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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No: W.P. No.623/2016

Ameen Masih **Versus** Federation of Pakistan, etc.

JUDGMENT

Dates of hearing:	20.01.2017, 20.04.2017, 23.05.2017 & 19.06.2017.
Petitioner by:	Mr. Sheraz Zaka, Advocate.
Respondents by:	M/s Nasar Ahmad and Muhammad Javed Kasuri, Deputy Attorney Generals for Pakistan. Ms. Hina Hafeezullah Ishaq, Assistant Attorney General for Pakistan. Rana Zafar Iqbal, Standing Counsel for Pakistan. M/s Anwaar Hussain and Ahmad Hassan Khan, Additional Advocates General, Punjab assisted by Miss Rutaaba Gul, Advocate. Ms. Uzma Rafique, Deputy District Attorney/ Senior Law Officer of respondent No.2. Mr. Ijaz Farhat, Advocate/President Christian Lawyers. M/s Kashif Alexander, Ch. Aneel Ashiq, Salvance Jacob, Advocates representing Christian Community. Ms. Hina Jillani, Advocate/amicus curiae. Mian Zahid, Law Officer, HR & MA. Ms. Fauzia Viqar, Chairperson, Punjab Commission on the Status of Women. Ms. Shunila Ruth, MPA.

	Ms. Marry Gill, MPA (Christian Community). Mr. Kamran Michael, Senator/Federal Minister Human Rights Pakistan. Mr. Khalil Tahir Sandhu, Minister for Human Rights & Minorities Affairs, Punjab. Father Emanuel Yousaf Mani, Sr. Priest, St. Anthony Church, Lahore. Wilson John Gill, Bishop, Chairman/ founder United Holiness Church Pakistan (Korea). Rt. Rev. Sabstian Francis Shaw, Archbishop of Roman Catholic Church, Lahore. Rt. Rev. Irfan Jamil, Bishop of Lahore, Church of Pakistan, Mall Road, Lahore. Rev. Dr. Majid Abel, Moderate Presbyterian Church of Pakistan, Empress Road, Lahore. Bishop Azad Marshall, Co-Adjutor Bishop of Raiwind Diocese, Church of Pakistan and President, National Council of Churches in Pakistan. The Revd. Shahid P. Mehraj, Dean of Lahore Cathedral. Mr. Johnson Bernard, Deputy Registrar, Lahore High Court, Lahore on Court's call. Mr. Asif Aqeel, Human Right Activist/ Journalist.
Assisted by:	M/s Qaisar Abbas and Mohsin Mumtaz, Civil Judges/Research Officers, Lahore High Court Research Centre (LHCRC) and Ali Uzair Bhandari (law intern).

Syed Mansoor Ali Shah, CJ:- Petitioner is a Christian, who wishes to divorce his wife because unfortunately his marriage has broken down irretrievably. He, however, cannot do so under the **Divorce Act, 1869**[1] **("Act")**, as it stands today, because he can only get a divorce if he alleges and proves that his wife has been guilty of **adultery** (see Section 10 of the Act).

[1] Law applicable to Christians only

He does not wish to do so as this is not true but wants a divorce on the basis of the fact that he has a dead marriage and an unhappy union and wishes to move on and restart his life by dissolving the existing marriage. He prays that under repealed section 7 of the Act, grounds of divorce under **UK Matrimonial Causes Act, 1973 ("UK Act"),** including the ground that the marriage has broken down irretrievably, were available to him in the courts in Pakistan, but section 7 was omitted through the **Federal Laws (Revision & Declaration) Ordinance, 1981 (XXVII of 1981) ("Ordinance").** He prays that item 7 (2) of the Second Schedule to the Ordinance, whereby Section 7 of the Act was repealed, be declared to be unconstitutional and violative of the fundamental rights of the petitioner.

2. He contends that Christians in Pakistan are a minority and under the Constitution, the State is bound to protect the *legitimate interests* of the Christians, over and above the fundamental rights, which are guaranteed to him as a citizen of Pakistan under the Constitution. He prays that grounds of divorce available to a Christian under the UK Act be made available to the petitioner. He contends that repeal of section 7 by the Ordinance is violative of the fundamental rights of the petitioner including right to profess and practice his religion, right to life, right to dignity and right to non-discrimination.

3. He argued that Section 7 of the Act was omitted during the undemocratic era of General Zia-ul-Haq, without any deliberations or consultations with the Christian community. He submits that the repeal was adverse to the interests of the Christian minority and was to pressurize Christians into forced conversion of faith. He submits that in order to go around

section 10 of the Act, many Christians have, over the years, carried out fake conversions, in order to divorce their spouses. He prays that legitimate interests of the minority and the fundamental rights of the petitioner be protected and item no. 7(2) of Second Schedule to the Ordinance be declared unconstitutional and section 7 be restored to its original position.

4. Ms. Hina Hafeezullah Ishaq, learned Assistant Attorney General for Pakistan in response to notice under Order 27A CPC submitted that the Pakistan has ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) thus committing to end discrimination against women. Article 25 of the Constitution empowers the State to make special provisions for women and Article 8 provides that any law or custom or usage inconsistent with fundamental rights will have no force of law. She also relied on Articles 9 and 14 to support the rights of women. She submitted that Divorce Act, 1869 is a pre-constitutional legislation almost 147 years old and inspite of several attempts to introduce amendments, the State has not been successful. She submits that even though the Federal Law (Revision & Declaration) Ordinance, 1981 stands validated under Article 270-A of the Constitution, but as it fails to pass the test of fundamental rights, the validation does not hold. Placed reliance on *Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others* **(PLD 2009 SC 879)**, *Miss Asma Jilani v. The government of the Punjab and another* **(PLD 1972 SC 139)**, *Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others* **(PLD 2006**

SC 697), *Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others* **(PLD 1996 SC 324)** and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others* **(PLD 2010 SC 61)**.

