

FAMILY LAW

TEACHING MATERIAL

INTRODUCTION

Both men and women who have attained marriageable age can marry and found a family. This is a constitutionally recognized right of individuals. Family law is one of the areas of law that is being transformed quickly. Particularly, the rights of women in marriage are of paramount importance when the dynamic nature of the law of family is considered. The recognition of the equal rights of women in owning and administering property in marriage and the rights of women during divorce have been the focal points in the transformation of family law.

The Federal Government has issued the Revised Family Code (RFC) in the Proclamation No. 213/2000. The new family law tried to resolve the age-old problems of married women so that, rights recognized in the FDRE Constitution and international agreements be included in the family law. Yet, it cannot be said that the treatment of the RFC is complete. Emerging rights, such as reproductive and sexual rights of women are not addressed by the RFC, although they are partially recognized by the FDRE Constitution.

The RFC is believed to set standards for the family laws that are to be enacted by the Regional States where the 1960 Civil Code is still in force. Regional States are expected to enact their own family laws based on the peculiar conditions of each Regional State, without violating the constitutional rights of individuals, particularly of women. One Regional State, that is the Tigray Regional State enacted its own family code before the Federal State has made the RFC. After the advent of the RFC two Regional States, the Amhara and Oromia Regional States have made their respective family codes. The Oromia Family Code, although adopted by the Oromia Council, it has not yet appeared in the official gazette of the State. Therefore, when reference to

the Oromia Family Code is made anywhere in this material, note has to be made that the Oromia Family Code was not promulgated in the Negarit Gazette of the State. The Southern Region is preparing its regional family code. The family codes of the three regional states have no great departures from the RFC, except on some points. The main differences are highlighted in this material.

This teaching material is prepared by following the methods that are relevant to teach especially adult students. Almost all of the articles of the RFC are briefly explained in a plain language. The explanations are followed by exercises. The exercises are specifically designed to enable students to think of an alternative explanation or answer. Sometimes exercises precede explanations. These are particularly intended to serve brainstorming purposes. The student can get answers for most exercises in the material as he progresses in his reading. However, some exercises are left without answers and this has been done deliberately. Moreover, the material is supported by a number of illustrations and cases that would contribute for the better understanding of the course. The writer believes that the material would add a fresh impetus to the teaching-learning process. The students are advised not to consider the material as the only text; rather they should take it as the springboard for the study of family law.

GENERAL OBJECTIVES OF THE COURSE

After completing the study of this course, the student shall achieve the following general aims.

He/she shall:

- Know the type of family structures that exist in Ethiopia;
- Understand the importance of including the essential conditions of marriage for the validity of marriage;

- Analyze the rights of the spouses that should be exercised at the conclusion of marriage, in marriage and during divorce in light of the family rights of individuals recognized by the FDRE Constitution;
- Recognize why change in the Ethiopian family law has become necessary;
- Understand the extent which the Ethiopian women have benefited from the revision of the family law;
- Know the areas of the Revised Family Code that still need revision;
- Reason out why the law has allowed unmarried cohabitation between a man and a woman without concluding marriage;
- Realize why the law provides stringent procedures for the ascertainment of paternity where it provides for relatively easy procedures for ascertaining maternity;
- Elaborate the rights of legitimate and illegitimate children and the rationale for deciding on the custody of children when parents are living separately;
- Understand the reasons for adopting a child and the rights and duties of such child against his adopter;
- Know between which persons, for what reason, to what extent should the obligation to supply maintenance exists; and
- Solve and pass decisions on imaginary and real cases by applying the provisions of the law.

CHAPTER 1

CONCLUSION OF MARRIAGE

INTRODUCTION

Marriage is a legally recognized union between a man and a woman as husband and wife. It is a legal status, condition, or relation of a man and a woman united in law for life, or until divorced, for discharge to each other and the community of the duties legally incumbent on those whose association is favored on the distinction of sex. The word "family" is more of sociological than legal. You might have encountered different meanings to the word family. We may divide family into four types:

- i) The nuclear family,
- ii) The compound family,
- iii) The joint family, and
- iv) The extended family

Nuclear family. The term “nuclear family” (or “elementary,” “simple,” or “basic”) is most frequently used to refer to a group consisting of a man, a woman, and their socially recognized children. It refers to the concrete groups, and the qualification “nuclear” suggests that this is a unit out of which more extensive family groups are built or grow.

Compounded family. The term “compounded family” is used to refer to a concrete group formed thorough the amalgamation of nuclear-family units or parts of them. A polygamous household consisting of one man, his two or three wives, and their respective children would constitute a compound family.

Joint family. A joint family exists when “two or more lineally related kinsfolk of the same sex, their spouses and offspring, occupy a single homestead and are jointly subject to the same authority or single head.”

Extended family. An extended family is a dispersed version of the joint family. That is, members of the constituent groups of an extended family do not all live together in one dwelling. They usually live close together and engage in common activities.

From functional point of view, the family is the one social system that all societies look to for the replacement of their members. However, from the structural point of view, the word “family” is used to refer not only to the marital couple and their children but also to the larger kin group.

The new family code has introduced several changes to the country's family law. One of the areas of change concerns the equality of sexes in marriage. In the Revised Family Code (RFC) the husband and the wife are given equal right and equal power in the management of their household. There are also other major changes with which we are going to deal in due course.

Marriage is one of the sources of family. Marriage is a very important institution in which the spouses take responsibility to respect, assist and support each other and up bring their children. The state gives special attention to marriage since marriage is an institution through which the family; which is the natural and fundamental unit of the society is established. Men and women are complementary and interdependent. In order to survive, men need women, and women need men. Marriage is the legal institution, which expresses the interdependence of men and women. Marriage is a social and economic partnership, which ideally allows a man and a woman to flourish together. Marriage is also a partnership for the raising and nurturing of children.

Because men and women depend upon one another, and because children depend on their parents, it is important for the law to specify the respective rights and obligations of family members. Thus, although in some way marriage is a private matter in which the government will not interfere, in other ways marriage is a matter of public concern which the government regulates its administration by law.

The RFC does not define the word marriage. But from the understanding of the provisions of the Code we can derive a working definition for marriage. We can define it as follows:

“Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law.”

From this definition, it can be seen that marriage is a solemn contract which the parties cannot dissolve as they please. A contract is an agreement, freely entered into between two people, which affects their rights and obligations and which the state will recognize and enforce through the legal system. Although marriage is a type of contract, unlike other contracts, the parties cannot simply dissolve it as they please. Rather, the parties can only terminate their marriage according to specific rules and procedures contained in the law. Thus, in addition to being a contract, marriage is a lasting relationship which endures until it is terminated either by death of one of the spouses or by the declaration of his/her absence or by order of the court or by divorce.

Because marriage is a serious commitment which will determine the future rights and obligations of the husband and wife, it is important that both parties have the capacity at the time they enter the marriage to understand and consent to the commitment which they undertake. The government thus has a strong interest in regulating the formation of marriage.

In this particular chapter you will learn about the conclusion of marriage, that is, the procedures through which marriage is concluded. In Ethiopia celebrating marriage through various ways is allowed. This is not the case in some other countries. Some countries allow only civil marriage, a marriage that is celebrated before the officer of civil status. There are three forms of celebration of marriage that are recognized by the Ethiopian family law. All the three forms of marriage shall be celebrated by fulfilling the conditions for the validity of marriage.

Objectives

At the end of this chapter, you will be able to:

- Explain the differences between the various kinds of marriage;
- Enumerate essential conditions that are common to all forms of marriage;
- Discuss such conditions in relation to the sanctions entailed if such conditions are not fulfilled;
- Discuss the personal and pecuniary effects of marriage;
- Discuss the various causes of dissolution of marriage;

- Demonstrate how the existence of marriage will be proved;
- Identity the differences and similarities between marriage and irregular union;
- Illustrate the changes introduced by the Revised Family Code; and
- Solve imaginary and real legal problems by applying the law.

Throughout this chapter, your study must be based on these objectives. As you progress in your study, you must think that how much you have achieved them.

Marriage is a special contract concluded between two persons of opposite sex. There are various forms in which marriages are celebrated. Irrespective of their forms, however, all types of marriage produce similar effects. That is, although there are different ways by which marriages are concluded, once they are concluded all marriages that are concluded and celebrated with different formalities will be treated at equal footing.

1.1. Forms of Marriage.

Marriage is celebrated in various forms. The law equally recognizes marriages celebrated in different formalities.

Study Articles 1-5 of the Revised Family Code.

Exercise

- 1. How many forms of marriage do we have?**
- 2. What differences do you see between civil marriage and religious marriage?**
- 3. What differences do you see between civil marriage and customary marriage?**

According to Article 1 of the RFC, there are three forms of marriage.

These are:

- Civil Marriage

- Religious Marriage
- Customary Marriage

1.1.1. Civil Marriage

From Article 2, you may have noted that civil marriage is the one that is celebrated before the officer of civil status. From the wording of the law, it is clear that only heterogeneous type marriage is allowed in Ethiopia. Moreover, the law requires that the man and the woman must physically appear before the officer of civil status and give their respective consent.

Exercise

Who is the officer of civil status?

The officer of civil status is an officer who registers vital events such as births, deaths, marriages, divorces, and adoptions. The status of birth, death, marriage, divorce and adoption are generally called the civil status.

One of the most important elements in the conclusion of marriage is the consent of the future spouses.

Exercise

What do you think is consent of future spouses?

The following provision is extracted from the Federal Democratic Republic of Ethiopia (FDRE) Constitution.

Article 34(2)

Marriage shall be entered into only with the free and full consent of the intending spouses.

As you can clearly see from the above article from the FDRE Constitution, marriage must be concluded on the basis of the free will and volition of the man and the woman. If, for instance, a girl or a woman is forced to marry a certain man she does not want to marry, there is no consent on the part of the girl or the woman.

