THE DISSOLUTION OF RELIGIOUS MARRIAGES IN ETHIOPIA

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The judgment in the case *of Shewan Ghizaw Ingida Work* v. *Nigatu Yimer*[1] deals with a problem of great concern to Ethiopians, and of importance for the development of legal systems generally. It concerns the relationship between a newly promulgated code and the religious law that previously governed some of the matters dealt with by the code: how, if at all, is the religious law displaced by the new code?

The situation as it arises in the Ethiopian context is as follows: Prior to the promulgation of the Civil Code,[2] a body of laws known as the *Fetha Negast* was the basis of Christian Ethiopian law.[3] It contained both religious and temporal laws, but with religious overtones throughout. The *Fetha Negast* makes specific references to the holiness of any marriage contracted under the authority of the Ethiopian Orthodox Church. Any Christian Ethiopian who entered into such a marriage understood that, according to the precepts embraced by the faith and embodied in the *Fetha Negast*, dissolution of his marriage would be possible in only a few limited cases, where grounds existed to justify annulment of the marriage bond.[4] And, he understood, determination that such grounds existed could be made, and his marriage could be dissolved, only by Church authorities. Civil authorities would play no role.

This religious form of marriage was not the only one recognized in the Empire prior to the Code, however. One could also enter into a marriage by complying with the custom of a given community (a customary marriage), by following the prescribed rites of another religion, or by having the proper local governmental authority sanctify the marriage on behalf of the State (a civil marriage). Dissolution of these marriages, likewise, was governed by the institutions which had contributed to their formation.

In its articles relating to marriage, the Civil Code has drawn from the more stable rules of Ethiopian "customary"[5] laws. In doing this the Code has recognized

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1 Journal of Ethiopian Law, Vol. III (1966) 390.

2 Proclamation No. 165 of 1960 *Negarit Gazeta* extraordinary issue.

3 See, Lowenstein, The Penal System of Ethiopia, Vol. II (1965) 383.
Graven J., The Penal Code of the Empire of Ethiopia, *Journal of Ethiopian Law*, Vol. I, (1964) 207.

4 Chapter XXIV Section 6. *The marriage which may be dissolved* (English translation Abba Paulos Tsadua, edited by Mr. Peter L. Strauss, under the auspices of Faculty of Law, Haile Sellassie I University, 1967) the grounds cited are
1) If the husband and wife choose a religious life;
2) If one of the spouses refused to perform the marital union;
3) A marriage in which mutual help is not attained, that is:
a) performance of adultery;
b) damage to the life of one of the spouse.

5 See Arts. 666, 668 and 676-680. These are the Articles that introduce the family arbitrators. The arbitrators were a strong institution under the customary law of Ethiopia, known as the "shimaglleoch" literally, "old men," but implying older men of the community who knew how decisions involving personal status should be made.

all three of the above-mentioned forms of marriage,[6] set down specific conditions common to all forms of marriage,[7] and dealt with the problem of dissolution of a marriage.

In dealing with the problem of dissolution, the Code has incorporated what may appear to be contradictory principles regarding the continued function of religious bodies and rules. Art. 662 states.

> (1) The causes and effects of dissolution of marriage shall be the same whichever the form of celebration of the marriage.
>
> (2) In this respect, no distinction shall be made as to whether the marriage was celebrated before an officer of civil status or according to the formalities prescribed by religion or custom.

This provision, read alone, seems to state that religious authorities have no role whatsoever when issues regarding dissolution of marriage arise. It also seems to state that any married person, whatever the origin of his marriage bond, can avail himself of the grounds and procedures for dissolution set out in the Code. These grounds and procedures would lead to dissolution of marriage in a far greater number of cases than those of, for example, the Ethiopian Orthodox Church.

On the other hand, in Art 671, it has provided that

> "There is also a serious cause for divorce when a marriage contracted according to the formalities of a religion has been declared null by the religious authority."

This might be taken to suggest that the relevant religious authorities are the ones who must decide any issue of dissolution regarding a religious marriage, and that they may do so in accordance with the relevant religious rules.

