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# UNDERSTANDING ISLAMIC LAW IN INDIA: AN ASSESSMENT OF THE CONTRIBUTION OF JUSTICE V.R. KRISHNA IYER: A TRIBUTE

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**Abstract**

V.R. Krishna Iyer was one of those judges of India who not only read Muslim law but undersood it in its appropriate form, and accordingly conceptualised and interpreted it. He admitted the distortions made by the British judges in their interpretation of the Muslim law because they were unable to understand the culture and social background in which Muslim law was promulgated. In his opinion, when Manu and Mohammad of India and Arabia would be interpreteted by the British judges, marginal distortions were bound to creep in. The same is true for many Indian judges when they interpret Muslim law. This paper is a tribute to Krishna Iyer J, in the form of analysis of his various judgments, which show his in-depth knowledge and foresight about the Muslim law in India. He is no more with us but his judgments continue to enlighten the scholars of Muslim law throughout the world and particularly India.

## I Introduction

INDEPENDENT INDIA has seen a number of judges that have left an indelible imprint on the sands of time and who shall be remembered forever. One name that shines is that of V.R. Krishna Iyer.[1] He not only delivered justice as per traditional norms but always tried to achieve social justice in a welfare state. His judicial acumen not only solved the problems of common man but also compelled the executive and the legislature to come out of their

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1 V. R. Krishna Iyer (Nov. 15, 1915- Dec. 4, 2014) was an Indian judge and minister who reformed the Indian criminal justice system, stood up for the poor and the underprivileged, especially, and remained a human-rights champion, a crusader for social justice and the environment, and a doyen of civil liberties, throughout life. Also a sports enthusiast and a prolific author, he was conferred with the *Padma Vibhushan* in 1999. He was appointed as a judge of the Kerala High Court in July.

stupor. Accordingly, many legislative and executive measures were taken for achieving the welfare of the underprivileged. Whether he took the cause of environmental protection or sexual discrimination, one theme remained constant in his journey as a judge-he was always inclined towards amelioration of the downtrodden tribals, minorities, women and other deprived groups of people. When the nation had just started celebrating his 100th birth anniversary and various seminars and workshops on his life were being organised, he left his fellow men to fulfil his further accomplished task. Words are not sufficient to express gratitude for the contributions he made for the nation and the whole of humanity. Many eminent scholars, lawyers and activists have and will pay rich homage to him, but as a student of Muslim law, one is forced to think that people of the caliber and acumen of Iyer J are born once in many generations. Iyer J was highly informed about the intricacies of Islamic law which gets reflected in his work.

The purpose of writing this paper is to pay homage to the departed soul by remembering his well informed interpretation of Muslim law. The contribution of some jurists for the development of Islamic law in India during early 20th century is significant.[2] However, as a judge of independent India, how Iyer J contributed to create a body of work which reflects the true law of Islam, is indeed noteworthy. One can quote a few words from his judgment to illustrate his in-depth knowledge and far sightedness on the sources of Islamic law. In *Yousuf* v. *Swaramma*,[3] he lamented the distortions of Muslim law. According to him, this was bound to happen since Muslim law was interpreted by those who had no background in it. In this case, unlike his brother judges, he drew the true picture of Muslim law which may be a torch bearer for the brother judges of the departed soul and even for the Muslim clergy. He states:[4]

> Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just

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2. 1968. He was a member of the Law Commission from 1971 to 1973 where he drafted a comprehensive report, which would lead to the legal-aid movement in the country. He was elevated to judge of the Supreme Court on July 17, 1973.

2 Furqan Ahmad, "Role of some Indian Muslim jurists" 34 *JILI* 563-579 (1992).

3 AIR 1971 Ker 261.

4 *Id*. at 264.

> to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture-law is largely the formalised and enforceable expression of a community's cultural norms- cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.

The above observation is an illustration of his deep understanding the of subject which equipped him with the interpretive tools to draw a fine line between the true law of Islam and the distorted picture drawn by the British. By emphasising some of his significant judgments on various aspects of Muslim law, this paper attempts to appreciate Muslim law in its spirit and at the same time distinguish it from its real distorted forms.

## II Some significant aspects of Muslim law

### Marriage - Polygamy

One of the most debatable aspects of Muslim law in India happens to be polygamous marriages. The reason behind it is that the British judges[5] and most of the writers like Macnaughten[6] and Mulla[7] and even sometimes, the *maulvis*;[8] gave the impression that under Islamic law, bigamous marriage has

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5 Following are the few decisions in British courts which are totally inconsistent *Mohd. Hayat* v.*Mohd. Nawaz*, AIR 1935 Lah. 622, 623; *Khurshed Jan* v. *Abdul Hamid* 6 P.R. 1908; *Shahulameeda* v. *Subaida Bebee* 1970 M.L.J. Cr. 562.

6 W.H. Macnaughten, *Principles and Precedents of Mohammedan Law* (Calcutta, 1825).

7 M. Hidyatullah (ed.) *Mulla, Principles of Mohammedan Law* (N.M. Tripathi Pvt. Ltd, Bombay, 18th edn., 1977); Faiz Badraddin Tyabji, *Muslim Law: The Personal Law of Muslims* (N.M. Tripathi Pvt. Ltd, Bombay, 3rd edn., Mumbai,1940); A.A.A. Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 4th edn., New Delhi, 1974); Ameer Ali, *Mohammedan Law* (Himalayan Books, 5th edn., New Delhi, 1985).