Exercise

- 1. What do you think is the consequence of the absence of consent?**
- 2. What is your opinion on arranged marriage and marriage by abduction?**

1.1.2. Religious Marriage

The second form of marriage is religious marriage.

Exercise

Is marriage between persons of different religions prohibited?

Religious marriage is a marriage that will be celebrated in accordance to the rites (ceremonies) of:

- The religion of both future spouses, or
- The religion of one of the future spouses.

You must note here that the manners of celebrations of marriages could differ according to the rules of the respective religion. The law is not interested in the details of the rites of each religion.

1.1.3. Customary Marriage

The third form of marriage is customary marriage. Customary marriage is celebrated in accordance with one of the following:

- Custom of the community in which both spouses live, or
- Custom of the community to which they belong, or
- Custom of the community to which one of them belongs.

Just as in religious marriage, the formalities of celebration of customary marriage differ from custom to custom. While marriage celebrations in all civil marriages follow similar procedures, the procedures followed in religious and customary marriages vary from religion to religion and from culture to culture.

In addition to the above forms of marriage, marriages celebrated outside Ethiopia are accepted as valid marriage if they conform to the Ethiopian laws and public moral. In one case, (Civil Case File No.972/90) a marriage between Dr. Ashagre Yigletu and Wro. Marta Tangel, which was concluded in Yugoslavia, was treated as though it was concluded in Ethiopia and family arbitrators decided its divorce by applying Ethiopian law. The Federal First Instance Court approved the divorce according to the Ethiopian law, even if the marriage was concluded outside Ethiopia.

Exercise

If country "X" has a law that allows marriage between similar sexes, do you think such marriage be valid in Ethiopia? Why / Why not?

1.2. Essential Conditions of Marriage

In this section, you will study the conditions that are necessary for the validity of a marriage. The marriage is said to be defective, unless the essential conditions are fulfilled. The conditions must be fulfilled by all marriages irrespective of the formality in which the marriage is celebrated.

Read Articles 6-16 of the Revised Family Code

1.2.1. Consent.

Both the man and the woman who are married to each other must give their consent to the marriage. The consent must be free and full. In Civil Case File № 55/92, Wro. Se'ada Hassen applied to the Arba Minch Zuria Woreda Court claiming that she concluded marriage without her consent by the imposition of her father Hajji Hassen Delil. She argued that the marriage agreement was concluded between her father and her husband without her consent by violating Art 34(2) of the FDRE Constitution and the provisions of the Civil Code. Her husband, Ato Eshetu Mohammed responded that, the marriage between him and the plaintiff was concluded according to the rules of their religion and that cannot violate the Civil Code. Consent is one of the very essential conditions of marriage even in the Civil Code.

Exercise

If you were the judge at that court, what would be your decision for the above case?

In the Civil Code there is the idea of betrothal, which is not included in the RFC. Betrothal, unlike marriage, is concluded between the family members of the future spouses. Betrothal may be practiced in the countryside of some parts of Ethiopia, even today. However, it also requires the consent of the future spouses. Today in urban areas, betrothal is almost non-existent. But that does not mean that people are prohibited from concluding betrothal. They can conclude betrothal contracts, although there is no mechanism of handling disputes that may arise out of betrothal.

In the Tigray Family Code, which was enacted before the enactment of the RFC and in the Amhara and Oromia Family Codes, betrothal was retained. There is a basic difference between betrothal in these three codes and betrothal in the Civil Code of 1960. That is, betrothal in the Civil Code was a contract between the family members of the future spouses. But in these codes, it is a contract concluded between the future spouses themselves. It must be noted here

that in the Civil Code also consent of the future spouses to the contract of betrothal was a requirement.

The marrying spouses must give their consent voluntarily. If consent is extorted by force or by compulsion, such consent is a defective one. A defective consent results in a defective marriage.

The use of violence/force to compel may not be limited to the victim alone. As you read in Art.14 (2) consent is deemed to be extorted by violence where it is given by a spouse to protect himself/herself (the victim) or one of his/her ascendants or descendants, or any other close relative from a serious and imminent danger or threat of danger.

Exercise

- 1. What is serious and imminent danger or threat of danger?**
- 2. What will happen to the marriage if it is concluded irrespective of a defective consent?**

1.2.2. Age.

The minimum age requirement for both the man and the woman is 18 years. That is, unless the marrying spouses attain the age of 18 years they cannot conclude marriage. The Civil Code of 1960 allowed girls to marry at the age of 15. According to Art. 27 of the Tigray Family Code a man cannot marry unless he attains a full age of 22 years. For women the marriageable age is 18 years in the Tigray Family Code.

Exercise

- 1. Why do you think it is necessary to raise marriageable age of a woman to 18 years?**
- 2. Is there any maximum age limit to conclude marriage?**

There are several reasons for raising the marriageable age of women and are related to legal, medical, social and economic reasons. Legally, it is believed that a person who is under the age of 18 is incapable of performing juridical acts. He or she cannot give a consent that is

sustainable at law. Marriage is a juridical act. A minor is under a general incapacity to conclude a juridical act. Moreover, minors are believed to be incapable to shoulder responsibilities that are associated with marriage due to their inexperience in life. Medically, early marriage has a number of problems especially, associated with pregnancy and childbirth. Moreover, a minor girl should devote her time for her education and other activities that contribute to her well-being and self-actualization rather than holding family and social responsibilities for which she is not ready. Notwithstanding this, however, the law authorizes the Minister of Justice, for a serious cause to reduce this age by two years, if an application is made to him (Art. 7(2)). Application to this end can be made to the Minister by the future spouses, the guardian of one of the spouses, or their parents.

In addition, at present the population growth rate of Ethiopia is one the highest in the world. This country did not develop strong economy that could support the alarmingly increasing population number. Ethiopia should devise a mechanism to check its population growth. One of the mechanisms could be raising the marriageable age of women.

Exercise

What do you think constitutes a “serious cause” for the Minister of Justice to reduce the marriageable age by two years?

All forms of marriage are required to respect this age requirement.

1.2.3. Consanguinity

People who are related by consanguinity are prohibited from marrying each other. The RFC has narrowed consanguinity relationship, so that cousins can marry each other. The Civil Code prohibited marriage between persons who are related up to the seventh generation. Prohibiting marriage by counting up to seventh generation seems to be impractical for two main reasons. Firstly, the method of computation is not very clear, as provided in the Civil Code. Secondly, it is very difficult to apply the rule at this modern era where people move from place to place

frequently and continuously. The bases for the prohibition of marriage between persons who are related by consanguinity could be for religious, moral, medical, social, etc. reasons.

There are two types of consanguinity relationships. These are consanguinity in the direct line and consanguinity in the collateral line. In the former case, the relationship is between descendants and ascendants. Whatever the distance between these persons, they cannot marry each other. People who are related in the collateral line are those who descend from one or more common ancestors. For instance, a brother and a sister are persons related in the collateral line.

According to Article 8:

- Marriage between persons that are related by consanguinity in the direct line (that is, between ascendants and descendants) is prohibited.
- Likewise a man cannot marry his sister nor can he marry his aunt; a woman is also prohibited from marrying her brother and her uncle.

A man may, however, marry his cousin (his aunt's or his uncle's daughter) similarly a woman may marry her cousin (her aunt's or her uncle's son).

Exercise

What do you feel with such an abrupt change in the rule of consanguinity in relation to an established custom of kinship in Ethiopia (particularly the highland Ethiopia)?

The Tigray Family Code has adopted the degree of relationship of the Civil Code without any modification. Art. 551 of the Civil Code and Art 2 of the Tigray Family Code similarly prescribe that:

- (1) The degree of relationship by consanguinity in the collateral line shall be calculated by counting seven generations in each line from the common ancestor.*
- (2) Relationship by consanguinity shall be of no effect beyond the seventh generation.*

This means that people who are related up to the seventh generation cannot marry each other. The seven generations should be counted in each line starting from the common ancestor. This type of computation seems to have been based on the canon law approach of calculating the degree of consanguinity relationship in the collateral line.

The Oromia Family Code has followed a different method of computation, even if it has retained the degree of relationship up to the seventh generation. According to Art. 4(3) of this Code, the degree of relationship is determined by counting and adding the number of generations in both branches, starting from the common ancestor. (See also Art. 27(2) of the Oromia Family Code)

Exercise

What is the difference between the method of calculation between the Civil Code and the Oromia Family Code?

1.2.4. Affinity

Like in the case of consanguinity relationship, there are two types of relationship in affinity; affinity in the direct line and affinity in the collateral line.

Read Article 9 of the Revised Family Code.

There is an affinity relationship in the direct line between a man and the parents (ascendants) and children (descendants) of his wife. Similarly, there is an affinity relationship in the direct line between a woman and the parents (ascendants) and children (descendants) of her husband. Also there is an affinity relationship between a man and the sisters of his wife and similar relation exists between a woman and the brothers of her husband.

Exercise

- 1. If “A” (a man) and “B” (a woman) conclude marriage and if “A” has a brother called “C” and “B” has a sister called “D”, can “C” and “D” conclude marriage? Why? / Why not?**

2. “K” and “A” are husband and wife respectively. “K” has a son called “S” from a previous marriage. “A” also has a daughter called “D”, from her past husband. “S” is 23 years old and “D” is 19. Can “K” marry “D”? Why do you say so?
3. Can “S” and “D” get married? Give reasons for your decision.
4. Can “A” ’s sister marry “K”? Why? / Why not?

A husband is related to the parents of his wife by affinity in the direct line. The wife also has the same relationship with the parents of her husband. You may also remember that a husband has a relation of affinity with the sisters and brothers of his wife in the collateral line. The wife also enjoys the same relationship with the brothers and sisters of her husband on the same ground.