5. She argued that under Article 227 of the Constitution all existing laws shall be brought in conformity with the injunctions of Islam and no law can be enacted which is repugnant to such injunctions. No such corresponding or similar provision is available to the laws of the other faiths, which would then have to be judged and examined on the touchstone of fundamental rights and the Constitution. When Divorce Act, 1869 was prevalent, the English law of the time was Matrimonial Act, 1857, which had limited grounds of divorce. Then came Matrimonial Causes Act, 1923 and finally Matrimonial Causes Act, 1973 which allows for divorce if the marriage has irretrievably broken down. It is submitted that Divorce Act, 1869 has to come in line with the developments in the Christian world and Christians in Pakistan be extended the same relief.

6. Mr. Anwaar Hussain, Additional Advocate General, Punjab in response to notice under Order 27A CPC submits that the Government has made efforts to amend the Act and for this purpose meetings were held under the Chairmanship of the Minister for Human Rights and Minorities Affairs Department in order to include other grounds for divorce besides adultery. However, consensus could not be reached because the representatives of Catholic Church, Presbyterian Church and Church of Pakistan expressed reservations and contended that amendment in Section 10 of the Act would be in contravention

of the Holy Scriptures. He further submits that by efflux of time in countries where Christians are in majority, law of divorce has undergone a sea change. Christians all over the world can divorce their spouse on grounds other than adultery. He argued that No Fault Divorce was introduced way back in the year 1918 in Russia. In the United Kingdom, Matrimonial Causes Act, 1973, confers right on a person to divorce his or her spouse on the grounds other than adultery. Similarly, in United States in 1969, State of California first recognized No Fault Divorce. Family Law Act, 1975 in Australia and Divorce Act, 1968 in Canada were amended to set such a separation for one year with the requirement to prove fault by either spouse. In China, divorce is granted if one party can present evidence of incompatibility. Learned Law Officer argued that if this Court declares the impugned repeal *ultra vires* the Constitution, restored section 7 can easily co-exist with Section 10 of the Act by applying the principle of harmonious construction/ interpretation of statute.

7. Ms. Hina Jillani, Advocate/learned *amicus curiae*, fully supports the contention of the petitioner and submits that deletion of Section 7 by the Ordinance is violative of Articles 9, 14 and 25 of the Constitution. In order to protect the rights of the minorities in the country their interests should be safeguarded in a manner that the grounds of divorce available to Christians all over the world be made available to the Christian minority in Pakistan.

8. Ms. Fauzia Viqar, Chairperson, Punjab Commission on the Status of Women, invited as an *amicus*, fully supports the contention of the petitioner and submits that Christians in the country have tried hard for several years to bring about

amendment in Section 10 of the Act so that grounds other than adultery are available to them to dissolve marriage. She prays that fundamental rights of the Christians be restored and this legitimate interest of the minorities be safeguarded.

9. Ms. Shunila Ruth, MPA representing Christians in the Provincial Assembly in Punjab fully supports the contention of the petitioner and vehemently submits that amendment brought about in section 7 of the Act be struck down as unconstitutional so that grounds other than adultery are available to the Christians in Pakistan which will be in line with human dignity guaranteed to every citizen of Pakistan under the Constitution.

10. Rt. Rev. Dr. Alexander John Malik, Bishop Emeritus of Lahore in his written comments dated 14.02.2016 states as follows:-

> "Zial-ul-Haq removed Section 7 of the Christian Divorce Act 1869 without taking the Christian religious leaders in confidence. I was very much the Bishop of Lahore in 1981 and to the best of my knowledge he did not consult us. It looks [that] Zia-ul-Haq was used to doing such things quietly as he did by removing the word "freely" pertaining to the minorities from the Objective Resolution while making the resolution a substantive part of the constitution as Article 2A. Later the Supreme Court took notice of it and the worked "freely" was put back in the Resolution and the Constitution. Similarly, Section 7 of the Christian Divorce Act of 1869 needs to be put back in the said Act. Removal of Section 7 has changed the original spirit of the said Act and made it restrictive and violative of Human Rights. I, therefore admit/agree to the prayer sought for in the writ petition."

11. In order to reach out to the Christian community and to ensure maximum participation, public notices dated 25.04.2016 were published in National Dailies i.e., "*The News*" and "*Nawa-i-Waqt*", in addition, notices were issued to Sebastain

Francis Shaw, Archbishop, Archdiocese of Lahore, 73-FCC, Canal Bank Road Gulberg-IV, Lahore, Bishop Azad Marshal, Church of Pakistan, Raiwind DIOCESE Saint Thomas, Centre near Lahore Safari Park, Raiwind Road, Lahore, Dr. Majeed Abel, Moderate Presbyterian, Church of Pakistan, Naulakha Church Empress Road, Lahore, Senator Kamran Michael, Federal Minister for Human Rights, Government of Pakistan, 133-A, Model Town, Lahore and Mr. Khalil Tahir Sindhu, Provincial Minister for Human Rights, 1-Upper Mall, Lahore.

12. On 20.01.2017, Mr. Khalil Tahir Sandhu, Minister for Human Rights & Minorities Affairs, Punjab has tendered appearance and submitted his written comments dated 20.01.2017 which primarily relies on the verses of the Bible and places reliance on *Mst. Nazir Yasin v. Yasin Farhat* **(PLD 2000 Lahore 594)**.

13. Rt. Rev. Sebastian Francis Shaw, Archbishop of Roman Catholic Church, Lahore, Rt. Rev. Irfan Jamil, Bishop of Lahore and Rev. Dr. Majid Abel, Moderator Presbyterian Church of Pakistan, Lahore have also submitted their written position, where in they state that "no one can change any verse or order of the Holy Bible."

