**Al-Azvā** **الاضواء**
ISSN 2415-0444; E- ISSN 1995-7904
Volume 33, Issue,49, 2018
Published by Sheikh Zayed Islamic Centre,
University of the Punjab, Lahore, 54590 Pakistan.

# Revisiting *Abdul Kadir v Salima*: *Locus Classicus* on Civil Nature of Marriage?

Shahbaz Ahmad Cheema*

Abstract:
*Abdul Kadir v Salima* is one of the most important cases on the nature of Muslim marriage and its legal consequences in British India. Syed Mahmood -the author of the judgment- is considered to have propounded that marriage under Islamic law is a civil contract. The holistic analysis conducted in the paper questions this attribution to Syed Mahmood and argues that he alluded to such notion for judiciously resolving the issue at litigation, i.e. maintainability of the suit for restitution of conjugal rights in case of non-payment of dower. It was not his objective to propound an absolute theory of universal application as to civil nature of marriage. The main contribution of *Abdul Kadir v Salima* was to facilitate the transplantation process of the suit for restitution of conjugal rights into Anglo-Muhammadan law and augment its religious sanctity by equating it with mutual rights of cohabitation of spouses under Islamic law. Additionally, the paper juxtaposes some of the main propositions of *Abdul Kadir v Salima* with Pakistani cases to appreciate the points of converge and divergence.

**Key words: *Abdul Kadir v Salima, Locus Classicus,* Civil Nature of Marriage.**

## Introduction:

The institution of marriage occupies a unique status under Islamic family law. Marriage is at the foundation of a Muslim family which constitutes a basic unit of a society. In Indian Sub-continent, it is hard to find any book on Islamic family law which does not incorporate a celebrated case on this subject titled *Abdul Kadir v Salima*.[1] It is a full bench decision by Allahabad high court which deals with some important issues pertaining to Muslim marriage. The legal value of this case has captured the attention of the author to revisit it by exploring the main principles laid down and analyzing their relative significance.

The extraordinary status attained by *Abdul Kadir v Salima* is for numerous reasons: some of which could be identified, while some other would remain elusive. For instance, it was penned down by first Muslim judge of any high court in British India; the author was a son of a revered

*Assistant Prof., University Law College, Punjab University, Lahore, Pakistan.

Muslim leader of early colonial era, namely Syed Ahmad Khan; the author of the judgment, in addition to his mastery of British legal system, was well acquainted with classical Islamic texts to which he frequently referred to in his judgments; and the decision in hand has constructed the conjugal relationship between Muslim spouses in Indian Sub-continent in the legal phraseology understood by the legal apparatus of British raj.

The analysis conducted in the paper evaluates the text and context of *Abdul Kadir v Salima*. It examines the sources referred to by the judge and what was the purpose of reference. The main focus of the paper is to dispute the attribution of 'civil marriage theory' to Syed Mahmood by a deconstructive analysis of the case. During the course of the analysis, the paper also compares, albeit briefly, some main principles of *Abdul Kadir v Salima* with Pakistani case law to evaluate how far they still hold the field. Sometimes cases decided in the past after being analyzed and reanalyzed through secondary sources and commentaries appears to shift their main focus of debate. Probably, this type of shifting of focus has been wrought upon *Abdul Kadir v Salima*: what was relatively less contemplated by the learned author of the judgment that attracted more attention as compared to its main thesis. The present analysis is an attempt to re-fixing the main thesis of the case.

## Syed Mahmood and *Abdul Kadir v Salima*:

Former Chief Justice of India M. Hidayatullah in his tribute to Syed Mahmood -the first Indian judge of Allahabad high court- explained the manner in which he used to decide the cases.[2] His technique of rendering decisions was influenced from numerous factors and extensive range of sources. According to CJ Hidayatullah, "[h]is method of approach was not one but multifarious" because Syed Mahmood was of the opinion that "[l]aw is capable of being investigated from diverse angles."[3] Some of the most prominent sources relied on by Syed Mahmood in his decisions and highlighted by the Chief Justice were "the vast knowledge of Roman jurisprudence and the whole of classical culture", the influence of "British, Continental and American systems", his undeterred access to "the original texts in Arabic" and his leaning towards equity than on common law.[4]

Allahabad high court commemorated its centenary celebrations in 1966 which would have been imperfect without mentioning of Syed

Mahmood.[5] Sri Gur Dayal Srivastava argued that it would have been impossible to transplant successfully the common law system into Indian Sub-continent without genius and legal craftsmanship of indigenous judges like Syed Mahmood who were not only well versed in British legal system, but also well acquainted with local religious and cultural sensitivities.[6]

