

Divorce *a mensa et toro*
and
Christian Minorities in Pakistan

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ABSTRACT

In Christian Divorce Act 1869 there are limited and stringent grounds available for dissolution of marriage, due to which Christians living in Pakistan are facing problems in settlement of their divorce issues. From theological and legal stand point divorce is difficult to obtain in Christianity, however their laws and religion allow for judicial separation more easily. Living in a Muslim majority country like Pakistan where Sharia and Muslim Family Laws Ordinance-1961 give more rights to women to dissolve their marriages or apply for Khula, Christian community is facing striking contrast in civil courts. Reasons behind this crucial issue are twofold, one theological and the other legal. Trends of ecclesiastical courts differ from the trends observed in civil courts where obtaining divorce or dissolving Christian marriage is comparatively easy. This article takes into account cases decided in Pakistani courts in last 10 years pertaining to Christian Dissolution of Marriage. It is concluded that the issue has become so strained due to differing opinions of Christian community and interpretation of Biblical texts by their religious scholars. Second reason appears to be lack of legislative developments in Christian Personal Laws' in Pakistan. Amendment in Christian Divorce Law was made difficult due to 'lack of consensus in Christian community leadership. This article is aimed to assess the importance and value of recent developments and efforts taken by Pakistan's Judiciary and Legislation to promulgate laws in order to ease this tension among Christian community and to provide them with a workable solution in Divorce cases.

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Introduction

Christians are the largest non-Muslim religious minorities living in Pakistan. In 2005 total number of Christians in Pakistan was estimated at 2.5 million, which is 1.6% of the population⁽¹⁾. There are about 4% Christians living in Islamabad Capital territory and Punjab Province has the highest population of 2.31%. However according to 1998 consensus Christians are scattered around Khyber Pakhtunkhawa, FATA, Sindh and Baluchistan⁽²⁾.

Since 1945 Christians in Punjab and Sindh have been very active in supporting Quaid e Azam's Muslim League⁽³⁾. Muhammad Ali Jinnah had promised complete equality of citizenship to all citizens of Pakistan. This was further reinforced in 1956 when Pakistan was declared 'Islamic Republic'. This meant that Islam would be the source of legislation in Pakistan and according to Islamic percepts non-Muslim religious minorities will have complete freedom of religion as was practiced in the time of Prophet Muhammad (Blessings and Peace of Allah be upon him)⁽⁴⁾. Upon Pakistan's independence a large number of Christians fled to Pakistan. Since then Christians have made numerous contributions towards national life of Pakistan. Justice A.R. Cornelius was the first Christian Chief Justice of Pakistan Supreme Court. Pakistani Christians have contributed towards the field of education, medicine, law and business. Wealthy native Christians established many educational institutions in leading cities of Pakistan. Christians have also served in Pakistan military service on important positions such as Major Generals, Air Vice Marshalls & Rear Admirals⁽⁵⁾. Churches and Cathedrals were established in all major cities of Pakistan. One of Pakistan's largest cathedral 'St. Patrick's Cathedral' is built in Karachi and 'Sacred Heart Cathedral' in Lahore. After 1980s Muslim-Christian relations in Pakistan continued to tarnish owing to various reasons⁽⁶⁾.

The core issue around which this article revolves is the application of Christian Divorce Act 1869 in Pakistan. Protection and preservation of the rights and status of minorities is globally considered as a human rights issue. It is for this reason that the

state of Christian minorities living in Pakistan has become so contentious.

Objectives of Research

Objectives of this research are to find out problems associated with the application of 'Christian Divorce Act 1869' in Pakistan. Christians living in Pakistan are facing numerous problems relating to their personal laws. This research is an effort to highlight their problems related to Marriage and Divorce or Dissolution and Annulment of their marriages and identifying reasons why dispensation of justice in family matters for Christian minorities could not be achieved in these 69 years in a state which came into being in the name of Islamic Republic of Pakistan.

Statement of Problem

There are two problems associated with the application of 'Christian Divorce Act 1869' in Pakistan. One is theological and the other is legal. Firstly, ecclesiastical churches have remained dominant in matters of personal laws of Christians. Marriages and divorces have been taking place in Church courts rather than civil courts of Pakistan. This State of affairs has left little room for 'Christian Personal Laws' to be developed by Pakistan's Judiciary. According to Christian theology marriage is a permanent relationship which cannot be broken and remarriage is not allowed in Christianity or is looked down upon where it is allowed. Secondly, the omission of Sec: 7 from 'The Christian Divorce Act of 1869'.⁷ This section said that 'Court to act on principles of English Divorce Court' thus providing flexibility and ease in Christian Divorce cases. Restoration of Section 7 will facilitate Christian couples to end their marriages on reasonable grounds. Whereas according to section 10 of the said Act Christians were only allowed to invoke divorce on grounds of conversion or adultery.

First part of this article discusses the theological orientation of Christian clergy in general and with special reference to Pakistan on the issue of divorce. An effort is made to document the views of two major Christian denominations residing in Pakistan, the Catholics and the Protestants. Second

part of this article focuses on reported cases on Dissolution of Marriage and Judicial Separation by Christian spouses in the past eight to ten years. The third part deals with the legal perspective. It includes discussion on The Christian Divorce Act 1869 and Christian Divorce (Amendment) Bill 2014. Finally conclusion is drawn on the basis of theological and legal discussion on the issue under consideration.

Literature Review

Article 36 of the constitution of Pakistan refers to ‘protection of minorities’ without defining the term however Article 260 (30-b) carries a definition of Muslim and non-Muslim who are usually considered the minorities in Pakistan. A minority religion is a religion held by a minority of the population of a country, state or region⁽⁸⁾.

