraq. The most revolutionary move was made by Tunisia, when in 1957, besides other things it declared that divorce outside a Court of Law is without a legal effect. Algeria, followed suit by issuing an ordinance in 1959 making all divorces subject to judicial adjudication.¹¹⁵

Pakistan promulgated Ordinance No. VIII of 1961,¹¹⁶ whereby the recommendations of the Commission on "Marriage and Family Laws" were made effective. In Talaq cases, it has been made obligatory to give notice to the Chairman of the Arbitration Council, who shall take all necessary steps to bring

114. *Ibid.*

115. *Ibid.*

116. Ordinance No. VIII of 1961 (March 2, 1961). It came into force in Pakistan on July 15, 1961.

about reconciliation, between the parties concerned.¹¹⁷ But if *Talaq* is inevitable, then it shall not be effective until the expiry of ninety days from the day on which notice of *talaq* has been delivered to the Chairman.¹¹⁸ Contravention of these provisions will result in punishment of simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.¹¹⁹ Indonesia, in the year 1974 modified the law relating to the marriage and divorce. In Indonesia, the extra-judicial divorce is not recognised. There the divorce can be obtained only by a judgment of the Court, after the Court tried unsuccessfully to reconcile the parties concerned.¹²⁰ In other words, the intervention of the Court is essential in divorce cases.

CONCLUSION

It is submitted that in India, the Muslim Personal Law must be modified on the same pattern as it has been modified in other Muslim countries. All such modifications are within the frame-work of the Quran. The tremendous increase in the divorce rate particularly in the State of Jammu and Kashmir with increasing inclination towards *Talaq-ul-Biddat* makes us to suggest that the Jammu and Kashmir Dissolution of Muslim Marriage Act must be remodelled in order to meet the present demands of society. The modifications made in Indonesia and Pakistan may be taken into consideration in this respect. Further, it is submitted that the registration of the marriages along with the quantum of the dowry, details of the ornaments and other gifts given to the bride by both the families must be made obligatory. Scope of the extra-judicial divorce which is often being exercised in an arbitrary manner must be narrowed down and *Talaq-ul-Biddat* must be abolished. The divorce, in what-

117. *Id.*, S. 7(4).

118. *Id.*, S. 7(3).

119. *Id.*, S. 7(2).

120. S. Hanifa, "The Law of Marriage and Divorce in Indonesia", *Islamic and Comparative Law Quarterly*, Vol. III, No. 1 (March 1983), 25-26.

soever form it may be, must be allowed only through the Court of Law and it must be made effective only after a period of 90 days from the day on which petition has been submitted by either of the party in the Court.

Religious leaders have a solemn duty to start an educative process to clear up thick clouds of distortion regarding the Islamic Law of divorce.¹²¹ The changes suggested above are not in contravention of the Quran or tradition, but are purely in confirmity with the spirit underlying the law of divorce. Moreover, proposals suggested for amending Jammu and Kashmir Dissolution of Muslim Marriages Act, have, by and large, been already adopted in various Muslim countries.

121. *Supra*, n. 109 at 301.