8 See J.S. Bandukwala, "The Imrana case and the Deoband fatwa" *available at*: http://www.pucl.org/Topics/Religion-communalism/2005/imrana.htm (last visited on July 4, 2015).

been fully recognised on the socio-legal platform without any sanction. On the contrary, the Quran, which is the primary source of Islamic law, prohibits bigamous marriage as man cannot treat the wives equally. It is pertinent to note that bigamous marriages were permitted in times when war left children orphaned and women widowed. Thus to support them, maintain them and protect their life and property and to avoid their exploitation, this practice was allowed but even then the condition of equality amongst the wives was emphasized. The way Iyer J looks at the provision of bigamy which is an exception under extreme circumstances favouring women and not a law for the pleasure of men is discussed hereinafter. In a case[9] he had to consider whether a person accepting persuasion, ceases to be Muslim under the Mohammedan law while considering a question of bigamy. Analysing the law on the subject, Iyer J observed:[10]

> Religion is not amenable to reason and theological disputes cannot be decided by secular courts. So my duty is as embarrassing as my jurisdiction is limited. Even so, the laws of the land lay down norms of conduct and bind divine and commoners alike. The Indian Penal Code which prohibits bigamy cannot be evaded by pleading Islam unless founded on some exemption recognized by the law.

The above exposition should remove the doubts and misunderstandings of the Indian judges. They should avoid putting together all the aspects of *sharia* and *fiqh* including religion, and interpreting the same in their own way without having adequate knowledge on the subject. They are entitled to interpret and enforce the secular law uniformly but as far as religious law is concerned, it is not their domain to interpret it, as is evident from the above exposition. This attitude will avoid many misunderstandings among different sections of the society. Recently, a decision on bigamy[11] was delivered by the Supreme Court. The decision affirmed preventive measure adopted by the UP government for their employees in order to prevent bigamy during service. The court should have, with the help of Quranic injunctions, observed that bigamy is not law, but an exception allowed in extreme situation. Instead the court went into the domain of religion without resorting to the difference of

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9 *S.I. Koya Thangal* v. *Ahammed Koya,* 1971 KLT 68.

10 *Id.* at 68.

11 *Khursheed Ahmad Khan* v. *State of UP* 2015 (2) SCALE 229.

*jiqh* and *sharia*. Adding fuel to the fire, the court deemed itself fit to interpret a purely theological term like *iman* (faith). Such a situation may create a lot of problems and controversies. Thus, if any social reform is to be initiated, in order to secure upliftment of women, it should be followed on the lines of Iyer J. He was fully aware of the Quranic law on bigamy and how it was misinterpreted. In his words:[12]

> The Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognized the difficulty of treating two or more wives with equal justice, and in such a situation, directed that an individual should have only one wife. In short the Koran enjoined monogamy upon Muslims and departure therefrom is an exception. This is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted.

The above explanation, based on primary sources of Islamic law leaves no doubt as to the true law of polygamy under Muslim law.

**Dower**

Dower is a unique feature under Islamic law which has no parallel concept in any other legal system. Therefore, it is often misunderstood by those who do not understand the spirit of this law. Either they understand it in terms of dowry or sale. Though the Islamic legal literature is replete with the concept of dower and many leading judicial decisions are found on the subject, even then both laymen as well as the lawmen in modern times get confused about the concept of *mehar*. The legal history of Indian Muslim law also reveals this confusion. When under section 125 of the Code of Criminal Procedure, 1973 (CrPC), a divorced wife was declared entitled to get maintenance by her former husband, the clergy men protested against this provision, treating it as inconsistent with *sharia*. Thereafter, section 127 (b) of Cr PC was added through an amendment. According to this section, if the dower of a women is such a substantial amount that it may be considered as a substitute of maintenance, then the Muslim husband gets absolved of his obligation under

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12 *Shahulameedu* v. *Subeda Beevi* (1970) KLT 4.

section 125 of Cr PC. Since this provision has been inducted, many doubts have surfaced. One cannot understand how *mehar*, which is an integral part of Muslim marriage, (about which the Prophet says "no mehar, no marriage") can be a substitute of maintenance for divorcee.

*Mehar* is not related to divorce and it is an independent institution of Islamic law of status. It is to be paid as a gift at the time of marriage by the husband to his wife and it may be only in the form of prompt dower (*mehar-a-muajjal*). There is no deferred dower (*mehar-a-muwajjal*) as such. It is an exception and a pro-women law that marriage should not be postponed if the women are voluntarily ready to defer their bridal gift due to poverty of their proposed husband. In such cases alone, *mehar* can be paid later. But it does not mean that it should be paid only after divorce or death. It is like a debt and the property can be retained in lieu of *mehar*.[13] As soon as a man is capable of having such amount, it should be paid at that very moment. Here again, Iyer J clearly understood the law; he states that "we must realise that Muslim law shows its reverence for the wife in the institution of mehar. It is neither dowry nor price for marriage."[14] He further referred to a famous judgment on dower by Syed Mahmood J, which reads:[15]

> Mehar is not the exchange or consideration given by the man to the woman, but an effect of the contract imposed by law on the husband as a token of respect for its subject: the woman. Giving a correct appraisal of the concept of mehar, the Privy Council once described it as an essential incident to the status of marriage.

He profusely quoted Islamic legal literature in support of judicial decisions and juristic interpretations.[16] Iyer J further removed the confusion between dower and its relationship with divorce and maintenance particularly in the

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13 See *Miana Bibi* v. *Vakil Ahmad* AIR 1925 PC 63, 52 IA 145; *Abdul Samed* v. *Alimuddin* 1943 (22) Pat. 750; *Zaibunnissa* v. *Nazim Hasan*, AIR 1962 All 197; *Hamira Bibi* v. *Zubaida Bibi* 1916 (43) IA 294 as cited in *Syed Sabir Hussain* v. *Farzand Hassan* 1937 (65) IA 119.

14 *Fuzlunbi* v. *K. Khader Vali*, AIR 1980 SC 1730.

15 Syed Mahmood J in *Abdul Kadir* v. *Salima* (1886) 8 All. 149, 157.

16 Tahir Mahmood, *The Muslim Law of India* 71 (1984); Neil B.E. Baillie, *Digest of Mohummudan Law* (London, 1875); Tyabji, *supra* note 7; *Abdul Kadir* v. *Salima* (1886) ILR 8 All 149 (FB), describing the true nature of law of dower as a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed

light of section 127 (3) (b) of CrPC as well as Islamic law. Quoting from various Islamic legal authorities and Privy Council decisions, he observed:[17]

> The quintessence of mehar whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focuses on marital happiness and is an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when mehar is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for divorce too distant and unpleasant for the bride and bridegroom to envision on the nuptial bed. Maybe, some legislatures might have taken it in that light, but the law is to be read as the law enacted. The language of Section 127(3) (b) appears to suggest that payment of the sum and the divorce

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or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower."- (Hamilton's Hedaya by Grady at 44). Even after the marriage the amount of dower may be increased by the husband during coverture….. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the Law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole dower is presumed to be prompt and due on demand."