The apparent conflict between these provisions was before the Supreme Imperial Court in the *Shewan Ghizaw Ingida Work* case. The petitioner filed her

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6 David, Le Droit de la Famille dans le Code civil éthiopian (1967) p. 5.

Art. 577. Various kinds of marrage.

1) Marriages may be contracted before an officer of civil status.

2) Marriages contracted according to the religion of the parties or to local custom shall also be valid under this Code.

Art. 578 Civil marriage.

A civil marriage shall take place when a man and a woman have appeared before the officer of civil status for the purpose of contracting marriage and the officer of civil status has received their respective consent.

Art. 579. Religious marriage.

A religious marriage shall take place when a man and a woman have performed such acts or rites as are deemed to constitute a valid marriage by their religion or the religion of one of them.

Art. 580. Marriage according to custom.

A customary marriage shall take place when a man and a woman perform such rites as constitute a permanent union between such man and woman under the rules of the community to which they belong or to which one of them belongs.

7 Arts. 581-596 Civil Code. These provisions include references to age, relationship (consanguinity or affinity), bigamy etc.

petition for the termination of her marriage with the High Court.[8] On disputed facts, the court found that her marriage, celebrated before the Invasion, had been in accordance with the rites of the Ethiopian Orthodox Church. From this, the Court held, it followed that she must go to the religious authorities, who, in its view, had the power to deal with dissolution issues. Only if these authorities found religious grounds for action would a divorce be possible. On appeal the Supreme Imperial Court affirmed the High Court's decision, with one judge dissenting.

The court dealt eloquently with the problem at hand, and in fact went beyond the petition for divorce to consider the general problem of what law now controls a matter previously considered as coming under the jurisdiction of the religious authorities, but presently treated in detail in the Civil Code. The majority took the position that where a petition for divorce involves a religious marriages, Art. 671 controls. Its interpretation was thus the second mentioned above, that one who enters a religious marriage is required by Art. 671 to take his case for dissolution to the religious authorities and establish his right to dissolution in terms of the governing religious dogma. In the case of Woizero Shewan Ghizaw, married under the rites of the Ethiopian Orthodox Church, this meant that she must go to the Ecclesiastical Council and seek to obtain an annulment. Then and only then could she seek through the High Court, and the family arbitrators she would appoint, to obtain a civil dissolution, or divorce, under Art. 671. Art. 671 was thus interpreted as bringing pre-Code religious practice bodily into the Code, and continuing it as the only source of dissolution for one who had contracted his marriage in religious rites. The Court phrased this conclusion in terms of jurisdiction, stating that, at least in the first instance, it is to the religious authorities — here the Ecclesiastical Council — rather than the High Court that the petitioner for dissolution of a religious marriage must go.

The presiding Justice in his dissent, on the other hand, argued that no matter what the previous law had been, one now must go directly to the most relevant articles of the Civil Code, which in his view were Art. 673 and those following it.[9] He, too, based his opinion on a concept of "jurisdiction," but his conclusion, based in large part on Art. 662, quoted above, was that only the courts have jurisdiction over issues of dissolution. Knowing that this conclusion, that Civil Law predominates over religious dogma on issues of dissolution, might offend many, he was at pains to note that it was the law — and not his own personal prejudices — which required the conclusion he reached.

The jurisdictional aspects of the dispute permeate the arguments. The majority opinion refers[10] to that part of the *Fetha Negast* which gives prietsts the authority to make judicial decisions. However, as the *Fetha Negast* and the Civil Code both refer to the dissolution of marriages, it is not clear on its face whether the religious authorities still have the authority to dissolve a marriage for civil purposes. The minority also makes reference to the *Fetha Negast*, but only to illustrate the

8 It would have seemed that the petitioner should have filed with the family arbitrators in accordance with Arts. 674-676, but it also seems that the reason the petitioner filed with the High Court immediately was to ask the court as a matter of law where she should institute the petition for divorce.

9 Art. 673 ff. refer to the functions of the family arbitrators and the procedures through which one must go in order to dissolve a marriage.

