Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division

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Introduction

In the current Ethiopian legal system, the concept *cassation* has its roots in the FDRE Constitution (See article 80) and Proclamation 25/1996 (see article 10). According to these laws, the *cassation Division* (CD) of the Federal Supreme Court (FSC) may entertain the cases which involve fundamental or basic error of law.[80] Such introduction is relevant particularly in lieu of the proper administration of justice and uniform application of law. Consequently, the CD has so far entertained considerable number of cases involving fundamental

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[80] The FDRE Constitution uses the term *fundamental error* while Proclamation 25/1996 uses the term *basic error*. Thus, we can use these terms interchangeably.

error of law and decided thereon as appropriate. In this regard, the FSC has been publishing and distributing the decisions of the CD with the view to making it reach all relevant persons/bodies. Such publication and distribution has become indispensable since the enactment of Proclamation 454/2005, which makes the decision of the CD on interpretation of laws binding on all courts at all levels (Federal and Regional).[81] Upon its enactment, Proclamation 454/2005 attracted challenges from some of us as we thought (and still think) it would erode the independence of judges. This is particularly so when the judges in the CD err; that is, when they themselves commit (fundamental) error of law in an attempt to rectify others 'alleged' fundamental error of law.[82]

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[81] See article 2(1) of the Proclamation. The Proclamation makes the publication and distribution of the decision of the CD compulsory.

[82] Fundamental error of law committed by the CD may be rectified by the Hose of the Federation (HOF), as I will be discussing later on, if such error has constitutional pertinence. In a sense, the HOF exercises cassation over the CD in constitutional matters. (See article 83 of the FDRE Constitution.)

In this writing, I will be commenting on one case[83] decided by the CD in 2007 and which is, in my opinion, worthy of consideration. Some writers have already commented on the case both in favour and against the decision of the CD on the case.[84] Thus, I will focus only on the aspects that are not touched upon by these writers and those points which are touched by these writers either inadequately or only as passing remarks. Further, I will do some survey to show where the

[83] *Shewaye Tessema V Sara Lengana and Others*, Federal Cassation Bench, File No. 20938, April 19, 2007 Actually, the case between *W/o Abebech Yeshewleul v W/o Etagegnehu Admasu and Others* is also similar to the present case on which similar decision was given by the same organ and in the same yerar. See Filipos Aynalem, *dÃó- (Ç= ó¡„) õ*; p 131-132, Mizan Law review, V 2, No. 1, 2008

[84] Mehari Radae, Assistant Professor of Law, AAU, has commented on the case primarily from the perspective of family law and has shown how defective the decision is and the possible danger it poses to the institution of marriage. See Journal of Ethiopian Law, Volume XXII, No.2, December 2008, p 37-45. On the other hand, Philipos Aynalem, who is a judge in Federal High Court and also a lecturer in St. Mary University College, commented on the case in support of the CD's decision. He cited and discussed in length many instances where similar cases appeared before courts both at Federal and Regional levels yet obtaining different decisions. See Filipos Aynalem, supra note 83, p 124-136,

decision of the CD on the case at hand might lead us. Finally I will conclude my comments and forward some recommendations on how to deal with the aftermath of this decision.

The Case

The whole text of the case as included in the FSC CD case reports, volume IV, is attched at the end of this writing. The gist of the matter is; the case arose between W/O Shewaye Tessema (the applicant) and W/o Sara Lengana and Others (the respondents) on dissolution of marriage. W/o Sara claimed that although she ceased to live with Ato Yilma W/Hana in 1985 E.C. (whom she wedded in 1966 E.C.) and started leading her own life by wedding another man, her marriage with Ato Yilma was not dissolved on legally recognized grounds. Thus, she argued that she should be declared the widow of Ato Yilma who died in 1989 E.C. This argument was accepted by lower court and the applicant then brought the case to the CD. The CD after considering the case admitted that the marriage was not dissolved based on the grounds recognized by law. Yet, it declared that the

non-use of marriage for long period would result in the dissolution of marriage. Thus, the CD has introduced the notion of *de facto divorce.*[85]