14. Bishop Azad Marshall, Co-Adjutor Bishop of Raiwind Diocese Church of Pakistan and President National Council of Churches in Pakistan has also submitted written position dated 19.01.2017 which states that biblical injunctions be kept intact.

15. Senator Kamran Michael, Federal Minister, Ministry of Human Rights, Islamabad also supported the view expressed by the persons mentioned above. He has also submitted his written

position, which states that being divine law of Christianity, no one can change any verse or order of the Holy Bible.

16. Father Emanuel Yousaf Mani, Sr. Catholic Priest, St. Anthony Church, Lahore submitted that there is a difference between nullity and dissolution of marriage. He submitted that as far as nullity of the marriage is concerned, it means that marriage never took place and therefore parties can re-marry, whereas dissolution of marriage means that marriage has validly taken place and is now being dissolved.

17. On the other hand, Ms. Marry Gill, MPA (representing Christian community) has tendered appearance and supports the contention of the petitioner and submits that all over the world "No Fault Divorce" has been introduced and it must also be available to the Christians in Pakistan. She submitted that provisions of section 10 of the Divorce Act, 1869 as they stand are discriminatory and against the dignity of women and required to be re-visited and contextualized with the norms of modern society. She submitted that section 7 of the Act was deleted from the law in order to force Christians to convert and this has been the practice since.

18. Mr. Ijaz Farhat, Advocate/President of the Christians District Lawyers Association, submitted that under the Act there are three different regimes, which are as follows:-

(i) Section 10 of the Act provide for ***dissolution of marriage***;

(ii) Sections 18 & 19 provides for declaring a marriage a ***nullity***; and

(iii) Section 22 provides for ***judicial separation.***

He submitted that nullity and dissolution of marriage are two separate concepts and have separate legal consequences.

19. Mr. Asif Aqeel, a human rights activist and journalist (belonging to the Christian community) submitted that the current legal position is in violation of the conventions signed by the Government of Pakistan, namely Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

20. I have heard the learned counsel for the parties, as well as, the various members of the Church, Christian parliamentarians and freelance journalist and have gone through the law and other materials presented before the Court.

OPINION OF THE COURT

Law and judicial review

21. This is a Constitutional Court empowered to judicially review legislation on the touchstone of fundamental rights. Judges of this Court have sworn an oath to discharge their duties and perform their functions, honestly, to the best of their ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law….to preserve, protect and defend the Constitution…and in all circumstances, do right to all manner of people, according to law, without fear or favour, affection or ill will. This Court is, therefore, to adjudicate matters in accordance with the Constitution and the law and there is no room for personal interest, belief, passion or inclinations.

22. In the present case, this Court is to examine the constitutionality and legality of the repeal of section 7 of the

Divorce Act, 1869 through Federal Laws (Revision & Declaration) Ordinance, 1981 (XXVII of 1981) on the touchstone of the *minority rights* guaranteed under the Constitution.

23. The submissions of the Christian ecclesiastical and political leadership revolved around their understanding and interpretation of the canonical law. Their singular argument was that divorce other than on the ground of *adultery* is not permitted in the Holy Bible and viewed the judicial examination of the impugned Ordinance by this Court, to amount to sitting in judgment over the personal/biblical law of Christians. They submitted that biblical law or Christian personal law fell outside the jurisdiction of this Court and any judicial interference by this Court would be a direct affront to the religious sensibilities of the Christians. This line of thinking, with respect, is totally misconceived. Biblical Law or Christian personal law is not under discussion in this case. It is the State law i.e., Federal Laws (Revision & Declaration) Ordinance, 1981 which is under review, whereby section 7 of the Act was deleted. It is pointed out for reference that Divorce Act, 1869 is the State law for divorce of Christians in Pakistan. Section 10 of the Act (reproduced hereunder) already provides for divorce on grounds of (a) change in religion (b) second marriage (c) rape (d) sodomy and (e) bestiality (f) adultery with bigamy, (g) incestuous adultery, (h) adultery coupled with cruelty or (i) adultery coupled with desertion. The Act also provides for annulment of marriage and judicial separation. Therefore, the existing State law provides for grounds of divorce other than the sole ground of adultery. The distinctiveness of State law and personal law has to be borne in mind in order to understand the scope of this judgment.

Sections 10, 18, 19 and 22 of Divorce Act, 1869 are reproduced hereunder for reference:-

> **Section 10. When husband may petition for dissolution:** Any husband may present a petition to the Court of Civil Judge praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.
>
> **When wife may petition for dissolution:** Any wife may present a petition to the Court of Civil Judge praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;
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> or 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 of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a *mensa et toro*.
> or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.
>
> Contents of petition: Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded."
>
> **Section 18. Petition for decree of nullity**. Any husband or wife may present a petition to the court of Civil Judge, praying that his or her marriage may be declared null and void.
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> **Section 19. Grounds of decrees** .Such decree may be made on any of the following grounds:
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> (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
>
> (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

> (3) that either party was a lunatic or idiot at the time of the marriage;
>
> (4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.
>
> Nothing in this section shall affect the [jurisdiction of the District Court] to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.
>
> **Section 22. Bar to decree for divorce a mensa et toro; but judicial separation obtainable by husband or wife**. No decree shall hereafter be made for a divorce a mensa for at toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion but: without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned.