Minority is defined as:

‘.... A group of people who because of their physical and cultural characteristics are singled out from the others in the society in which they live for different and unequal treatment, and who therefore guard themselves as objects of collective discrimination’⁽⁹⁾.

Jennifer Jag Jivan, Director Christian Study Center and Peter Jacob jointly published ‘*Life on the Margins: A Study on the Minority Women in Pakistan*’ (2012) while discussing marginalization of minority women in general they say that Family laws of minorities have not been reviewed and revised in Pakistan thus making dispensation of justice in family matters difficult.

“Personal Laws and usages (i.e conditions and modes of marriage) overlap in various ways making it difficult for even courts to dispense adequate justice in cases of dissolution of marriages and even judicial separation. For instance Christian family laws have not been reviewed since long and there is no clarity on the rights of Christian women in these laws”⁽¹⁰⁾.

In recommendations of the same book it is stated that, ‘*Existing family and personal laws for religious minorities in Pakistan*

should be reviewed by a competent body to check injustices against minority citizens and to ensure that these laws comply with human rights standards and prevent the overriding effect of personal law of majority community”⁽¹¹⁾.

Marriage registration is another serious concern of minorities therefore Jennifer and Jacob suggest that,

‘Family laws should be enacted for minority communities that provide for marriage registration certificate and other important safeguards and arrangement for fulfillment of human rights. In order to vitalize the institution of family, checking abuses and enabling marriage without conversions, there is a need of enacting common Civil Code, that makes it possible for the citizens to contract civil marriages, interfaith and otherwise with equal rights in all matters concerning marriage and divorce”⁽¹²⁾.

It is also suggested at various levels that government should train subordinate judiciary on personal laws and customs of religious minorities. Police should also be sensitized on the problems faced by these minorities so that they are able to handle injustices done to religious minorities in Pakistan.

Report of National Commission on Status of Women, The Impact of Family Laws on the Rights of Divorced Women in Pakistan, state that Christian minorities are still governed by ‘Christian Divorce Act of 1869 which deals with divorce, dissolution, nullity and judicial separation of Christians in Pakistan⁽¹³⁾.

Rabia Mehmood and Syed Hassan Akbar, under the patronage of ‘Jinnah Institute’ have published ‘State of Religious Freedom in Pakistan.’¹⁴ Although this book deals with incidents of discrimination and Violence of minorities in general, one of its chapters focuses on the ‘Legal Discrimination and Judicial Response’ towards religious minorities living in Pakistan.

Zafar Emmanuel, draws attention towards Pakistan Penal Code with reference to coerced marriages and absence of consent in marriages in his book ‘*Law Relating to Christian Marriages in Pakistan (India & Bangladesh)*’⁽¹⁵⁾ He further adds that, ‘*The Constitution of Pakistan explicitly states in Article 35*

that “the State shall protect the marriage, the family, the mother, and the child.” The Pakistan Christian Marriage Act (Act XV, the “Christian Marriage Act, 1872”) superseded the Christian Marriage Act (Act V, 1865) and must be read alongside the Foreign Marriage Act XIV, 1903. The latter applies only to non-citizen Christians and requires appropriate certification and notice before marriage can be contracted. Jurists have repeatedly noted that these marriage laws require redrafting following extensive consultation with relevant stakeholders and community representatives”. Emmanuel Zafar carries out an in depth discussion related to personal laws of Christians in Pakistan not only where both parties contracting marriage are Christians by faith but also where only one of the parties is Christian. This provision was included to safeguard Christian women from the practice of polygamy when marrying a man of Muslim, Hindu, or Buddhist faith. Emmanuel Zafar says Christian law, based on traditional interpretations of the faith, strictly enforces monogamy. This provision is readily ignored and laws concerning conversion and marriage are interpreted not as specified in law but in terms of Islam⁽¹⁶⁾.

Shaheen Sardar Ali and Rehman, Javed, in their book ‘Indigenous People and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives’ highlights that ‘In 1974, the revolving Pakistan Minorities fund was created in the amount of Rs 2 million (increased to Rs 5 million in 1982). In 1985 a non lapsable special fund for Welfare and Uplift of minorities was established with an initial fund of Rs 20 million to be increased yearly. National Commission for Minorities was established in 1993 to promote the welfare of and safeguarding religious, social and cultural rights of minorities and ensuring proper maintenance of worship places of minorities’⁽¹⁷⁾.

Part: I Theological Discussion

According to Christian theology marriages settle on heaven that’s why man has no right to break this sacred bond. Christians give importance to marriage to an extent that they believe that when male and female unite in marriage bond only death can separate them from each other. It is mentioned in the

Holy Bible that, *'He who finds a wife finds what is good and receives favor from the Lord'*⁽¹⁸⁾.

According to Christian theology marriages settle on heaven that's why man has no right to break this sacred bond. Christians give importance to marriage to an extent that they believe that when male and female unite in marriage bond only death can separate them from each other. Importance of marriage is mentioned at numerous places in the Bible. In addition to this the Bible also talks about divorce and mentions adultery as the ground for pronouncing. Furthermore the Bible mentions that according to the law of Moses divorce was allowed but teachings of the Bible reinforce that what God has joined together man should not separate and the man cannot divorce his wife for any and every reason.

"Then the Lord said, it is not good that man should be alone, I will make him a helper suitable for him' and while he was sleeping he took one of the man's ribs and closed up the place with flesh. Then the Lord God made a woman from the rib God had taken out from the man and He brought her to the man. The man said, this is now bone of my bone and flesh of my flesh; she will be called woman for she was taken out of man. For this reason a man will leave his father and mother and be united to his wife, and the will become one flesh"⁽¹⁹⁾.

