IN THE HIGH COURT OF SINDH, AT KARACHI

C.P. No. D-1773 of 2023

Present:
Yousuf Ali Sayeed and
Abdul Mobeen Lakho, JJ

Petitioner No. 1	:	Peter Jacob, through Bassam Ali Daheri, Advocate.
Petitioner Nos. 2 & 3	:	Legal Aid Society & another, through Rabia Khan, Advocate.
Respondent Nos.1 to 3	:	Federation of Pakistan, through Mehreen Ibrahim, DAG.
Respondent Nos. 4 to 7	:	Government of Sindh, through Agha Shahzaib, AAG.
Respondent No. 8	:	His Grace the Archbishop of Karachi, through Rev. Fr. Edward Joseph, Advocate.
Dates of hearing	:	21.10.26, 29.10.26 and 10.11.26

JUDGMENT

YOUSUF ALI SAYEED, J. – The Petition relates to the Divorce Act 1869 (the "**Act**"), which governs matrimonial causes and the dissolution of marriage of persons professing the Christian faith. For more than a century, through its Section 7, the Act included a provision enabling the Courts to grant relief on the principles on which the matrimonial courts of England act in such matters and allowed the law to keep pace with the development of divorce law in the jurisdiction from which it was drawn. That provision was omitted through the Federal Laws (Revision and Declaration) Ordinance, 1981 (the "**Ordinance**"), with the effect that under the law as it presently stands, a Christian citizen of this Province whose marriage has failed may obtain its dissolution only by establishing that his or her spouse has committed adultery, or one of other specified acts of grave misconduct.

2. The Petitioner No. 1, a Christian male, professedly leads a civil society organisation concerned with the rights of religious minorities. The Petitioner No. 2 is a non-governmental organisation that provides legal representation without charge to marginalised persons within Sindh, including members of minority communities. The Petitioner No. 3 is a Christian woman resident in Karachi, who avers that she has herself endured an unhappy and abusive marriage. The Petition was originally brought against the Federation of Pakistan and the Government of Sindh however, vide an Order dated 06.03.2024, His Grace the Archbishop of Karachi was impleaded as the Respondent No. 8 and has since filed a Written Statement through his authorised representative.

3. As a matter of record, the Ordinance was promulgated on 08.07.1981, at a point in time when the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**") stood in abeyance under a Proclamation of Martial Law, with Item 7(2) of the Second Schedule of the Ordinance (the "**Impugned Omission**"), read with Section 3, simply providing that Section 7 shall be omitted, and upon revival of the Constitution, the Ordinance, along with the other laws made in the interregnum, being affirmed by Article 270A.

4. Prior to the Impugned Omission, Section 7 of the Act, as amended by the Divorce (Amendment) Act, 1975, provided as follows:

> "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."

5. Whilst the Petitioners had initially prayed *inter alia* that Section 10 of the Act be declared unconstitutional and void and the Provincial Assembly of Sindh also be directed to legislate and enact a bill in conformity with the fundamental rights enshrined within the Constitution to regulate familial matters for Christians in Sindh, learned counsel for the Petitioners stated at the outset of the hearing that those prayers were not being pressed and the matter was being confined to the Petitioners seeking that the Impugned Omission be declared unconstitutional and without any legal effect and the District and Family Courts of Sindh be directed to disregard it.

6. The question that thus arises for determination at the behest of the Petitioners is whether the Impugned Omission, in the context of the overall scheme of the Act, is consistent with the Fundamental Rights guaranteed by Chapter 1 of Part II of the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**") and, if not, what consequence follows. For the purpose of appreciating the effect of the Impugned Omission, one must look to Sections 10, 18, 19, 22 and 23 of the Act, being the existing provisions to which a Christian citizen of this Province may turn under circumstances where their marriage has failed.

7. Section 10 of the Act, falling in Part III thereof under the heading "Dissolution of Marriage", provides that:

> "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.
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> 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."

8. In turn, Part IV of the Act provides for decrees of nullity, which proceed on the footing that no valid marriage ever came into being. Section 18 enables either spouse to petition for such a decree, and Section 19 sets out the grounds, namely impotence at the time of the marriage and of the institution of the suit; the parties being within the prohibited degrees of consanguinity or affinity; lunacy or idiocy of either party at the time of the marriage; and the subsistence of a prior marriage of either party, with a saving for the jurisdiction of the Court to annul a marriage where consent was obtained by force or fraud. Part V then provides for judicial separation, with Sections 22 and 23 stipulating as follows:

> "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 et toro, but the husband or wife may obtain a decree

> of judicial separation, on the ground of adultery, or cruelty, or desertion 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.
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> 23. Application for separation made by petition. Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the Court of Civil Judge and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly."