Like his father, Syed Mahmood developed a cordial working relationship with British raj. Despite cordial relationship, he steadfastly advocated the equal treatment of native Indians at the hands of the colonial government. Similar to many Muslim leaders of his age, Syed Mahmood was of the view that the Muslims could not get out of their miserable and dismal situation without acquisition of modern knowledge which was accessible in English language.[7] Additionally, he encouraged the traditional and classical Islamic learning in Arabic language. He opined that the non-availability of instructions in Arabic language would cut us off from the vast heritage of Islamic law causing horrendous injury to its administration in Indian Sub-continent.[8]

Syed Mahmood attained fame in legal arena for many of his judicial pronouncements. Some of those decisions have been mentioned by CJ Hidayatullah[9] and Sri Gur Dayal Srivastava[10] in their tributes to Syed Mahmood. It is rather surprising to note that none of them have considered *Abdul Kadir v Salima* as worth-mentioning case. It is another matter that none of them has claimed exhaustiveness of their list of ground-breaking cases. The analysis of almost one and half dozen cases by CJ Hidayatullah without inclusion of *Abdul Kadir v Salima* conveys that he did not consider it to be of that stature which it had assumed over the years in Indian Sub-continent.

*Abdul Kadir v Salima* first surfaced as a normal matrimonial dispute between spouses in 1883. Abdul Kadir was married to Salima and the marriage remained pleasant and friendly for three months. After this period, the wife went to visit her parental abode and upon request by the husband to accompany back to her nuptial home, her father declined to let her go. Few days later, the dispute landed in judicial forum of British Empire in a form of suit for restitution of conjugal rights initiated by the husband against his father-in-law and wife.[11] The defendants' side responded with their version of the story comprising of pronouncement of divorce, non-payment of dower and cruelty. The court of first instance was not convinced about the first and third counter claim of the defendants, but found some legal value in the second counter claim, i.e. non-payment of dower. The court pointed out that though nature of dower was not settled

at the eve of marriage, but even than in case of non-payment, the husband was obliged to disburse some of its amount as prompt dower. It is pertinent to mention that during the case hearing, the husband deposited the entire amount of dower in the court. Considering the deposit of dower, the court pronounced a conditional judgment for restitution of conjugal rights on payment of dower.[12]

Both parties appealed against the decision before the appellate court. While dismissing the appeal of the husband, it held that since the dower was not paid before the initiation of the suit, the husband did not have any cause of action to seek judicial relief.[13] This decision brought the parties before Allahabad high court. The division bench of the court referred the matter to the full bench on the issue of maintainability of the suit on non-payment of dower. In simple words, whether the suit for restitution of conjugal rights was maintainable before payment of dower.[14] Hence, the answer to this issue was *ratio decidendi* of the case, while all other matters pondered upon and discussed by the court formed its *obiter dicta*. After hearing the case, the full bench of the high court adopted the affirmative opinion written by Syed Mahmood. It is interesting to note that Syed Mahmood was part of the division bench before which the matter was initially placed, but was not part of the full bench which adopted his written opinion.

There were three issues on which Syed Mahmood opined in *Abdul Kadir v Salima*: the first was as to the nature of Muslim marriage and its consequences; the second related to the nature of dower and the effect of its non-payment on the husband's right to restitute his conjugal rights; and the last was on the manner of resolving dispute/contestation when it arose among various jurists of Hanafi school of law. Strictly speaking the resolution of the case founded on the second issue, but the judge delved into connected issues for making his judgment more convincing from the perspective of Islamic law. The paper has discussed the first two issues, but has not touched upon the third as it would land us to jurisprudential debate of significance of its own and the paucity of space in the present paper does not justify such treatment.[15]

During the course of writing the judgment, Syed Mahmood relied on diversified sources of reference from precedents of Privy Council and Indian high courts on the one hand and the standard Islamic law books translated during British raj on the other, e.g. Hamilton's *Hedaya*[16], Baillie's Digest[17]. Additionally, we come across references in the decision to some original Arabic books on Islamic law which are held in high esteem by Hanafi school of law, e.g. *Durrul Muktar*[18] and *Fatawa Qadi*

*Khan*[19]. In his decision, Syed Mahmood referred to and analyzed more than one dozen precedents: two of them are of more consequences than others. The one is *Moonshee Buzloor Ruheem v Shums-oon-nissa Begum*[20] which was in reality the foundation of his decision and another is *Sheikh Abdoo Shukhoor v Raheem-oon-nissa*[21] which was overruled. It is not surprising that both are on the issue of restitution of conjugal rights and not on the exact nature of marriage. As pointed out at the beginning of this section with reference to CJ Hidayatullah,[22] Syed Mahmood did not forget to refer to Roman law[23] and equity[24] in his decision.