If one or both of the spouses have children from another marriage, such children will have relation of affinity on the direct line with the wife or husband of their parent. (That is, with their stepparents).

Thus according Art 9, Marriage is prohibited between:

- Persons who are related by affinity in the direct line. This means: a man cannot be married to the mother of his wife; and a woman to the father of her husband. Moreover, a man is not allowed to marry the daughter of his wife begotten from another marriage. Nor is a woman allowed to marry the son of her husband from another marriage (i.e., her stepchild.) The same is true with other descendants and ascendants.
- Persons who are related by affinity in the collateral line. This means: a man is prohibited from marrying the sister of his wife; a woman is not allowed to marry the brother of her husband.

In the Civil Code there is a concept of double affinity. But double affinity is not included in the RFC. Art. 554 of the Civil Code provides as follows.

Art.554. — Double affinity.

- (1) A bond of double affinity exists between a person and the spouse of the persons to whom he is related by affinity.*
- (2) Such bond of double affinity shall produce the same effect as a bond of simple affinity.*

This rule is introduced into the Tigray Family Code without any change. The Oromia Family Code did not consider double affinity. However, its definition of simple affinity is similar to that of the Civil Code. That is, according to the Oromia Family Code, a bond of affinity exists in the direct line between a person and the ascendants or descendants of his spouse; and in the collateral line it exists between a person and the collaterals of his spouse. The RFC has shortened this situation to only the man and sisters of his wife and to the woman and brothers of her husband. Although the Civil Code of 1960 has restricted the affinity relationship to be effective only up to third degree in the collateral line, there is no such a limitation in the Oromia Family Code.

Exercise

Does that mean that, affinity relationship would persist up to the seventh degree, according to the Oromia Family Code?

The rule of double affinity establishes additional affinity relation. According to this rule, a person will have another affinity relationship with a spouse of a person whom he is related with simple affinity.

Both consanguinity and affinity relationships produce some effects. The effects may not necessarily be the same. Generally, relationships give rights; they create obligations; and they carry with them incapacities. Rights that emanate from relationship include; the right of succession, parental power, the right to demand supply of maintenance, etc. Obligations include; the duty of parents to raise their children, the duty to supply maintenance, the obligation to become tutor/guardian of minor children, etc. Incapacities also include impossibility of marriage and the prohibition of occupying same office by relatives, as some offices impose on them.

1.2.5. Bigamy

Bigamy is concluding another marriage while bound by a previous marriage. For example, if “A” and “B” are husband and wife respectively, “A” cannot marry “C” before dissolving his marriage with “B”. Bigamy is not only prohibited under the RFC (Art. 11), but also it is criminal under the Penal Code. (Art. 616)

Article 650 – Bigamy

- 1) Whoever, being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled, is punishable with simple imprisonment, or, in grave cases, and especially where the criminal has knowingly misled his partner in the second union as to his true state, with rigorous imprisonment not exceeding five years.
- 2) Any unmarried person who marries another he knows to be tied by the bond of an existing marriage, is punishable with simple imprisonment.
- 3) Limitation of criminal proceedings is suspended until such time as one of the two marriages shall have been dissolved or annulled.

Article 651 – Exception

The preceding Article shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law.

According to the Family Code of Tigray, bigamy is prohibited. Irrespective of this prohibition, the Tigray Family Code lays down an exceptional circumstance to the prohibition. That is, when religious and customary marriages are celebrated in accordance with accepted practices of the locality, the prohibition of bigamy under Art. 31 has no application. This means, if the marriage is celebrated in accordance with formalities of religion or custom, and if bigamy is an accepted norm of the religion or the custom, the prohibition of bigamy by law shall not be applicable.

There is no prohibition of bigamy in the newly enacted Family Code of Oromia. That is, the Oromia Family Code does not consider bigamy as one of the essential conditions of marriage. People in the Oromia Regional State can conclude bigamous marriages through legal means.

Exercise

How do you perceive the exceptional rule of the Criminal Code, the Tigray Family Code and the absence of bigamy prohibition in the Oromia Family Code? Discuss with friends.

There are reasons for the prohibition of bigamy. Some of these include:

- The existing demographic conditions in any society of the world do not suggest bigamy. That is, unless artificial factors involve, the number of men and women in any society is nearly equal. This natural factor would not suggest bigamy.
- Since it is men who usually allowed practicing a bigamous marriage, women's rights advocates argue that it violates the basic rights of women. Because it is considered to be a discriminatory practice. Moreover, since men usually practice it, it is also said that it would seriously affect the property rights of women. Because to conclude another marriage, the man utilizes the resources of the previous wife. Her property is taken by another person.
- It is believed that bigamy weakens ascendant-descendant relationship and consequently, family bonds, etc.

The Committee on the Elimination of Discrimination Against Women in its General Recommendation No. 21 (13th session, 1994) reported that:

Polygamous marriages

States Parties' reports also disclose that polygamy is practiced in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriage ought to be discouraged and prohibited. The Committee notes with concern that some States Parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches

the provisions of Art. 5(a) of the Convention (Convention on the Elimination of All forms of Discrimination Against Women — Ethiopia has ratified this Convention.)

While most countries report that national constitutions and laws comply with convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.

1.2.6. Representation Not Allowed

According to Art. 12(1) of the RFC, a marrying spouse should conclude the marriage by physically appearing before the appropriate authority (the officer of civil status, religious authority or customary authority), depending on the form of marriage to give his consent personally. He is not allowed to delegate someone to conclude marriage on behalf of him. Although this is the rule under Article 12(1), its exception is provided for in Article 12(2). According to this sub article, the Ministry of Justice may allow marriage through representation when the Ministry believes that there is a serious cause for doing this and if the marrying spouse gives his/her consent for the representation.

Exercise

- 1. What do you think constitutes a serious cause?**
- 2. Can both spouses be represented if both of them have a serious cause?**

The law does not define or list down what really constitutes a serious cause in this matter. Apparently, whether certain cause is serious enough to allow marriage by representation is left to the judgment of the Ministry of Justice. You should however, note at this point that the marrying spouse is represented only for the purpose of signing on the certificate of marriage on behalf of the marrying spouse. For that matter, a woman may represent a man and vice versa.

1.2.7. Fundamental Error

According to Art. 13 of the RFC, if the consent given by one of the spouses is based on an error such consent is deemed to be vitiated if the error is a fundamental error.

Exercise

What is a fundamental error?

The law defines what constitutes a “fundamental error” in Article 13 (3, a-d). **Study this Article carefully.**

The law does not consider every minor error to be treated as a ground to invalidate marriage. If such minor errors become a ground to invalidate marriage, that does not encourage marriage and it will be very difficult to entertain such cases in the court of law.

Exercise

- 1. What is an error on the identity of the spouse?**
- 2. If a certain man ‘A’, believed ‘B’, a woman, whom he intended to marry was a nurse (because she told him that she was a nurse), but he later knew that she was a janitor. Can this be taken as an error on the identity of the spouse? Why? / Why not?**
- 3. What does a “disease that does not heal” mean? Can you consider hypertension or diabetes to be a disease that does not heal and hence take it as a fundamental error? Why / Why not?**

1.2.8. Judicially Interdicted Person

Exercise

Who is a judicially interdicted person?

A judicially interdicted person is a person who is pronounced by a court of law as incapable to perform juridical acts. Unless the court authorizes him, a judicially interdicted person cannot conclude marriage.

1.2.9. Period of widowhood.

Article 16 of the Revised Family Code, rules that a woman is not allowed remarrying until the expiry of 180 days since the dissolution of her previous marriage.

Exercise

Why do you think is a woman obliged to stay without remarrying, up to the expiry of 180 days from the dissolution of her previous marriage?

This is to ascertain whether she had conceived a child from the previous marriage or not. However, Sub-article 2 of the same article provides for exceptions in which a widow may be allowed to remarry before the elapse of 180 days from the dissolution of the previous marriage.

Read Arts 17-21 of the Revised Family Code.

1.2.10. Opposition

Art 17 of the Revised Family Code prescribes about opposition of marriage. The persons who are allowed to make opposition under Art.18 can bring their opposition to the officer of civil status. The opposition must be made within fifteen days from the notification of the marriage.

Exercise

Is there the practice of notifying marriage by the officer of civil status in Ethiopia?

The persons who are allowed to oppose marriage should show in their favor that an essential condition of marriage is violated. If they succeed in proving these facts, the officer of civil status may refuse to celebrate the marriage after receiving the opinion of the future spouses. But the future spouses have the right to appeal to the court.

Exercise

If the marriage is concluded through religious or customary rites, to whom should the opposition be lodged?

1.3. Formalities of Celebration

Read Arts 22-25

Exercise

1. What is the consequence if marriage is celebrated without fulfilling the formalities prescribed under Arts 22-25?
2. If passengers in a ship want to celebrate their marriage, can they celebrate their marriage before the captain of the ship? If you consider this marriage as valid marriage, is it a religious or a customary marriage or what type of marriage is it?
3. Can the Ethiopian Ambassador abroad celebrate a marriage between two Ethiopian citizens living there? If he/she can, is that a civil, religious or a customary marriage?
4. If A (a man) and B (a woman) agree to celebrate their marriage after a month, but in the meantime B withdraws this agreement, can the relatives of A who incurred expenses in expecting the marriage to be concluded, get compensation from B:
 - a. When there is no ground for withdrawal?
 - b. When there is a serious ground for withdrawal?

Unlike the case of civil marriage, religious and customary marriages have no uniformity. Each religion and custom has its own formality.