9. It is thus apparent that the Act recognises cruelty, and desertion for two years or more, as conduct sufficiently grave to warrant a decree of judicial separation, but not, standing alone, as grounds for the dissolution of the marriage. A spouse who establishes such conduct may live apart from the other under the sanction of a decree, but the bond itself subsists, with the consequence that neither party is free to marry again. For a husband, dissolution is available only upon proof of adultery. For a wife, it is available only upon proof of adultery coupled with an aggravating circumstance, or of conversion coupled with a further marriage, or of rape, sodomy or bestiality. The disparity between the grounds available to each spouse is evident on the face of the provision.

10. As the matter stands, through a seminal judgment rendered in the case reported as Ameen Masih v. Federation of Pakistan and others PLD 2017 Lahore 610 ("*Ameen Masih*"), relating to a Christian citizen whose marriage had irretrievably broken down, the Lahore High Court declared the Impugned Omission to be unconstitutional, for being violative of the rights to life, liberty, dignity and non-discrimination, and held that

Section 7 stood restored in the manner in which it stood in the year 1981. As instructive as that erudite and lucidly reasoned judgment is, where the vires of the Impugned Omission was examined on the touchstone of the constitutional guarantees of dignity, equality and freedom of religion with great sensitivity, by virtue of Article 201 of the Constitution it binds the Courts subordinate to the Lahore High Court alone; and the Petitioners have placed on record an Order of the learned XVIth Family Court, Karachi South to illustrate their contention that presently the relief recognised in *Ameen Masih* is not properly extended to Christian litigants in Sindh, who remain confined within the contours of Section 10, hence recourse to the present Petition, which requires an independent examination by this Court.

11. Learned counsel for the Petitioners submitted that the subject of "marriage and divorce" had devolved upon the Provinces by the Constitution (Eighteenth Amendment) Act, 2010 and pointed out that the Respondent No. 1, in its para-wise comments dated 23.10.2023, had itself stated that "marriage" is a devolved subject. They pointed out that the challenge to the Impugned Omission was not one that was based on legislative competence but on its substantive incompatibility with Articles 9, 14, 20 and 25, and that while the affirmation of the Ordinance by Article 270A validated its making, it did not immunise the Impugned Omission made through it from scrutiny on the touchstone of the Fundamental Rights enshrined in the Constitution. They relied on the judgments of the Supreme Court in the cases reported as Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416, Federation of Pakistan v. Malik Ghulam Mustafa Khar PLD 1989 SC 26 and Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 879.

12. On merits, learned counsel submitted that Section 7 was not a colonial vestige left in by inadvertence, but a provision that the Legislature had itself revisited and retained under the Constitution when it amended the Act in 1975. Relying on the judgment rendered by the Lahore High Court prior to promulgation of the Ordinance in the case reported as Mrs. Marie Palmer v. O.R.J. Palmer PLD 1963 (W.P.) Lahore 200 ("*Palmer*"), they emphasised that Section 7 was the mechanism by which the Act kept pace with the liberalisation of the law of divorce in England, where the subject was covered under the Matrimonial Causes Act, 1973, and which provided for divorce upon irretrievable breakdown of a marriage without proof of fault since 06.04.2022 by virtue of the reforms introduced through the Divorce, Dissolution and Separation Act 2020. They argued that, by contrast, the Impugned Omission had frozen the Act in its nineteenth century form, compelling a spouse to remain bound for life in a marriage that had irretrievably broken down unless he or she could prove adultery, with conversion to another faith or a false accusation of adultery remaining the only practical means of exit. They contended that this offended the right to liberty under Article 9 and to dignity under Article 14; discriminated against Christian citizens in comparison with citizens of other faiths, as well as against Christian women in comparison with Christian men, contrary to Article 25; and burdened the free profession of religion under Article 20. Lastly, they submitted that because Section 10 was not under challenge, the restored Section 7 should be construed so that the two provisions operated together, with Section 7 supplementing the Act where it made no specific provision, and that the words "in the opinion of the Courts" and "as nearly as may be" preserved the control of the Courts of this Province over the manner in which the principles of English law were to be applied.