*Abdul Kadir v Salima* is a standard pen-picture of Syed Mahmood indicating various components of his 'legal being' which was shaped and groomed in a particular socio-political and religious setting. I do not intend to convey that he was reduced to nullity by the context, but want to highlight that it was his genius and exceptionality that he incorporated the maximum his context could have offered and then replicated the same with vigor through his decisions so that persons like us after a century or so could appreciate various currents and cross currents of that legal landscape.

## Nature of Marriage:

The first important issue on which Syed Mahmood discussed though relatively briefly was the nature of marriage. Two pages of his decision occupy this debate out of more than 20 pages. The substantive portion of the debate has been reproduced from Tagore Law Lectures (1873),[25] Baillie's Digest[26] and Hamilton's *Hedaya*.[27] Major part of the debate is comprised of legal formalities required for a marriage contract, such as offer and acceptance, and its legal impact on rights and liabilities of spouses.

There is no independent exploration or investigation in *Abdul Kadir v Salima* as to the nature of marriage though this aspect by necessity formulated the convenient stating point of the texts relied upon by Syed Mahmood. For instance, Shama Churun Sircar in his Tagore Law Lectures (1873) said and Syed Mahmood adopted the same that "marriage among Muhammadans is not a sacrament, but purely a civil contract".[28] The same author further explicates "[t]hat it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted…."[29] So, the requisites and formalities are of more consequence and they give an impression that marriage is a civil contract.

The decision reproduces from Baillie as "[m]arriage is a contract which has for its design the right of enjoyment and the procreation of children".[30] Has overarching objective of Muslim marriage as propounded

by Baillie, i.e. mutual sexual enjoyment of spouses and procreation of children, anything to do with conversion of marriage into a civil contract? From Hamilton's *Hedaya* "Marriage is contracted -that is to say, is effected and legally confirmed- by means of declaration and consent…."[31] So, the emphasis of *Hedaya* seems to be on how marriage in Islamic law is to be concluded and not on branding it as contract similar to other worldly affairs/transactions.

These extracts themselves indicate that Syed Mahmood did not intend to stir a contentious debate as to nature of marriage in Islamic law: his sole purpose was to highlight the main constituting elements of marriage along with its legal consequences upon the rights/duties of spouses. Though the texts also point out that he was not uncomfortable with the phraseology of contract for a marriage in Islam, but how far this nature was purely legal and civil that was not in his contemplation and nor was debated methodically and systematically. His main objective appeared to have been to emphasize that a marriage in Islamic law was bound to cause certain legal consequences in terms of cohabitation and payment of dower which the later part of his decision amply confirmed. And for achieving this purpose, there was no need to overemphasize on legalistic and civil nature of marriage to the exclusion of other dimensions of marriage -religious, social, emotional- than was already stated in the standard legal texts available then and referred by his goodself.

Marriage is defined or introduced in original Arabic books on Islamic law as "*aqd*" which literally means contract. And this contract like other contracts of civil and legal nature is executed through declaration/offer by the one party and acceptance of the other. The extracts referred to by Syed Mahmood incorporate such formalities. This formal and apparent semblance of marriage made the standard translators of Islamic law during British raj to employ the phrase like civil contract for marriage. But this formal and apparent semblance does not mean that it is exclusively civil and legal devoid of any religious consciousness and impulse. Sircar's definition of marriage in Islamic law as a 'purely civil contract' in contradistinction or opposed to 'sacrament' has been influenced conversely by Hindu notion of marriage as sacrament.[32] Muslim marriage as contract could only be held so if it is approached through binary categorization of either contract or status/sacrament.