SUMMARY

- There are three kinds of marriage that have been recognized by the Ethiopian law. These are, civil marriage, religious marriage and customary marriage. All the three types of marriage are equally valid before the law.
- The law tries to ensure the fulfillment of certain conditions that are considered to be the essential conditions of marriage. One of these essential conditions is consent. Consent is a very important condition that has to be satisfied upon conclusion of marriage. It is believed that it is one of the fundamental human rights of individuals and the FDRE Constitution recognizes it. That is, according to Article 34(2) of the FDRE Constitution, marriage has to be concluded with the full and free consent of the intending spouses. Not fulfilling this condition would entail the invalidation of the marriage. There are also other conditions that have to be seriously observed by those who intend to marry each other.
- The law prescribes the procedures for the celebration of a civil marriage by leaving religious and customary marriages. That is, the law does not say anything about how religious and customary marriages shall be celebrated. The reason for this is that, there are so many religions and customs in the country and it is not possible for the law to include all these procedures in the law. Moreover, state and religion are different institutions and one does not interfere in the affairs of the other.

CHAPTER 2

EFFECTS OF VIOLATIONS OF ESSENTIAL CONDITIONS OF MARRIAGE

INTRODUCTION

In the first chapter, you studied about the essential conditions of marriage. All forms of marriage should observe these essential conditions of marriage. In this unit, you will study the effects that arise when these conditions are not fulfilled. The effects are sanctions that are imposed by law to punish those who did not respect the essential conditions. The sanctions vary from case to case, depending on the essential condition violated. The violation of most conditions would lead to the invalidation of the marriage. To get the invalidation of the marriage that is celebrated by violating one of the essential conditions, an interested person must apply to the court of law. Although the marriage is concluded on violation of an essential condition, it shall be considered as valid marriage until the court invalidates it. This shows that, in Ethiopia there is no void marriage, instead we have a voidable marriage.

Objectives

After completing this chapter, you will be able to:

- Explain what sanctions will be imposed when each of the essential conditions are not fulfilled;
- Demonstrate the persons that can bring the case before the court claiming that an essential condition has been violated;
- Summarize the differences between absolute, relative and prohibitive impediments of marriage;
- Display the differences between void and avoidable marriages;
- Decide on imaginary and real cases by applying the provisions of the law.

2.1 The Consequences of the Violation of Essential Conditions of Marriage

All marriages may not necessarily be concluded in a perfect way as required by the law. A marriage may be defective because of unfulfillment of one or more of the essential conditions. It is only the court, with the exclusion of other institutions that can pass a decision on such a defective marriage. If the court finds that the marriage is defective, it may invalidate it. An annulment or invalidation affects individual's personal and property rights. These rights include: (1) rights of children born of the relationship, (2) personal and property rights of the parties between themselves: and, (3) property rights of other third parties in relation to the man and woman. However, the court may have no any alternative than invalidating the marriage, when such marriage is concluded irrespective of the existence of impediments of marriage. In most of the following circumstances, the court would invalidate the marriage.

2.1.1. Age

As we have seen in the previous unit, no person is allowed to marry before he/she attains the age of 18 years.

Exercise

What do you think of the result if a girl or a boy marries at the age of 15 or 16 years?

According to sub article (2) of Art. 31, marriage concluded between a man and a woman under the age of 18 shall be dissolved.

Exercise

Whom does the law authorize to bring the case to the court?

The application to the court to get the invalidation of the marriage may be made by any interested person or the public prosecutor.

Exercise

Who is an interested person?

If a girl, who is under eighteen years of age, concludes marriage, her parents, other relatives or even her friends may be interested persons. The phrase “any interested person” could be interpreted to include any citizen who is concerned about the well-being of the society and respect of law.

Exercise

- 1. Would there be a situation in which the court may not dissolve a marriage even the age requirement is not strictly met?**
- 2. What does sub article 2 of Art. 7 rule in this regard?**
- 3. A girl of only 16 years was married to a man of 40 with the permission of the Minister of Justice. However, an interested person appealed to the court for the dissolution of the marriage, on the ground that the girl was not 18 years old and was made to get married to a man much older than herself. What do you think will the decision of the court be? Why?**
- 4. Assume that “X” is a girl who married at the age of 16 years. Two years have passed since her marriage. Is it possible to invalidate her marriage now? Why? / Why not?**

2.1.2. Consanguinity or Affinity

Previously, we noted that a person might not conclude marriage with another person to whom he/she is related by consanguinity or affinity. We also identified the persons that are related to each other by consanguinity and affinity. As you may recall, according to Article 8 of the RFC a person is prohibited from concluding marriage with his ascendants and descendants. Similarly

one may not conclude marriage with his/her brother/sister or his/her aunt/uncle. Beyond that there is no prohibition in the RFC. Also, according to Article 9, a man may not conclude marriage with ascendants or descendants of his wife. He cannot also conclude marriage with the sisters of his wife after dissolving his marriage with his present wife. By the same token, a woman cannot conclude marriage with ascendants or descendants of her husband. She cannot also marry one of the brothers of her husband.

Here also the dissolution of marriage shall be ordered if any interested person applies to the court or if the public prosecutor makes such application.

Exercise

Can the term “any interested person” apply similarly in the case of consanguinity or affinity as it is used in age?

2.1.3. Bigamy

The RFC is based on the concept of monogamy, that is, a one-man one-woman type of marriage. Polygamy, which is a situation where a man marries several women at the same time, is a common practice in most cultures of Ethiopia. You have already learnt that the mandatory provisions of the law should not be neglected in any form of marriage. Whether a marriage is celebrated in accordance with civil, religious or customary formalities, all the mandatory provisions of the law must be respected. One of such mandatory provisions is the one that prohibits bigamy. Bigamy is an act of marrying a second wife/husband while a previous marriage is still legally in effect.

Exercise

- 1. If Ato A, without dissolving his marriage with his previous wife Wro W, now marries Wro. L, what will be the decision of the court?**
- 2. What will happen to the marriage if someone applies to the court immediately after the celebration of the bigamous marriage? Why do you say so?**
- 3. What will happen to the marriage if someone applies to the court five years after**

the celebration of the bigamous marriage? Why?

4. Who do you think can apply to the court to invalidate the marriage?

All National Regional States are expected to enact their own family codes. Until then, the 1960 Civil Code is applicable within such National Regional States, except in Regional States that have already enacted their own family codes.

Exercise

1. Do you think that the National Regional States would allow polygamy?

2. Is it unconstitutional to allow polygamy? Why? / Why not?

Consider that “A” concludes another marriage with “C” without dissolving his previous marriage with “B”, “A’s” marriage with “C” is a bigamous marriage. This is because the marriage between “A” and “B” is still legally effective. It is the marriage between “A” and “C” that the court is going to dissolve on application by a concerned party.

Only four persons are allowed to apply to the court to get the invalidation of the bigamous marriage. These are: “A”, “B”, “C” and the public prosecutor. (The Amharic version of Article 33 of the RFC is clearer than the English version). However, if “B” dies even after “A” married “C”, the bigamous marriage cannot be invalidated. Because, the first marriage (that of “A” with “B”) has already been dissolved by the death of “B”.

Consider the following case carefully and then answer the question given below.

Ato Abebe and Wro Martha concluded their marriage in 1985. They lived for 5 years together happily. But Ato Abebe also married Wro Almaz in 1990. Though he concluded a second marriage, Abebe did not dissolve his marriage with Martha. Shortly after his second marriage Ato Abebe died of a car accident. Following this, both Wro Martha and Wro Almaz appeared before the court claiming that each of them is a wife.

Exercise

If you were the judge, what would your verdict be? Why?

Fraud is not a ground to invalidate marriage in the Ethiopian family law. However, what can be said if one of the spouses:

- Does not disclose a previous criminal conviction passed on him by a court of law?
- (The woman) conceals the fact that she was pregnant at the time of the celebration of the marriage by a man other than her husband?
- Conceals his drug addiction or habitual alcoholism?

Exercise

If Abebe, who is a dresser, tells to his girlfriend Hanna that he is a gynecologist to win the consent of Hanna to marry him, can Hanna invalidate the marriage on the ground of error, after she concludes marriage with him?

Void and voidable marriage

Void marriage is an act, which has no any legal effect from its very inception. Such marriage is also known as void *ab initio*. It is because of the existence of a certain defects or impediments that a marriage is considered to be void. In the Ethiopian family law, there is no concept of void marriage. Therefore, it is difficult to give an example of a defect that results in void marriage in Ethiopia. However, in some other countries, there is a concept of void marriage. For instance, in France, Cambodia and the Philippines if a brother and a sister conclude marriage, their marriage is void from the time of its conclusion. This means, the marriage is not deemed to have existed at all. A marriage that is void is invalid from the very beginning of the supposed marriage. In the eyes of the law, the marriage never existed at all, no matter how much time has elapsed since the celebration of the marriage.

Since a void marriage is a legal nullity from the beginning, a formal action in the court to declare its invalidity is theoretically not necessary, in the countries that consider void marriage in their laws. As practice in these countries showed, such an action should be brought in order to establish a legal record that the marriage was void. In many countries that recognize a void marriage, any person can file for the annulment of the void marriage. In the past, in countries such as England and the United States, a declaration of annulment had very harsh consequences. For example, suppose that after living with a man for forty years a woman's marriage was annulled. She might not have been entitled to any alimony or support payments. Likewise, children born before the marriage was annulled would have been considered illegitimate. Today, the laws of many countries seek to avoid these unfair consequences. Most modern laws offer protection to people who believed they had a valid marriage. Hence a child born of a marriage which is later declared invalid shall be treated the same as a child born of a valid marriage. The rights and responsibilities of parents whose marriage has been annulled will be determined according to the rules regarding divorce. These rights and responsibilities include child custody, child support, and visitation. However, the appearance of the legitimacy, which the fact of the celebration had given to the union of two persons, is retroactively destroyed by the judicial sentence recognizing or pronouncing the nullity. Countries that divide defective marriages as void and voidable use the gravity of the defect for such division. Serious defects such as marriage between a brother and a sister would make the marriage void.