24. This Court is only to judicially review the existing State law on the yardstick of constitutional values and fundamental rights guaranteed to the minorities-cum-citizens of this country under the Constitution. Nothing else. The apprehension of the clergy that this Court is deciding against the teachings of the Holy Bible, is unfounded, as this court is doing no such thing. This Court is simply examining the constitutionality of the provision of the impugned Ordinance whereby section 7 of the Act has been deleted. If the Christian clergy are unhappy with the law, they can approach the Parliament for its revision. Therefore, this case is not about examining the canonical or biblical law but about assessing the legality and constitutionality of item 7(2) of the Second Schedule of Federal Laws (Revision and Declaration) Ordinance, 1981. Having dispelled this unfounded apprehension of the political and ecclesiastical leadership, I proceed further.

25. Section 7 of the Divorce Act, 1869 before its repeal by the Federal Laws (Revision & Declaration) Ordinance, 1981 and as amended by Divorce (Amendment) Act, 1975 read as follows:-

> Section 7: **Court to act on principles of English Divorce Court.** Subject to the provisions contained in this Act, the Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. *(emphasis supplied)*

Section 7 provided that Courts *shall give relief* to Christians on principles and rules, which are conformable with the divorce law in UK. Section 7 was deleted through item 7(2) of the Second Schedule read with section 3 of Federal Laws (Revision & Declaration) Ordinance, 1981 (XXVII of 1981) promulgated on 08.07.1981. The Ordinance (item 7(2) of the Second Schedule) simply provided that section 7 of the Act shall be omitted. With section 7 repealed by the Ordinance, the only grounds left for divorce or dissolution of marriage are provided under Section 10 of the Act, reproduced above.

26. Before reviewing the constitutional vires of the impugned Ordinance to the extent of repeal of section 7 of the Act, it is essential to have an overview of the concept of Christian *Divorce* and its liberalization over the years in Christian majority countries. The term "Divorce" as a verb means "to separate." When the word "divorce" is confined to its strict legal sense, it means the legal dissolution of a lawful union for a cause arising after marriage.[2] Divorces under Christian law are generally of two distinct types: Absolute divorce, or divorce

[2] Corpus Juris Secondum, Volume 27A. p.16 Thomson/West. Ed 2008

"*a vinculo matrimonii*" is a judicial dissolution of the marriage ordered as a result of marital misconduct or other statutory cause arising after the marriage ceremony, whereas limited divorce, sometimes referred to as divorce "*a mensa et thoro,"* "divorce from bed and board," or legal separation is a change in status by which the parties are separated and are precluded from cohabitation, but the actual marriage is not affected[3]. Limited divorce is sometimes termed a judicial separation, which suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force.[4]

27. In Christian majority countries, although it is public policy to discourage divorce, and not to favour or encourage it, public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. The State is not interested in perpetuating a marriage after all possibilities of accomplishing a desirable purpose of such relationship is gone, or out of which no good can come and from which harm may result, Accordingly, it is the public policy to terminate dead marriages.[5]

28. In this connection, non-culpatory or so-called "no fault" laws have been enacted in many jurisdictions in order to enable persons to extricate themselves from a dead marriage more easily.[6] Most states now have statutes which allow for no-fault divorce, or divorce by consent, in which the parties are not required to prove fault or grounds for divorce other than a

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[3] Corpus Juris Secondum, Volume 24 p.228 Thomson/West. Ed 2008
[4] Corpus Juris Secondum Volume 27A p.18 Thomson/West. Ed 2008
[5] Ibid p.30
[6] ibid p.31

showing of irreconcilable differences or an irretrievable breakdown of the marriage.[7]

29. Primary purpose of such a statute is to remove from domestic relations litigation the issue of marital fault as a determining factor, to abolish the necessity of presenting sordid and ugly details of conduct by either party to obtain a dissolution of marriage and to replace the concept of fault by substituting marriage failure or "irretrievable breakdown" as a basis for a decree dissolving a marriage. It has also been observed that the purposes of a no-fault divorce statute are: to strengthen and preserve the integrity of marriage and safeguard family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; to make reasonable provision for the spouse and minor children during and after litigation; and to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis of its dissolution.[8] These no fault statutes were enacted based on the theories that a divorce should be granted when a marriage has broken down, so that parties may be free to form other alliances, to keep pace with contemporary social realities, and to reduce guilt and conflict as incidents of divorce, as well as to minimize bitterness resulting from attempts to place blame for an unsuccessful marriage with either the husband or the wife. Most no-fault divorce statutes provide for dissolution of marriage upon a showing that the marriage is "irretrievably broken" or similar variations of such

[7] Corpus Juris Secondum, Volume 24 p.229 Thomson/West. Ed 2008

[8] ibid p.230

language. A marriage is "irretrievably broken" as a basis for divorce, where either or both parties are unable or refuse to co-habit and there are no prospects for a reconciliation.[9]

30. The Family Law Act of California has been enthusiastically received throughout that state by judges, lawyers, sociologists, psychologists, partners to broken marriages and the public at large. Judge Everett M. Porter applauds the action taken by the California Legislature and says:[10] "…The new act recognizes that a man and wife cannot be compelled to live together in the marital relation. It recognizes that the right to support, both temporary and permanent, should depend on relevant need and the circumstances of the parties. It decrees that when divorce and separation are inevitable, neither spouse shall be permitted to use the law or the court as an instrument for revenge… It empowers the court to do whatever is necessary to protect the vital interest of minor children. There isn't a state in the union that shouldn't be using the provisions in the New Family Law Act of California."

31. The so-called "no-fault" revolution started in the 1970s, when many countries introduced grounds for divorce in addition to fault, typically the "irretrievable breakdown" of the marriage. The table below shows the global change in the Christian divorce law in some of the majority Christian countries:

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[9] ibid p. 251

[10] *John D. Cannell* - Abolish Fault-Oriented Divorce in Ohio- As a service to society and to restore dignity to the domestic relations courts.