13. Conversely, as it transpires, the comments forthcoming in the matter on behalf of the Federation and the Province were conspicuously bereft of any statement of substance as regards the subject of Section 7, and neither the learned Deputy Attorney General nor the learned Additional Advocate General Sindh, both of whom appeared in response to the notices issued under Order XXVII-A CPC, was able to controvert the submissions advanced by learned counsel for the Petitioners as to the effect of the Impugned Omission, with both the law officers instead falling back on Article 270A in order to argue that the Ordinance was protected thereunder, while stating that fresh legislation on the subject remained under consideration in both the Federal and Provincial domains respectively.

14. For his part, the Respondent No. 8 strongly opposed the Petition. On his behalf, it was contended that the Petition was not maintainable as the Petitioners lacked *locus standi* to institute the proceedings on behalf of the Christian community, and that any reform must be preceded by meaningful consultation with all Christian denominations and representative bodies, and that the Petition could even otherwise not be entertained to the extent that it sought directions to the Provincial Legislature to enact or amend laws governing Christian personal law, as the Court cannot, consistent with the separation of powers, compel a Legislature to legislate in a particular manner or within a specified time. It was argued that the Roman Catholic Church regards marriage as a Holy Sacrament governed by Canon Law, and any reform which directly or indirectly interferes with sacramental doctrine, or ecclesiastical jurisdiction would offend Article 20. It was submitted that the Act along with the Christian Marriage Act, 1872 together constituted a

unified framework, and any amendment, repeal or replacement thereof ought to be undertaken by Parliament through a uniform framework applicable throughout Pakistan, so as to avoid conflicting regimes and uncertainty as to the recognition of marriages, divorces, legitimacy, succession and maintenance. Learned counsel also echoed the contentions of the learned DAG and AAG in contending with reference to Article 270A of the Constitution that all laws promulgated between 05.07.1977 and 30.12.1985 had thereby been expressly affirmed, adopted, and declared by Parliament to have been validly made by competent authority, hence the legislative competence underpinning the Ordinance could not be questioned as it had been promulgated within that period, and the same would continue in force unless altered, repealed, or amended by the competent Legislature.

15. Turning firstly to the objection raised by the Respondent No. 8 as to the maintainability of those prayers that seek a direction to the Legislature to enact province-specific legislation, the same is well-founded as a matter of principle, for it is not for this Court to command a Legislature to make a law, still less to prescribe its content or the time within which it is to be made. However, the objection has lost its substance, with the prayer made on that score not having been pressed. What remains is a challenge to the vires of an existing law, and the power of this Court under Article 199 of the Constitution, read with Article 8, to examine whether a law in force within its territorial jurisdiction is consistent with the Fundamental Rights, and to declare it void to the extent of any inconsistency, which power admits of no doubt. Indeed, such an examination is an ordinary incident of the Constitutional jurisdiction of a High Court

and involves no encroachment on the legislative domain. Nor are we persuaded that the devolution of the subject matter detracts from the jurisdiction of this Court, for when the Ordinance was promulgated, "marriage and divorce" formed an entry in the Concurrent Legislative List, and upon the omission of that List by the Constitution (Eighteenth Amendment) Act, 2010, the subject came to fall within the residual legislative competence of the Provinces under Article 142(c). By virtue of Article 270AA(6), every law with respect to a matter in the omitted List that was in force immediately before the commencement of the Eighteenth Amendment continues to remain in force until altered, repealed or amended by the competent authority. The Act, in the form in which the Impugned Omission left it, is therefore an existing law that continues to operate in this Province, the competent authority to alter it now being the Provincial Assembly of Sindh, which has not done so. The questions of which Legislature may amend a law in the future, and whether that law, as it stands, is consistent with the Fundamental Rights, are distinct. Article 8 renders void "any law" that is inconsistent with Chapter 1 of Part II, without regard to the Legislature from which it emanated, and the expression "the State", as defined in Article 7, embraces both the Federal and the Provincial Governments and Legislatures. The Act is administered by the Courts of this Province and operates on persons within its territory, and the jurisdiction of this Court under Article 199(1)(c) is attracted accordingly.

