CASE COMMENT

INTERNATIONAL LAW : STATE SUCCESSION
TRINGALI CARMELO TERESA v. MALTESE VINCENZE

Supreme Court of Eritrea - Civ. Case No. 590/62

*by Fasil Nahum**

In 1958,** the plaintiff, Tringali Carmelo Teresa, and the defendant, Maltese Vincenze, celebrated a marriage in Eritrea following the rites of the Roman Catholic Church. The marriage was subsequently registered by the officer of civil status of the municipality of Asmara. In August 1962, Plaintiff petitioned the Supreme Court in Asmara to declare the marriage juridically non-existent for purposes of the civil law, to declare null and void of any juridical power the entry of the marriage in the register of civil status of the municipality of Asmara, and to order the officer of civil status to correct the register accordingly.

To understand the problems raised by this petition, one must bear in mind the relevant historical background. In 1929 Italy and the Holy See entered into a Concordat (treaty) under which Italy agreed to recognise religious marriages celebrated in Italian territory following the rites of the Roman Catholic Church for civil law purposes. The Italian Government subsequently promulgated a law, No. 847 of 1929, to enforce the Concordat. This law also extended the application of the Concordat to all Italian colonies, including Eritrea.

Formal Italian sovereignty over Eritrea came to an end through the Peace Treaty of September 15, 1947, signed by Italy and the four allied powers.[1] In reality Italy had ceased to exercise any control over Eritrea in 1941. "The final disposal ... (of Eritrea was to be) determined jointly by the governments of the Soviet Union, of the United Kingdom, of the United States, and of France within one year from the coming into force of the present Treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments...."[2]

Since these powers did not agree as to what was to happen to Eritrea, the responsibility to decide its future status was transferred to the United Nations General Assembly following the procedures laid down in the declaration. In December 1950, the United Nations General Assembly passed a resolution which became the basis for the federation between Ethiopia and Eritrea. This legal instrument was adopted by Ethiopia and Eritrea in September 1952. Later, on November 15, 1962,

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** All dates are given according to the Gregorian Calendar.

1. "Italy renounces all right and title to ... Eritrea." Art. 23 (1) The Peace Treaty.
2. Art. 23 (3), The Peace Treaty.

Order No. 27 of 1962[3] was issued by Ethiopia, terminating the federation and thus making Eritrea part of a unified Empire.

The major issue raised by this case is whether the Concordat of 1929 entered into by Italy and the Holy See was still in force in Eritrea at the time of the parties' marriage in 1958. Under the Concordat, civil courts would be bound by the religious rules of the Catholic Church regarding, for example, dissolution of marriages. Thus, if the Concordat was in effect, an annulment could be granted only if sanctioned by Church authorities. It appears that no such sanction had been given in this case.

By 1958 Eritrea and the federation had succeeded to the sovereignty formerly exercised by Italy. Whether Eritrea was still bound by the Concordat depends on the principles of the law of nations governing the rights and duties of such successor states. In dealing with this issue, the Supreme Court stated that an "undisputed principle of public international law provides that in the succession of States, the successor State does not inherit *ipso jure* the treaties of the States from which it derives." Furthermore, the Court held that "a limitation on the jurisdiction of one State in favour of another may be admitted only if and to the extent that the State concerned agrees, and not as a result of a law existing before the State came into being."

The Court by this last remark simply means that the Concordat would be in force in Eritrea only if Eritrea had ratified it subsequent to assuming sovereignty. Under the Eritrean Constitution[4] the power of ratifying international agreements is expressly reserved to the Emperor as Sovereign of the Federation. Since the Emperor never took steps to ratify the Concordat, the Court rightly concluded that the Concordat of 1929 between Italy and the Holy See had ceased to be in force in Eritrea by 1958.

The Court did not determine at what point prior to 1958 the Concordat became ineffective, whether it did so with the end of *de facto* Italian presence and rule in 1941, or with the Peace Treaty of 1947, or with the termination of the British Civil Administration and the creation of the Federation with Ethiopia in 1952. Since the marriage in question took place in 1958, the Court did not have to commit itself to any of these possible choices.

In this respect the Court acted within the generally held principle that a court should not decide more than is necessary for the disposition of the case before it. Although the Court did not decide the issue, however, it did indicate some concern over the question, stating that, "Perhaps it can be argued that in the interim between the time when Italy gave up its sovereignty over Eritrea, and the time when the Ethiopian Crown assumed it on September 11, 1952, the Concordat and the related norms could be considered to have been in force."

There is, indeed, no question but that after 1952 the Concordat had ceased to be in force in Eritrea. Generally speaking, "a treaty only creates law as between

3. An Order to Provide for the Termination of the Federal Status of Eritrea and the Application to Eritrea of the System of Unitary Administration of the Empire to Ethiopia, *Neg. Gaz.* No. 3 Year 22nd.

4. The Eritrean Constitution, Art. 5 (1).

the States which are parties to it."[5] Eritrea had through the Federation assimilated itself to Ethiopia, thereby becoming part of a different international personality. Under the principles of the law of nations such international personality is not required to be bound by treaties entered into by another State; thus the Concordat had no force in Eritrea after 1952. But may one go further and conclude that even during the interim period before the Federation the Concordat had ceased to be in force?