No Fault Divorce in the Christian World[11]

Sr. No	Country	Year when Divorce allowed	No-fault Divorce allowed	% Christian	% Catholic	% protestant/ Orthodox/ other
1	Austria	Pre-1950	Pre-1950	70%	59.9%	10%
2	Belgium	Pre-1950	Pre-1950	65%	58%	7%
3	Denmark	Pre-1950	Pre-1950	79%	1%	77.8%
4	Finland	Pre-1950	Pre-1950	74.9%	0	74.9%
5	France	Pre-1950	1976	63-66%	53-63%	4%
6	Germany	Pre-1950	Pre-1950	60%	29%	31%
7	Greece	Pre-1950	1979	89.5%	1.2%	88.3%
8	Iceland	Pre-1950	Pre-1950	85.3%	3.6%	81.7%
9	Ireland	1997	1997	87%	84%	3%
10	Italy	1971	1975	83%	81.2%	2%
11	Luxembourg	Pre-1950	Pre-1950	72.4%	68.7%	3.7%
12	Netherlands	Pre-1950	1971	34%-44%	22.0%-23%	10.2%-22.0%
13	Norway	Pre-1950	Pre-1950	76.7%	2.4%	74.3%
14	Portugal	1977	1977	84.3%	81%	3.3%
15	Spain	1981	1981	71%	68%	2%
16	Sweden	Pre-1950	Pre-1950	65%	2%	63%
17	Switzerland	Pre-1950	Pre-1950	69.1-78%	37.9-40.0	31.2-39%
18	UK	Pre-1950	1971	59.3%	8.9%	50%
19	Australia		1975	61.1%	25.3%	35.8%
20	Canada		1986	67.3%	38.7%	29%
21	South Africa		1979	80%	5%	75%
22	United States	1970s	1970s	71%	20.8%	49.8%

The above shows that the countries with majority Christian population, irrespective of being catholic or protestant, have introduced the *no-fault* divorce based on the concept of irretrievable breakdown of marriage.

32. 90th Report of the Law Commission of India on *THE GROUNDS OF DIVORCE AMONGST CHRISTIANS IN INDIA: SECTION 10 OF INDIAN DIVORCE ACT, 1969* states as under:

> 1.1. The Law Commission of India has taken up for consideration on the question whether the law relating to the grounds of divorce applicable to Christians in India under section 10 of the Indian Divorce Act, 1869 should be reformed, and if so, on what lines. The inadequacies of the present law have been stressed

[11] The Effect of Divorce Laws on Divorce rates in Europe- Libertad Gonzalez. March 2006 (IZA DP no. 2023) and Sovereign States and defendant territories – Christianity by Country.

from time to time by individuals and social organisations. The Law Commission of India itself had, a few years ago, made detailed recommendations for reform[12] of the law on the subject, in a comprehensive Report dealing with the entire law of marriage and divorce amongst Christians in India, supplemented by another Report[13] dealing with certain matters arising out of the Bill prepared by Government on the subject. While legislation for removing the defects in the law on the subject has not been introduced, it appears to the Commission that it is urgently necessary in the interest of social justice to take up some issues, even if a comprehensive legislation by way of revision of the enactments on the subject cannot be undertaken by Government.

1.2. In a letter recently addressed to the Chairman of the Law Commission[14] there have been narrated certain actual cases of Christian women who were treated with severe cruelty by their respective husbands, as a consequence of which the women had to undergo a lot of suffering, resulting in their mental breakdown. The letter also mentions many other cases of cruelty by Christian husbands (even of husbands putting their wives into prostitution), and of long continuing desertion by the husbands, who, notwithstanding their own past misconduct, nevertheless expect their wives to accept them back. Because of the difficulty of getting a divorce in such cases, these women, it is stated, have no hope of redeeming their lives and finding happiness for themselves and their children.

1.3. It has also been emphasized in the letter mentioned above that the recent proposal to amend the Special Marriage Act and the Hindu Marriage Act by way of introducing "irretrievable breakdown" as a ground for divorce (in the two Acts) is the first step towards the liberation of unfortunate Indian women and that the same should be extended to Christians also Towards the end of the letter, the need for a uniform divorce law covering every community has also been stressed, "thereby enabling the Christian woman

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[12] Law Commission of India, 15th Report (Law relating to marriage and divorce amongst Christian in India).
[13] Law Commission of India, 22nd Report (Christian Marriage etc. Bill).
[14] Letter addressed to the Law Commission by Ms. Aud Sonia Reberts, New Delhi, dated 15th September, 1981.

> especially, to break away completely from an unhappy union and start a new life while she is still young and sane enough to do so." *(emphasis supplied)*

33. Thereafter, India brought about the Indian Amendment Act, 2001 (51 of 2001) which expanded the scope of divorce in sections 10 and 10A of their Act:

> **10. Grounds for dissolution of marriage**
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> "(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent
>
> (i) has committed adultery; or
>
> (ii) has ceased to be Christian by conversion to another religion; or
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> (iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or
>
> (iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or
>
> (v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or
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> (vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or
>
> (vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or
>
> (viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years

or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

10-A. Dissolution of marriage by mutual consent

(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

UK Matrimonial Causes Act, 1973

34. Repealed Section 7 of the Act provides that the Courts in

Pakistan shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. The UK law referred to in (repealed) section 7 is the UK Matrimonial Causes Act, 1973. Section 1 of Part 1 of Chapter 18 of UK law provides as follows:

> 1.- (l) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage **on the ground that the marriage has broken down irretrievably.**
>
> (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say-
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) **that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent ;**
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition ;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as " two years' separation ") and the respondent consents to a decree being granted ;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as " five years' separation ").