17 *Fuzlunbi* v. *K. Khader Vali*, AIR 1980 SC 1730.

> should be essentially parts of the same transaction so as to make one the consideration for the other. Such customary divorce on payment of a sum of money among the so called lower castes are not uncommon. At any rate the payment of money contemplated by section 127(3) (b) should be so linked with the divorce as to become payable only in the event of the divorce. Mehar as understood in Mohammadan Law cannot under any circumstances be considered as consideration for divorce or a payment made in lieu of loss of connubial relationship.

On another occasion he explained that *mehar* was a legal responsibility of the husband.[18] These judicial observations evidence a correct understanding of the Islamic legal concept of *mehar*. But due to misunderstanding of the law on *mehar*, which is already replete with many judicial decisions and other legal literature, this confusion arose. In order to remove the confusion between dower and maintenance, after explaining the concept of *mehar*, Iyer J beautifully harmonized the two institutions and the legislative intent as under:[19]

> …that even by harmonizing payments under personal and customary laws with the obligations under Sections 125 to 127 of the Cr PC the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution which is the anathema of the law. This perspective of social justice alone does justice to the complex of provisions from Section 125 to Section 127 of the Criminal Procedure Code.

## Divorce

In Islam, marriage is a very simple procedure. It is nothing but the expression of two words; one from the bride's side and the other from the bridegroom's. These words are generally known as *ijab* and *qubool* which mean offer and acceptance. *Mehar* is already included in the concept of marriage. However, divorce is a very long procedure and this procedure is not described in any secondary book but in the divine book itself. One full chapter is devoted to

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18 *Id.*, para 17.

19 *Id.* at 1736.

*talaq*[20] and in another chapter[21] its details are explained. The crux is that divorce is only permissible in extreme circumstances *firstly*, by husband, *secondly*, by wife and *lastly*, by mutual consent of both. These three cases are popularly known as *talaq*, *khula* and *mubarat* respectively in legal terminology. It is little difficult to understand the concepts of various forms of divorce. The practice of Indian Muslims has made marriage complex and *talaq* very simple.[22] The Indian Muslim practice includes only three utterances of the word *talaq* (*i.e.*, *talaq talaq talaq*). The procedure is often misunderstood; the whole procedure of divorce is rarely known except to few members of the bench and bar. Unfortunately certain decisions which throw light on the true exposition of divorce could not find the place in any legal report.[23] Here again, Iyer J seems well informed and some of his judgments are being presented to illustrate his knowledge. It was held: [24]

> It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, if they (namely, women) obey you, then do not seek a way against them (Quaran IV:34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life

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20 Quran, Sura Al-Talaq IXV: 65.

21 Quran, II: 229-30.

22 Procedure of marriage is very simple; the parties willingly tie-up in a matrimonial bond to live together, throughout their life, in a single sitting and before the presence of two witnesses. This is all for the commencement of Muslim marriage, However, lot of customs and rites are observed and unnecessary money is spent. Nowadays many complex processes and formalities which have nothing to do with Islamic society, law and religion are followed.

23 It is regretted that the two judgments given by Behrul Islam J which can be termed as a compendium of law of *talaq* could not find place in any legal report and only Krishna Iyer J mentioned them in one of his judgments. Also see, Furqan Ahmad, *Triple Talaq* (Regency Publications, New Delhi, 1994); G.C. Cheshire, "The International validity of Divorces" 61 *Law Quarterly Review* 352 (1945); Furqan Ahmad, "Muslim women's right to divorce: An apparently misunderstood aspect of Islamic law in India" 13 *Delhi Law Review* 85-94 (1991).

24 *Supra* note 3 at 264.

> unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously.

Further references to the Islamic scholar, Ahmad A. Galwash's observations were made: [25]

> The pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came, he declared divorce to be the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: "God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". Commentators on the Quran have rightly observed-and thistallies with the law now administered in some Muslim countries like Iraq-that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce.

Maulana Muhammad Ali, an eminent Islamic legal scholar has also explained that if marriage is not serving its purpose it should be broken down. In such a situation men and women have equal rights to dissolve the marriage. In this regard he observed: [26]

> Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract.....It is clear, then, that Islam discourages divorce in principle, and permits it only when it has

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25 Ahmad A. Galwash, *The Religion of Islam* 117 (1945). Also see, Furqan Ahmad, *Triple Talaq, supra* note 23 at 157.

26 Muhammad Ali, *Commentary on The Holy Quran* 96 (1917).

> become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes.

Further, Iyer J rightly affirmed that Islamic law allows the wife to claim divorce when she finds it difficult to live with her undesired husband because such marriage without love creates a hardship crueler than any divorce. In this regard, he referred to Ahmad A. Galwash as under:[27]

> Before the advent of Islam, neither the Jews nor the Arabs recognized the right of divorce for women: and it was the Holy Quran that, for the first time in the history of Arabia, gave this great privilege to women.

Iyer J further referred to Galwash who concludes with the help of Quran and Prophet's teachings that:[28]

> Divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting reconciliation have failed, the parties may proceed to a dissolution of the marriage by Talaq or by Khola. When the proposal of divorce proceeds from the husband, it is called Talaq, and when it takes effect at the instance of the wife it is called Kholaa Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation.

Iyer J also referred to the commentary of Holy Quran by Maulana Mohummad Ali which runs thus: [29]

> Divorce is one of the institutions of Islam regarding which much misconception prevails, so much so that even the Islamic law as administered in the courts, is not free from these misconceptions….The Islamic law has many points of advantage

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27 *Supra* note 3 at 265.