It has been said: "Anyone who divorces his wife must give her a certificate of divorce." But I tell you that "anyone who divorces his wife, except for marital unfaithfulness causes her to become an adulterous and anyone who marries the divorce woman commits adultery"⁽²⁰⁾.

They (Pharisees) said, "Moses permitted a man to write a certificate of divorce and send her away". "It was because your hearts were hard that Moses wrote you this law", Jesus replied. But at the beginning the creator made them male and female, and said, "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh". So they are no longer two, but one. Therefore what God has joined together, let man not separate. When they were in the

house again the disciple asked Jesus about this. He answered, “Anyone who divorces his wife and marries another woman commits adultery against her”⁽²¹⁾

Some Pharisees came to him to test him, “They asked, it is lawful for a man to divorce his wife for any and every reason?” “Haven’t you read”, he replied, that at the beginning the creator made them male and female, and said, “For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh”. So they are no longer two, but one. Therefore what God has joined together, let man not separated”⁽²²⁾.

In the light of above mentioned verses we can say that divorce and annulment of marriage is not allowed in Scripture, whether it is by consent of both spouses or by any one of them. The justification for not breaking the marital tie is that marriage is from the will of God and a sacred bond, one who unties it considers himself/ herself superior than God. Christian clergy is very strict in matters of Christian divorces or dissolution of marriages. They hold this view that just like clergy is involved in marriages similarly they should be involved in the divorce process⁽²³⁾.

Word “divorce” is strictly prohibited in church .In official church language “separation of spouses” is used for divorce. Church describes rules for divorce as follow:

1. If both the spouses are baptized and marriage is consummated then divorce never takes place.
2. If marriage has not been consummated then divorce is allowed by Church.
3. If two spouses were non-Christian at the time of marriage and after that one of them enter into Christianity and other does not agree to leave his religion then it is permissible for Christian spouse to dissolve the marriage and marry again it is called “pauline privilege”⁽²⁴⁾.
4. If a non-Christian has more than one wives after converting to Christianity he is ordered to choose any one of them and divorced the others.

5. If both spouses were non-Christian and both converted into Christianity. It is compulsory for them to marry again.
6. If spouses are non-sacramental then they can separate and dissolve the marriage for valid reason⁽²⁵⁾.

Divorce is mentioned several times in the Old and New Testaments. Jesus had used word “*apoluo*²⁶” which means dissolution or divorce. In this sense Jesus allowed divorce but also called it as adultery. It is also translated as bill of divorcement. It included the concept of remarriage for both parties. According to Jesus if the divorce is not on account of fornication, then it is an unjust or unlawful divorce. The one who unjustly divorces his/her mate is the guilty one and is therefore forbidden to remarry. This was implied in Matthew 5:32, and here it is explicitly stated that if he/she (the guilty party) remarries this union would be adulterous. This is supported by the following Gospels of Mark and Luke.

“He answered, “Anyone who divorces his wife and marries another woman commits adultery against her. And if she divorces her husband and marries another man, she commits adultery.” (Mark 10:11-12)

“Anyone who divorces his wife and marries another woman commits adultery, and the man who marries a divorced woman commits adultery”. (Luke:16-18)⁽²⁷⁾.

Since God does not approve of an adulterous marriage this man’s remarriage is not sanctioned by God⁽²⁸⁾. Thus anyone who divorces his wife and marries some other woman Jesus considers it adultery⁽²⁹⁾.

Remarriage is prohibited to the one who unjustly divorces his/her spouse. In contrast, remarriage is not prohibited to the one who pronounces divorce justly. It is stated in Bible:

“I tell you that anyone who divorces his wife except for sexual immorality and marries with another woman commits adultery”. (Matthew 19:9)

Jesus clearly teaches a kind of dissolution-divorce in which the innocent party is permitted to remarry and the guilty party is not. The innocent party is a mate in a just divorce that is not guilty of fornication and the party in an unjust divorce who has been unjustly divorced. The guilty party is a mate in a just divorce that is guilty of fornication, and the party in an unjust divorce who unjustly divorces his/her mate. Jesus permits the innocent party to remarry in both just and unjust divorce. And in both cases, without having to wait until the guilty party either remarries or dies⁽³⁰⁾.

St. Paul says:

“For example, by law a married woman is bound to her husband as long as he is alive, but if her husband dies, she is released from the law that binds her to him. So then if she has sexual relations with another man while her husband is still alive, she is called an adulterous. But if her husband dies, she is released from that law and is not an adulterous if she marries another man”. (Roman 7:2-3)⁽³¹⁾

It is worth mentioning here that divorce as we know and understand it today was generally allowed in Western Europe after tenth century. Separation and annulment of marriage were widely well known in Western European society. Legal or Judicial separation was termed as ‘divorce *a mensa et toro*’. In such a separation husband and wife are physically separated but their marital relation does not fully terminate. Civil courts had no power over divorce or marriage at that time.³²

Let us now consider the opinions of two major Christian denominations living in Pakistan on the issue of divorce. These are:

1. Catholics &
2. Protestants

Catholics

Roman Catholic Church considers marriage as a sacrament instituted by God and Christ which man cannot dissolve. Divorce is not permissible in Catholic Church for valid sacramental marriages. Roman Catholics are very strict about

divorce and second marriage. If someone divorced his wife, then both of the spouses are not permitted to remarry according to Catholic Church. In Roman Catholic remarriage is prohibited. It is only permissible when one of the spouses has died. Word divorce is strictly prohibited in Catholic Church .In official church language “separation of spouses” is used for divorce⁽³³⁾.