Comment

In our legal system, the grounds for the dissolution of marriage are death (and absence) of a spouse, invalidity of marriage, and divorce.[86] Save for death, the dissolution of marriage becomes valid in the eyes of the law only if it is approved by the court. Thus, there are only two exits from marital relationship-one created by

[85] See Mehari, supra note 84, p 40. He argues that such holding of the CD is logically unsound and legally invalid. He eloquently shows why such holding is both unsound and invalid. He further shows the possible way of arriving at the same conclusion by the CD without rendering logically unsound and legal invalid decision. I unreservedly concur with this view for the CD engaged, in this particular case, in making a law than interpreting the law. In fact, there are provisions to interpret to reach the same conclusion had the CD meticulously looked for them (such as provisions on partition of matrimonial property). As I will be discussing later on, this holding of the CD is constitutionally suspect as well.

[86] See for example, articles 75 of the Revised Family Code (Federal), 663-664 of the Civil Code for areas it governs.

death and the other by court. No other way of dissolving marriage such as by unilateral or bilateral repudiation of marriage is sustainable at law. Understandably, such proscription is necessitated by the need to protect and preserve the institution of the family in general and marriage in particular as envisioned in the FDRE Constitution and other international human rights instruments.[87]

In the case at hand, W/o Sara and Ato Yilma put an end to their marriage in 1985 EC (1992/1993 GC). Then, they went on leading their separate and independent lives by wedding other partners. When Ato Yilma died, W/o Sara claimed that she was still the wife of the deceased as their marriage was not dissolved on legally recognized grounds. Before lower courts, she prevailed. Yet, the CD decided that she was not the wife of the deceased at the time of his death as they were separated and started leading their independent lives long before the death of

[87] According to Mehari argues the the recognition of rigorous exit from marriage arises from the need to protect and preserve, to the extent possible, the institution of marriage.

the man. Accordingly, the applicant, the second wife of the deceased, won the case. Such decision of the CD is susceptible to many criticisms from different angles particularly the family law and constitutional law.

As I stated before, Mehari has eloquently and intelligently commented on the case primarily from the perspective family law. Thus, in his opinion, the decision is logically unsound and legally invalid.[88] I would like to add something to his contribution particularly from the perspective the FDRE Constitution.

A. Little Survey

I administered the following question to fifty (50) individuals (males and female) picked ramdomly.

Let us assume that you are a married person and you have lived for a while with your spouse. Now, you are having a serious problem with him/her and you do not wish to continue living with him/her any more. If you know that your marriage will dissolve some time later

[88] See for example, his conclusion on page 44, JEL

even if you do not go to court if you two stay separately from one another for some time and start leading your own separate lives, and in the meantime, by wedding others, will you go to court to have your first marriage dissolved? Why?

As you can see, the questionnaire contains one vivid question; that is, whether one would like to go to court or not if he/she can put an end to his/her marital relationship. Expectedly, and unsurprisingly, 70% of them responded, **why will I go to court?!** This means people will opt for deserting their spouses by unilaterally repudiating their marriages or they will bilaterally repudiate their marriages. On the other hand, 30% of them said they would go to court because there are post dissolution legal issues. Even in this case, the motive is to get rid of legal problems that might arise after dissolution by disuse. So, the closer look at why those who said they would go to court reveals that they would want to dissolve their marriage on their own if it were not for post dissolution legal complications.

This is dangerous and devastating to the institutions of marriage and family. Then, since the current decision of the CD has binding effect on all courts at all levels, no one can challenge the validity of such repudiation provided that following such repudiation, the spouses have lived separately for long time. Perhaps, the issue then will be, how long is *long* to say marriage is disused and hence dissolved? In the case at hand, the respondent and the deceased were separated in 1985 EC[89] and Ato Yilma died in 1989 (four years later). Thus, it can be said that the CD considered a period less than or equal to four years as long time (duration of non-usage of marriage) and then declared their marriage dissolved.[90]

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[89] As one may understand from the reading of the decision of the CD, it seems that the lower court accepted the separation of the respondent and the deceased to be in 1985 E.C. although the applicant stated that the respondent and the deceased was separated before 1977 E.C..