28 *Supra* note 25 at 104.

29 *Supra* note 26.

> as compared with both the Jewish and Christian laws as formulated in Deut. and Matt. The Chief feature of improvement is that the wife can claim a divorce according to the Islamic law, neither Moses nor Christ (nor Manu, may I add) conferring that right on the woman.

Then Iyer J himself quoted the Holy Quran and Prophet's teachings. The Holy Quran mentions that "women have rights similar to those against them in a just manner...". The Prophet also dictates that "[o]f all things which have been permitted divorce is the most hated by Allah."[30] The law of Islam on the subject was a revolutionary one for the Arabs of those days and almost equated women with men. He further opined that the views of Muslim jurists reveal a revolutionary step taken by the Islam particularly in such atmosphere where equality among women and men could not be imagined. He further added that decisions of court and the books on Islamic law frequently refer to the words and deeds of the Prophet. He referred in support of his view a tradition that "if a woman be prejudiced by a marriage, let it be broken off."[31] Iyer J did not confine himself to quoting Quran, Hadith and views of leading jurists, but in the case of women's rights to divorce, he also furnished illustrations from Islamic history: [32]

> The wife of Thabit-ibn-Quais came to the Prophet and said 'O Messenger of God, I am not angry with Thabit for his temper or religion; but I am afraid that something may happen to me contrary to Islam, on which account I wish to be separated from him. The Prophet said: Will you give back to Thabit the garden which he gave to you as your settlement? She said, 'Yes'. Then the Prophet said to Thabit, 'Take your garden and divorce her at once'.

It has been further illustrated that "Asma, one of the wives of the Holy Prophet, asked for divorce before he went to her, and the Prophet released

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30 Sulaimaan bin al-Ashath Ashaiastaanee, Abu Daaud, *Sunna* 1:26 (1988).

31 Ashraf Ali Thanvi, *Bhabisti Zewar* 239 (1979). Also see, Furqan Ahmad, "Maulana Ashraf Ali Thanvi: Juristic Thought and Contribution to the development of Islamic Law in the Indian Subcontinent" VI *Islamic & Comparative Law Quarterly* 71-80 (1986).

32 Al- Bayhaqi, II *al sunan al Kubra* 133-14 (1353 A.H.).

her as she had desired."[33] Iyer J referred to Yusuf Ali's commentary on the Holy Quran, which runs thus: [34]

> While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life.

In this support, the Holy Quran has been referred to: [35]

> And if we fear a breach between husband and wife, send a judge out of his family, and a judge out of her family: if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and apprised of all.

The policy of law of divorce in Islam is also reproduced by Iyer J from Maulana Muhammad Ali's explanation which runs thus: [36]

> This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should divorce cases be made too public. The, judge is required to appoint two arbiters, one belonging to the wife's family and the other to the husband's. These two arbiters will find out the facts but their objective must be to effect areconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam.

Iyer J referred to leading cases of Pakistan where wife's right to divorce in the form of khula, unlike India, is affirmed.[37] It was held that under Muslim

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33 *Supra* note 3 at 265.

34 *Ibid.*

35 Quran IV: 35.

36 *Supra* note 26.

37 In *Khurshid Bibi* v. *Mohd. Amin*, PLD 1967 SC 97, which endorses the Lahore High Court's view in *Mst. Balqis Fatima* v. *Najmul-Ikram* (1959) Lah. 566.

law the wife is entitled to *khula*, as a matter of right, if she satisfies the conscience of the court that it would otherwise mean forcing her into a hateful union.

After a long discussion in the light of basic Islamic sources, Iyer J arrived at a conclusion:[38]

> The Holy Prophet found a dissolute people dealing with women as mere sex-satisfying chattel and he rid Arab society of its decadent values through his doings and the Quoranic injunctions. The sanctity of family life was recognised; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock. While there is no rose but has a thorn if what you hold is all thorn and no rose, better throw it away. The ground is not conjugal guilt but actual repulsion.

Similarly in *Aboobacker Haji* v. *Mamu Koya*,[39] Iyer J tried to show the difference of Muslim marriage from the hindu and christian marriages. He also justified the need and valid reasons to resolve the marriage, referring to Tyabji CJ in *Noer Bibi* v. *Pir Bux*: [40]

> The Muslim marriage differs from the Hindu and from most Christian marriages in that it is not a sacrament. This involves an essentially different attitude towards dissolutions. There is no merit in preserving intact the connection of marriage when the parties are not able to fail 'to live within the limits of Allah', that is to fulfil their mutual marital obligations, and there is no desecration involved in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality, and when this is not possible, and the marriage becomes injurious to the parties, the Quran enjoins a dissolution.

Referring to a decision of the Pakistan Supreme Court on the wife's right to divorce, Iyer J summarizes that "the sanctity of marriage is preserved not merely by morality that permeates it, but by the reality that holds the family

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38 *Supra* note 3 at 266.

39 (1971) KLT 663.

40 AIR 1950 Sind 8 at 10.

together; one without the other spells a breakdown; and so a ground for divorce may be made out if there is total irreconcilability between the spouses." The above exposition explains the two important forms of dissolution *i.e.*, at the initiative of husband known as *talaq,* and at the initiative of wife known as *khula.*

