SUMMARY OF THE THESIS

The whole thesis has been presented schematically into six detailed chapters as follows:

The whole study is comprised of six chapters, which are as follows:

The journey of the research starts with the present chapter first ‘Introduction’. The theme of the topic is being discussed in this chapter. The researcher is introducing the topic and is delineating the scope of her work in this chapter. This chapter throws light on the status of women before and after coming of Prophet of Islam. It covers the episodes of all past marriages with focusing the position in the present. In the same way the ways of divorce and the procedures of getting maintenance are also discussed. Overall the entire chapter depicts the advancement of the position of women over the past-before the advent of Islam. The Fatawa which mainly affect the women are also discussed with special reference to the Fatawa of Imrana and Mukhtaran Ma who has been gang-raped and Pakistan Supreme Court acquitted five accused out of six. Similar way the Fatawa relating to rape of daughter-in-law (Imrana) by her father-in-law has also been focused. Individual dignity and equal status of man and women as depicted in Holy Quran has also been explained. The Status of Muslim women in period of Ignorance (Jahiliyah period) has been studied in detail with special relevance to divorce, marriage and maintenance.

The second chapter is on “Status of Women in Islam and Marriage Laws” Marriage as an institution is encouraged by Islam because family life not only ensures survival of the human race but also guarantees social stability and a dignified existence for both woman and man. According to the quranic philosophy, there is nothing wrong with sex if it is used for procreation within the marital framework and not merely for enjoyment and pleasure.
In the pre-Islamic Arabian society, the position of women was very bad. In those days, the customary laws of Arabia were all in favour of the males. The females were treated as properties and not as human beings. The only object of a marriage was the enjoyment of sex and procreation of children. Limitless polygamy prevailed and a man could have as many wives at a time as he liked. Except a very few blood-relations, such as the real mother or real sister, there was no restriction in marrying a girl even on one’s close relationship. Several kinds of marriages were recognized. But, they were almost the different forms of prostitution. The form of marriage, which was very near to the present marriage, was one on which the father or any other guardian sold the girl to the husband in the same manner as he used to sell his camels or sheep. There was, therefore, no certainty in the matrimonial status of a wife. To be precise, the women in those days were not better than the slaves and had no existence of their own in the status.

The Quran specifically forbids sexual relations for “fornicating and receiving paramours” cannot impart dignity to women. It would not only reduce sex to mere physical pleasure but would also lead to a much greater exploitation of women. According to Quran, “Husband and wife are each other’s garments.” Thus marriage is not merely a sexual urge which brings woman and man together; it has a higher end, and exalted motive, and is a relationship of love and mutual respect.

It was Prophet Mohammad who brought about a complete change in the position of women. The improvement was vast and striking and their position is now unique as regards their legal status. Islam is a strong advocate of marriage. There is no place for celibacy, like for example the Roman Catholic priests and nuns. The Prophet has said “there is no celibacy in Islam. Marriage is a religious duty and is consequently a moral safeguard as well as social necessity.” Prophet Mohammad (PBUH) placed woman on a footing of almost perfect equality with men in the exercise of all legal powers and functions, which stand in bold relief when compared with the state of law amongst the ancient Arabs of the pre-Islamic.

Islam has given every possible right to women for accepting or repudiating the marriage. Muslim marriage is a valid contract between the parties that means both partners entering into marriage contract have got equal rights. Muslim marriage is civil contract with the object of legalizing sexual intercourse and procreation and
legitimation of children. Limited polygamy is permitted but polyandry is not permitted. No religious ceremonies are required. Irregular marriages may be validated by removing temporary or relative impediments and after cessation of impediments, all legal effects of a valid marriage ensue. Marriage is a religious duty of every Muslim and it is considered to be a moral safeguard and social need. The Prophet has also said, “Marriage is my tradition whosoever keeps away there from is not from amongst me”.