Exercise

If persons of same sex conclude marriage, can we consider such marriage as a void marriage here in Ethiopia?

The Ethiopian family law, however, considers only a voidable marriage unlike many other countries that divide defective marriages into void and voidable marriages. A voidable marriage is also a defective marriage. But it is going to be invalidated by a court of law when application is made for its invalidation. Until it is invalidated by a court of law, the marriage will produce all legal effects of a normal marriage. For example, according to the Ethiopian law, even if a brother and a sister marry each other, their marriage is effective until the court invalidates it. By the same token, if a man concludes a second marriage without dissolving the previous marriage

the second marriage produces all the legal effects of a normal marriage. Therefore, a bigamous marriage, even though it is prohibited, is regarded as effective marriage so long as the court does not invalidate it. In view of this there will be community of property between the bigamous spouses and the children born of such relations are also legitimate. In one case, the appellant Wro. Asnakech Dama vs. the respondent Wro. Yilfashewa W. Gebriel, Civil Appeal File No. 12/79, both women claimed that each of them was the widow of the deceased, Private G. Mariam Chemisso. Asnakech was the first wife. The man concluded the second marriage with Wro. Yilfashewa without dissolving the first marriage. The High Court decided that the respondent is the wife of the deceased, considering the long time separation between the deceased and the appellant. But the Supreme Court reversed that decision and ruled that both the appellant and the respondent were wives of the deceased.

Exercise

Which one of these decisions is correct?

2.1.4 Marriage of a Judicially Interdicted Person

As you may recall from our previous discussion, a judicially interdicted person is a person who is declared by the court as incapable to perform juridical acts. You may also remember that a judicially interdicted person cannot conclude marriage unless he is authorized to do so by a court of law.

Exercise

What do you think will happen to a marriage concluded by a judicially interdicted person?

According to Art. 34 (1), if a judicially interdicted person concludes a marriage without the authorization of the court, the marriage can be invalidated by the application of the judicially interdicted person himself or by the application of his guardian. He can apply only within six months from the termination of his interdiction. His interdiction could be lifted when the conditions that have caused his interdiction are lost. The guardian of the interdicted person can

lose his right to bring an application to the court to the effect of invalidation of the marriage of the interdicted person after a period of six months from the time he came to know the existence of marriage. The guardian also loses the right to apply to the court for the invalidation of the marriage of the interdicted person after the interdiction has been lifted.

Exercise

Why does the law fix a period of 6 months in sub-Articles (2) and (3) of Article 34?

2.1.5 Consent

You may recall from our previous discussion that consent is an important condition in concluding marriage. Consent will be vitiated if it is given under violence or under fundamental error.

A) Violence

Exercise

Y (a man) abducted Z (a woman) and forcefully took her to his house and compelled her to conclude marriage with him,

- a) Is this marriage a valid one? Why? Why not?**
- b) Whom does the law authorize to apply to the court to invalidate the marriage?**
- c) When is it possible to apply to the court to get the invalidation of the marriage? Why do you think the legislature included the time limit?**

Any marriage that is concluded under violence could be invalidated by the application made to the court by the victim of the violence. Note here that it is only the person who has concluded marriage under threat of violence that can apply to the court for the invalidation of the marriage. However, this person cannot bring an action to invalidate the marriage if six months have elapsed since the cessation of the violence. Moreover after two years from the conclusion of marriage, no application could be made to invalidate the marriage.

B) Fundamental Error

You may remember that Sub-Article (2) of Article 13 of the Revised Family Code rules that consent will be vitiated if it is given as a result of error where such error is a fundamental error. Moreover, Sub-Article (3, a-d) of the same article, defines what shall be considered to be fundamental error.

Exercise

- 1. What is a fundamental error?**
- 2. Who may apply to the court to get the invalidation of the marriage due to a fundamental error?**
- 3. When should the application to the court be made?**

2.1.6 Period of Widowhood

As you may remember from your previous study that a widow is required not to remarry before the expiry of 180 days from the dissolution of the previous marriage. See Article 16 (1).

Exercise

What do you think is the consequence of the failure to meet this condition?

Art. 37 of the RFC rules that:

“The dissolution of marriage may not be ordered for the sole reason that the period widowhood specified under sub-Article (1) of Article 16 has not been observed.”

Even if the law requires that a woman should stay 180 days without remarrying after the dissolution of her prior marriage, the non-observance of this requirement shall not entail the invalidation of her new marriage. In a similar manner, the invalidation of marriage shall not be ordered for the sole reason that the officer of civil status who celebrated the marriage is not

competent to celebrate the marriage. (See Art. 38) Also the court shall not order the invalidation of marriage on the ground of non-observance of formalities specified by the law. For example, when the marriage was celebrated, if the officer of civil status did not inform the spouses or their witnesses, the consequences of their declaration before they took the oath, the marriage may not be invalidated for this reason only. (See Art.39)

2.1.7 Impediments to Marriage

So far we discussed the defects or impediments to marriage. These impediments could be divided into 3 groups. These are:

- Absolute impediments,
- Relative impediments, and
- Prohibitive impediments

A) Absolute impediments

Absolute impediments are such impediments that shall always be there. These impediments do not fade as time goes by. They do not cure as a result of passage of time. The marriage will always remain defective if it is affected by such impediments and it is always possible to invalidate the marriage. The marriages suffering from these impediments are voidable and not validatable.

Exercise

Which defects do you think fall under absolute impediments?

Irrespective of the fact that persons who are related by consanguinity or affinity married each other, their relation would subsist forever. For example if a brother and a sister get married they would be siblings forever, irrespective of the fact that they married each other. That is, their

defective marriage is always susceptible to invalidation. The same is true for a marriage between a man and a woman who are related by affinity.

Exercise

If a man concludes a bigamous marriage, can we consider that marriage as being affected by absolute impediments?

B) Relative impediments

A marriage that is affected by relative impediments shall be susceptible to invalidation only within a certain limited period of time. Once this time elapses, no action to invalidate the marriage is admitted. A marriage that is affected by a relative impediment is voidable and validatable. For example, if a girl of 17 years old concludes marriage, her marriage is a defective one. But application to invalidate her marriage is possible only until she attains the full age of 18 years. After then, the law shall not allow any application for invalidation. Vice in consent and marriage of a judicially interdicted person also come under relative impediments. Bigamy may also considered to be a relative impediment (but not necessarily always). For instance, if A and B were husband and wife respectively and A, though still bound by this marriage, concluded a second marriage. In the meantime, if B died, A's second marriage would not be invalidated.

C) Prohibitive impediments

Prohibitive impediments are such impediments that do not lead to the invalidation of the marriage even if marriage is concluded in the existence of these impediments. For instance, if a woman did not observe the required period of widowhood, her marriage may not be invalidated on the sole ground of non-observance of period of widowhood.

Exercise

Articles 17 - 21 deal with opposition to a marriage. That is, someone may oppose the celebration of a marriage on the ground of violation of the essential conditions. Different

persons are entitled to oppose the conclusion of marriage. The identity of these persons depends on the type of the condition that is violated. For example, when the age condition is violated, the parents of the minor, the public prosecutor or any interested person may oppose. However, when the condition of bigamy is violated, only the person who alleges that he (she) had a previous marriage with the bigamous spouse or the public prosecutor can oppose. Other interested persons are excluded from bringing an opposition in the bigamy case.

1. Why do you think does the law make such differences?

2. Articles 28 - 30 require the registration of all forms of marriage by the officer of civil status. What is the advantage of having the records of marriages?

SUMMARY

- A marriage may be defective as a result of failure of observing the essential conditions of marriage. The consequence of the unfulfillment of the essential condition would entail the invalidation of the marriage by the order of the court. When the marriage is ordered by the court to be invalidated, it loses its legal validity. Thereafter, there will not be such a marriage.
- Although a court pronounces an order of nullity when marriage is concluded by violating an essential condition, the Ethiopian family law does not know a void marriage. That is to say, a marriage, whatever it is defective, it is not invalid from its very inception. It becomes ineffective only after its nullity is declared. Before it is nullity is declared it is an effective marriage. This can be well illustrated in a bigamous marriage. If a man marries a second wife without dissolving the first marriage, the second marriage is a bigamous one and it is not a valid marriage. But here, the second marriage cannot automatically be invalidated. It can be invalidated only by the order of the court. The court invalidates the second marriage upon application by an interested person. If no one applies for its invalidation, the marriage is equally effective as any legal marriage. In case the man dies, both marriages are dissolved by the death of the man. Both women are considered wives of the deceased.

- The unfulfillment of some of the essential conditions does not entail the invalidation of the marriage. On the basis of this character of the essential conditions, such conditions are divided into three categories. These are; absolute impediments, relative impediments and prohibitive impediments. Absolute impediments are those, which remain forever. There is no lapse for these impediments. An application can be made for their invalidation any time so long as the defective marriage is there. Relationship by consanguinity is an example of such an impediment.
- Relative impediments are the impediments that could entail invalidation of the marriage only within a specified period of time. Once such period is lapsed, the marriage cannot be invalidated. A marriage that is affected by this impediment is voidable but it is validatable.
- Prohibitive impediment is the one that does not totally entail the invalidation of the marriage. It is a light defect and the law considers it that it is not proper to invalidate the marriage for such a minor defect. Therefore, the marriage will not be invalidated for sole reason that it did not observe such a condition. An example is period of widowhood.