From another perspective, though Syed Mahmood never resorted to any academic debate on the nature of marriage except the reproduction of some extracts from then available standard legal texts, but as his adoption was through the medium of judicial pronouncement, it assumed

more significance thereafter than the original sources on which it was basically founded. This dynamics opens for us a window about the significance of judicial precedent over the standard law books under the influence of British raj in Indian Sub-continent. Despite this inference, the relationship between the standard law books and their judicial reproduction as precedents is trickier than it appears from the above illustration.[33]

After reproduction of extensive extracts from the three standard books, Syed Mahmood commenced the next paragraph as "[t]hat this conception of mutual rights and obligation arising from marriage between the husband and wife bears in all main features close similarity to the Roman and other European systems…."[34] On the very next page,[35] in the same flow he said that "[n]ow the legal effects' of marriage, as enunciated in the *Fatawa-i-Alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife." These lines of Syed Mahmood make it clear that the focal point of his decision was not to discover the 'nature of marriage' but was to move steadily on the consequential and ensuing rights and obligations of spouses.

Syed Mahmood ingeniously kept himself away from extensive discussion on the contractual nature of marriage by mere reproduction of extracts from the standard legal texts as this discourse to such extent was sufficient for him to resolve the issue at litigation, i.e. the maintainability of the suit for restitution of conjugal rights on non-payment of dower.

It is remarkable to observe what Syed Mahmood avoided carefully, i.e., the nature of marriage in Islamic law, that became a source of academic debate afterwards. Many writers expressed their views on it.[36] Sir Abdur Rahim in his Tagore Law Lectures (1907) opined that marriage in Islam had the characteristics of both worldly and religious cum devotional affairs.[37]

It was probably Maulvi Samee Ullah Khan[38] who first criticized Syed Mahmood on some of his opinions expressed in *Abdul Kadir v Salima* in 1891 including the nature of marriage. The academic contestation started by grandfather was further peddled ahead by Maulvi Samee Ullah Khan's grandson Mahomed Ullah ibn S. Jung who wrote extensively on Islamic law and its administration in British India.[39] Following the footsteps of his grandfather though academically far more nuanced and eloquent, he gave some space to the nature of marriage in his

books and tried to highlight the religious, devotional and social aspects of marriage.

Commenting upon the definitions of marriage by Baillie, Roland Wilson and Shama Churun Sircar -two of them were relied upon by Syed Mahmood in *Abdul Kadir v Salima*-, Mahomed Ullah states that "these definitions only represent one aspect of the Muslim marriage; they ignore the ethical importance, and its religious value, and they fail to realise the close and intimate connection between religion and law in the Muslim faith."[40] In context of the British legal system then applicable in Indian Sub-continent where a precedent was undeniably preferred over individual opinions, he expressed that Syed Mahmood's conception of marriage as purely a civil contract in *Abdul Kadir v Salima* "may be taken to be decisive" in Anglo Muhammadan law as it was judicially laid down.[41] Despite this, he made an effort to present a comprehensive definition of marriage as "[n]ikah though essentially a contract is also a devotional act, its object are the right of enjoyment, procreation of children and the regulation of social life in the interest of the society."[42]

We do not find a single verse of the Quran and saying of Holy Prophet Muhammad (SAW) in Syed Mahmood's explanation of marriage in *Abdul Kadir v Salima*, but on the other Mahomed Ullah's discourse in addition to referring to standard *fiqh* books is built on numerous verses and says of Prophet Muhammad (SAW). Such nuanced explanation and discovery merits to be held as academically serious and exploratorily comprehensive. Mahomed Ullah's discourse on nature and conception of marriage in all of his books resonates and reiterates the above perspective and that too on the basis of almost similar source/reference material.

In an academic article, Mahomed Ullah audaciously took a different starting point and said in the first few lines that "[t]he Muslim jurists have not attempted a precise definition of marriage, they speak about the regulation of marriage-tie, about its continuance and dissolution."[43] To my understanding, this single sentence conveying that Muslim jurists were more concerned with the functional/operational aspects of marriage than in a theoretical inquiry as to its nature is the most important contribution of him on the subject. When the books of Muslim jurists were translated under the auspices of British raj, the translators got themselves in a perplex situation that on the one hand they had a full-fledged notion of civil contract enforceable by the courts and on the other they found the Muslim jurists using in their treatises the phrase '*aqd*' for marriage. So, they might have thought that the '*aqd*' in Muslim marriage and civil contract in their legal system were of similar nature and

consequences without appreciating the niceties of the both and then opted to translate '*aqd*' as 'civil contract'. Thereafter, this laxity crept into the judicial pronouncements and stirred a long drawn battle on the true nature of marriage which was never a point of contestation among the Muslim jurists.

