CASE COMMENT

DISSOLUTION OF MARRIAGE BY DISUSE: A LEGAL MYTH

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The Case[1]

The deceased, a certain Yilma W/Hanna[2], had marital relationship which remained intact from 1973-1992 with W/ro Sara.[3] They separated for good, in 1992, though they did not comply with the requirements of the divorce procedures. Following their separation, the ex-spouses led their own ways of life independently of each other. Accordingly, each of them concluded other marriages with other partners.

The deceased, concluded marriage with W/ro Shewaye[4] in 1993 and remained engaged until his death in 1997. Following his death, his former spouse, the respondent, petitioned the Federal First Instance Court with a view to obtaining a declaratory judgment that she was the wife of the deceased. In fact, she obtained a judgment which conferred her status of a widow.

As soon as the applicant knew the respondent had obtained a judgment in her favor, she filed an opposition[5] in view of reversing the judgment rendered in the respondent's favor contending that the latter's marriage with the deceased was dissolved long before his death. Nevertheless, the Federal First Instance Court rejected the opposition by stating that "since the respondent has shown, to the satisfaction of the court, that she had marital relation with the deceased and since the applicant failed to show respondent was divorced, there is no convincing reason why the previous judgment could be reversed".

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[1] Federal Supreme Court Cassation Bench; File No.20938. An extensive and well researched article, (written in Amharic) by Philipos Aynalem, in support of the Bench's position, appeared in *Mizan Law Review*, Vol.2 No.1(Jan,2008)(pp.110-136)

[2] Hereinafter referred in this document as "the deceased"

[3] Hereinafter referred in this document as "the respondent"

[4] Hereinafter referred in this document as 'the applicant"

[5] Art.358 of The Ethiopian Civil Procedure Code provides for such an opportunity.

Although the applicant lodged an appeal against this decision, the appellate court confirmed the decision of the lower court. As a final resort, the applicant brought her case to the Cassation Bench of the Federal Supreme Court contending that the lower courts committed fundamental error of law in disposing the case before them[6].

The Cassation Bench examined the application. Being convinced that the case warrants revision at the level of cassation, it summoned the respondent to submit a written reply as to why the decision of the lower courts' should be sustained.

The respondent in her statement of reply stressed that "it was shown a marriage was concluded between herself and the deceased; there was no evidence that this marriage was lawfully dissolved; a subsequent marriage entered into between the present applicant and the deceased could not have the effect of dissolving the previous marriage. She further argued that, though she concluded another marriage and gave birth to two children from the new marriage, such an act would not have the result of dissolving the former marriage." Thus, she contended, the lower courts' decision should stand.

It should be noted that once she is granted the status of a widow, her next move will be to claim the pecuniary effects of the marriage. Hence, her first step is only a tactical move; the strategic move being to benefit from the pecuniary effect of the marriage.

I. The Holding of the Cassation Bench

"The Respondent presented a contract of marriage[7] issued in 1973 while the applicant produced a certificate of marriage prepared in 1994. Both documents stated that each of them had concluded marriage with the deceased. Consequently, the Bench realized that both the applicant and the respondent had valid marriage with him". However, the Bench further learnt that the marital relation of the respondent and the deceased lasted until 1992 after which they had disagreement and as a result of which they separated for good. The lower court's record spelt out that respondent affirmed before the court that she had knowledge as to the conclusion of marriage between the deceased and the applicant and their cohabitation in Agaro; but she did not raise any objection against this fact.

The Bench, thus, held that:

> *Although the deceased and the respondent had marital relationship, they separated and moved towards leading their respective independent mode*

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[6] When a decision of a lower court is confirmed by an appellate court, the decision shall be held final. Nevertheless, Ethiopian legal system has framed out a procedure for hearing before a Cassation Bench where the aggrieved party manages to show the commission of fundamental error of law in arriving at the final decision which is the subject of the attack. (See, Arts. 10(1) & 22(1) of Proc. No.25/1996.)

[7] The author understood it to mean Certificate of Marriage

of livelihood. Although respondent contended that her marriage was not dissolved in accordance with the law, her testimony before the court unequivocally showed the breakdown of her marriage."(emphasis added).

The Bench further stated that, "undeniably there are specifically spelt out grounds on the basis of which marriage could be dissolved and this bench accepts these. Nevertheless, *there is a need to make distinction between grounds of dissolution and manner of proving them* (emphasis added). The grounds of dissolution may be inferred from the externally expressed acts of the ex-spouses. The main contention of the respondent remained to be that the applicant did not prove the dissolution of the marriage between the respondent and the deceased. *However, the facts of the present case clearly show that the marital relation of the respondent and the deceased has been irreparably broken down beyond any shadow of doubt and the ex-spouses established their own marital life elsewhere* (emphasis added). Thus, the Bench concluded that, holding the marriage of the deceased and the respondent as still valid for non-compliance with divorce proceedings would be inappropriate interpretation of the law". Hence, it reversed the decision of the lower courts and held that the respondent is not a widow.