CHAPTER 3

EFFECTS OF MARRIAGE

INTRDUCTION

You have already been informed in the previous chapters that marriage is a special contract that is going to be made between a man and a woman. Marriage produces very important effects that

may have legal consequences. Marriage starts to produce effects just at the moment of its celebration. The effects of marriage shall not simply remain between the spouses. It also produces effects on the relatives of both spouses. The effects of marriage are generally divided into two. These are personal and pecuniary effects. In this chapter, you will study in detail the general rules in relation to the effects of marriage, personal effects of marriage and pecuniary effects of marriage respectively.

Objectives

At the end of this chapter, you will be able to:

- Describe the essence of contract of marriage;
- Show the differences between contractual regime and the legal regime;
- Explain the difference between contract of marriage and record of marriage;
- Discuss the importance of the contract of marriage;
- Indicate which of the provisions of law are mandatory and which of them are permissive;
- Identify the differences between personal properties of spouses and their common properties;
- Demonstrate the differences between properties acquired by onerous title and those not acquired by onerous title;
- Define the meaning of income of spouses;
- Discuss the acts of spouses in relation to their common property that require the consent of both spouses; and
- Indicate debts that are personal and common to both of the spouses.

3.1 General Rules of Effects of Marriage

Read Arts. 40-48 of the RFC

In this section the focal point of our discussion is the meaning of contract of marriage and its purposes. Contract of marriage, as you will learn in this section, is a rare phenomenon in Ethiopia.

3.1.1 Equivalence of All Forms of Marriage

Whether the marriage is celebrated with civil, religious or customary formalities, the law does not make any distinction among them with regard to the effects of marriage. According to Article 40, all forms of marriage produce similar effects. For instance, any income of spouses is their common property, irrespective of the fact that the marriage is celebrated in any of the three formalities. Community of property is one of the effects of marriage. All forms of marriage shall result in community of property. Spouses owe each other fidelity. This is also another effect of marriage that is common to all forms of marriage.

3.1.2 Consummation of Marriage

Consummation of marriage is the sexual intercourse between the husband and the wife. According to Article 41, however, the effects of marriage shall not depend on the real or presumed consummation of the marriage.

Exercise

What is a presumed consummation of marriage?

By the mere fact of cohabitation, it is presumed that the spouses consummate their marriage. If a man and a woman, after concluding marriage, live together but without performing sexual intercourse, their marriage is effective irrespective of the absence of sexual relation in marriage. You could assume that there is no maximum age limit to conclude marriage. Therefore, very old persons may conclude marriage. And yet they may be unable to exercise sexual intercourse. Can't we call them spouses? They are spouses and their marriage produces all the effects of marriage. In one case, the Addis Ababa High Court (Civil Case № 72/62) decided that the

husband of the mother of a child was the father of the child, although there was no sexual intercourse between the spouses. This shows that the marriage produces effects even without the consummation of the marriage. (For more details of this case, see Chapter 9 below).

Exercise

Do you think fidelity to each other would remain as an obligation of a marriage even if one of the spouses is not willing to have sexual intercourse?

3.1.3 Contract of Marriage.

Contract of marriage is a contract concluded between the marrying spouses before or on the date of their marriage. The purpose of this contract is to regulate both personal as well as pecuniary effects of their marriage.

Exercise

Is contract of marriage similar to record of marriage?

Contract of marriage is different from record of marriage. Record of marriage is the registration of marriage by the officer of civil status. Article 28 of the Revised Family Code requires all forms of marriage to be registered by the officer of civil status. After recording the marriage, he will issue a certificate of marriage to the spouses. When a man and a woman conclude a contract of marriage, they may agree, for instance, to make their respective personal properties they owned before their marriage, a common property of both spouses, or they may agree to keep such properties separately as the personal property of each spouse. They may also agree to make one of them be the administrator of their common and/or personal properties. However, the contract of marriage should not incorporate agreements that violate the mandatory provisions of the law. An example of a mandatory rule is Article 49 (1) of the RFC. It reads as:

“The spouses owe each other respect, support and assistance.”

Since this is a mandatory rule, spouses cannot agree, in their contract of marriage, in violation of this rule. Moreover, marrying spouses may not impose an obligation upon third parties through their contract of marriage. Article 46 specifically rules against such impositions.

Exercise

How can spouses impose obligations upon third parties?

For instance, assume that a man, who is getting married, had a child prior to this marriage. Now this man and his spouse cannot agree that only the relatives of the child on his mother's side are responsible for the upbringing of the child. Moreover, a contract of marriage must clearly lay down how the spouses' personal and pecuniary matters are to be regulated, and their wishes cannot be expressed simply by reference to a local custom, religion or law of another country. (Art. 46)

Capacity is required to conclude contract of marriage. A contract of marriage concluded by a judicially interdicted person shall be effective only when the court approves it. But a legally interdicted person is under no disability as far as concluding a contract of marriage is concerned. (Art.43)

Exercise

Who is a legally interdicted person?

Contract of marriage should be made in a special form. That is, it has to be made in writing and attested by four witnesses, two for the husband and two for the wife. Since a contract of marriage is also required to regulate the pecuniary relations of spouses, Article 44 has introduced this formality in line with Article 1727 of the Civil Code of 1960. It states that:

Art. 1727. — Written form.

(1) Any contract required to be in writing shall be supported by a special document signed by all the parties bound by the contract.

(2) It shall be of no effect unless it is attested by two witnesses.

The law requires contract of marriage to be deposited in the court or with the office of civil status. You may have realized that the law stipulates that persons authorized by court or by any one of the spouses may freely consult the document of contract of marriage. That is, persons who want to see the document can see it if they are allowed to do so by court or by one of the spouses.

Exercise

- 1. Why do you think people may be interested in consulting the document of contract of marriage?**
- 2. If the contract of marriage is not deposited in the court or with the office of civil status:**
 - a) Should it be totally invalidated or;**
 - b) Should it be effective between the spouses and ineffective only against third persons?**

As it is explained above, the contract of marriage is an agreement made between the marrying spouses to regulate their personal and pecuniary relations. Especially, with respect to the pecuniary relation of the spouses, creditors may be interested in knowing how the spouses have regulated the pecuniary effects of their marriage.

According to Article 47 of the RFC, the terms of the contract of marriage may be modified if the interest of the family so requires. However, the modification needs to be approved by the court.

Exercise

- 1. Why does the law require the court to approve the contract of marriage or its modification?**
- 2. If spouses do not have contract of marriage, what do you think will govern their personal and pecuniary relations?**

Article 48 of the RFC provides that if the spouses have no contract of marriage to regulate their personal as well as their pecuniary relations, it is the law that governs their relations. This shall also be true if the court invalidates the contract of marriage. When the personal and pecuniary effects of the marriage are regulated by a contract of marriage, it is said to be a ***contractual regime***. When the law governs these effects of marriage, the situation is called a ***legal regime***.

Exercise

Discuss the differences between a contractual regime and a legal regime.

3.2 Personal Effects of Marriage

Personal effects of marriage are very strong. As it is known, the relationship between spouses is very close and probably the closest relation when compared to other forms of relations between any two persons. Spouses have many personal relations, which are peculiar only to them. In this section, you will study the most important personal relations of spouses.

The Civil Code starts the personal effects of marriage with the provision entitled, “Head of the family.” Art. 635 of the Civil Code is read as follows:

Art. 635. — Head of family

- (1) The husband is the head of the family.*
- (2) Unless otherwise expressly provided by this Code, the wife owes him obedience in all lawful things which he orders.*

This rule is in direct conflict with the constitutional provision that has guaranteed equality of both sexes in marriage. Article 35(2) of the FDRE Constitution provides for, “*Women have equal rights with men in marriage as prescribed by this Constitution.*” Moreover, Convention on the Elimination of All forms of Discrimination Against Women requires that:

Article 16

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women:*
 - a) *The same right to enter into marriage;*
 - b) *The same right to freely choose a spouse and to enter into marriage only with their free and full consent;*
 - c) *The same rights and responsibilities during marriage and at its dissolution; ...*

Based on the FDRE Constitution and the CEDAW Convention, the RFC has eliminated the idea of the husband being the head of the family. Article 635 of the Civil Code was based on the traditional way of life of spouses, in that only the husband was considered to be the breadwinner of the family. Traditionally, men work outside the house and the responsibility of wives was to attend household duties. The economic value of taking care of the home was never considered. In almost all societies of Ethiopia, women are not only restricted to household chores, but also they are responsible to perform much of the works on the farm or on the field. In addition to their household duties, wives spend much of their time in farm works in agricultural areas and in the construction of houses and fences in the pastoral areas.

3.2.1 Respect, Support and Assistance of Spouses

Examine the following case and then answer the question given below.

“A” and “B”, before celebrating their marriage, wanted to regulate their personal relation by a contract of marriage. The draft contract included the following terms.

“We shall respect, support and assist each other only when we are healthy. If one of us encounters any severe illness, the other is not bound to take care of his partner and can even leave him alone.”

“A” and “B” brought to you the draft contract and required your professional advice. What advice will you give them?

According to Art. 49 spouses owe each other respect, support and assistance. This is the very essence of marriage. A man and a woman conclude marriage to become spouses and to shoulder any responsibility that is imposed on them by the law or by their agreement. The spouses are expected to respect, support and assist each other. The rule that prescribes respect, support and assistance is a mandatory rule. Hence husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support.

The Oromia Family Code has included additional point on this provision. Art. 65(1) of this Code stipulates that, *“Husband and wife have equal rights upon the conclusion of marriage, during marriage and at divorce.”* (Translation mine)

Exercise

Can a spouse who leaves the common abode and lives somewhere for no good cause, have the right to be supported by the common property of the spouses?

3.2.2 Management of Family Affairs

Study Articles 50, 51 and 52 carefully again and then give answers to the following exercise.