We have concluded from the above, that Syed Mahmood did not embark on serious academic inquiry as to nature of marriage to decisively conclude the issue for ages and merely thought it appropriate to reproduce some extracts on this from standard legal texts then used in British India to facilitate his judicial debate on the main issue at litigation, i.e. the maintainability of the suit for restitution of conjugal rights on non-payment of dower. The nature of marriage was not pivotal to resolve the contentious judicial battle of *Abdul Kadir v Salima*, rather these were the allied rights and liabilities of the spouses which indirectly brought it to the main course and that too for the purposes of settling the spouses' claims and counter claims.

Pakistani courts have been following the similar course in latter half of 20th and early 21st century. On the one hand, they do not declare unconditionally that marriage is a civil contract so that it might not attract the legal consequences of other civil contracts which are not suitable for Muslim marriage, but on the other, they do not hesitate to present it as civil contract when it comes to the issue of protecting the rights of parties and particularly women's rights.

In *Shahida Parveen v Samiullah*[44] on the issue of damages like other civil contracts for breaching the marriage contract by the wife, Justice Saqib Nisar held that though marriage is a civil contract, but it is not similar to other civil contracts of sale, purchase, property and personal services. Hence, the provisions of breach of contract embodied in the Contract Act 1872 could not by any stretch of imagination be extended and applied to a marriage contract. The court in this case, without getting into the controversy how far the marriage in Islamic law is civil and legal theoretically jumped to the operational part of the litigation and resolved that the civil and legal nature of marriage could not be extended to the extent of infliction of damages on its breach.

In *Muhammad Masood Abbasi v Mamona Abbasi*[45] the parties incorporated a provision in their *nikahnama* that in case the husband divorces his wife without any justification he would pay Rs 100,000/-. The fateful incident took place and the divorcee brought a suit for recovery of the above said amount. The court, considering the marriage as civil contract, did not find any force in the objections raised by the husband that

such restrictions on his right to divorce could not be enforced being against public policy as understood in Islamic law. For the purpose of protecting the divorcee's right, the court held that such restrictions like any other reasonable restriction/condition can be incorporated in a marriage contract.

The above cases from Pakistan illustrate similar to *Abdul Kadir v Salima* that instead of delving into theoretical inquiry about nature of marriage contract, it is more important to resolve the matrimonial conflicts. The next section will deal with the matrimonial conflict confronted by Syed Mahmood in *Abdul Kadir v Salima*.

**Suit for Restitution of Conjugal rights and Non-Payment of Dower:**

*Abdul Kadir v Salima* was brought before the full bench of Allahabad high court for settling the issue of maintainability of the suit for restitution of conjugal rights by a husband without payment of dower. Two earlier cases -one by Privy Council and another by a high court- provide the background of the judicial battle. In *Moonshee Buzloor Ruheem v Shums-oon-nissa Begum*,[46] Privy Council had laid the foundation for the application of the suit for restitution of conjugal rights to Muslim spouses of British India. Disregarding the religious baggage of the suit, the Council said that this relief could be sought by Muslim spouses in case of desertion by one of them like an ordinary civil suit in civil courts of British India. Further, the Council opined that for the purposes of determining the valid defenses to the suit, the personal law of the spouses must be considered as relevant.

Relying upon the personal law of the parties, a high court in *Sheikh Abdoo Shukhoor v Raheem-oon-nissa*[47] came to the conclusion that under Islamic law without payment of dower a suit for restitution of conjugal rights by a husband was not maintainable. Considering the judicial precedent, the first appellate court in *Abdul Kadir v Salima* dismissed the appeal filed by the husband as non-maintainable on the ground of non-payment of dower before initiation of his judicial battle for the recovery of his wife. Hence, it was the issue of maintainability of the suit which the full bench in *Abdul Kadir v Salima* was supposed to address. And we find at the end of *Abdul Kadir v Salima* that this reference to the full bench was answered in affirmative leaving the rest of the issues involved to be decided by the division bench that sought guidance from the full bench.

The mixed issue pertaining to the suit for restitution of conjugal rights and non-payment of dower in *Abdul Kadir v Salima* depicts the uneasy marriage of Islamic law on the one hand, and transplantation of legal practices/instruments of British legal system on the other. At one end

of the case, it was unpaid dower which was claimed by the wife under Islamic law, and at another end it was the suit for restitution of conjugal rights claimed by the husband a remedy recently made available by the colonial legal apparatus. The first was a legal cum religious obligation according to Islamic family law and the second was a transplanted instrument of colonial regime which was originally engineered to keep an indissoluble English-Christian marriage intact. The synthesis was not easy to carve, but the layered legal reasoning of Syed Mahmood connected these divergent poles.