Protestants

Protestants allow divorce, and few of them even allow second marriage⁽³⁴⁾. However, conservative protestant Churches strongly oppose divorce viewing it as a sin. They say that once sacred bond is broken it cannot be joined again. Contract of marriage can be dissolved according to them in case of adultery only. Some of them permit remarriage and say that God forgives sins⁽³⁵⁾.

Biblical evidence given by them is Matthew 5:31-32, which states:

“It was also said, ‘Whoever divorces his wife, let him give her a Certificate of divorce.’ But I say to you that anyone who divorces his wife, except on the ground of sexual immorality ,makes her commit Adultery, and whoever marries a divorced woman commits adultery”⁽³⁶⁾.

Thus there is difference of opinion about dissolution of marriage and divorce in Christian clergy and society. And their social practices are also different among Catholics, Orthodox and Protestants. However, majority of Protestants and some Orthodox allow divorce on the reasoning that if married life is not successful then it is better to get divorced than to lead a miserable life.

Part II: Case Law & Society

When a Christian couples marries and realizes latter that they will not be able to cope up with the marital tie owing to incompatibility or other reasons it becomes impossible for them to dissolve their marriage. The only grounds available to Christian couples in Pakistan are adultery committed by the spouse and change of religion. Not only this, the alleged

adulterer has to be made a codefendant in such cases. Otherwise the couple has to resort to the option of judicial separation which is not divorce in true sense and the couple is only separated by the court and they remain legally married. After this decree they cannot live together but their marriage does not get dissolved and they are not allowed to remarry⁽³⁷⁾.

In Pakistan not many Christians file petitions for dissolution of their marriages or judicial separations. A survey of case law of past ten years show that very few cases have been filed by Christians for dissolution of their marriages or judicial separation on grounds available in 'Christian Divorce Act 1869'. It is pertinent to make reference of three cases filed in 2009, 2011 and 2014 all filed by wives against their Christian husbands. In the first two cases the wives invoked section: 10 for dissolution of marriage and in the third case the wife invoked section 22 for Judicial separation. Recently a case has been filed by the husband (Amin Masih) for divorce but he does not hold his wife guilty of adultery.

The first case pertains to dissolution of Christian marriage. This was brought before Justice Syed Shaheen Masud Rizvi in which the petitioner Parveen Amanual pleaded for divorce/ dissolution of her marriage from her husband Razzak Shakir but was not successful in getting her marriage dissolved.³⁸ Mst. Parveen Amanual (the petitioner) said that she was not ready to live with her husband at any cost and filed a suit for dissolution of her marriage before the learned Judge Family Court, Rahimyarkhan under the Divorce Act, 1869. The suit was contested by Respondent No.3, Razzaq Shakir, the husband. The case was still at the initial stage when on 4-10-2005, the learned Judge Family Court decreed the suit of the petitioner-plaintiff for dissolution of marriage.

The husband, feeling aggrieved by the above said order and decree dated 4-10-2005, filed an appeal before the learned District Judge, Rahimyarkhan, which was decided by Mr. Wajahat Hussain, Additional District Judge, Rahimyarkhan, who vide his judgment dated 16-11-2005 remanded the case to the learned Judge Family Court, Rahimyarkhan on the ground that the dissolution of marriage was not in accordance with the

provisions of the Divorce Act, 1869, applicable to the parties and directed the learned Judge Family Court to decide the suit for dissolution of marriage of the petitioner-plaintiff afresh, keeping in view the provisions of the Divorce Act, 1869.

The bond of marriage between Christian husband and wife is of a permanent nature and the wife has to prove her case on the concrete facts after leading reliable and cogent evidence to the facts on which the claim of dissolution of marriage is based. Only then the Court can grant a decree for a judicial, separation within the meaning of section 22 of the Divorce Act, 1869 or to dissolve the marriage under section 10 of the same Act. Therefore the instant writ petition has no force and the same was dismissed.

This clearly indicated that Family Court Judge was influenced by Muslim Family Laws Ordinance 1961 where mere plea of the wife that she is not ready to live with her husband at any cost is an effective ground for *Khula* for Muslim families but not for Christian families. Thus mere statement of the wife that she is not ready to live with her husband is not sufficient to dissolve the marriage in Christian law, so the writ petition was dismissed as it had no force in Christian law.

In the second case filed for dissolution of marriage by the wife Zia Fatima vs Station House Master³⁹ and 3 other respondents one of whom was her Christian husband. The basis of the case was change of religion by the wife. The wife embraced Islam and upon conversion declared that Christian man and Muslim woman cannot remain as husband and wife and she told her husband that there is no relation between them according to injunctions of Islam. She also asked the respondent No.2, her husband to convert to Islam if he wants to continue relations with her but respondent No.2 became hostile and tortured the petitioner No.1 and tried to kill the petitioner but luckily she escaped and fled out of the house and came to Jamia Rizvia Mazhar-ul-Islam Sheikh-ul-Hadith Road, Jaranwala and stated all these facts to *Mo'allim* of the said mosque, where the said *Mo'allim* issued a certificate of being a Muslim and also changed the name of the petitioner Razia. On the same day, after Zohar prayer, said *Mo'allim*

announced in the mosque that a converted deserted lady is in the mosque and if someone ready to marry her, he may come forward. On the announcement of *Moallim*, one Muhammad Shakeel Raza petitioner No.2 came forward and showed his willingness to marry with the petitioner No.1 so the petitioner got married with the said Muhammad Shakeel Raza according to her sweet will and using her right of being *sui juris*⁴⁰. Her husband filed an F.I.R No.924 dated 31-12-2009 registered in Police Station Kari Wala, District Faisalabad under section 496-A, P.P.C⁴¹. The petitioner Zia Fatima (Razia) sought for quashment of the criminal case against her.