[90] The reading of Filipos' commentary, cited before, shows that similar cases involving as long as fifty years of disuse of marriage have been appearing before courts.

The ramification of the decision of the CD in this regard is far reaching. Article 34(3) of the FDRE Constitution stipulates that the institution of family is entitled to protection by society and the State. So, when family laws ordain that only courts can declare the dissolution of marriage (unless death transpires), the purpose is the protection of the institution of family as envisioned by the Constitution. However, by adding one more ground, and the simplest ground, to the grounds for the dissolution of marriage, the CD has denied marriage and transitively the family the protection it had and that the Constitution has foreseen therefor.[91] Indeed, the CD has now put both marriage and family at greater risk as one can discern from the above little survey. Nevertheless, as part of the State structure, the CD should have

[91] Actually, one may say that the subsequent family laws also go contrary to this constitutional protection of family and marriage by adopting the "no fault" ground for divorce. Yet, the laws are simply striking the balance between individuals' right (the Constitution by itself recognizes) to get out of marital relationship if they do not have to be bound by such relationship for whatever reasons and the interest to maintain the institution of family.

considered the constitutional stipulation in relation to the protection of both marriage and family.

Now, there is little difference between marriage and irregular union. In irregular union, partners can put an end to their partnership forthwith while in marriage they have to wait a bit so that their marriage becomes *unused* for long time. Nonetheless, such relegation of marriage is not what the Constitution, which recognizes marriage as a means of founding a family, seems to have envisaged.[92] That is why the subsequent laws have not widened the scope of grounds to use to dissolve marriage.[93]

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[92] Incidentally, it is important to note that the Constitution does not recognize irregular union as a means of founding a family.

[93] As Filipos raises in his commentary, the issue of disuse of marriage was raised during the drafting process of the Revised family Code of the Federal Government. Filipos, supra note 83, p 110-136. However, in the end, *long disuse* did not appear among the grounds for dissolution of marriage. This shows that this ground was deliberately omitted and now adding it to the domain does not seem right.

B. Separation of Powers

According to the principle of separation of powers, the judiciary's job is interpreting laws. Anything beyond the interpretation of laws is none of the business of the judiciary and it will become *ultra virus*. In the present case, one may wonder whether what the CD did, being part of the judiciary, is within the purview of judicial power. Or, did it make a law?

As stated before, the role of the judiciary is interpreting laws. According to the plain meaning rule, courts interpret laws only when the there is doubt. Thus, when the law is clear, they must apply the law as it is. The only exception pertains to the situation where the application of the clear meaning of the law will lead to an absurd conclusion in which case interpretation in relation to a clear law becomes an issue.

In the case at hand, the grounds for dissolution of marriage are plainly listed down and *long disuse* of marriage is not listed as one of these grounds. Thus, there is no doubt as to the meaning of the law. Thus, the

CD should have said that since the *non-use of marriage for long period* is not recognized as a ground for dissolution, the marriage of W/o Sara and Ato Yilma was dissolved by death in 1989 EC. Similarly, the clear application of the law would not have led the CD to make absurd conclusion because as, Mehari convincingly writes, it could have achieved the same result by interpreting the other provisions of the Family law and tort law on "unlawful enrichment" [94] That is to say, the woman could have been barred from obtaining any benefit from the 'common property', which was her ulterior motive.[95]

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[94] For instance, among others, article 62(1) of the Revised Family Code stipulates that all income derived by personal efforts of spouses and from their common and personal property shall be common property. The CD might have said, to achieve the same objective, that the establishment of the common property this stipulation foresees depends on the existence of the status of 'spouseship' both in law and in facto. In the absence of such status, then the contribution of one spouse, directly or indirectly, to the property obtained by another, while marriage is being disused, does not exist. As a result, he/she will not be allowed to have a share in such property upon the legal dissolution of such bare marriage.