> (3) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.
>
> (4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to sections 3(3) and 5 below, grant a decree of divorce.
>
> (5) Every decree of divorce shall in the first instance be a decree nisi and shall not be made absolute before the expiration of six months from its grant unless the High Court by general order from time to time fixes a shorter period, or unless in any particular case the court in which the proceedings are for the time being pending from time to time by special order fixes a shorter period than the period otherwise applicable for the time being by virtue of this subsection.

UK law and other international material show that *no-fault divorce* or *irretrievable breakdown of marriage* is an established ground of divorce in Christian majority countries of the world.

Pakistan & Christian Minority

35. Pakistan's population is estimated at nearly 188.9 million with a Christian population of 2.5 million. The white rectangle on the left side of the Pakistani flag symbolizes the nation's minority community. Religious minority in Pakistan includes Christians, Hindus, Sikhs, Parsis, Zikris, Bahais, Buddists and Kalasha. Government statistics show that 96.28% of Pakistan's population is Muslim and 1.6% is Christian.[15]

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[15] A Question of Faith – A Report on the Status of Religious Minorities in Pakistan. Jinnah Institute Research Report. 2011 p.14

Minority Rights

36. In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly and provided in Article 1 that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." It is within this international framework of human rights and the indicators of equality and non-discrimination that a dialogue on the protection of minorities finds its roots.[16]

37. In 1992 the General Assembly adopted the United Nations Minorities Declaration by consensus (resolution 47/135). It is the main reference document for minority rights. It grants to persons belonging to minorities[17]:

> i. Protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity (art. 1);
>
> The right to enjoy their own culture, to profess and practise their own religion, and to use their own language in private and in public (art. 2 (1));
>
> ii. The right to participate effectively in cultural, religious, social, economic and public life (art. 2 (2));
>
> iii. The right to participate effectively in decisions which affect them on the national and regional levels (art. 2 (3));
>
> iv. The right to establish and maintain their own associations (art. 2 (4));
>
> v. The right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their own country and across State borders (art. 2 (5)); and

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[16] ibid p.19

[17] Minority Rights – International Standards & Guidance for implementation - 2010. UN Human Rights- Office of the High Commissioner

vi. The freedom to exercise their rights, individually as well as in community with other members of their group, without discrimination (art. 3).

vii. States are to protect and promote the rights of persons belonging to minorities by taking measures to:

viii. Ensure that they may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law (art. 4 (1));

ix. Create favourable conditions to enable them to express their characteristics and to develop their culture, language, religion, traditions and customs (art. 4 (2));

x. Allow them adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (art. 4 (3));

xi. Encourage knowledge of the history, traditions, language and culture of minorities existing within their territory and ensure that members of such minorities have adequate opportunities to gain knowledge of the society as a whole (art. 4 (4));

xii. Allow their participation in economic progress and development (art. 4 (5));

xiii. Consider the legitimate interests of minorities in developing and implementing national policies and programmes, and international programmes of cooperation and assistance (art. 5);

xiv. Cooperate with other States on questions relating to minorities, including exchanging information and experiences, to promote mutual understanding and confidence (art. 6);

xv. Promote respect for the rights set forth in the Declaration (art. 7);

xvi. Fulfill the obligations and commitments States have assumed under international treaties and agreements to which they are parties.

xv. Finally, the specialized agencies and other organizations of the United Nations system shall also contribute to the realization of the rights set forth in the Declaration (art. 9).

38. The International Covenant on Civil and Political Rights **(ICCPR)** and, in particular, article 27 inspired the contents of the United Nations Minorities Declaration. It states that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This article protects the rights of persons belonging to minorities to their national, ethnic, religious or linguistic identity or a combination thereof, and to preserve the characteristics which they wish to maintain and develop. Although it refers to the rights of minorities in those States in which they exist, its applicability is not subject to official recognition of a minority by a State. States that have ratified the Covenant are obliged to ensure that all individuals under their jurisdiction enjoy their rights; this may require specific action to correct inequalities to which minorities are subjected.

39. The Human Rights Committee's General Comment No. 23 (1994) on the rights of minorities provides an authoritative interpretation of article 27. The Committee stated that "this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant." The right under article 27 is an autonomous one within the Covenant. The interpretation of its scope of application by the Human Rights Committee has had the effect of ensuring recognition of the existence of diverse groups within a State and of the fact that decisions on such recognition are not the province of the State alone, and that

positive measures by States may be "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.[18]"

Minority rights and our Constitution

40. The preamble of the Constitution, as well as, the Objectives Resolution, which forms substantive part of the Constitution under Article 2A of the Constitution, provide that adequate provisions shall be made for the *minorities* to freely profess and practice their religion and develop their culture. And adequate provision shall be made to safeguard the legitimate interests of the *minorities*. Article 20 of the Constitution, as a fundamental right, provides that every citizen shall have the right to profess, practice and propagate his religion subject to law, public order and morality. Principle of Policy under Article 36 provides that State shall safeguard the legitimate rights and interest of minorities. Under Article 29 of the Constitution, it is the responsibility of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles. Members of the minority also enjoy fundamental rights guaranteed to every citizen under the Constitution. Therefore, *inter alia*, right to life, liberty, dignity and non-discrimination are also available to the minorities of this country being citizen of Pakistan. *Minority rights* are, therefore, a basket of fundamental rights, constitutional values, State obligations under the Principles of Policy, international conventions like ICCPR (duly ratified by Pakistan) and the rich jurisprudence developed over the years. Reliance is placed on: *Mumtaz Oad and 2 others v. Sindh Public Service Commission through*

[18] ibid.