Exercise

- 1. To which of the spouses does the law give the responsibility of managing the family?**
- 2. The 1960 Civil Code ruled in Art. 635 that the “husband was the head of the family”. That rule has been repealed by the RFC. How do you respond to the change in light of rights of women?**
- 3. In what conditions does the law give responsibility of managing the family to one**

of the spouses alone?

4. If any of the spouses have children from an earlier marriage, do both spouses have equal rights in bringing up such children?

In the past in many countries, laws have prescribed different rights and duties for husbands and wives. Throughout much of the world, the legal rights of wives have been unequal when compared to the legal rights of husbands. In the recent past, Ethiopian law also failed to give women equal legal rights during marriage. In the past several decades, many countries have rewritten their laws in an effort to give women equality with men during marriage. Ethiopia is one of the countries that has incorporated the principle of women's equality into law.

Many societies have found it difficult to enforce the equal rights which their constitutions and laws provide. In some countries, customs and traditions make it difficult to achieve the goal of equality. Nevertheless it is important for the written laws to recognize that equality is one of the goals of society. When the law recognizes equality as a goal, people can use the law to help make the goal into reality. That is why the Ethiopian legislature has made the new family code, irrespective of the existence of cultural practices that are against the equality of women in marriage. As Ethiopia is a federal country, it has legislative organs both at the Federal level and at States level. All States legislatures are expected to enact their own family laws that will clearly show the equality of women with men in marriage.

According to Article 50 spouses will have equal rights in the management of their family. Management of family may mean, the administration of their common property, rearing their children in a proper manner, etc. However, Art. 51 rules that if one of the spouses becomes incapable to perform these activities, that is, if one of them is seriously sick, desert the marital house, or jailed, etc., the other spouse should perform these activities alone. Moreover, if one of the spouses had a child prior to marriage, Art. 52 states that it is only the parent of the child that has the right to decide with regard to matters concerning the upbringing of such child. This provision is designed to limit the powers of stepfathers or stepmothers on their stepchildren.

Exercise

Can you think of possible problems that can crop up as a result of the rule that gives an exclusive right to the biological parent to make decision about the upbringing of the children whom he had begotten prior of the present marriage?

3.2.3 Cohabitation, Residence and Fidelity

You may well know that cohabitation is one of the personal effects of marriage. According to Art. 52 (1) spouses are bound to live together (under the same roof). They can owe each other respect, support and assistance in a decent manner, only if they live together. It is difficult to lead a meaningful married life if the spouses live separately. Regarding the place of residence, Art. 54 rules that the spouses jointly determine it. Living together is a mandatory rule in that Art. 53 (3) prescribes that the spouses cannot derogate this rule in their contract of marriage. However, the general rule of the law that orders the spouses to live together has an exception. According to article 55, spouses can live separately for definite or indefinite period of time by their mutual agreement. But according to Art. 55 (2), this agreement may be revoked at any time by any one of the spouses so long as such revocation is not arbitrary.

Moreover according to Art. 53 (2) spouses are bound to have sexual relations, which are normal in married life unless they are seriously prejudicial to their health. Notwithstanding this, the spouses have a duty of fidelity to each other (Art.56). This means sexual intercourse should be limited only between the spouses. That is, a husband shall exercise sexual intercourse only with his wife and vice versa. The law does not allow adultery and it is a crime under the Penal Code. (See Art. 618 of the Penal Code)

Exercise

If spouses agree to live separately for the coming 10 years, can that be regulated under Article 55(1)? Why? / Why not?

In one case, (Wro. Kasathun Chane vs. Ato G. Amanuel Teka, Civil Appeal File No. 1884/74), the Supreme Court decided that property obtained by the effort of only one spouse while spouses

lived separately does not constitute a common property. The Court further ruled that it is only when spouses live together by assisting and supporting each other that they have a community of property.

Exercise

Can we consider that spouses have lived separately when one of them goes to another place for work or education purposes?

What the RFC does not consider, but treated in family laws of many countries are temporary restraining orders. Although the Ethiopian family law does not specifically provide for temporary restraining orders, in other countries, temporary restraining orders are very important in cases where there has been domestic violence (especially against women.) A temporary restraining order is a court order, which requires the defendant to refrain from physically abusing or threatening the plaintiff or her children. A temporary restraining order may also require the defendant to stay away from her home and place of employment. Usually the court passes this order against husbands who practice domestic violence on their wives. This order requires the man to live separately from his wife for a definite or indefinite (but relatively short) period of time.

3.3 Pecuniary Effects of Marriage

One of the most important aspects of any marriage is how the husband and wife will regulate their property and finances. This is an issue in every society which permits private property ownership. There are several different ways to regulate property ownership during marriage. In Ethiopia the laws of ownership of private property are still developing. Before turning to the Ethiopian law, let us examine some of the different ways that different countries treat property ownership during marriage.

When a man and a woman marry and live together as husband and wife, questions arise as to their property rights. The husband may own property when he marries. The woman may also be owner of property at the time of the marriage. The family of the husband or the family of the wife may give a gift of money or other property to the husband or wife at the time of the marriage. After the man and the woman married, they may work very hard and acquire other property. Who owns these pieces of property during the marriage? Who is responsible to maintain each piece of property during the marriage? Who can sell it? In every country laws have been developed to try to answer these questions about the rights and obligations of each spouse to own, use and take care of the property during marriage.

The laws governing the property rights of a husband and a wife have varied greatly from country to country and from century to century. In some societies, all property of every kind, whenever it is acquired, is considered property owned equally by both spouses from the start of the marriage. In these countries, property owned by one spouse, years before the marriage, becomes the property of the husband and wife during the marriage. At the other extreme, in certain countries, married women do not own any property during a marriage. In these countries the man owns every piece of property during the marriage, and he controls its use. Even if the woman owned the piece of property before the marriage, at the moment of the marriage it would belong to the man. Nowadays in most countries these extremes no longer exist. There is a middle way where the parties can each own certain property separately and may also own certain property together. As we shall discuss, Ethiopia is one of the countries that avoids the two extremes. Another form of property relation between spouses is that, spouses will have no common property. Each spouse's income is the personal property of that spouse.

Many people agree that the most important effect of marriage is the pecuniary effect. As long as the spouses live in marriage, any income will be their common property. This community of property is one of the situations that bring oneness into marriage. The law also allows personal property. But, as you will learn in this section, the law favors common property rather than personal property in marriage.

3.3.1 Personal Property of Spouses

Spouses have the right to have their own personal property in addition to their common property that they own jointly. But any property obtained in the form of income is always considered to be common property of spouses.

Read Arts. 57-73 of the RFC

Exercise

- 1. Do you think it is possible for spouses to have their respective personal property other than their personal clothes while they are still married? Why do you say so?**
- 2. Let us assume that H and W are a happily married couple with four children. W owned a house prior to their marriage. The couple now lives in this house.**
 - (a) To whom does the house belong?**
 - (b) Ten years later, if H and W decide to sell the house and keep the money in a Bank, to who does this money belong? Why?**
 - (c) Whose property would the bank interest collected on this money be? Why?**
 - (d) If the couple buys a vehicle with a part of this money, whose property is this car?**

Acquisition by onerous title is the acquisition of a property through an effort or work, or by exchange of one property by another or through purchase by spending some money. Acquisition not by onerous title means the opposite of the former, that is acquisition of a property which is obtained not through effort, or not by way of exchange of one property by another or not by way of purchase by expenditure of money. Although a property obtained through an effort of one of the spouses is a property by onerous title, it cannot be taken as the personal property of that spouse.

According to Art.57 any property that is owned by a spouse on the day of marriage shall remain his/her personal property. This is to mean that; any property owned by a spouse prior to

marriage (he is already the owner of such property on the day of the marriage) will be his own property even after the conclusion of the marriage.

Example

“A” had a villa while he was concluding marriage with “B”. This house would belong personally to “A” alone and “B” would have no right of ownership over this villa. This is a property which the spouse possesses on the day of the marriage.

This Article also states that if one of the spouses acquires property by way of donation or succession (acquisition not by onerous title) in marriage, such property shall belong to the spouse, to whom the donation is made, although the property is acquired after the celebration of the marriage.

Assume that “X” and “Y” are married couple. “X” had an ox before he got married with “Y”. After their marriage “X” may do one of the following to his ox.

- a) He may sell it and deposit the money.
- b) He may exchange it with a donkey.
- c) He may sell it and buy another property by the money obtained by the sale of the ox.

The money deposited, or the donkey or any another property bought shall remain personal property of “X”. Such property is said to have been acquired by onerous title. However to make such property “X” ’s personal property a decision that the property is a personal property of “X” has to be made by the court of law on the application of either “X” or “Y”.

Exercise

In the above example, assume that “X” exchanges his ox with a donkey. If he himself or “Y” fail to apply to the court to get a decision to the effect that the donkey should be the personal property of “X”, what do you think will happen to the donkey? Why do you say so?

3.3.2 Administration of Personal Property

Exercise

Who do you think is authorized by law to administer the personal property of spouses?

Article 59 rules that each spouse shall administer his own personal property. It also rules that if this property generates an income, the owner spouse shall collect the income. Moreover it points out that the owner spouse can freely dispose of his personal property.

Exercise

What does it mean by disposition of property?

Freely disposing a property is, the power of selling or exchanging or donating the property to somebody by one's free choice. This power shows the full ownership over a property.

Exercise

Wro. N, while in marriage, acquired a supermarket from her deceased father by way of succession. Now she wants to donate the supermarket to her daughter begotten prior to the present marriage. Should she get the permission of her present husband to donate this property? Why? Why not?

The law also provides another option for the administration of personal property of spouses. (Read Art. 60 of the RFC.)

As provided in Sub-Article (1) of Article 60 spouses may agree in their contract of marriage that the whole or part of the personal property of one spouse to be administered by the other spouse. However Sub-Article (2) of the same Article obliges the spouse to whom this power was given to submit a yearly report of accounts regarding the property at the request of his/her spouse. Moreover, article 61 provides that one of the spouses may freely appoint the other spouse as an

agent to administer his/her personal property. This is possible even in the absence of a contract of marriage.