10 Journal of Ethiopian Law, Vol. III (1966) p. 393.

limited type of jurisdiction that, in the view of the dissenting Justice, the religious authorities may assume over a case involving the dissolution of a marriage. The minority opinion states that only where a religious issue — such as, for example, marriage within a religiously prohibited degree — is involved may the religious authorities assume jurisdiction. But even then the religious authorities may annul the marriage only for the purposes of the Church; it must still be considered by the temporal authority if it is to be dissolved for civil purposes. Once the religious authorities do annul, their action is to be considered a serious cause for divorce[11] and dealt with immediately.[12] However if a petitioner can satisfy some other conditions for divorce, he is not required to obtain an order of annulment, even though his marriage is a religious one.

The majority also refer to Art. 10 of Decree 2 of 1942[13] to show that "the Church has a private jurisdiction over the congregation under which it can deal with the members by way of confession and inflict penalties." They interpret this to mean that in any dispute involving the Church, the religious authority has exclusive jurisdiction. However, the majority refused to interpret a later part of the same article, which refers matters of civil (temporal) jurisdiction to the government courts. The majority dismisses that passage by saying that the petition at hand is not the type of conflict that is meant by that passage, even though in other types of conflicts that are truly temporal but have religious overtones, "the Ecclesiastical Council may propose men who are capable of civil (temporal) jurisdiction but they shall be appointed by the Emperor."

This last-quoted language would seem by itself to destroy the argument of the majority. It seems to mean that there are problems that arise in the Ethiopian law for which the basic jurisdiction is the government-appointed court, but in which a special knowledge of the religious sources of the law is most relevant; in such cases the Ecclesiastical Council may exercise their power to recommend persons for judicial positions where they might exercise this special knowledge, but it is the temporal law and the temporal courts which govern. In thus relieving the Church of its former judicial power, Art. 10 formed part of the complete judicial reform that started when Emperor Haile Sellassie I returned from his Fascist-imposed exile in the United Kingdom. It was soon after his return — early in a period of reform which has extended through the promulgation of the Revised Constitution of 1955 and following Codes to the present[14] — that the Church lost

11 Art. 671. Civ. C.

12 Under a serious cause for divorce the family arbitrators have only one month within which to make an order for divorce; whereas if it is an "other cause" for divorce, which would be anything that is not "serious," the arbitrators can take up to a year before acting.

13 Regulations for the administration of the Church, Dec. No. 2 of 1943 Art. 10, *Negarit Gazeta* of November 30, 1942. This Article is entitled "Legal Jurisdiction"; it then goes on to say that "private" jurisdiction exists over the congregation, but differentiates this from jurisdiction in matters that they call "civil (temporal) jurisdiction."

14 Penal Code of 1957.
Civil Code of 1960,
Commercial Code of 1961,
Maritime Code of 1961,
Criminal Procedure Code of 1961,
Civil Procedure Code of 1965 and
Code of Evidence now in preparation.

a great deal of its former power. The above mentioned Art. 10 seems to be the single most important factor in this withdrawal of power. The fact that the majority opinion merely questions what that Article did cannot obscure that the courts were abiding by its language long before this case was decided. It seems clear that the purely religious jurisdiction left to the Church would only be over those matters that could be classified as religious in nature, where the Church imposes only spiritual penalities, such as prayer, fasts, meditation and the like.[15]

The basic issue is complicated by the special legal recognition which had been given in Ethiopia to a religious minority, Islam. Special courts were set up to deal with disputes involving the personal relations of a Muslim.[16] The special rules of Islam were incorporated into the law of Ethiopia because of the number of Muslims who are nationals of the Empire. The majority in *Shewan Ghizaw* argued that, because special religious oriented rules were allowed for Muslims, Christians should equally be allowed to fall back upon *their* religious dogma in legal matters. It may be noted, however, that the Court's equal treatment logic may be correct, and yet not support its result. The articles we have been referring to refer even-handedly to "religious marriages." They do not specify the Ethiopian Orthodox Religion, the Islamic Religion or any other. Thus, the Code probably does have equal respect for all religions. This is not to say, however, that the rule the Code adopts regarding religious practice is the one the majority chooses — that religious grounds and procedures are the only bases for dissolution of religious marriages. It is perfectly consistent with the equality notion to argue, as did the dissent, that all persons, whatever their religion, may obtain a dissolution not only when an annulment has been proclaimed by the relevant religious authority, *but also* on any other basis recognized by the Civil Code. This, indeed, is exactly what Art. 662 appears to mean when it states

> (1) The causes and effects of dissolution of marriage shall be the same whichever the form of celebration of the marriage.
>
> (2) In this respect, no distinction shall be made to whether the marriage was celebrated before an officer of civil status or according to the formalities prescribed by religion or custom.