II. Comment

It must be clear from the outset that under our family law, conclusion of marriage has three modalities: civil, religious and customary.[8] Hence, the entry corridor for marriage has three gates. When it comes to the exit corridor, however, there is only a single gate. This single exit gate is pronouncement of court judgment to this effect.[9] The approach of the law tends to reflect the governmental policy towards marriage in the sense that it encourages marital relations by establishing multi-door entry and discourages dissolution by drawing up a single exit door.

Actually, under the Civil Code of 1960, there exited express provisions which read as follows: "Any unilateral repudiation of the wife by the husband or the husband by the wife shall be of no effect."[10] "Divorce by mutual consent is not permitted by law".[11] Examination of the provisions of the Revised Family Code also reveals, even though divorce by mutual consent is allowed, it, nevertheless, requires court approval for its

[8] Revised Family Code(Ethiopia), Art.1

[9] ibid, Art.75. Admittedly, death of either of the spouses is one ground for dissolution of marriage. It must be noted that the single exit gate of judicial pronouncement does not include this. In deed, absence requires judicial determination. The writer of this piece is fully aware that some people tend to argue that the exit gate from marital relation should also be multi-door. To entertain such liberal position, it requires policy reconsideration and amendment of the law. As the law stands now, however, the exit gate is singular and narrow.

[10] Civil Code of 1960, Art.664.

[11] Ibid, Art.665(1)

validity.[12] The reason for such rigorous exit procedures in the two instruments seems to arise from the need to protect and preserve, to the extent possible, the institution of marriage. In addition to this, such streamlined divorce procedure might be helpful in avoiding any doubt as to the dissolution of the marriage if and when dissolution occurs.

Protection and preservation of marriage seem to have been motivated by firstly, marriage is the basis of society and hence society and its continuity may be preserved as well. Secondly, marital relation and its dissolution affect innocent third parties such as, children of the marriage and relatives of the spouses and hence in the interests of these parties, conclusion and dissolution of marriage should be clearly identifiable and regulated. Thirdly, more often than not, marriage creates community of property between the spouses and protection of property rights and protection of creditors of the marital household demand strict rules and procedures.

Against this background, however, the Cassation Bench held "since the deceased and the respondent were separated with no intention for reunion, this tantamounts to divorce". Through this approach, the Bench introduced the concept of "*de facto divorce*" (i.e. divorce in fact) into the Ethiopian legal fabric. Nevertheless, such introduction seems logically unsound because as Ethiopian legal system does not recognize *de facto marriage*;[13] it would be legally and logically inconsistent to introduce *de facto divorce*.

Undeniably, partners in an irregular union are entitled to put an end to their relationship unilaterally or bilaterally whenever they wish to.[14] Theirs was a factual union and it naturally flows that they may terminate it factually. This has been held to be one of the basic differences between marriage and irregular union.

That being said, it must be borne in mind that marriage is the creation of the law while irregular union is a union *merely recognized* by law. However, the holding of the Bench, if maintained, would have the effect of making the line of demarcation between marriage and irregular union very blurred. We submit, this is a dangerous move militated against sanctity of marriage.[15]

Furthermore, winding up marital relation through separation, if allowed, would be deriving benefit from taking the law into one's hand (i.e. self-help measure). Most

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[12] Supra at note 7 Art.77(1)

[13] The above mentioned three modes of conclusion of marriage are the only recognized ones. No matter how long standing and permanent an irregular union has been, it cannot be upgraded or transformed into marriage under the existing legal framework in Ethiopia.

[14] Supra at note 7, Art.105(1)

[15] In File No.23021 the Bench held that "re-union of ex-spouses with out any formality amounts to marriage". The author has submitted his comment (in Amharic) on that case to *Mizan Law Review* to be published soon.

legal systems, more often than not, prohibit self-help measures on the policy consideration that such measures could result in social anarchy and thereby create risks to social order. If and when legal systems grant self-help, it is only exceptionally and expressly[16]. Consequently, self-help, as a remedy, cannot be implied.

Unfortunately, in the present case, the Bench is validating a self-help measure through interpretation as there is no express provision anywhere in our law that states separation, no matter long and final it may be, amounts to divorce. Thus, it seems to us that, this is a major deviation from the well established approach of not only our legal system but also most legal systems as well.

In arriving at its decision, the Bench has taken into account the acts of the deceased and the respondent subsequent to their separation. The most important ones in this respect were the following:

- the deceased concluded marriage with another woman (the applicant);
- the respondent had knowledge about the marriage with the applicant but she did not object it in whatever way;
- the respondent, on her part, concluded marriage with another man and gave birth to two children from her new engagement; and
- the deceased did not object to the same.