16. As to the subject of *locus standi*, the Petition raises a question of public importance concerning the Fundamental Rights of an entire class of citizens, namely those members of the Christian community within this Province to whom the Act applies by reason of their faith.

In such matters, the expression “aggrieved person” is not to be construed narrowly. In any event, the Petitioner No. 3 is a Christian woman resident in Karachi who is directly governed by the Act, and the Petitioner No. 2 is an organisation that represents members of minority communities in matrimonial proceedings within Sindh. The fact that the Petitioner No.1 resides at Lahore is of no real consequence as a petition properly brought by any one of the petitioners is maintainable, with the territorial nexus required by Article 199 being supplied by the operation of the law within this Province. The Petition, as confined, is therefore maintainable.

17. Looking on to the objection raised with reference to Article 270A(1), which affirms, adopts and declares the laws made between 05.07.1977 and the date on which the Article came into force to have been validly made by competent authority, and provides that they shall not be called in question in any court on any ground whatsoever, whilst the language of the Article may, when read in isolation, appear to place the Ordinance beyond scrutiny, on closer examination it becomes apparent that it is not so. Indeed, Clause (6) thereof provides that such laws may be amended by the appropriate Legislature in the manner provided for amendment of such laws, which is indicative of the fact that they are ordinary laws, enjoying the status of laws made by a competent Legislature, rather than provisions of the Constitution itself. The Supreme Court has held in Benazir Bhutto and Malik Ghulam Mustafa Khar (supra) that the protection extended by Article 270A goes to the validity of the making of such laws, and not to their continuing conformity with the Constitution, such that, once they are treated as laws made by the appropriate Legislature, they stand subject to the Fundamental Rights in the

same manner as any other law. As such, we agree with and endorse the view taken in *Ameen Masih* that Article 270A does not shield the Impugned Omission from examination under Article 8. Even otherwise, the Petitioners do not question the competence of the authority that made the Ordinance, nor the regularity of its making, which are precisely the matters on which the affirmation conferred by Article 270A(1) operates. Instead, their challenge is to the continuing operation of the Impugned Omission as a law in force, which is to be tested as per Article 8(1) on the touchstone of the Fundamental Rights.

18. Before embarking on that exercise, it is necessary to be clear as to what is not in issue. The Respondent No. 8 has, with sincerity, placed before us the view of the Roman Catholic Church that marriage is a Holy Sacrament governed by Canon Law. Similar views were expressed by the leadership of several denominations before the Lahore High Court in *Ameen Masih*. We hold that view in the highest respect. However, the Act is not Canon Law, nor is it Biblical law; it is a law made by the State, administered by the Courts of the State, and the question before us is whether that State law is consistent with the Constitution. Nothing in this judgment touches upon the doctrine of any Church as to the indissolubility of a sacramental marriage, or the recognition that a Church may or may not accord, for its own purposes, to a decree of a civil Court. The distinction between the civil status of a marriage under State law and its sacramental character under the doctrine of a particular denomination is one that the Act itself has always drawn, since it has, from its inception, provided for the dissolution of marriages on grounds that some denominations may not recognise.

19. We would also observe that we are not embarking upon any determination of the motive underpinning the Impugned Omission. Learned counsel for the Petitioners invited us to infer that it was actuated by an *animus* against the minority, and in *Ameen Masih* too it was argued before the Court that it had been driven by oblique ends. The title and scheme of the Ordinance suggest, however, that it formed part of a general exercise in the revision of federal laws, and we find it unnecessary to dwell on the point, for the test under Article 8 is not the purpose with which a law was made, but its effect upon the rights of those to whom it applies. A law that abridges a Fundamental Right is not saved by the innocence of its object any more than a law that is consistent therewith is vitiated due to imputation of an improper motive.

20. Moving on then to the core issue as to whether the Impugned Omission is inconsistent with the Fundamental Rights, before turning to the specific Articles relied upon, it is necessary to firstly identify what the Impugned Omission did, for the Petitioners do not challenge Section 10, and it is not the function of this Court to sit in judgment over the wisdom of the grounds of divorce that the Legislature has chosen to enumerate. As such, it falls to be considered that Section 7 did not itself confer any particular ground of divorce, but merely directed the Courts, where the Act made no specific provision, to ask whether the matrimonial court in England would, in corresponding conditions, give or refuse relief, and to act accordingly. As was observed in *Palmer*, Section 7 required 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 not to get out of step with that Court." In short, it was the

means by which the law governing the dissolution of Christian marriages in Pakistan was left open to development. The effect of the Impugned Omission was to close that avenue so as to fix the law as it stood at the time, and to render Section 10 the sole and exhaustive route to dissolution. As such, the Impugned Omission was retrogressive, depriving Christian citizens of a means to an evolutionary remedy that they had possessed since 1869, and that Parliament had expressly retained in 1975. That being said, we proceed to view the Impugned Omission through the lens of Articles 9, 14, 20 and 25 accordingly.