It was decided that the petitioner has embraced Islam but according to law of the country, the wife was under an obligation to file a suit for dissolution of marriage under section 2(ix) of the Dissolution of Marriages Act, 1939 because without obtaining decree for the dissolution of marriage, second *Nikah* in presence of existing marriage is not warranted under the law. In the circumstances, this petition is without any merit and is dismissed in *limine*. This motion in *limine*⁽⁴²⁾ was put up before the judge by the defendant's attorney and thus the wife's petition was dismissed.

In the third case⁽⁴³⁾ the wife filed a suit for judicial separation under section 22 of Christian Divorce Act. She filed the case on ground of cruelty and desertion for more than two years. Since wife filed the suit on recognized grounds therefore separation was decreed.

Contention of the petitioner (wife) was that judicial separation could be granted on the sole ground of cruelty, which included mental as well as physical torture and the evidence produced by the husband also established the grounds for seeking judicial separation.

In Christian faith, though wedlock was a bond of permanent nature, yet in the matter of judicial separation, Court was required to determine the controversy according to S.22 of the Divorce Act, 1869. Under S.22 of Divorce Act, 1869, desertion of a spouse for two years without reasonable excuse was a valid ground for grant of decree for judicial separation and in the present case, it was admitted position from both sides that

petitioner (wife) had left the house of respondent (husband) on 22-11-2011 and since then there was no cohabitation between the parties while the cruelty for desertion existed---Serious allegations regarding illicit relations of wife with other men were sufficient proof of mental torture and cruelty against wife by the husband---Petition for judicial separation was decreed on the basis of cruelty as well as admitted desertion of the spouses for a period of more than two years without any reasonable excuse.

From the above reported cases it is evident that in Pakistan Christians seldom approach Pakistani courts for dissolution of their marriages as not many cases could be found reported. Also, cases of dissolution of marriage are difficult to decide owing to stringent condition of proving adultery and making the adulterer co defendant in the case. On the other hand Christian marriage cannot be dissolved on the plea that the wife cannot live with her husband as was decided in Parveen Amanual vs Razzaq Shakir⁽⁴⁴⁾. Change of religion of wife from Christianity to Islam is a valid ground for marriage dissolution but no case has been found to be decided effectively on this ground. The best option available for Christians is judicial separation or divorce *a mensa et toro*. Under this option the couple does not completely stand divorced but they are separated from bed and maintenance. They cannot remarry after judicial separation. For proper divorce Christians have to apply for it explicitly after obtaining decree of dissolution of marriage.

Part III: Legal Developments & Discussion

Christian conception of divorce is '*divorce a mensa et thoro*' or '*divorce a mensa et toro*'. It means divorce from 'bed-and-board'. It is a legal process by which a married couple may formalize a de-facto separation while remaining legally married. This is a legal separation which is granted in the form of court order. The legitimacy of the future child born to the couple remains intact and the couple cannot remarry. Divorce *a mensa et thoro* does not automatically lead to divorce if the couple wish to proceed for divorce they have to file for divorce explicitly.

The process of amendment of Christian Divorce Act started in 1918 in many countries. In UK Matrimonial Causes Act is now interpreted in a liberal manner providing a cushion to

both Christian spouses to part their ways if their marriage had become irretrievable. Surprisingly this flexibility in Christian law was not available to Christian couples in Pakistan. According to ‘Christian Divorce Act 1869’ three grounds are available to Christians to resolve the issue of irretrievable marriages. Firstly, section 10 (Part III) ‘Dissolution of Marriage’ secondly section 18 (Part IV) ‘Nullity of Marriage’ and thirdly section 22 (Part V) ‘Judicial Separation’. Very recently Justice Mansoor Ali Shah of Lahore High Court has pointed out that section 7 of Christians Divorce Act (1869)⁽⁴⁵⁾ which was expunged during General Zia ul Haq’s regime in 1981 should be revived. This was stated during hearing of a petition filed by Amin Masih⁽⁴⁶⁾ who wanted to divorce his wife but did not want to place false accusation of adultery on his wife. Justice Syed Mansoor Ali Shah restored section 7 of Christian Divorce Act 1869 and declared 1981 Ordinance against the Constitution⁽⁴⁷⁾. The Lahore High Court has issued notices to Federal and Punjab governments on a petition seeking restoration of Section 7 of the Christian Divorce Act 1869. Justice Syed Mansoor Ali Shah appointed a senior lawyer and rights activist Hina Jilani as amicus curie (friend of court) to seek her assistance in the case. The judge also issued notices to Bishop of Pakistan Alexander John Malik and Lahore Bishop Irfan Jamil⁽⁴⁸⁾. Sheraz Zaka (Petitioner’s counsel) said that ‘*after the omission of section 7 of the Act the principles of English Divorce Court had been overshadowed and neglected which placed the entire statute to be administered in an ex-facie and discriminatory manner*’⁽⁴⁹⁾. He went on to say that not allowing Christian couple’ to part ways on mutual consent was violation of Article 9 and 14 of the Constitution. He argued that Christians in the country should have same rights as anywhere else in the world, “where a Christian man and his wife can part their ways on reasonable grounds, rather leveling false allegations of adultery on each other.”

Ameen Masih, submitted that in UK, the Matrimonial Causes Act was interpreted in a liberal manner providing a cushion to both Christian man and woman to part their ways if marriage is a irretrievably broken down or with mutual consent,

but this ground is not available in Pakistan for Christians. He submitted that the only ground available is in section 10 for a man to divorce his wife and that is adultery and it was derogatory.