From these externally manifested acts of the ex-spouses, the Bench inferred that the intention of the spouses was permanent separation. We admit this is a valid inference. The problem, however, is, though the intention of the parties to terminate commitment may be relevant to contractual relations, it is less relevant; and at times irrelevant, when it comes to marital relation.

It must be underlined that marriage is not a mere contract. It is rather a legally established institution.[17] Institution making and unmaking is not a purely private act and hence it should not be left to the mercy of private actions. Since the state, through its law making power, was involved in the making of the institution of marriage, it is logical to assume that it remains involved at its unmaking, presumably through its adjudicative power.

The Bench is of the opinion that there is a need to distinguish between grounds for dissolution of marriage and the manner of proving the same. Actually, since this was

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[16] Some of them are the following: Art.78 of the criminal Code on legitimate defence; Art.78 (1) of the Criminal Procedure Code; Art. 2076of the Civil Code on victim's guarantee; Art. 157 of the Labour Proclamation on strike and lock out.

[17] Although there are unsettled controversies as to whether marriage is a contract or something different from that, it suffices for the present purpose to highlight the fact that there are some peculiar features of marriage. These are: its permanency; its personal effect other than pecuniary effect on the spouses; its effect on third parties (i.e. relatives of the spouses); no dissolution at will; etc. In fact, the present author belongs to the camp which holds that marriage is an institution far beyond a mere contract.

spelt out, by the Bench, in the form of a passing remark, it failed to enlighten us as to what it means and how this distinction is relevant to the case before it. Nevertheless, even if the grounds of dissolution of marriage and the manner of proving them are to be treated independently of each other, it does not bring any change to the case at hand. The reason for this is, permanent physical separation of the spouses was no where mentioned in the Revised Family Code as a ground of dissolution of marriage and hence the ground in the present case does not appear among the grounds for dissolution. Furthermore, from the angle of proof, as the court is the sole organ to pronounce divorce,[18] production of the court decision is necessary and sufficient proof thereof. This proof was not available either in the present case. Thus, the separate treatment of grounds of dissolution of marriage and proof of dissolution of the same, if at all the separation is necessary and meaningful, is unhelpful as neither the ground of dissolution nor the proof thereof does exist in the present case.

It seems to us that the reason why the Bench held the abovementioned position is holding otherwise, it assumed, would entitle the ex-spouse to community of property as marriage brings with it community of property of the spouses. The Bench felt that it would be unfair and unjust to grant the respondent a right of community of property with the deceased in his household to which she contributed nothing. This appears to be a valid concern.

In fact, it is safe to conclude that the reason why the respondent wanted the declaratory judgment, as indicated above, is purely property interest because once Ato Yilma is dead; there is no room to revitalizing the marriage.

However, it is our strong belief that the Bench could have maintained the validity of the marriage and at the same time denies community of property to the respondent. In our view, marriage *per se* is not a license for community of property. The reason why the legislature presumed community of property, in the absence of valid contract of marriage with otherwise effect, is the presumption of contribution of the spouses to the household in the form of goods and/ or services.

It seems to us that there is a need to make distinction between the existence of marriage and the existence of the effects thereof. Whether marriage exists or not is a legal issue; while whether the effects of marriage, particularly pecuniary effects of marriage exist is an issue of fact.

It is an established fact that marriage brings with it, among other things, the following:[19]

- Cohabitation of the spouses;
- Mutual respect, support and assistance between spouses;

[18] Art.117 of the Revised Family Code.

[19] Ibid, Arts. 49, 53, 54 &72

- Co-decision on common residence and common property administration; and
- Cost sharing and contribution to the household expenses in proportion to the their means

The legal bases for presumption in favor of community of property are mostly the above mentioned realities of marital relationship. However, it must also be noted that the presumption is not an irrebuttable one. Admittedly it may be contended that the legislature no where mentioned whether this presumption is rebuttable or not and hence it cannot be confidently said that it is a rebuttable one.

However, the way the Ethiopian legal system operates in this regard deserves due consideration. Our legal system has spelt out different kinds of presumptions in the different branches of the law. At times, it includes phrases such as "No proof shall be admitted against this presumption"[20], or "not withstanding any proof to the contrary"[21] or other phrases of equivalent effect. In such situations, it is fair to regard such presumptions as irrebuttable as the legislature, through its words, conveyed its clear position in this regard.

At other times, the legislature lays down the presumption and keeps silent as to whether it is rebuttable and the manner of rebutting it. In such cases, the proper assumption should be that it is rebuttal because had the legislature intended to make it irrebuttable it would have expressly stated as such. Thus the proper holding should be silence amounts to allowing rebuttal.