In this chapter all conditions of a valid marriage, essentials and prohibitions of marriage has been covered in detail. The procedure and way of performance of marriage with definition of and meaning of marriage under different personal laws has been explained. The essentials and legal incidents of Muta marriage have been explained in detail with cases and citations and it deals with procedure of marriage in pre-Islamic Arabs and the marriage in the present law. It also deals with all the forms and kinds of marriage before and after the coming of Islam, because without discussing the past marriage problems, study of the topic will be incomplete. Further, the most prevalent and non-prevalent marriages has also been discussed in this chapter. More stress has been given on the prohibitions against the marriage, conditions and essentials of a valid marriage. The researcher has also incorporated such marriage ties which have no legal validity, i.e. Misyar Marriage which is prevalent in Arabs and Maitiri Karar (Friendship Agreement) in the chapter. The definition of marriage under different personal laws (Hindu law, Parsi law, Jew laws and Christian law) has also been defined. The relevant provision of Constitution of India like ‘Right to Marry’ has also been dealt with. The bigamy and polygamy has also covered in this chapter with the consequences of conversion from one religious faith to another.

The third chapter is on “Status of Women in Islam and Divorce Laws” specifically relates to the divorce—talaq, the concept, meaning and definition has also been discussed. The meaning of talaq and divorce as given in various dictionaries has also been discussed. The origin and background of triple talaq has been given in detail. The divorce under different personal laws has also been discussed. The post prevalence of triple talaq and its usage in the present society has also been studied.
The countries where the practice of triple irrevocable talaq has been abolished also included in this chapter. The need for change to stabilize the position of Muslim women who suffer because of this ill-fated triple talaq has also been covered in this chapter. The ways of pronouncing triple and single pronouncement divorces has given the separate heading in this chapter. Besides non-prevalent forms of divorce like Ila and Zihar although these are not practiced in India has been added in this chapter. Moreover, the divorce by mutual consent of husband and wife (khula and mubarak), the unilateral power of husband to divorce wife (by single and triple irrevocable pronouncement-talaq-ul-biddat) and the divorce at the instance of wife (talaq-e-tafwiz) has been thoroughly examined, studied and brought within the precincts of the record in this chapter. The Muslim woman has given the right to dissolve her marriage on certain grounds under **Dissolution of Muslim Marriage Act, 1939** along with faskh and lian have also been discussed in this chapter with certain merits and drawbacks of the Act. Besides, the dissolution of marriage due to apostasy and conversion and dissolution of foreign marriage has discussed in detail with reference to the latest cases on the issue.

It deals with the position of Muslim women during the period of Ignorance which is also called the *Jahiliyah Period*. The Qur’an also mentions that the Arabs in *jahiliyah* used to bury their daughters alive. That barbaric custom of burying infants alive, seems to have been fairly widespread in pre-Islamic Arabia, although perhaps not to the extent as has been commonly assumed. The motive were twofold: the fear that an increase in female offspring would result in economic burdens, as well as the fear of the humiliation frequently caused by girls being captured by a hostile tribe and subsequently preferring their captors to their parents and brothers. In the pre-Islamic period there was no restriction on the number of wives a man could have. The tribal chiefs and leaders had many wives in order to build relationships with other families. This practice of wooing other families and forging political alliances through marriage was practiced in other feudal societies too on a very wide scale. Even the Bedouins desired to have a large number of wives. A person belonging to the tribe of Quraysh on an average married ten women. There were people who married four,
five, six or even ten women and asks who could stop him from marrying more than
the others. Women were not regarded as full human beings and were inherited like
any other property in case of the death of the husband or master, any number of wives
could be kept or thrown out at will. They had no rights of property and had nothing to
say in the matter of divorce. Their economic rights were non-existent and their fate
wholly depended upon the sweet will of their husband’s, fathers or guardians. A man
could divorce or take back a wife any number of times. All customs and traditions
worked to the disadvantage of women who were treated no better than playthings to
be loved or destroyed at will. Girls were often killed after birth, and wives and slave
girls were used for enrichment without any thought about their welfare. Misery and
sorrow was mostly the share of a woman whenever she incurred the displeasure of her
lord and master. Women were literally at the mercy of men and were treated as
expendable. Women have been “victimized”, through the ages and continued to be the
subject of debate. It also deals with the present position of women in the existing
scenario and efforts of the women taken to struggle against the so called the barbaric
customs which have either made in the form of fatwa, and the steps to abolish triple
talaq.

The institution of divorce as provided, under Muslim law in its pristine purity
is an admirable system of modern jurisprudence providing many rational,
revolutionary and humanitarian gender concepts which could not be conceived by any
other system of law then in force at that time as well as at the present time. Justice
V.R.Krishna Iyer, highlighting this aspect of Shari ah, in a felicious manner in Yusuf
Rowthan v. Sowramma,¹ observed:

“Since the infallibility is not an attribute of judiciary, the view has been
ventured by Muslim that the Indo-Anglian Judicial exposition of Islamic law of
divorce has not exactly been just to the Holy Prophet or the Holy book. Indeed a
deeper study of the subject discloses a surprisingly rational, realistic and modern law
of divorce”.