The suit for restitution of conjugal rights found its way into British India by *Moonshee Buzloor Ruheem v Shums-oon-nissa Begum*, but it was firmly grounded by Syed Mahmood in *Abdul Kadir v Salima*. He treated the suit for restitution of conjugal rights as an absolute equivalent to the mutual rights of cohabitation of spouses under Islamic law. Various passages reproduced and arguments extended by him during the course of his decision witness this bridging.

After briefly explaining the nature of marriage and its legal consequences on the rights and obligations of spouses, Syed Mahmood argued that the rights and obligations, such as cohabitation and payment of dower, arose simultaneously and the performance of one was not dependent on the other.[48] Syed Mahmood said that "under Muhammadan law, the right of cohabitation comes into existence at the same time and by reason of the same incident as the right of dower."[49] This transformation of the suit for restitution of conjugal rights as mutual rights of cohabitation of spouses augmented the religious authenticity of the former indescribably.

The wife's attorney on the basis of some extracts from Hamilton's *Hedaya* and *Durral Mukhtar* argued that non-payment of dower conferred a right upon the wife to refuse herself to her husband.[50] This view was also supported by some judicial pronouncements that the husband could not initiate a suit for restitution of conjugal rights unless he had discharged his dower debt.[51]

Syed Mahmood with his exceptional legal skill and foresight responded to the above contentions. He said that "the fact of marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vestiture of the right [of cohabitation], is to hold that a relationship, of which the rights and obligations are essentially correlative, may come into existence at one time for one party and another time for the other party."[52] He further explicated that it was logical

conclusion of the arguments extended by the wife's attorney that "her right of cohabitation with her husband would be dependent for its coming into existence upon the payment of her dower [by her husband]."[53]

According to Syed Mahmood, the defense of non-payment of dower was for securing dower and not for preventing other incidents of marriage.[54] Had it been otherwise, even the wife would not have a right of cohabitation unless her dower was paid. And in this situation, securing one right of the wife, i.e. payment of dower, would have prevented the performance of another right, i.e. cohabitation. Therefore, it was wrong to argue that in case of non-payment of dower, the suit for restitution of conjugal rights was not maintainable as it would have been equally detrimental to the wife's right of cohabitation.

What was the way out from this conundrum which was essentially created by reading the Islamic legal texts under the cognitive and legal structures of the colonial regime? Construing '*aqd*' as civil contract and cohabitation as an absolute equivalent to the restitution of conjugal rights was cognitively internalized, while routing the rights of the spouses through the legal technique of the suit for restitution of conjugal rights was structurally engrafted by British raj. What was the cause of perplexity, i.e. cognitive and legal structures of colonial regime, the same supplied the source of resolution, i.e. equity in English law. And it was Syed Mahmood's resourceful grasp on English legal system that he discovered it authoritatively and said with reference to the above mentioned case of Privy Council that "[c]ourts in India, in the exercise of their mixed jurisdiction as Courts of equity and law are at full liberty to pass conditional decrees to suit the exigencies of each particular case…."[55]

Accordingly Syed Mahmood proposed that in such situations, the course best suited was to pronounce a conditional decree for the restitution of conjugal rights on payment of dower as was done by the court of first instance and not to dismiss the suit for non-payment of dower as was the judicial approach of the first appellate court. He held that "… in the case of a suit by the husband, the defense of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt."[56]

For concluding the matrimonial conflict, Syed Mahmood travelled upon a tricky pathway struggling to maintain the balance between Islamic law on the one hand and colonial legal apparatus on the other. If we evaluate the manner in which *Abdul Kadir v Salima*'s arguments are structured, it palpably tilts in favor of the colonial legal apparatus. To be fair with Syed Mahmood, he plucked some petals from one flower and some from another and thereafter presented a workable amalgam of the both. This amalgam still has

many of its traces on the administration of Islamic family law in Pakistan though its rigors to a maximum extent have been calmed down.