He submitted that it was debacle that for the past more than 30 years not a single law has been passed for the protection of minorities/Christians and it has been over more than 145 years that the Divorce Act 1869 has not been reformed. He requested to declare the omission of Section 7 of Divorce Act 1869 unconstitutional⁽⁵⁰⁾.

Section 7 of Christian Divorce Act 1869 was first amended by the Act IV of 1976 and then omitted by Ordinance XXVII of 1981. It was a residuary section and had transferred a dual power of divorce, divorce *a mensa et toro*⁵¹ according to ecclesiastical law and statutory power to divorce *a vinculo*. Divorce *a vinculo* is a total divorce of husband and wife, dissolving the marriage tie, and releasing the parties wholly from their matrimonial obligation.

Amended Christian Divorce Act 1869

The Amended Christian Divorce Act after omission of section 7 provided only following three options to Christian couples to move out of their marriage. Following is an explanation of these three sections provided in the Act.

1. Dissolution of Marriage
2. Nullity of Marriage
3. Judicial Separation

Part III of the said Act relates to ‘Dissolution of Marriage’ according to which husband could file a petition for dissolution of marriage only on one ground and that was ‘adultery committed by wife’. Wife could petition for dissolution on more than one grounds namely change of husband’s religion, adultery, rape and cruelty, desertion and bigamy coupled with adultery making the grounds of marriage dissolution very stringent. Not only this the alleged adulterer had to be made a co respondent in

the case which created numerous complexities as adultery falls under *hudood* crime for which *Qanoon e Shahadat* Order had to be invoked.

Part IV pertained to ‘nullity of marriage’ which means to declare a marriage ‘null’ and ‘void’ *abinito*. Four grounds available for nullity of marriage are,

- a) Impotency
- b) Marriage within a prohibited degree
- c) Marriage with a lunatic or idiot
- d) Former husband or wife of the petitioner was alive and the marriage was in force (as bigamy is not allowed in Christianity)

Part V of the Act relates to ‘Judicial Separation’. The husband and wife may obtain a decree for judicial separation on grounds of adultery, cruelty or desertion without a reasonable excuse for two years or upwards. Such a decree shall have the effect of divorce ‘*a mensa et toro*’.

It is not only omission of section 7 from the Act which has resulted in limited and stringent grounds for Christians to seek divorce. Another reason is that Christian clergy too does not want to change the law of dissolution of marriage. Because they are against the dissolution of marriage and say that it is not according to their religion. The influence of Christian theology in marriage and divorce matters as discussed above holds back the clergy from taking any liberal stance on the issue of divorce. They are still influenced by the classical interpretations of the Holy Book. They are not realizing that Christians living abroad have made very adaptable and flexible and developed laws to resolve divorce issues keeping it close to Christian thought. In this age of globalization when friends, families and relatives are scattered all over the globe this distinction has become very striking at societal level and there is already a shift and change in people’s attitudes and understandings. Christian community living in Pakistan has the view that Christian’s law of divorce is

very old. Since the time of British rule it has been practiced in Pakistan. There is need to amend the Act according to need of the time. Because according to this Act they have only one ground of adultery for dissolution of marriage. And as a result of it spouses make false accusation of adultery on each other in order to dissolve their marriage.

Director of Pakistan Christian National Party Joseph Francis said:

“A great number of countries with Christian populations officially permitted Christian men and women to register for divorce on grounds such as differences in personalities and incompatibility”⁽⁵²⁾.

Christian Divorce (Amendment) Bill 2014

As a result of efforts of Pakistan’s Ministry of Law and Human Rights ‘Christian Divorce (Amendment) Bill 2014’ was proposed to further amend the Christian Divorce Act of 1869. This bill suggested changes in section 10 of the original ‘Christian Divorce Act of 1869 and provided eight grounds for husband and nine grounds for wife to file a Petition of Dissolution of Marriage. These grounds are reproduced below:

- i. that since the solemnization of marriage, the respondent spouse has changed his profession of Christianity for the profession of some other religion, or have gone through a form of marriage with another person;
- ii. that the respondent has committed adultery;
- iii. that the respondent has contracted another marriage and is living an adulterous life;
- iv. that there has been an irretrievable breakdown of marriage between the two spouses and it would be inflicting tyranny on both or either of the spouses by carrying forth the marital tie, and the court has satisfied itself about such state after conducting a thorough inquiry to that effect;

- v. that the respondent has deserted the petitioner for more than two years without sufficient cause;
- vi. that the parties have lived in separation from each other under strained relations for a period of more than two and a half years;
- vii. that the respondent has been habitual in committing cruelty, physical or mental, against the petitioner; or
- viii. any other ground wherein either of the spouses are exposed to danger to life.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that-

(ix) Her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality; or her marriage, whether consummated or not, was solemnized before she attained the age of eighteen years and she has repudiated the marriage before attaining that age⁽⁵³⁾.

Seeking divorce on ground of adultery when a woman has not committed was against the respect and dignity of Christian women. Even in UK the Matrimonial Causes Act is now interpreted in a liberal manner in order to ease both Christian men and women to part their ways if marriage was irretrievably broken down or with mutual consent, but this ground was not available in Pakistan.

Christians have been facing a lot of problems regarding dissolution of marriage issue since the colonial period in Subcontinent and afterwards in Pakistan. Because Divorce Act 1869 is still applicable in Pakistan for Christians along with omission of section 7. Pakistani Christians have limited and stringent grounds for dissolution of marriage according to this Act. Christians want to have amendments in Divorce Act 1869. They also have the view that divorce is officially permitted in most of the Christian populated countries on more grounds as

compared to those stated in Divorce Act 1869, which is applicable in Pakistan.