21. It is by now well settled that the word "life" in Article 9 is not confined to mere animal existence, but encompasses all such amenities and facilities as a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. If any authority is required in that regard, one need look no further than the judgment of the Supreme Court in the case reported as Ms. Shehla Zia & others v. WAPDA PLD 1994 SC 693. Liberty, likewise, is not merely freedom from physical restraint, but extends to the freedom of a person to make the fundamental choices that shape the course of his or her life, free of restrictions that are oppressive. Article 14 declares the dignity of man to be inviolable, and it does not subject that guarantee to law. The decision to enter into a marriage, and the decision to seek release from one that has failed, are among the most personal choices that an individual can make, and lie at the core of the autonomy that these Articles protect. It cannot be overlooked, as observed above, that the Act itself recognises cruelty and prolonged desertion as conduct that justifies the separation of the spouses, yet denies the injured spouse the release that dissolution alone can provide. The

consequence of the Impugned Omission is that a Christian wife who has been subjected to sustained cruelty, or desertion for a decade or more, may obtain a decree of judicial separation, but remains bound in law to the person who has inflicted that cruelty or desertion, and is debarred from forming another lawful family for so long as that person lives, unless she is able to establish that he has also committed adultery. A husband whose wife has deserted him is in the same position, save that adultery alone will suffice. Equally, a husband and wife who have lived apart for many years and who both desire to bring their marriage to an end have no lawful means of doing so, unless one of them is prepared to accuse the other of adultery. We are unable to conceive of a more intrusive restriction on personal liberty than one that obliges an individual to remain bound in a relationship from which all substance has departed, with no prospect of release, save on terms that the individual cannot or will not meet.

22. The affront to dignity is compounded by the nature of the grounds to which the parties are confined. Section 10 makes the dissolution of a marriage contingent on the public allegation and proof of sexual misconduct by a spouse, which, under the law of Pakistan, is itself a criminal offence. A spouse who wishes to be released from a marriage must therefore not only expose the most intimate aspects of the relationship to judicial scrutiny, but must also, in effect, accuse the other of a crime. Where the allegation is true, the proceedings are degrading to both parties; where it is not, the law places a premium upon its fabrication. It was contended before us on behalf of the Petitioners that in practice, parties have resorted to the renunciation of their faith, a course which may either furnish a ground under Section 10 or

take the parties outside the Act altogether. We do not say that the Impugned Omission was designed to bring about these consequences, but they are its natural and foreseeable effect, and we are unable to regard a law that leaves an individual with a choice between a dead marriage, a false accusation and an abandonment of faith as being consistent with the inviolability of human dignity. As was observed in *Ameen Masih*, the State has no legitimate interest in perpetuating a marriage after all possibility of accomplishing its purpose is gone.

23. Article 20 guarantees to every citizen the right to profess, practise and propagate his religion, and to every religious denomination and every sect thereof the right to establish, maintain and manage its religious institutions. The Supreme Court has held in *Suo Motu Case No.1 of 2014 etc.* PLD 2014 SC 699 that this right is conferred not only upon religious communities but upon every citizen, and that it protects the individual citizen against the imposition of religious views, including by co-believers of his own denomination. The relevant observations in that regard, as followed by this Court in *Har Lal v. Federation of Pakistan and others* PLD 2024 Karachi 100, read as follows:

> "15. Of all the Articles relating to the minorities' rights, Article 20 is of prime significance. A close reading of this provision would indicate that the freedom to practice religion and manage religious institutions under this provision is multifaceted because:
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> (a) The right to religious conscience conferred under this Article does not make any distinction between majority and minority or Muslim and Non-Muslim. It is in the nature of an Equal Religious Protection Clause conferred on every citizen, every religious denomination and every sect thereof. This equal religious protection clause is in the same nature as the equal justice under the law and equal protection under the law clauses conferred under Articles 4 and 25. In

other words, every absolute equality and there is no distinction among citizens, religious denominations and sects thereof, as far as the right to religious conscience, is concerned.