### III Dissolution of Muslim Marriages Act, 1939 and its interpretation

It is a famous saying that one, who does not know law, does not know the spirit of the law. Abdur Rahim J in this regard, observes: "The fact is, the groundwork of the Muhammadan legal system, like that of other legal systems, is to be found in the customs and usages of the people among whom it grew and developed."[41] This is the reason many Islamic jurists like Ibn-Taymia also hold the view that to know the real spirit of the Islamic law we should know the customs and rituals of pre-Islamic Arabs, because most of the legal provisions in Islam are definitely affected by the customs and usages of pre-Islamic Arabs. Prophet Mohammad did not outrightly reject all the customary laws of Arabs. In the same spirit, while interpreting the provisions of Dissolution of Muslim Marriages Act, 1939 (hereinafter Act, 1939), one must know the history, as to why about 100 years ago a law for woman to get rid of undesired husband was enacted, when no other legal system in India allowed this. Under prevalent Islamic law in India *i.e.*, in *hanafi* law, woman has no right to dissolve marriage even if her husband is suffering from leprosy, unsound mind, not providing her maintenance, indulging in cruelty or inflicting atrocities. Some Muslim jurists and *ulemas* like Maulana Thanvi launched a movement and created awareness among the Indian Muslims that *hanafi* law is not the only law of Islam and all seven schools of Islamic jurisprudence are equally good. If something is harsh in one school, the other school can be preferred with consensus and accordingly a *fatwa* could be issued.[42] This doctrine of inter school divergence is known as *takhyyar* (eclectic choice). After long efforts, awareness in the masses grew and women got a sigh of relief when the bill was introduced in the legislative assembly. Many Hindu women wondered why they were deprived of their rights in this respect. The contribution of Maulana Thanvi and his book *Hilat al-Najizah* (a

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41 Abdur Rahim, *Muhammadan Jurisprudence* 1 (All Pakistan Legal Division, Lahore, 1958).

42 Furqan Ahmad, *supra* note 31.

lawful devise for disabled women) was mentioned in the object, content and reasons of the bill. A mention of the efforts of Maulana Thanvi for women's emancipation is also found in the speech of Mohammad Ahmad Kazmi, the member who had introduced the bill.[43]

In order to understand the interpretation of the provisions of Act, 1939 it is necessary to know the history and object for which this legislation was brought. Then, of course, the interpretation given by the court will be in the interest of the woman. However it may be added that very few legal professionals perhaps have taken the trouble to understand the objective and historical background of the law so far. A unique quality of Iyer's J judgments is that he examined the law from its origin and that is why he was able to understand the spirit of Act, 1939.

In *Aboobacker Haji* case before the Kerala High Court, the issue was whether under the Act, 1939 an insistence on behalf of the husband to adopt religious reforms and modern lifestyle would amount to cruelty and a ground for divorce.[44] Iyer J observed:[45]

> The story of cruelty set up here is of a species too subtle for legal forceps. The man is not reported to be living an un-Islamic way of life, although I do Not understand it to be within the puritan rights of an obscurantist wife to cry 'cruelty' if her husband departs from standards of suffocating orthodoxy. No female can hold the male chained to bigoted beliefs and ritualistic observances on pain of jettisoning him out of wedlock if he subscribes to religious reforms and a modern mode of living. And yet, that is the trend of the evidence in the case. The statute prohibits her being obstructed in her religious observances but does not arm her with a whip to lash her partner into five daily prayers and observance of fasts and celebration of feasts according to the book or the mullah. The courts of fact have declined to swallow her tale of religious torture, a plea too statutorily tailored to be true in actual life.

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43 Statement of object and reasons, Dissolution of Muslim Marriages Bill, 1939. For historical detailed historical account of the bill see, *supra* note 2.

44 *Supra* note 39.

45 *Id.* at 667.

Cruelty being one of the grounds amongst nine grounds given in section 2 of Act, 1939, Iyer J rightly pointed out that if a husband obstructs his wife to perform religious activities then it may be treated as cruelty but if the husband is not strictly adhering to religious rituals it cannot be treated as cruelty. Section 2 (ii)[46] of the Act, 1939 enables a Muslim wife to seek judicial divorce on the ground that the husband has neglected or has failed to provide for her maintenance for a period of two years. Is this right absolute or conditional and, if it is conditional what are the conditions regulating it? This question has been debated and decided in different ways in the courts of the Indian subcontinent. In *Yousuf Rowthan case*[47] Iyer J regarded this right of the Muslim wife as wholly unconditional and was convinced that this view was in conformity with the breakdown theory of divorce on which the Islamic matrimonial law was based. In the case of *Ithoochalil Meethal Moossa* v. *P. Pachiparambath Meethal Fathimas*,[48] Menon J of Kerala High Court dittoed the decision and the arguments in *Yusuf Rowthan's*[49] case. Referring to some authentic commentaries of the Holy Quran, the judge concluded that he was in perfect agreement with Iyer's J views.

In a contrary judgment, *Mst. Zoona* v. *Mohammad Yakub Najjas*,[50] Kotwal J of the Jammu and Kashmir High Court decided otherwise. In his opinion, a Muslim wife living separate from her husband without any reasonable cause would not be entitled to seek divorce under section 2 (ii) of the Act of 1939.[51]

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46 S. 2 (ii) of Dissolution of Muslim Marriages Act, 1939, which reads thus: (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years.

47 *Supra* note 3.

48 AIR 1983 Ker. 283.

49 *Supra* note 3.

50 AIR 1983 J&K 78.

51 Tracing the origin of the innovation of breakdown theory Iyer J quotes J.N.D Anderson, "Modern Trends in Islam: Legal Reform and Modernization in the Middle East" 20(1) *The International and Comparative Law Quarterly* 1-21 (1971): "Very considerable relief has been given, almost everywhere, to ill-used wives.....In Tunisia, Pakistan and Iran things have gone further than this. The Tunisia Code allows a wife to insist on divorce, whatever her reasons may be, provided she is prepared to pay such financial compensation as the court may decree. In Pakistan judge made law become intolerable, on condition that she pays back her dower and returns ant gifts which she may have received in respect of the marriage. And in Iran she can apply for a divorce, after first obtaining a certificate of impossibility of reconciliation, on a wide variety of grounds (in which virtual equality between husband and wife has been achieved)."