Secretary and 2 others **(2015 CLC 1605)**, *District Bar Association, Rawalpindi and others v. Federation of Pakistan and others* **(PLD 2015 SC 401)** and *Suo Motu Case No.1 of 2014 etc.* **(PLD 2014 SC 699)**. The impugned amendment (deletion of section 7) in Divorce Act, 1869 is to be reviewed and examined on the touchstone of these *minority rights* available to the petitioner and for the minorities reflected in the table below:

Population by Religion in Pakistan[19]

Muslims	***Christian***	*Hindu*	*Qadiani*	*Scheduled castes*	*Others*
96.28	***1.59***	*1.60*	*0.22*	*0.25*	*0.07*

41. In this case, the petitioner has argued that the impugned amendment in the Act through the impugned Ordinance whereby section 7 of the Act was deleted is unconstitutional, in as much as, it abridges and limits the *minority rights* of the petitioner and the Christian community at large. Undisputed international material referred to above show that there has been liberalization in the grounds of divorce all over the Christian world. The UK Matrimonial Causes Act, 1973 also provides for *irretrievable breakdown of marriage*. This freedom would have been automatically available to the Christian minority in Pakistan had section 7 been available on the statute book. The wisdom and experience behind the liberalization and emancipation of the Christian Divorce law around the world has been the protection of the right to a happy family life and right to dignity of a human being, who cannot be left chained to a dead marriage forever or forced to convert to another religion just to be released of the bondage of an unhappy marriage. "Right to family life is a daughter-right of

[19] website of the Pakistan Bureau of Statistics.

human dignity. It has been said of this daughter-right that it "is one of the fundamentals of human existence…. Among human rights, the human right to family stands on the highest level. It takes precedence over the right to property, to freedom of occupation and even to privacy and intimacy…. Human dignity dictates that the state must create a system of laws that recognizes the right of every person to create a familial relationship as he desires. The right to family life thus includes the right of the individual to choose his partner and to establish a family with him. The basic human right to choose a spouse and to establish a family unit with that spouse ...is part of a person's dignity. Thus a statute requiring a person to enter into a familial relationship against his will limits the constitutional right to human dignity.[20]" Human dignity is based on the individual's free will and his ability to develop his personality and fulfill his life.[21] The dignity of a human being is his free will: the freedom to shape his life and fulfill himself. It is a person's freedom to write his life story.[22] "Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity regards a human being as an end, not as a means to achieve the ends of others[23]."

42. Right to life and liberty is a separate fundamental right under our Constitution. The impugned amendment limits the choice of a person to divorce and forces a person to lead an unhappy and an oppressive life unless he or she can prove the charge of adultery against the spouse. This limitation

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[20] Aharon Barak- *Human Dignity- The Constitutional Value and the Constitutional Right* – Cambridge 2015. Pp 292-293
[21] ibid at p126 (or see Ackermann, *Human Dignity* at 23)
[22] ibid p. 144.
[23] *Aharon Barak* – The Judge in a Democracy. Princeton. p 86.

perpetuates a dead marriage and impairs the quality of life and curtails the liberty of a person by forcing him to live through an unhappy family life against his free choice. Right to liberty means "the state of being free within society from oppressive restrictions imposed by authority on one's behaviour.[24]" Impugned amendment has a deep impact on the behaviour of the petitioner and restricts his choice to lead his life. The impugned amendment by limiting the grounds of divorce stunts the growth and freedom of *minority rights* in Pakistan. The amendment has deprived the Christians to fashion their divorce law with the same freedom, emancipation and liberation as have the Christians around the world. The limited grounds of divorce under the State divorce law when compared with the rights enjoyed by the Christians in the world, amounts to discriminating the Christian minority in Pakistan. This gap and deprivation in State law, can best be abridged by extending the same rights enjoyed by Christians in majority countries to the Christians in Pakistan. This can be easily achieved by restoring section 7 of the Act, as was the case prior to the impugned amendment. The only ground agitated by the clergy is that the revival of the amendment is against the Biblical teachings. As pointed out earlier in the judgment, it is the State law that is under consideration and not the personal canonical law of the Christians, hence the Act can be examined on the touchstone of the fundamental rights read with the other penumbral rights and values under the Constitution. It is nobody's case that the revival of section 7 is against public order or morality as provided under Article 20 of the Constitution. I, therefore, see no better way to protect and strengthen the *minority rights* of the Christians in our country than to extend the same rights to

[24] Oxford Dictionary of English.

them that are available to Christians in all the majority Christian countries of the world, irrespective of catholic or protestant majority within them. The impugned amendment does not pass the test of *minority rights* (above) and in particular the fundamental rights to life, liberty, dignity and non-discrimination. Reliance is placed on: *Alleged Corruption in Rental Power Plants etc.: in the matter of* **(2012 SCMR 773)**, *Wattan Party and others v. Federation of Pakistan and others* **(PLD 2012 SC 292)**, *All Pakistan Newspapers Society and others v. Federation of Pakistan and others* **(PLD 2012 SC 1)**, *Watan Party and another v. Federation of Pakistan and others* **(PLD 2011 SC 997)**, *Ms. Shehla Zia and others v. WAPDA* **(PLD 1994 SC 693)**, *The Employees of the Pakistan Law Commission, Islamabad v. Ministry of Works and 2 others* **(1994 SCMR 1548)**, *Dr. Mehmood Nayyar Azam v. State of Chhattisgarh and others* **(2013 SCMR 66)**, *Arshad Mehmood v. Commissioner/Delimitation Authority, Gujranwala and others* **(PLD 2014 Lahore 221)**, *Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others* **(PLD 2013 Lahore 413)**, *Raja Rab Nawaz v. Federation of Pakistan and others* **(2014 SCMR 101)**, *N.W.F.P. Public Service Commission and others v. Muhammad Arif and others* **(2011 SCMR 848)**, *Pakcom Limited and others v. Federation of Pakistan and others* **(PLD 2011 SC 44)**, *Pakistan International Airlines Corporation through Chairman and others v. Samina Masood and others* **(PLD 2005 SC 831)**, *Mst. Attiyya Bibi Khan and others v. Federation of Pakistan through Secretary of Education (Ministry of Education), Civil Secretariat, Islamabad and others* **(2001 SCMR 1161)**, *I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others* **(1991**

SCMR 1041), *Shrin Munir and others v. Government of Punjab through Secretary Health, Lahore and another* **(PLD 1990 SC 295)**.