The Court gave no reason why it thought that the Concordat might have remained in force in this interim period, and it appears that such an argument would be rebutted by the principles of the law of nations. There is general agreement among international jurists today on the principle that a State which succeeds another State in sovereignty over a territory is not a successor to the constitutional authority of the predecessor State. It follows from this that the public law of the predecessor State cannot survive the end of its sovereignty.[6] Treaties entered into between States form part of the public law of such States.[7] It thus follows that the Concordat ceased to have force in Eritrea from the time that the Italian State lost its sovereignty over it. This means that even during the interim period, the Concordat had lost its force because Italian sovereignty had given place to British effective sovereignty.[8]

So far we have been dealing with the effectiveness of the Concordat. There is a related and necessary question regarding the effectiveness of what the Court referred to as the "related norms," namely, law No. 847 of 1929. It was this legislation, rather than the Concordat itself that was the immediate basis of the claimed indissolvability of the religious marriage.

The Court held that once the Concordat became ineffective, law No. 847 of 1929 ceased to be in force in Eritrea. To support its view, the Court quoted an Italian authority's statement: "If a treaty is extinguished for any reason whatsoever, the norms set up as a result of the treaty also become extinguished, without the necessity of any declaration to this effect." The Court analogised the situation to a collapsing roof. A chandelier hanging from the roof would have to come down as the roof does. The chandelier analogy is colourful, but not very precise. It is not *necessary*, as a matter of logic, that the norms set up as a result of a treaty automatically become ineffective as soon as the treaty itself is extinguished. This was recognised by the German Reichsgericht, the highest German court, when it was confronted with the same issue. It held that, "even if it be admitted that the binding force of the Convention under international law ... ceases ipso facto ... the contents of the Convention, insofar as they have become part of our civil law, do not cease to be valid ... *The international validity and the internal effectiveness are not necessarily interdependent.*"[9] (Emphasis added).

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5. The Permanent Court of International Justice, in the case of *Certain German Interests in Polish Upper Silesia*, P.C.I.J., Ser. A No. 7 p. 29 (1926).
6. R.P. O'Connell, *The Law of State Succession* (1956). p. 211.
7. Refer for instance to Art. 122 of the Ethiopian Revised Constitution of 1955.
8. R.P. O'Connell, *International Law* (1965), vol. I p. 368.
9. S.H.H. v. L.CH. in Paris (Reichsgericht, Germany, 1914), *Entscheidungen des Reichsgerichts in Zivilsachen* vol. 85 p. 374; as found in R. Stanger, *Materials on Public International Law* (1965, unpublished, Law Library, H.S.I.University), p. 496.

One can see the basis for this position by taking a simple example. If a bi-lateral commercial treaty is entered into by which one State undertakes to amend its municipal regulations on custom duties and tariffs, these regulations, if enacted, are not necessarily and automatically made ineffective if the treaty is abrogated. If the contrary is argued, then the state may be left unexpectedly with no law at all on an important subject of tax regulation, if the former law must be treated as repealed.

It is not easy to make a general rule as to when such norms automatically become ineffective and when not. Each case has to be examined individually. Differences in fact may result in a difference of law. The Court should not have tried to create a universal principle but only solved the questions raised by the particular facts. In the particular circumstances of the *Tringali* case, the Court's reasoning and application of the principle seem sound. In the absence of the Concordat, law No. 847 is useless; the legislation refers to the Concordat and the ineffectiveness of the Concordat results in the ineffectiveness of the legislation as well.

Since the Concordat and its related norms had, at the time of the parties' marriage, ceased to be effective, the Court granted the petition that the marriage be declared juridically non-existent for purposes of the civil law and ordered the correction of the register of civil status of the municipalty of Asmara accordingly.

While the conclusion that the Concordat no longer had effect at the time of the parties' marriage is unimpeachable, serious questions can be raised from the perspective of domestic law whether the marriage should have been declared "non-existent." If the court really meant that the civil law status of the parties was as if their marriage had never occurred, it would seem to have adopted two rather troublesome sets of results. First, *all* Eritrean marriages entered into in the Catholic Church during the period of the Concordat's ineffectiveness would seem to be null and void; second, none of the civil incidents of marriage - - for example, the right of the spouse to share communal property held with an intestate deceased spouse - - would seem to apply. Such results are questionable. The opposite result would have been reached, for example, under the Civil Code of 1960 which became applicable in Eritrea in November 1962 upon dissolution of the Federation. Under the Code, any marriage celebrated in accordance with the rites of the parties' religion is by that fact valid, whether or not registered by the officer of civil status.[10] In this case, however, the issue was only whether dissolution could be authorised despite the Concordat. While the Court's language may have been unfortunate, its result was correct. This paper has been concerned only with the International Law aspects of the case, and leaves to another court and another writer the troublesome problem of the domestic impact of this decision.

10. Civ. C. Arts. 577, 579, 605, 697 ff.