He was convinced that interpreting that section literally so as to give to the wife an unconditional right to divorce, would be against the policy of Islamic law. Iyer J thus discussed at length what is breakdown and how that breakdown may be considered as the ground for divorce under Act, 1939. Under section 2 among the nine grounds, clause (ix) says that 'any other ground which is recognized under Islamic law'. Iyer J observed in this regard:[52]

> The sanctity of marriage is perceived not merely by the morality that permeates it, but by the reality that holds the family together; one without the other spells a breakdown; and so a ground for divorce may well be made out if there is a total irreconcilability between the spouses. The Muslim Law, independently of Act 8 of 1939, accepts this ground for dissolution of marriage, as I have held in Yusuf Rawthan's case; and the statute itself in s. 2 (ix) preserves "any other ground which is recognized as valid for the dissolution of marriages under Muslim Law". It, therefore, follows that we have to see whether any ground of breakdown has been set up and, if so, whether it has been made out.

The law passed for emancipation of victimized woman in India about a 100 years back was totally in agreement with the established law of Muslims in India. It may be mentioned that the following words of Iyer J highlighted the policy of Muslim jurists on which this law was based. It states:[53]

> The law has to provide for possibilities; social opinion regulates the probabilities. For all these reasons, I hold that a Muslim woman, under section 2 (ii) of the Act, 1939, can sue for dissolution on the sore ground 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.

Anyhow Iyer J was rightly of the view that Islamic law accepts irreconcilable breach as a ground for dissolution. If the wife alleges that her life with the husband has become insufferable and therefore she does not want to cohabit with him at all, divorce is permitted. Since Iyer J understood the law carefully in its true spirit, he was in favour of giving remedy to Muslim woman preserved

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52 *Supra* note 39 at 670.

53 *Id.*, para 7.

under the Act, 1939.[54] *Khula* as it is interpreted by Iyer J on the lines of Pakistan's Supreme Court in *Khursheed Biwi's*[55] case, is the true law. *Khula* is of course the wife's right to divorce *mutatis mutandis* to man's right to *talaq.*

As far as for a Muslim husband marrying second time during the subsistence of first legal marriage, it was made clear that the wife is entitled to get separate maintenance and is not legally bound to cohabit with the husband.[56]

## IV Maintenance

The law of maintenance, particularly the maintenance of wife has created history in the arena of Islamic law of India. Under Islamic law, husband is entitled to maintain his wife till subsistence of marriage and after divorce till the period of *iddat.* This is a codified law of some established schools of Muslim jurisprudence particularly *hanafi* and *ithna-ashari* law which are applicable and prevalent in India. Since maintenance is covered under criminal law which after amendment of 1973 to the CrPC included the divorced wife in the definition of wife. Section 125 of the CrPC, 1973 imposes an obligation to maintain wife which includes divorced wife with a caveat to maintain till she is not remarried. The traditional law followers protested against this legislative measure and therefore it was further amended under section 127 (b) which stipulates that if the sum of dower amount paid to wife and other 'customary or personal law sum' is sufficient to fulfill the divorcee's need, the magistrate may exempt former husband from maintenance. This customary or personal law sum or gift as well as *mehar* is the substitute provided by the later amendment. The confusion this led to has been discussed above.[57]

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54 S. 2 (ix) of the Dissolution of Muslim Marriages Act, 1939. It reads thus:- "on any other ground which is recognised as valid for the dissolution of marriages under Muslim law: Provided that-

(a) no decree shall be passed on ground (iii) until the sentence has become final; (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and (c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

55 *Khurshid Bibi* v. *Mohd. Amin,* PLD 1967 SC 97.

56 *Shahulameedu* v. *Subaida Beevi* 1970 KLT 418.

57 Refer to the discussion on 'dower'.

The harmonious construction of these two provisions made by Iyer J in *Fuzlubi* v. *K. Khader Vali* [58] and *Bai Tahira* v. *Ali Hussain Fidaalli Chothia* [59] did not lead to any controversy and was peacefully admitted. However, in *Shah Bano*[60] the interpretation of these concepts opened many floodgates. The Supreme Court did not confine itself to the legislative provisions but interpreted the Quranic verses; a fair provision *i.e.*, *mata* which is mentioned in the verses of Holy Quran was also referred to and accordingly a lifelong maintenance of divorcee was reaffirmed, completely ignoring the provisions of section 127 (b). This invited resentment from traditional *ulema* and afterwards Muslim masses. In order to overpower the furore of Muslims against the intervention in their law and religion, the legislature passed a law known as the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter Act, 1986) owing to which a Muslim wife is exempted from the provisions of CrPC. Though the validity of this Act was upheld by the apex court but since then till date, Supreme Court itself has decided the cases under CrPC in order to award maintenance to muslim wife keeping aside the later Act of 1986.[61]

In this context how Iyer J tried to harmonize and explain various issues on this aspect is worth appreciating. Whether it was legislature or judiciary, Iyer J never hesitated to correct their anamolies at various places. What he explained, exposed and analyzed on this issue through his judgments is being reproduced as under.

He firmly believed that the law on maintenance applied to one and all irrespective of region and religion. He believed in the secular nature of maintenance law. In one instance, a Muslim husband had requested for restitution of conjugal rights and the wife had applied for a decree of divorce, The dismissal of the petition for the decree of divorce, according to Iyer J, did not *ipso facto* lead to allowing the petition for restitution of conjugal rights; besides the wife was entitled for maintenance even if both the petitions were dismissed.[62] While called upon to decide the issue of maintenance, Iyer J very wisely interpreted section 125 of CrPC.[63] The husband had divorced his wife.

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58 (1980) 4 SCC 125.

59 (1979) 2 SCC 316.

60 *Mohd. Ahmed Khan* v. *Shah Bano Begum* (1985 SCR (3) 844).

61 See for instance, *Shamima Farooqui* v. *Shahid Khan,* AIR 2015 SC 2025.

62 *Aboobacker Haji* v. *Mamu Koya* 1971 KLT 663.

63 *Bai Tahira* v. *Ali Hussain*, AIR 1979 SC 362. Also see, *Fuzlubi* v. *K. Khadervali*, AIR 1980 SC 1730.