43. It is important to underline that historically the impugned amendment was introduced not through a democratic and participatory constitutional legislative process but was more of a surgical intrusion during the dark undemocratic period of our Constitutional history. The Christian political and ecclesiastical leadership had never opposed section 7 when it was on the statute book prior to 1981. They also had no role to play in its deletion. This regressive amendment, driven by oblique ends by the undemocratic regime of the past, not only obstructed and frustrated the *minority rights* but also went against the grain of international obligations entered by the State by ratifying International Covenant on Civil and Political Rights and the Principles of Policy under the Constitution. The impugned deletion is therefore repugnant to constitutionalism.

44. Article 29(1) & (2) of the Constitution states as follows:

> (1) The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.
>
> (2) In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principle shall be regarded as being subject to the availability of resources.

Principles of Policy provide the constitutional aspirations, goals and mission statement for the State of Pakistan. It is a constitutional obligation of the State and its organs and authorities to synchronize with and promote these Principles.

These Principles nourish the roots of our democracy and help actualize and fertilize our constitutional values. They are our roadmap to democracy and ensure that the State remains on course to achieve social, economic and political justice. The State or any authority may take time to achieve the said constitutional aspirations due to the non-availability of resources but they cannot at any stage or at any cost go against the Principles of Policy. In this case the impugned amendment goes against the fabric and texture of Article 36 that envisions that the legitimate interests of the minorities shall be safeguarded. Article 30 (2) of the Constitution protects a law which is not *in accordance* with the Principles of Policy i.e., where the law has not yet fully actualized the Principles of Policy but does not protect a law that is inconsistent with the Principles of Policy. Reliance is placed on *Minerva Mills Ltd. and others v. Union of India and others* **(AIR 1980 SC 1789)**, *Miss Farhat Jaleel and others v. Province of Sindh and others* **(PLD 1990 KAR 342)**, *Shirin Munir and others v. Government of Punjab through Secretary Health, Lahore and another* **(PLD 1990 SC 295)**.

45. The impugned amendment is an affront to *minority rights* of the petitioner including the constitutional values, fundamental rights, Principles of policy and international obligations. Hence, the impugned amendment does not enjoy the constitutional immunity under Article 270A. Reliance is placed on *Miss Benazir Bhutto v. Federation of Pakistan and another* **(PLD 1988 SC 416)** and *Federation of Pakistan and another v. Malik Ghulam Mustafa Khar* **(PLD 1989 SC 26)**, *Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others* **(PLD 2009 SC 879)**,

Miss Asma Jilani v. The Government of the Punjab and another **(PLD 1972 SC 139)**, *Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others* **(PLD 2006 SC 697)**, *Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others* **(PLD 1996 SC 324)** and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others* **(PLD 2010 SC 61)**.

46. For the above reasons, item 7(2) of the Second Schedule to Federal Laws (Revision & Declaration) Ordinance, 1981 (XXVII of 1981) promulgated on 08-7-1981 is declared to be unconstitutional and illegal being in violation of the *minority rights* guaranteed under the constitution to the petitioner and the Christians in Pakistan. As a result, section 7 of Divorce Act, 1869 is restored, in the manner it stood in the year 1981, making available to the Christians of Pakistan the relief based on the principles and rules of divorce under UK Matrimonial Causes Act, 1973. Reliance is placed on *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* **(PLD 2010 SC 265)** and *Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others* **(PLD 2012 SC 870)**.

Restored Section 7 of the Act

47. Restored section 7 is to be read harmoniously with Section 10 of the Act. This means that grounds of divorce on the basis of adultery are available and anyone who wishes to invoke them is free to do so, but for those who wish to seek *divorce* on the ground of irretrievable breakdown of marriage, they can rely on section 7 of the Act and avail of the additional

grounds of divorce available under the Matrimonial Causes Act, 1973 (UK), which will be available to the Christians in Pakistan and will be enforceable in Pakistan. Reliance is placed with advantage on *Mrs. Marie Palmer v. O.R.J. Palmer* **(PLD 1963 (W.P.) Lahore 200)** where Manzoor Qadir CJ (as he then was) held: "This is where section 7 comes in. As I understand it, it makes it incumbent on the Courts in Pakistan that whenever the Act makes no specific provision, they must ask themselves the question whether the Divorce Court in England would, in corresponding conditions, give or refuse relief and act accordingly. It further requires the Courts in Pakistan to remain in step with the English Court all the times, and to alter their course from time to time if need be so as no to get out of step with that Court." The term *subject to the provisions of the Act* in Section 7 is read down in order to make sections 7 and 10 work together and to make them constitutionally compliant. On reading down, reliance is placed on *Messrs Chenone Stores Ltd. Through Executive Director (Finance Accounts) v. Federal Board of Revenue through Chairman and 2 others* **(2012 PTD 1815)** and *Nadeem Asghar Nadeem and others v. Province of the Punjab and others* **(2015 CLC 1509)**.

48. For the above reasons this petition is allowed with no order as to costs.

(Syed Mansoor Ali Shah)
Chief Justice

*M. Tahir**

APPROVED FOR REPORTING