(b) The right to religious conscience is a fundamental right. It has not been subjected or subordinated to any other provision of the Constitution because it is only subject to law, public order and morality and not to any religious clauses of the Constitution. The very term law, public order and morality has been used in non-religious terms as the notion of law or public order or morality is not reducible to the Islamic meanings of these terms. Therefore, Article 20 has a certain preeminence in the Constitution being only subject to the general restrictions of law, public order and morality, which three terms cannot be interpreted or used in such a restrictive way as to curtail the basic essence and meaning of the pre-eminent right to religious conscience.

(c) The right to profess and practice is conferred not only on religious communities but also on every citizen. What this means is that every citizen can exercise this right to profess, practice and propagate his religious views even against the prevailing or dominant views of its own religious denomination or sect. In other words, neither the majority religious denominations or sect nor the minority religious denomination or sect can impose its religious will on the citizen. Therefore, not only does it protect religious denominations and sects against each other but protects every citizen against the imposition of religious views by its own fellow co-believers. It needs to be mentioned here that every citizen would necessarily include both males and females (Article 263), which point needs emphasis considering the exclusion or subordination of women in relation to numerous forms of religious practices."

Where the practical effect of a law is to make renunciation of one's faith the most accessible means of escape from a failed marriage, it places a burden on the free profession of religion that Article 20 does not countenance. The Respondent No. 8 has invoked Article 20 in the opposite direction, contending that any reform which directly or indirectly interferes with sacramental doctrine or ecclesiastical jurisdiction would infringe the right of a denomination to manage its own religious affairs. We

have carefully considered that submission but find ourselves unable to accept that the revival of Section 7 would occasion any such interference. Section 7 does not compel any Christian to seek a divorce, nor does it require any Church to recognise a civil decree of dissolution as having sacramental effect, or any minister of religion to solemnise the marriage of a person whose earlier marriage has been dissolved. It governs only the civil status of the parties under State law and leaves the doctrine and governance of every denomination exactly where they were. A Catholic who, in obedience to the teaching of his Church, regards his marriage as indissoluble is under no compulsion to approach a civil court, and loses nothing by the availability of a remedy that he declines to invoke. Conversely, the denial of a civil remedy to a Christian citizen who, in conscience, takes a different view, on the ground that a particular denomination does not recognise it, would impose the doctrine of that denomination upon a citizen through the coercive apparatus of the State. Such a course would not protect the autonomy guaranteed by Article 20(b); it would subordinate the right of the individual under Article 20(a) to it.

24. For its part, Article 25(1) of the Constitution guarantees equality before law and the equal protection of law, and Article 25(2) prohibits discrimination based on sex. It is well settled in terms of the judgment of the Supreme Court in I.A. Sharwani v. Government of Pakistan 1991 SCMR 1041 that Article 25 does not preclude reasonable classification, but that any classification must be founded on an intelligible differentia which distinguishes the persons grouped together from those left out, and that the differentia must bear a rational nexus to the object sought to be achieved by the law. On that basis, we take

first the contention under Article 25(2), which in our view admits of a clearer answer. The Impugned Omission is inconsistent with that clause. It is apparent from the text of Section 10 that a Christian wife must establish considerably more than a Christian husband to obtain a dissolution of her marriage. That disparity is not before us for adjudication, as Prayer I has not been pressed, and we express no view as to whether Section 10 would, in and of itself, withstand scrutiny under Article 25. However, the Impugned Omission cannot be viewed in isolation from its effect. Section 7, by directing the Courts to apply the principles on which the English matrimonial court acted, provided a means by which the grounds available to a wife could be brought to parity with those available to a husband, English law having long since ceased to draw any such distinction. By removing Section 7, the State removed that means and left the disparity to operate without mitigation. A law which perpetuates discrimination based on sex, by foreclosing the avenue through which it could otherwise be redressed, is no less inconsistent with Article 25(2) than one which creates it in the first place.