Conclusion

A detailed and in depth discussion has been carried out on Christian Divorce Law in Pakistan in this article. The discussion encompasses theological perspective, opinion of Christian clergy and stance of ecclesiastical courts in matters of personal law related to marriage and divorce in Christianity. Furthermore since it is a matter of law and civil and family courts are involved in it when cases come to them. Therefore a detailed discussion on legal documents, their interpretation and application and developments taking place in The Christian Divorce Act 1869 are an important component of this article. To further elaborate the legal position on the issue of Christian Divorce relevant cases decided in Pakistani courts have also been discussed. Surprisingly very few cases have been reported in Civil courts and it seems that Christians residing in Pakistan usually settle their matrimonial cases in ecclesiastical courts. Three relevant cases have been referred to in this article. All these three cases have been lodged by Christian wives. Two cases were filed for dissolution of marriages (section: 10) and one for Judicial separation (section: 22). A thorough analysis of these three cases has revealed that granting Judicial Separation is comparatively easier when compared with Dissolution of Marriage. This is so because of two obvious reasons. Firstly the concept of permanent and life- long marital bond and sacramental marriage in Christianity. This thought has a direct influence in Christian law making and decisions and opinions of ecclesiastical courts and their clergy. Secondly availability of limited and stringent grounds available to the Christians living in Pakistan in The Christian Divorce Act 1869 for dissolution of marriages. However Judicial Separation can be granted if valid grounds such as cruelty and desertion for more than two years are proved.

After detailed discussion of Christian's dissolution of marriage issue, it can be concluded that there is need of reconciliation between Christian community and clergy. This is

so because Christian community residing in Pakistan wants to have more grounds and flexibility in Dissolution of Marriages whereas Bishops want to adhere strictly to Biblical texts. Christians have demanded for change in Divorce Act 1869 and have put up Christian Divorce (Amendment) bill 2014. This bill provides eight grounds to husband and nine grounds to wife for dissolution of marriage. But Christian's Bishops are against this amendment.

There are also different interpretations of Biblical text. Some say that Jesus had allowed dissolution of marriage whereas others say that he had not allowed. Three main sects Catholics, Orthodox and Protestants have different views about dissolution of marriage. Therefore there is a need to achieve harmony and coherence between Christian community of all major denominations and Bishops of Pakistan. It is not as much the fault of Pakistani courts, the entire onus does not lie on them for failing to provide effective remedies to Christians in divorce disputes. It is also due to the resistance of Christian clergy that Divorce procedure is so difficult and no effective remedy provided to the effected parties. Recent decision of Justice Mansoor Ali Shah to revive section 7 of Christian Divorce Act 1869 is a ray of hope through which divorce *a vinculo* will be easy to get without putting the charge of adultery on the wife but strong resistance and disagreement is expected on it.

A very important aspect must be understood that this whole exercise is not to encourage divorces among the Christian spouses but its sole aim is to save the wife and husband from the false allegation/accusation of adultery which is inhumane and to facilitate in the process of resolving family disputes.

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- ² Accessed May 6, 2016. "Population distribution by religion, 1998-Census"(*PDF*). *Pakistan Statistical Year Book 2011*. Pakistan Bureau of Statistics. 2011.
- ³ See Munir ul Anjum and Shahnaz Tariq, 'Role of Christians in Freedom Movement of Pakistan: An Appraisal' *Pakistan Journal of Social Sciences (PJSS)*. (2012), vol.32, No.2, pp. 437-443 and Nadeem Francis. *This is Our Country*. Lahore; Hum Ahang Publishers. (1997)
- ⁴ See Zia Shah. The Constitution of Medina: A Symbol of Pluralism in Islam.(2012)<https://themuslimtimes.info/2012/11/09/the-constitution-of-medina-a-symbol-of-pluralism-in-islam>. Accessed May 10,2016
- ⁵ These are the names of some leading Pakistani Christian citizens who have served in Pakistan Air Force, Army and Navy: Air Vice Marshal Eric Gordon Hall, Air Vice Marshal Michael J. O'Brian, Air Vice Marshal Patrick Desmond Callaghan, Air Commodore Charles H Zuzarte SBT, Air Commodore Hilary Zuzarte S Bt, Group Captain Cecil Chaudhry, Air Commodore Nazir Latif, Major General Julian Peter, Major General Noel Israel Khokhar, Brigadier Samson Simon Sharaf, Brigadier Mervyn Cardoza, Brigadier Daniel Austin, Rear-Admiral Leslie Mungavin, Commander Saleem Akhtar Matthew,P. Officer J D Gill, Admiral Roberto Philip Rossario.
- ⁶ Tension between Christians and Muslims in Pakistan began during 1980s and 1990s. This was the time of military dictatorship of Gen. Zia ul Haq and influence of strict Wahhabi interpretation of Islam coming from Saudi Arabia and Gulf states. In the beginning of 21st century first the 9/11 attack which spread the image of Islam as intolerant religion globally, created resentment and insecurity among religious minorities living in Pakistan. From 2009 onwards series of attacks on Churches and suicide bombing in Gojra,

Pashawar and Lahore and murder of Shahbaz Bhatti in 2011 further aggravated the situation.