[95] See Mehari, supra note 84, p 37-45

Therefore, the CD erred by attempting to interpret the law when interpretation is not necessary. Such error is fatal because it made the CD to encroach upon someone's power thereby breaching the principle of *separation of powers*. That is to say, the CD has *injected* one ground the law-maker(s) has/have not recognized for the dissolution of marriage. This is undeniably law-making, not law interpreting. Such encroachment upon others' power is utterly unconstitutional. The FDRE Constitution has given legislative powers to legislatures (federal and regional) and as its decision is binding on courts at all levels, the powers of both the federal and regional legislative organs have been affected by this decision. At this juncture, it is important to consider article 9(3) of the FDRE Constitution. It states: "It is prohibited to assume state power in any manner than that provided under the Constitution" Has not the CD assumed state power (of making law)? Its power as provided and envisaged under the Constitution is construing laws when there are fundamental errors.[96]

[96] See article 79(1) cum. Article 80 of the FDRE

Yet, by failing to applying the existing clear law, the direct application of which would not have led to ludicrous conclusion, it widened the scope of the existing laws thereby modifying them. This is contrary, not only to the principles of separation of powers, but also to article 9(3) of the Constitution.

Conclusion and recommendations

As this brief discussion has outlined, the CD held that 'long disuse' of marriage dissolves marriage. This injection of one ground into the legislatively recognized grounds of marriage is not sustainable in light of the provisions of the FDRE Constitution as it, firstly, affects the protection the Constitution envisions for marriage and family. This is easily discernable from the little survey I conducted. Secondly, the injection runs contrary to the principle of separation of powers the Constitution in one way or another recognizes and protects such as under article 9(3).

Constitution and other laws.

If what is done is wrong, then the natural question is, what is to be done to rectify the wrong? After all, one may wonder where to go as the CD is apparently the last organ on judicial matters. But there still seem to exist some solutions. Firstly, the CD may render a different interpretation of the same provision, if it deems necessary, some other time.[97] Secondly, the House of the Federation (HOF) may be approached with the matter. This is like a boss for a boss. The HOF is an organ with final say on constitutional disputes.[98] Thus, the HOF may consider the decision of the CD in light of the protection the Constitution gives and foresees to be given to marriage and family and also the principle of separation of powers. In this regard, both federal and regional legislative organs may challenge the constitutionality of the decision of the CD on the addition of 'long disuse' into family laws as a ground for

[97] See article 2(1) of Proclamation 454/2005. It can be question whether the CD can do this in abstract; that is, without there being a similar case, or it should wait for a similar case to arise. Further, it may be questioned whether the CD can review its decision.

[98] See articles 62(1) and 83(1) of the FDRE Constitution.

dissolution of marriage. Further, any association or group or person may also approach the HOF, by virtue of article 37 of the FDRE Constitution, to challenge the current CD's decision. Thirdly, as an interim solution, it may be argued that all lower courts can refuse to be bound by the decision of the CD. Such refusal should, however, be premised on the alleged unconstitutionality of the decision. Article 9(1) of the Constitution provides that any law, customary practice or decisions contravening the Constitution shall be of no effect. Concomitantly, article 9(2) imposes the duty to ensure the observance of the Constitution on everyone including all state organs. Now, for courts, to ensure that the decisions of other organs are constitutional, the best thing to do is declining to accept the decisions if they find that they are unintentional.[99]

[99] At this juncture, one may argue that the courts cannot do so until the HOF declares that such decisions are unconstitutional. But I think this power can be exercised by courts even before HOF declares something is unconstitutional. Otherwise, they will be furthering the violation of the Constitution thereby violating their own duty to obey the Constitution as stipulated under article 9(23).