One would think that this language would put an end to the assertion that only the Church authorities can exercise authority over dissolution of religious marriages. However, the religious authorities feel that the basis of their authority comes from a set of religious law (*Fetha Negast*) that remains supreme. One must agree with their contention that the religious dogma does have a certain "mystical" quality which controls the actions of its adherents; but it is the government's body of laws that declares the legal effect of dissolution of marriage and this same body of laws declares through the whole of these provisions, that dissolution is in the competence of the civil authority.[17]

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15 Journal of Ethiopian Law, Vol. III (1966) p. 396. This is as the minority considers it.

16 Naibas and Kadis Councils Proclamation No. 62 of 1944, *Negarit Gazeta* of May 29, 1944. Art. 2 determined jurisdiction:

> a) any question regarding marriage, including divorce and maintenance, guardianship of minors, and family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are all Mohammedans.

17 Art. 10 of Decree No. 2 of 1942 and Art. 662 Civ. C.

With all respect, the author feels that "jurisdiction" as such is not the dispositive issue. In his view, Art. 662 and 671 can be reconciled in a way that gives appropriate scope to both civil and religious authority. Art. 662, establishes the primacy of the temporal legal system and its agencies, in governing what is, at least insofar as that system is concerned, a temporal legal relationship — marriage. It creates rules of general applicability to all, and establishes the important principle, recognized by the majority, of equal treatment under the law. In Art. 671, on the other hand, there is embodied a recognition that parties to religious marriages may on occasion wish to seek dissolution on religious grounds— that these grounds, reflecting the deepest of human feelings, are deserving of recognition by temporal as well as religious authorities *and* that the presence or absence of such grounds is most appropriately to be determined by a religious tribunal rather than a temporal court.

It is to be remembered that the Decree which withdrew power over temporal affairs from the Ethiopian Orthodox Church reaffirmed its powers in spiritual affairs. If the Church is unable to prevent its members from obtaining legally effective divorces on grounds that are not spiritually recognized, it is in no way required to recognize these temporally valid dissolutions as effective for spiritual purposes. That is, it is free to condemn such dissolutions as "invalid" and to inflict "penalties" within its private spiritual jurisdiction over what it considers to be erring members of the Church. The temporal law, even if it validates the dissolution for temporal purposes, requires no contrary conclusion.

What one comes to ultimately, is the conclusion that the previous hegemony of the Ethiopian Orthodox Church (or any other religious body) over the marital status of its members has been replaced by the provisions of the Civil Code — in case of dissolution, by Arts. 662 ff. This does not affect the Church authorities' power to annul marriage where the parties deem it proper to bring their case to these church authorities. However, it must also be understood that, according to the Civil Code, even when the Church authorities are called on to annul a religiously celebrated marriage, the parties must still go to the judiciary exercising temporal jurisdiction, who have the final say on whether the marriage is dissolved for civil purposes.[18] In Ethiopia today if a person who has been married according to his religion (in the case discussed the Ethiopian Orthodox Church) wants to dissolve his marriage, the ultimate power for the dissolution rests with the temporal authorities and the ultimate basis for the dissolution will be a temporal rule. In the eyes of the law, marriage under Ethiopian law today is primarily a temporal rather than a spiritual relationship.

18 One could argue that if a person consults the Church authorities, who give him a decision, that decision if abided by in society has a binding effect that would be legal. However, it is inevitable that corrolary questions that arise would in some way come before the temporal authorities who have actually been vested with the power to make legal decisions. Thus, it would only be a matter of time until the authority of the church would be diluted by the activity of the Civil Courts.