In early years of the post-colonial Pakistan, the west Pakistan high court observed in *Mst Rahim Jan v Muhammad*[57] that non-payment of prompt dower did not deprive a wife to refuse her body to her husband even after consummation of marriage. In the last mentioned case, the court extensively relied upon the legal reasoning and analysis of a pre-partition Allahabad case titled *Anis Begum v Muhammad Istafa Wali Khan*.[58] A pending suit for restitution of conjugal rights does not prevent a wife from claiming her prompt dower.[59] Once a demand for prompt dower is made by a wife and refused by her husband, she is at liberty to reside at a place of her choice and that too on the expenses of her husband.[60] To a large extent, the judicial attitude of the courts in Pakistan pertaining to the suit for restitution of conjugal rights has been influenced by its misuse at the hands of scrupulous husbands for preventing their wives to enforce bona fide rights of maintenance and judicial dissolution as aptly highlighted by *Tariq Mahmood v Mst Farah Shaheen*.[61]

## Conclusion:

The paper has revisited one of the most cited cases from British India titled *Abdul Kadir v Salima*. It influenced and contributed to the legal landscape of Indian Sub-continent multifariously particularly to the matrimonial relationship between Muslim spouses. The case is for the most part remembered for exposition of 'civil marriage theory' about nature of Muslim marriage. This attribution is factually mistaken and academically not convincing. Syed Mahmood's allusion to marriage as civil contract was methodologically calculated move to avoid falling into a theoretical inquiry as to nature of Muslim marriage and to solve the matrimonial conflict before the high court in a manner not offensive to Muslims' sensibilities on the one hand and on the other befitting squarely within then growing Anglo-Muhammadan law. Syed Mahmood during the course of his decision synthesized various legal traditions of common law and equity on the one hand and Islamic law on the other in which the former possessed the cognitive as well as structural dominance.

Syed Mahmood in the case was responding to a matrimonial conflict caused by the application of a colonial legal apparatus, i.e. the suit for restitution of conjugal rights, to the religious precept of payment of dower and effects of its non-payment. He took the suit for restitution of conjugal rights as constant entity not subject to correction and thereby left the burden of accommodation to be borne by the Islamic precept of payment of dower. He further enhanced the religious sanctity of the suit for restitution of conjugal rights by evaporating the distinction between the suit and the spouses' mutual rights of cohabitation under Islamic family law.

Pakistani courts follow the judicial craftsmanship of *Abdul Kadir v Salima* as to nature of marriage. Without defining Muslim marriage as a civil contract in theoretical and absolute terms, they sometimes treat it so for the protection of rights of the parties and more precisely wife's rights, while on other occasions, they hold that this contract is not coextensive with other civil contracts for detailed legal implications. About the suit for restitution of conjugal rights, Pakistani courts though are unable to get rid of this colonial legal apparatus, but they have, to a reasonable extent, softened its rigors. If a husband does not discharge the liability of dower, his suit for restitution of conjugal rights is more likely to be dismissed and he may be required to bear maintenance in separate abode for his wife till the payment of dower instead of securing a conditional decree like the one pronounced in *Abdul Kadir v Salima*.

## References

1. (1886) 8 All 149
2. 'Justice Syed Mahmood' by Chief Justice M. Hidayatullah. Available at http://www.allahabadhighcourt.in/event/Justice_Syed_Mahmood_M_Hidayatullah.pdf (Accessed on 28-07-2018).
3. Ibid
4. Ibid
5. Centenary High Court of Judicature at Allahabad 1866-1966 (Volume 1) pp. 271-292. Available at http://www.allahabadhighcourt.in/centenary/centenary1.htm (Accessed on 28-07-2018).
6. 'Mr Justice Mahmood' by Sri Gur Dayal Srivastava. Available at http://www.allahabadhighcourt.in/event/MrJusticeMahmoodGDSrivastava.pdf (Accessed on 28-07-2018).
7. Syed Mahmood delivered two notable lectures on the subject at Muhammadan Education Conference in 1893 and 1894 which were later compiled and brought into a book form titled as 'A History of English Education in India' (1895). Available at https://archive.org/details/historyofenglish032043mbp (Accessed on 29-07-2018). See also Alan M Guenther (2011) Syed Mahmood and English Education in India, South Asia Research, Vol. 31, Issue 1, pp. 45-67.
8. *Tazkirah Syed Mahmood* (Urdu Booklet) at pp.32-34.
9. Supra no. 2
10. Supra no. 6
11. Supra no. 1 at p. 150
12. Supra no. 1 at p. 151
13. Supra no. 1 at pp. 151-152