Thereafter wife moved the magistrate under section 125 CrPC for grant of maintenance to herself and her son, which was granted. On appeal the sessions judge held that the court had no jurisdiction under section 125. The high court dismissed the wife's appeal. Consequently, the appeal came before the Supreme Court. Interpreting the situation and removing the confusion between dower and maintenance, Iyer J opined that no husband can under section 127(3) (b) claim absolution from his obligation under section 125, except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to the maintenance allowance. The deep understanding of Iyer J, of both codified and divine law, is beautifully manifested in his following observations:

> The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfillment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the Court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit If the first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under section 125 then section 127(3) (b) subserves the goal and relieves the obligor not pro tanto but wholly the purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. There must be a rational relation between the sum so paid and its potential as provision for maintenance.

The misery of a divorcee was also recognized by famous Indian Muslim jurist, Maulana Asraf Ali Thanvi while he was advising his disciple and leading scholar, Abdul Majid Dharahadi, who wanted to seek separation on the ground that the marriage had irretrievably broken down. Maulana's reply in this regard was significant:[65]

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64 AIR 1980 SC 1730.

65 Maulana Thanvi, as cited in *supra* note 2. It may be mentioned to note that Rs. 5 and Rs. 10 per month were more than worth money, 100 years ago for woman's expenditure.

> I agree with you that you would arrange another husband for her. This is one alternative which you think suitable but this may have some defects. If at another place she is unable to maintain harmonious relationshiip and in case her marriage tie irretrievably breaks down then you would be responsible for that. You think over the matter again and again and if it is inevitable for you in the present circumstances and you have decided to divorce her you should do it with the condition that if she does not many again, you will pay her an amount of Rs 5/- per month forever during her life time and if she remarries you will give her an amount of Rs. 10/- per month until her second marriage.

The understanding of Iyer J about the true spirit of law of maintenance and its exposition had saved the nation from any furore. However, legislation was brought in a hurried manner after the controversial judgment of *Shah Bano.*[66] KNC Pillai has rightly remarked that Iyer's J intelligent way of interpretation of section 125 Cr PC in *Fuzlumbi* and *Bai Tahira*[67] could have helped the nation to avoid the Act, 1986. As an aftermath of controversial judgment of *Shah Bano,*[69] the above mentioned legislation came into being with many pitfalls. This legislation provided maintenance to a divorcee through the *waqf* property in case no other relative is available (living) and capable of maintaining her. This is highly problematic as the law of *waqf* is not similar to law of trust and the state has no authority to invest the usufruct of the *waqf* property for the purpose it is not dedicated to by the dedicator (*waqif*). It would be worth mentioning the observation of Iyer J:[70]

> It is an ultra vires injustice to the law of the wakfs because wakfs are not trusts to look after privatized wrongs inflicted by the irresponsible talaqs.

## V Some other socio-economic issues

Not only laws of status but some other social as well as property laws of Islam have also not been explained by Iyer J. A few illustrations are as follows.

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66 *Mohd. Ahamad* v. *Shah Bano Begum*, AIR 1983 SC 1526.

67 *Supra* note 63.

68 KNC Pillai, "Foreword" in Sebastian Champappilly, *Muslim Law* vii (Southern Law Publishers, Cochin, 2006).

69 *Supra* note 66.

70 V.R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act, 1986* xviii (Eastern Book Company, Lucknow, 1987).

**Gift**

A leading case decided by Iyer J on property law, related to law of gift. As we know that property can be disposed of by various means under Islamic law, for example through gift, will and inheritance. A man can gift his whole property during his lifetime provided the three essential ingredients should be completed to make it valid. The Kerala High Court in *Assan Rawther* v. *Ammu Umma*[71] discussed the concept in detail and according to Iyer J, it is nothing else but what is declared by various Islamic jurists *i.e.*, declaration of gift by the doner, the acceptance of the gift 'expressed or implied' by or on behalf of the donee and delivery of possession of the subject of the gift by the doner to the donee to the extent the interest conveyed is susceptible of. A declaration, according to him, in this regard should not be a ritual but a reality. It need not be a formal statement but may be made out by the conduct. Under Islamic law a gift can be made orally and it is of course the established legal position which is not only recognized by Privy Council but reaffirmed by the Supreme Court recently.[72] However, according to Iyer J, section 129 of Transfer of Property Act, 1882 (TPA), which exempts gifts of moveable property under Islamic law, has its own significance; the need for a document and its attestation and registration are not necessarily inhibited by section 2 of Muslim Personal Law (Shariat) Application Act, 1937. Moreover, the expression 'gift' in section 2 along with trust and trust properties and *waqfs* takes colour from the society of these words. The amplitude of the expression of 'gift' in section 129 must be read down so as to restrict it to the transactions and presents with a religious or charitable motivation or purpose. Therefore, oral gifts of secular nature as distinguished from the gifts of religious nature should conform with the requirements of writings, attestations and registration as laid down in section 123 of TPA. By classifying gifts into religious and secular categories, these judgments imports into the fabric of Islamic law that which is not known. However, Iyer J limits the scope of the expression gift in section 129 of the Act to that category of gifts which have religious import or charitable motivation and purely secular gifts cannot get the protection of section 129. With great respect to the judge, it may be submitted that this interpretation may create many complications. *Firstly,* it is difficult to differentiate between religious and secular gifts in all cases and as Mahmood J observed "[i]t is to be remembered that Hindu and Mohammedan law are so intimately connected

71 (1971) KLT 684.

72 *Rasheeda Khatoon* v. *Ashiq Ali,* 2014 (11) SCALE 694.

with religion that they cannot be dissevered from it."[73] *Secondly*, the concept of charity in Islam is very wide. An act which ordinarily may not look charitable is really a charity. For example, gift to one's own descendants or relations will be charitable and therefore, in most of the cases, the distinction between 'religious or charitable' and 'non-religious' may become extremely difficult and it would be very confusing for the present day judges to distinguish the same.