The Judicial observation of learned Judge presents a correct, just, unbiased
and an authentic view of divorce. Islam provides a modern concept of divorce by

¹ AIR 1971 Ker 271
mutual consent what is now known as the break-down theory of divorce. Inspite of the fact that a substantial reform in the pre-Islamic system of divorce was introduced by the Holy Prophet (PBUH) with a view to prevent the exploitation of women and give them a status equal to men as well as moral, social and economic security right from the childhood to the motherhood. But these ceaseless efforts of Prophet, due to deplorable distortions made by and unfortunate metamorphosis undergone at the hands of Indo-Anglian courts have failed to earn the proper admiration and appreciation. More than a century ago the Privy Council in a famous case *Moonshee Buzloor Raheem v. Shamsoonnissa Begum*, observed that “Matrimonial Law of Mohammedan like that every ancient community, favours the stronger sex where the husband can dissolve the marital tie at will.” About the law of talaq, the Privy Council further observed that a divorce by talaq is a mere arbitrary, act of the husband who may repudiate his wife with or without any cause.

However, the judicial attitude towards the law of talaq has not undergone any change during all these hundred years and a reference may be made to the controversial decision of the Supreme Court in *Mohd. Ahmad Khan v. Shah Bano Begum*, wherein a five Judge Bench again observed that “*undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so for reasons good, bad or indifferent or even for no reason at all.*”

Besides it, the on going controversy regarding the mode of pronouncement of triple divorce and its instantaneous effect on marital relation has added fuel to the fire and as a result a concerted effort is going on at a global level to abrogate and replace Muslim Personal law by common civil or uniform code. I got prompted to work upon the instant topic, in the wake of the frequent subjection of Muslim law relating to divorce to an unfounded and baseless criticism, not only by the ignorant but also by the persons of learned profession from Bar to Bench. It has been impressed upon by the critics that under Shariah law a Muslim Wife ha no right to the dissolution of her marriage under any circumstances for any reason whatsoever and event if it is so, her rights are inferior to her counterpart. These critics have gone to the extent of saying that under Muslim Personal law the right to dissolve the marital tie squarely rests with

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2 1867 II MIA 551e

3 1985, SCC 556
the husband only which is unilateral, arbitrary, capricious and is designed to undermine and degrade the position of women and fails to pass the constitutional test of gender equality.

The present work is confined to study a Muslim woman’s right to dissolution of her marital tie available under classical Islamic jurisprudence and thus covers in it ambit Khula, Mubarat, Tafwiz, Ila, Zihar and Lian etc. The grounds of Dissolution of Muslim Marriage Act, 1939 have been discussed in detail.

The chapter fourth is on “Status of Women in Islam and Maintenance Laws” and it deals with maintenance of Muslim wife and divorced women. Same has been divided into two categories i.e. maintenance of wife during the subsistence of marriage and maintenance of divorced women after dissolution of marriage. The maintenance which has been awarded under different sources like Code of Criminal Procedure, 1973, Personal law and Muslim Women (Protection of Rights on Divorce) Act, 1986 has been studied in detail. The application of this Act only to Divorced women and not wives, with its constitutionality and inapplicability to wives has been given in full detail. The award of maintenance under Section 125-128 of Criminal Procedure Code, 1973 to both wives and divorced women with its applicability and option of the divorced women to take maintenance under this code or Muslim Women Act, 1986 has been fully examined with cases also so as to give the actual position of the destitute women after divorce for want of maintenance. Moreover, the award of maintenance beyond iddat period in the case of Shabana v. Imran Khan⁴ which made the revolution in the field of destitute women who has been thrown out of homes by their husbands has been discussed fully with all factual position. Furthermore the passing of Muslim Women (Protection of Rights on Divorce) Act, 1986 due to the struggle of 73 years old aged Shah Bano, has been explained with relevant provisions of its applicability to divorced women. This case history of Shah Bano Begum v. Mohammad Ahmad Khan⁵ has also been covered in detail with all debates while passing the Act.