- ⁷ Section 7 of Christian Divorce Act of 1869 was omitted through an ordinance during General Zia ul Haq's rule. Lahore High court has restored section 7 in May 2016. Justice Syed Mansoor Ali Shah has argued that 1981 ordinance was in violation of Article 9 and 14 of the Constitution of Pakistan and hence should be restored. With restoration of Section 7 Christian couples can seek divorce and file for separation according to British courts directives on the matter.
- ⁸ Sociology. 10th Edition. WadsWorth. Chengage Learning. USA. 2010 John M.Shepard
- ⁹ Ibid., p. 240
- ¹⁰ Jennifer Jag Jivan and Peter Jacob, February 2012, Sanjh Publications & National Commission for Justice & Peace, Pakistan: Lahore. P.65
- ¹¹ Ibid., p. 69
- ¹² Ibid., p.70
- ¹³ Report of National Commission on Status of Women, The Impact of Family Laws on the Rights of Divorced Women in Pakistan, Islamabad, Pakistan: Aligarh Publishers, 2005.
- ¹⁴ Rabia Mehmood and Syed Hassan Akbar, '*State of Religious Freedom in Pakistan*' Jinnah Institute, 2015.
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- ¹⁷ Ali, Shaheen Sardar and Rehman, Javed, '*Indigenous People and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives*', Richmond Surry, Curzon Press, 2001.
- ¹⁸ The Holy Bible (New International Version), Proverbs 18:22.
- ¹⁹ The Holy Bible (New International Version), Genesis 2:18. 21-24
- ²⁰ The Holy Bible (New International Version), Matthew 5:31-32
- ²¹ The Holy Bible (New International Version), Mark 10:4-11
- ²² The Holy Bible (New International Version), Matthew 19:3-6
- ²³ The authors had a detailed discussion with Jennifer Jag Jivan, Director Christian Study Center, Rawalpindi.
- ²⁴ Sean Wales, '*Catholics and Divorce*'. South Africa: Redemptorist Publications. (2004).p.1-10
- ²⁵ <http://dictionary.reference.com/browse/non+sacramental>
Accessed 14.8.2015 6:30 am.

- ²⁶ "Put away" is derived from the Greek *apoluo*. *Apoluo* is translated "put away" in Matthew 5: 32 (cause A) and "divorced" in clause B. *Apoluo* means to "let go or let loose" and Thayer says *apoluo* involves repudiation in the case of divorcement (Vine's Expository Dictionary of New Testament Words and Thayer's Greek-English Lexicon, pg. 66)
- ²⁷ Taken from *The Holy Bible (New International Version)* The New International Version (NIV) is a completely original translation of the Bible developed by more than one hundred scholars working from the best available Hebrew, Aramaic, and Greek texts.
- ²⁸ See Dale Fisher. *A Biblical study of divorce*. USA: Xulon Press. (2004). and Rev. John C. Martin, *Jesus on Divorce*. USA: Author House. (2004)
- ²⁹ Ina Taylor, *Religion and life with Christianity and Islam*. Britian: Heinenan Educational Publication. (2005). P.52.
- ³⁰ Dale E. Fisher, *A Biblical Study of Divorce*. USA: Xulon press. (2004) p.114. Dale E. Fisher was the Pastor of Central Baptist Church, Hobart, Indiana. He originally wrote this book in 1985 which is now revised in 2014.
- ³¹ *The Bible God's Holy Words*. USA: International Society, New International Version. (1984). *Roman 7:2-3*
- ³² Kent's Commentaries on American Law, p. 125, n.1 (14th ed. 1896).
- ³³ Sean Wales, *Catholics and Divorce*. South Africa: Redemptorist Publications. (2004). p.11-14
- ³⁴ Ina Taylor, *Religion and life with Christianity and Islam*. Britian: Heinenan Educational Publication. (2005). p,51
- ³⁵ Ina Taylor, *Religion and life with Christianity and Islam*. Britian: Heinenan Educational Publication. (2005). p,53
- ³⁶ *The Bible God's Holy Words*. USA: International Society, New International Version. (1984). p.486 Matthew, 5:31-32
- ³⁷ Ina Taylor, *Religion and life with Christianity and Islam*. Britian: Heinenan Educational Publication. (2005). p,50
- ³⁸ PLD 2009 Lahore 213
- ³⁹ 2011, P Cr.L J 388
- ⁴⁰ *Sui juris* means Possessing full rights, having the capacity to manage one's own affairs independentl , not under any legal disability.
- ⁴¹ section 496-A, P.P.C 'Marriage ceremony fraudulently gone through without lawful marriage.— Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being

married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.’

⁴² It refers to a motion before a trial begins, request by one party before the trial begins, after listening to motion in *limine* judge may make a decision which could affect the entire case.

⁴³ PLD 2014, 113

⁴⁴ PLD 2009 Lahore 213

⁴⁵ Sec: 7 ‘Court to act on principles of English Divorce Court’

⁴⁶ Madeeha Bakhsh, LHC hears case over petition seeking restoration of section 7 of Christian Divorce Act. Christians in Pakistan, Jan14, 2016; See also *The Express Tribune*, May 30th, 2016.

⁴⁷ Rana Tanveer, *Section 7 of Christian Divorce Act restored*. Published: May 30, 2016

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⁴⁸ The News Paper Staff Reporter ‘DAWN’, ‘Plea to Restore Section 7 of Divorce Act’ Jan 14, 2016.

⁴⁹ The News Paper Staff Reporter ‘DAWN’, ‘Plea to Restore Section 7 of Divorce Act’ Jan 14, 2016.

⁵⁰ The News, Lahore, February 20, 2016, ‘Notices in Christian Divorce Act Case’.

⁵¹ Term a mensa at toro literally means ‘from bed and board’. It is a separation of parties by act of law and is granted instead of dissolution of marriage. Divorce a mensa et toro does not affect legitimacy of children nor authorize second marriage.

⁵² <http://www.christiansinpakistan.com/christian-demand-change-in-divorce-law/> Accessed May 21, 2016 11:00 pm.

⁵³ Re vetted bill proposed in 2014 to amend Christian Divorce Act 1869.