[14]. Supra no. 1 at p. 152
[15]. For discussion on this issue see, Alan M. Guenther (2004) Syed Mahmood and the Transformation of Muslim Law in British India (PhD Thesis) McGill University, Canada.
[16]. Charles Hamilton (1963) The Hedaya or Guide: A Commentary on the Mussulman Laws (Edited by Standish Grove Grady), Premier Book House, Katchery Road Lahore. Available at https://archive.org/details/hedayaorguide029357mbp (Accessed on 29-07-2018).
[17]. Neil Baillie (1875) A Digest of Moohummudan Law, Smith, Eldor & Co. 15 Waterloo Place, London.
[18]. Supra no. 1 at pp. 160 and 165
[19]. Supra no. 1 at pp. 162 and 165
[20]. (1867) 11 Moo I. A., 551
[21]. N.W.P.H.C. Rep., 1874, p. 94
[22]. Supra no. 2
[23]. Supra no. 1 at p. 156
[24]. Supra no. 1 at p. 169
[25]. Shama Churun Sircar (1873) Muhammadan Law being a Digest of Law Applicable Especially to the Sunnis of India, Thacker Spink and Co. Calcutta. Available at https://archive.org/details/in.ernet.dli.2015.220651 (Accessed on 29-07-2018).
[26]. Supra no. 17
[27]. Supra no. 16
[28]. Supra no. 1 at p. 154
[29]. Supra no. 1 at p. 155
[30]. Supra no. 1 at p. 155
[31]. Supra no. 1 at p. 155
[32]. Mahomed U. ibn S. Jung, (1925) The Conception of Muslim Marriage, Allahabad University Studies, Volume 1, pp. 257-266 at p. 262.
[33]. See for instance, Scott Alan Kugle, Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia, Modern Asian Studies, Vol. 35, No. 2 (May, 2001), pp. 257-313; Elisa Giunchi, The Reinvention of Shari'a Under the British Raj: In Search of Authenticity and Certainty, The Journal of Asian Studies, Volume 69, Issue 04 (November) 2010, pp 1119-1142; Shahbaz Ahmad Cheema (2017) Mulla's Principles of Mahemodan Law in Pakistani Courts: Undoing/Unrevaling the Colonial Enterprise?, LUMS Law Journal, Volume 4, Issue 1, pp. 48-71; Shahbaz Ahmad Cheema and Samee Ozair Khan (2013) Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan, *Al-Adwa* 23-36.
[34]. Supra no. 1 at p. 156
[35]. Supra no. 1 at p. 157

[36]. Muhammad Munir, Marriage in Islam: A Civil Contract or a Sacrosanct, Hamdard Islamicus, (January-March 2008) Volume xxxi, Issue no. 1, pp. 77-84.

[37]. Abdur Rahim (1911) the Principles of Muhammadan Jurisprudence, London: Luzac & Co. at p. 327.

[38]. Maulvi Samee Ullah was a well known supporter of Aligarh movement and close ally of Syed Ahmad Khan. Like Syed Mahmood, he served as district judge in British era. He parted his ways with Aligarh on appointment of Syed Mahmood as Life Honorary Joint Secretary of MAO College. See Alan M. Guenther (2004) Syed Mahmood and the Transformation of Muslim Law in British India (PhD Thesis) McGill University, Canada, at pp. 189-190.

[39]. Al-Haj Mahomed Ullah ibn S. Jung (1926) A Dissertation on the Muslim Law of Marriage (Place of publication not mentioned on the downloaded file); Al-Haj Mahomed Ullah ibn S. Jung (1932) A Digest of Anglo Muslim Law, Allahabad: The Juvenile Press; Al-Haj Mahomed Ullah ibn S. Jung (1932) A Dissertation on the Development of Muslim Law in British India, Allahabad: The Juvenile Press.

[40]. Al-Haj Mahomed Ullah ibn S. Jung (1932) A Dissertation on the Development of Muslim Law in British India, Allahabad: The Juvenile Press, p. 2.

[41]. Ibid at p. 3

[42]. Ibid at p. 3

[43]. Supra no. 32 at p. 257

[44]. PLJ 2006 Lah 1215

[45]. 2004 YLR 482 (Lahore)

[46]. Supra no. 20

[47]. Supra no. 21

[48]. Supra no. 1 at p. 157

[49]. Supra no. 1 at p. 157

[50]. Supra no. 1 at pp. 159-160

[51]. Supra no. 1 at pp. 160-161

[52]. Supra no. 1 at p. 165

[53]. Supra no. 1 at p. 165

[54]. Supra no. 1 at p. 166

[55]. Supra no. 1 at p. 169

[56]. Supra no. 1 at p. 170

[57]. PLD 1955 Lah 122

[58]. AIR 1933 All 634

[59]. Tahir Ayub Khan v Mst Alia Anwar 2017 MLD 412 (Karachi)

[60]. Mst Shazia v Muhammad Nasir 2014 YLR 1563 (Peshawar)

[61]. 2010 YLR 349 (Lahore)