Over all the decision of Iyer J does not hurt the basic tenets of Islamic law. However, in this present atmosphere sometimes oral gifts may create problem more so if all the above three elements are not easily proved. The problem is that in some states like UP *etc.* the registration fee for the gift and sale is put at par in order to avoid mischief during the sale by giving it the name of gift. Neither a poor donee nor doner is in a position to spend lot of money for a mere pious and charitable purpose which has nothing to do with sale or any other benefit. Had Iyer J been aware of this fact he would have suggested the remedy for these poor doners and donees, if such a case was a put before him to decide.

**Parda**

It is worth mentioning that *parda* or veil system is not strictly attached to the legal aspect of Islam rather it a social tradition prevalent in almost all the ancient communities. Women were not allowed, unlike in western countries, to move around and mix with males without proper and appropriate traditional dress. Whether such practices forcefully bind those who are champions of liberalism is assessed in a case by Iyer J.[74] The court investigated the custom in harmony with the requirements of section 132 of CPC, 1908. Iyer J explaining the same, clarifies that women who according to the customs and manners of the country, ought not to be compelled to appear in public, should be exempted from personal appearances in the court. Similarly, courts should be careful to see whether in the context of the case and norms of conduct adopted in a particular community, if the women should be kept away from

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73 *Govind Dayal* v. *Inayatulla; Bibi Maniran* v. *Mohammad Isaque*, AIR 1962 Patna 229; *Moti Das* v. *S.P. Sahi*, AIR 1959 SC 942; J.N.D. Anderson, "Modern trends in Islam: Legal reform and Modernization in the Middle East" 20 *International and Comparative Law Journal* 1 (1971).

74 *Kunhu Mohammad* v. *T.K. Ummayithi Allias Umma Haji Umma* (1969) KLT 418.

the public places.[75] The right available is a limited right which exempts from personal appearance in court while holding its public hearing and it does not extend to her examination in camera in the chambers of the judge or some other place where both parties have equal facilities.[76] Though Iyer J did not decide the case in Islamic perspective since *parda* is more a social tradition than legal order under Islamic society. The purpose of *parda* is to save the society from corruption and that is why Maulana Thanvi is also of the opinion that it should be observed as per the requirement and need. He was also of the opinion that judges and witnesses are allowed to look at the face for giving judgment and evidence respectively. Similarly, a doctor is allowed to look the location of disease. These professionals are allowed even if there is a danger of sexual attraction, says Maulana Thanvi.[77] At the same time, Islamic law is also in agreement that women cannot escape from appearance as a witness in the name of *parda* system.[78] Thus, most of the observations made by Iyer J were in consonance with the views of Maulana Thanvi, the renowned jurist of early 20th century in consonance.

## VI Conclusion

The above expositions of Iyer J on various aspects of Islamic law reveal that he never tried to understand the law from the perspective of British judges or from secondary sources. At the same time, he did not confine himself to the distorted picture of law presented by some judges and the uneducated *maulvis*. He tried to learn the law from its original sources in its letter and spirit and after understanding its historical background. This is the reason why we find that his judgments quote extensively the verses from the Holy Quran and Prophet's traditions. At the same time he extensively the quoted the leading books of Islamic jurisprudence while interpreting Islamic law and its various major and minor components. This approach makes him markedly different from his

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75 *Id.* at 423. Iyer J writes: "It is conscience and consciousness of the community as a whole and not the individual disposition of an affluent family or set of families that matters. S. 132 of CPC, 1908 cannot be treated as a concession to some aristocratic families, but is recognition of a universally observed custom."

76 *Id.* at 424. Iyer J writes: "…Judge has the power to direct the examination of a party or witness in his chambers or in some place other than the residence of the person to be examined."

77 See for details Asraf Ali Thanvi, *Indaad-al-Fatawa* (1327 A.H.) as cited in Furqan Ahmad, "Role of Some Indian Muslim Jurists for the development of Islamic law in Indian Sub Continent" 34 *JILI* 577 (1992).

78 *Ibid.*

brother judges who unfortunately give judgments without having consulted even the elementary books of Islamic law and without going through the precedents by other, wiser members of the bench. Undoubtedly some of the judges in the past like Behrool Islam J, Basant and Badar Durrez Ahmad JJ have shown remarkable diligence.[79] There are other living and active examples of hard working judges who try to read and understand Islamic law.

The interpretation of law, particularly of those laws which are strictly associated with religion and social customs, must be done very carefully. One should know the background, the intent, the letter and spirit of such laws. Iyer J did not leave any stone unturned to do justice with the interpretation of Islamic law. His contribution for the protection and interpretation of the law in its true spirit will always be a torch bearer not only for the lawyers but for students and other legal professionals. All those who want to understand the true law in its true spirit must read his judgments and his writings on Islamic law. This will not only remove their confusion but also save the Muslim society from being misguided by the political leaders. Last year while the nation was celebrating Iyer's centenary, he left for the heavenly abode. However, he would always be remembered for the wealth of Islamic legal literature he produced through his judgments. This would indeed prove a treasure for the future Islamic law students of India and abroad. Persons like Krishna Iyer are born once in a generation. His contribution towards Islamic law is a sound treasure for bench, bar and academicians to read, learn and follow. Similarly, his life as a judge, his knowledge, his humility and his sense of justice is an inspiration and an example worth replicating by present and future judges, academicians and senior lawyers who should never be blinded by power, education or wealth. The void he left behind will take time to fill. To wind up, the author wishes to pay homage to the departed soul of a great son of India:

*Humare baad andhera rahega gulshan mein,*
*Bahut cherag jalaoge roshni ke leiye*

People will forever remember me, for my persistent efforts. You would try your best to find my substitute, but it will always remain a herculean task.

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79 Behrool Islam J had pronounced remarkable judgments on law of divorce but unfortunately it could not find place in law reports/ journals. For complete text of Bchrool Islam's J judgement see, Furqan Ahmad, Triple Talag Appendix III, 142-58 (1994). For Basant's J observations see, *Abdurahiman* v. *Khairunneesa,* 2010 (1) KLT 891 in Furqan Ahmad, "Muslim Law", XLVI *ASIL* (2010). Also see, *Masroor Ahamad* v. *State (NCT of Delhi),* 2009 DLT 512.