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⁴ AIR 2010 SC 305: (2010) 1 SCC 666 MP
⁵ AIR 1985 SC 945
The present study addresses itself to the following fundamental questions centering of maintenance obligations:-

(i) What is the true nature and function of the institution of maintenance in the over-all set up of Islamic law?

(ii) What is the legal and statutory position of the Muslim wives and divorced wives right to maintenance in India?

(iii) What is the co-relation between statutory provisions and Islamic law relating maintenance and how far do they depart from Shariah?

(iv) What is the real impact of statutory and decisional law on the socio-economic position of the women in the society? Are the existing legal devices the most efficient means of solving the short term economic needs of the weaker sex and the long-term goal, if stability and happiness of family life?

(v) Whether the statutory provisions override the Islamic law and to what extent the judiciary has interpreted the law in accord with Islamic law?

(vi) What can be the proper course to meet the present economic challenges to Muslim women, within the limit prescribed by the Islamic law?

(vii) What is the extent to which the award of maintenance is the most efficient way to meet the financial needs of women, and what is the legal and normative criterion in the award of maintenance?

The present study concentrates of the general anatomy of law and changing values of the society. Case law as one way to study the ideas, religious values, and basic premises of a particular society, through time. The impact study of the case law enunciated by the Supreme Court and the High Courts is the backbone of any legal research. The present study was planned to examine, the role of judiciary, which deviated from the Islamic Shariah. Some time judicial mechanism have distorted and on slought the Muslim law and cover impressed by the theory even at the cost of express provisions of Islamic Shariah.
In the case on award of maintenance, the courts have not considered the changing improvement in economic growth in India, the present study confirmed that they prefer to award meager amount of maintenance to the destitute and discarded women. The courts can avoid the award of meager maintenance by using the consumer price index, and increase in the Gross National product, as a measure of correlation between quantum of maintenance and real increase of the inflation rate in India. The present judicial treatment in their zeal to protect the women is being brought to bear on the provisions of the statute to achieve results, which the law makers did not contemplate.

The chapter fifth deals with “Empirical Study” which includes primary as well as secondary data collected after the efforts of researcher by interviewing the various segments in different States of India and by attending workshops and conferences during the course of study in Mumbai which was organized by Centre for Study of Society and Secularism and Institute of Islamic Studies Mumbai headed by Dr. Asghar Ali Engineer, a renowned Islamic scholar in this field in the month of August, 2009 and March, 2010, the topic of which was mainly on the Muslim women and her position in Holy Quran and in Law. Besides the information under Right to Information Act, 2005 has been obtained from the three session Judge courts of Malerkotla, (Sangrur, Punjab) regarding the status of divorce, maintenance and bigamy and polygamy cases, that information has also been incorporated. The specimen copy of Nikah-Nama after collecting information from Mufti Azam of Malerkotla has also been obtained. Besides the family problems of women of Malerkotla after interviewing them is also explained in this chapter. After interviewing the Muslim women of slum area of Dindigul- Chennai, Ahmadabad-Gujarat, Bangalore and Mumbai, the whole information has been explained in this chapter. Besides secondary data which clearly shows the position of Muslim women in West Bengal, Bijnor of UP district has been added to give the actual position in these States of India. Moreover, the information from daily news papers, articles, journals and website information have been studied to understanding the chapter fully.
The sixth chapter—the last chapter is based on the “conclusions and suggestions” of the researcher. This chapter is based on the concluding remarks of the research scholar, which include the problems which prevail in present generation of the Muslim women, regarding the marriage, divorce and maintenance. To overcome such problems researcher has given her own suggestion for the upliftment of women over all. The basic suggestion which she has stressed is the education of Muslim women who are considered very backward due to lack of education. Because home is well if mother is educated and mother is educated the whole nation is educated. The researcher has also concluded that the main problem of the muslim women is due to illiteracy as she also asserted in workshop held in Bangalore on the same topic where the researcher gave forty minutes presentation in which she mainly stressed on the education and said that the present problem of the Muslim women is due to the unawareness of proper Islamic knowledge, because in our democratic country most of the ladies folk remain hidden within the four walls of the home although the government is doing a lot for educating the women in scheme like “Sarwa Shiksha Abhiyan” in which education upto eighth class has been made mandatory for all citizens of India and this Scheme is free of cost. But some Muslim women are not ready to come forth to take advantage of this scheme. Reasons behind is their stubborn husbands who always want that their wife should not leave home without their permission and it is regarded as great sin as their husbands have made them to run their life like that.