25. The Petitioners also contend that the Impugned Omission discriminates against Christian citizens as a class, in comparison with citizens of other faiths. We approach that contention with circumspection, for in our view the vice, if any, lies not in any comparison between faiths, but in the withdrawal of a remedy from a defined class of citizens. Until 08.07.1981, Christian citizens had available to them, through Section 7, a means by which their State law of divorce developed in step with the law from which it was derived, whereas after that date they did not. That circumstance shows that the narrowness of the law by which they are now governed does not flow

from the faith of the community, or from any choice made by the community as to its own personal law, but from a choice made by the State to withdraw from them a provision that the Legislature had enacted for their benefit and protection in 1869 and retained in 1975. The class so singled out consists of only those citizens who are governed by the Act, and the question is whether their selection for that deprivation rests on a differentia bearing a rational nexus to some legitimate object. No object has been suggested by any of the Respondents to which the withdrawal of Section 7 bears a rational relation, and we can discern none. A deprivation of that kind would, *prima facie*, appear to be arbitrary. However, having found the Impugned Omission to be inconsistent with Articles 9, 14, 20 and 25(2), we stop short of resting any decision upon the point.

26. For the foregoing reasons, we concur with the conclusion reached in *Ameen Masih* and hold that the Impugned Omission is inconsistent with Articles 9, 14, 20 and 25(2) of the Constitution and is, by virtue of Article 8(1), void to the extent of such inconsistency.

27. The Respondent No. 8 has submitted that questions relating to Sections 7 and 10 of the Act are matters for the competent Legislature. Insofar as that submission is directed against the revival of Section 7 by judicial pronouncement, we are unable to accept it. When an omitting or amending provision is declared void, it is treated as having never validly taken effect, and the provision that it purported to remove continues as if it had never been disturbed. Revival in such circumstances is not an act of legislation by the Court, but the legal consequence of the declaration that the Constitution

requires the Court to make. The provision that is revived is one that the Legislature itself enacted in 1869 and re-affirmed in 1975, and the Court introduces nothing into the Act that the Legislature did not place there.

28. As to the relationship between Section 7 and Section 10, as explained in *Palmer*, Section 7 operates wherever the Act makes no specific provision. Section 10 prescribes the grounds on which a husband and a wife may respectively seek dissolution on the basis of the matrimonial fault of the other, but it does not address the situation in which a marriage has irretrievably broken down without any such fault being established or alleged. In that situation the Act makes no specific provision, and Section 7 operates. Section 10 and Section 7 are, accordingly, to be read harmoniously: a spouse who wishes to proceed on a ground enumerated in Section 10 remains free to do so, while a spouse who seeks dissolution on the ground that the marriage has irretrievably broken down may invoke Section 7. This is a matter of construction of Section 7, and involves no alteration of Section 10, which continues to operate in its own terms. The substantive principle that Section 7 now imports is, therefore, that a Christian marriage may be dissolved on the ground that it has broken down irretrievably, without either party being required to establish matrimonial fault.

29. The concerns expressed by the Respondent No. 8 as to the desirability of a uniform law for Christians throughout Pakistan, enacted after meaningful consultation with all denominations, are weighty, and are entitled to respect. However, they are considerations that bear upon how the competent Legislature may choose to reform the law, not upon whether the Impugned Omission is consistent with the Fundamental Rights.

30. In view of the foregoing, the Petition is disposed of in the following terms:

(a) Prayers I and IV, not having been pressed, are dismissed as such.

(b) It is declared that Item 7(2) of the Second Schedule, read with Section 3, of the Federal Laws (Revision and Declaration) Ordinance, 1981 (XXVII of 1981), insofar as it omitted Section 7 of the Act, is inconsistent with Articles 9, 14, 20 and 25(2) of the Constitution and, by virtue of Article 8 thereof, is void and of no legal effect in the Province of Sindh.

(c) In consequence, Section 7 of the Act stands revived in the Province of Sindh in the form in which it stood on 08.07.1981 and is to be read harmoniously with Section 10 thereof, in the manner discussed hereinabove.

(d) The declarations contained in sub-paragraphs (b) and (c) shall govern all proceedings under the Act pending on the date of this judgment and instituted thereafter, and the Courts in the Province exercising jurisdiction under the Act shall give effect to the revived Section 7 accordingly. The Registrar of this Court is directed to circulate a copy of this judgment to all such Courts for information and compliance.

31. Before parting with the matter, we would be remiss not to record our appreciation for the able assistance rendered by learned counsel for the Petitioners, who argued meticulously and well.

JUDGE

JUDGE

Karachi.
Dated :