At this juncture, it is worth noting that the community of marital property provision in the Code is silent as to its rebuttability or otherwise.[22] Consequently, the said principle which is enshrined under the Revised Family Code is rebuttable in the sense that when and if contribution to common property has been shown not to exist, community of property shall be held non-existent. The presumption will only have the effect of shifting the burden of proof. The beneficiary of the presumption (i.e. the respondent in the present case) will be relieved from proving her contribution to the household. It will be the applicant who will be required to show that the respondent had contributed nothing to the household. Moreover, the fact that this principle can be legally derogated (it can be contracted out) through contract of marriage is an indication of its rebuttability.[23]

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[20] Art.3 (2) of Civil Code; Art.128 (2) of the Revised Family Code.

[21] Art.672(2) of the Civil Code of 1960

[22] See, Art.63(1) of Revised Family Code

[23] Ibid, Art.48

Even from logic point of view, rebutting evidence brought against one's position is an expression of a right to defend one's position. The right to defend oneself, on its part, is an aspect of the right to be heard which is recognized as a basic feature of due process of law in modern world. Therefore, any working procedure which restricts this right, being an exception, should be expressly spelt out. This means irrebuttability of presumption must be expressly stated. It can never be implied. Hence, when and where the legislature is silent as to whether a certain presumption is rebuttable or irrebuttable, the logical interference would be treating it as rebuttable. As indicated above, the relevant provision on the presumption of community of property is silent as to its rebutability. To sum up, therefore, the presumption of community of property which is enshrined under our family code is susceptible to rebuttal. Thus, the Bench would have lawfully rejected the respondent's claim for community of property, at her subsequent claim for that, as, from the facts of the case, she contributed nothing to the household of her first marriage.

It is also important to note, at this point, that our legal system denies recognition to "unlawful enrichment".[24] Besides, the Federal Constitution defines private property "*as any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of the person concerned*" (emphasis added).[25] Based on this definition, one has to contribute something[26] in either of the forms mentioned above to the realization of the property at issue, in order to possess a lawful claim to private or community property right. This, we think, squarely fits to the case of the respondent and all of these basic facts would have assisted the Bench in its effort to attain just and legal outcome to the case before it.

III. Conclusion

It seems to us that the Cassation Bench's holding which states "long non usage of personal effects of marriage by the spouses amounts to divorce" is logically unsound and legally invalid.

It is logically unsound because what has been legally constituted should be legally dissolved. Marriage, as indicated earlier, is something which is legally constituted. It, thus, logically begs for legal (not factual) dissolution. Moreover, given the non existence of de facto marriage, one cannot logically think of de facto divorce in Ethiopia.

It is legally invalid because the law has expressly and exhaustively laid down grounds of dissolution of marriage; and separation, how deliberate and permanent it may be,

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[24] Arts. 2162-2178 of the Civil Code.

[25] FDRE Constitution, Art.40(2)

[26] Actually, when there is a legal presumption, as in the case at hand, in one's favour, she will not be required to prove that.

does not exist among the listed grounds. Thus an addition of a judge made ground to the list of the legislature will be unlawful. An utmost good faith and a sense of justice from the Bench would not in any way justify such an act.

It would have been more plausible and legal to hold both marriages lawful and grant the community of property entitlement to the later marriage. As it is well known, though bigamy is prohibited, Ethiopian family law recognizes bigamous marriages until and unless they are challenged by the stakeholders who are entitled to.[27] Thus holding these two marriages lawful is not something illegal. Such an approach would have dissuasive effect on those who would like to unduly benefit from the existence of marriage, for its sake, without complying with its personal effects because they will realize that though they may succeed in obtaining confirmation as to the existence of the marriage, they will not, anyways, be successful in obtaining common marital property which is their strategic goal.

In situations where appreciable number of the Ethiopian legal community is not sufficiently clear with the distinction between marriage and irregular union, the Bench's holding in the case at hand will have the effect of aggravating the confusion in this regard. It is well recognized that there are lots of factual similarities between marriage and irregular union, given such similarities, if separation were to have an effect of putting an end to both marriage and irregular union, there will be little or no difference left in them. Nevertheless, the law wanted them to be separate institutions with distinct legal status and effect. This is the reason why they are treated separately under the Code.

Furthermore, it is not the end result of a legal controversy that matters. The way the result was achieved is also equally material. Both the result and the manner of arriving at the end result should be lawful. We believe, the Bench, in the present case failed, to deliver the latter.

Finally, the principle of separation of state powers reminds us that courts, no matter how high they are situated in the judicial hierarchy, cannot amend laws. They are there to apply and interpret the laws with a view to resolving disputes before them. Law amendment is within the competence of the legislature. But the act of the Bench in the present case, in our view, is something beyond interpretation and an action which transcends into the territory of lawmaking and hence *ultra vires.*

[27]The right to challenge bigamous marriage has been accorded only to either of the spouses of the bigamous spouse or the public prosecutor.(See, Art.33(1) of the Revised Family Code)