Exercise

To appoint the other spouse as one's agent, should one need to get the approval of the court or that of the notary public or can he simply appoint his spouse as his agent without the need of the approval of these authorities?

3.3.3 Common Property

Above, we discussed the legal provisions that rule with regard to property that are owned personally by each of the spouses. However, the law also provides for properties that are commonly owned by spouses. As a general rule, in most countries, all property that is not defined by law as personal property will be considered common property. It is true here in Ethiopia that all property that is not specifically defined as personal property will be common property.

In deciding whether property is common or personal it is helpful to first ask yourself some questions about the property. Then the question whether the property is common or personal will be easier to answer. Some questions to ask are:

- What is the piece of property I wish to put in the category of common property or personal property?
- When was this property acquired? For example, was it acquired before or during the marriage?
- How was this property acquired? For example, was it a gift? Was it an inheritance? Did husband or wife pay money for it? Did husband or wife trade something for it? Did they find it without paying money?

- Is there a written record of ownership of this property, and if so, what does that record show regarding ownership after it was acquired?

Sometimes property is in part common and in part personal property. Under the laws in many countries it is possible for a piece of property to be classified in one category but many years later to be classified in the other category. This will happen when the parties treat the property first in one way and then later alter the way they treat the property.

Consider the following example and whether you think there would be a change in the characterization of the property from personal to common at any time:

Example

Seifu's mother owned a small shop. When she died Seifu inherited the shop and was the owner. He and his wife Helen ran the business for many years. Helen worked there more than Seifu. She was the manager. Seifu often said that they now owned it together, although they did not sign any papers saying in writing that he transferred an interest in the business to her. Seifu and Helen borrowed money together to buy equipment for the business. The business increased in value till it was worth three times what its value was when Seifu inherited the business from his mother. After ten years, is it still personal or common property? Do you think anything could have been done to make ownership more clear?

A) Property acquired by the efforts of spouses.

According to Sub-Article (1) of Article 62, all incomes of the spouses that are derived by their efforts shall make the common property of the spouses. Salaries and wages of spouses are their incomes derived by their efforts. Moreover, any income from an income generating property is also a common property. This is true whether the income generating property is a personal or a common property. Art. 62(2) states that any property acquired by any of the spouses by onerous title shall be the common property of the spouses unless it is declared by a court of law to be the personal property of one of the spouses as specified in Article 58 (2) of the RFC.

When any change is made to a personally owned property (e.g. when it is sold, exchanged with another property or when a new property is purchased by money that is personally owned), this situation has to be reported to the court. In case the spouses fail to notify this situation to the court to get its declaration to the effect that the newly acquired property is the personal property of one spouse, such property shall become common property of both spouses. Art. 62(2)

According to this Sub-Article, any property acquired through donation or inheritance during marriage shall be the common property of spouses. However, this rule will not apply if the act of the donation or will clearly states that the donation or bequest is made to one of the spouses.

Exercise

Can pension allowance of one of the spouses be considered as the common property of both spouses?

There are two main sources of pension allowance. One source is the deduction from the basic salary of the employee (4%) and the other source is the deposition (6%) of the employer (the government) on behalf of the employee. Courts have never passed decisions regarding pension allowances uniformly. The Supreme Court in Wro. Asefash G. Giorgis vs. Ato Tesfaye Abraham, Civil Appeal File No. 248/1980, decided that the divorced wife should be entitled to the half of the 40% of the pension allowance of her x-husband. But the dissenting judge argued that; “Pension allowance can never be attached nor it be assigned to third parties. Moreover, the purpose of pension allowance is to supply the means for the livelihood of the former employee at the time when he could not be able to earn his livelihood by his work as a result of old age, etc.”

Exercise

Which decision do you favor? The majority or the minority decision?

In another case, Asfaw H. Mariam vs. Fanaye Alemayehu, Civil Appeal File No. 1291/75, the court allowed payment of a lump sum of Eth. Birr 5000 to a divorced wife instead of granting her half of the 40% pension allowance. The court reasoned that, “...a divorced wife has no any

right to claim a monthly payment from the pension allowance of her previous husband.” The court further stated that, “...having regard to the duration that the marriage lasted, the wife should get some money by way of compensation.” In another very interesting case, (Wro Beletu Bedane vs. Wro. Tenaye Mekonnen, Civil Appeal File No. 969/79) both women alleged that each was wife of the late Ato Bekele Tesfaye. They made their applications separately and succeeded in getting the certificate that proved that each was a wife. However, the pension authorities refused to pay the pension allowance for both women. It ordered them to bring a certificate that clearly indicates which one is the true wife of the deceased. Wro. Tenaye alleged that her marriage with the deceased lasted for more than thirty years and the other woman has never been wife of Ato Bekele. Because the other woman (Wro. Beletu) lived only for eight months with the deceased. She further argued that it was her name that was filled in the files of the Pension Authority. Wro Beletu on her part argued that, Wro Tenaye and the deceased had stopped living together since fourteen years ago and hence she cannot be wife of the deceased.

The Awraja Court decided that the second marriage was a bigamous and illegal marriage and it has no legal effect. It recognized Wro. Tenaye Mekonnen, the only wife of the deceased, by dismissing Wro. Beletu. The High Court affirmed the Awraja Court decision. The Supreme Court ruled that, Wro Beletu, except alleging that the deceased was not living with Wro. Tenaye, she did not prove the dissolution of the previous marriage. It reasoned that, living separately for long time does not cause the dissolution of a marriage, unless the marriage is dissolved through legal formalities. It further reasoned that since the first wife did not apply for the invalidation the second marriage while the deceased was alive, it couldn't be said that the second marriage is void. The Supreme Court decided that both women were wives of the deceased. However, it granted the right to demand payment of pension allowance to the first. It based its decision on the ground that the deceased concluded the second marriage after his retirement and the second wife did not contribute anything for the pension fund.

Exercise

Do you agree with the decisions of these courts? Why? / Why not?

B) Legal presumption

Exercise

1. Explain the meaning of the phrase “unless such spouse proves that he is the sole owner thereof” in Article 63(1).
2. What do you understand from Sub-Article (2) of Article 63.
3. Is the legal presumption made in Article 63 rebuttable? Why?

Let us consider that “A”, a husband, has a personal property. Consider this property is a **FORD** car. The car is registered in the name of “A”. Even if the **FORD** car is “A” ’s personal property, the law presumes it as the common property of “A” and “B”. (“B” is a wife). However, this presumption is rebuttable. Thus “A” can rebut this presumption of the law by showing that the **FORD** car is his personal property.

Exercise

How can “A” show (prove) that the FORD car is his personal property?

“A” can prove that the **FORD** car is his personal property by showing one of the following:

- a) By producing a document that shows he owned the car before he married “B”, or
- b) By producing an evidence that shows he has acquired the car by way of donation or succession, or
- c) By producing evidence that he acquired the car by an onerous title (exchange, sale, etc. of personally owned property) during marriage. In this case “A” also has to show that he has informed the court of this fact and obtained its approval.

Unless “A” proves that the **FORD** car is his personal property in one of the above ways there is no way out for him. The car will be the common property of both spouses as a result of the presumption of law under Article 63 of the RFC. Because of this presumption of the law everyone can assume any property in the possession of the spouses as a common property of the spouses. For instance let us say that "C" is a neighbor of "A" and "B". Let us now assume that "A" and "B", by their common consent received some money in loan from "C". In this situation, "C" can simply consider the **FORD** car as the common property of the spouses. In view of this,

"C" can move to attach the **FORD** car if "A" and "B" fail to pay back the money to him. In this situation "A" may not claim that the **FORD** car is his personal property to stop "C" 's action over the car. Here, "A" can, however, set up a defense against "C", if and only if "A" shows that "C" knew of the fact that the **FORD** car is his personal property or "C" should have known of such fact as ruled in Sub-Article (2) of Article 63. If "A" fails to show that "C" knew or should have known about this fact, "C" can pursue against the car to get his money paid back.

C) Management of common property.

Although salaries and wages of each of the spouses are common properties of both spouses, the law allows each spouse to collect or receive his/her earnings. (Art.64)

Exercise

- 1. In what ways is Article 65 an exception to Article 64?**
- 2. Assume that "A" is husband and "B" is wife, "A" is a drunkard and usually comes home almost empty-pocketed on paydays. What piece of advice would you give to "B"?**

Sub-Article (1) of Article 64 rules that each spouse shall receive or collect his earning in person. According to Sub-Article (2) of the same Article, the spouses can deposit their respective earnings in personal or joint bank accounts. But this does not mean that each spouse can dispose his/her earning freely. It has been stipulated under Article 62 (1) of the RFC that all incomes obtained from the personal efforts of spouses shall be their common property. Moreover According to Article 64 (3) each spouse is expected to show the other spouse the amount of his/her earnings and expenditures. However, the law also provides for an exception to Article 64 (1). You may already be aware that according to Article 65 (1), one of the spouses can officially permit the other spouse to collect his/her earnings. In other words, a husband may freely give the mandate to his wife to collect his earnings. A wife can also freely give the mandate to her husband to collect her earnings. In addition to this, the court may order, at the request of one of the spouses, the earnings of one spouse to be received by the applicant spouse. This means the court may order that the husband's salary to be collected by the wife if she applies to the court for

such authorization. Also the husband may apply to the court to be authorized to receive the salary of his wife, and the court may decide in favor of this application.

Exercise

- 1. Why do you think a wife is moved to apply to the court to be authorized to collect the salary of her husband?**
- 2. Is this rule subject to the rule of Art 404 of the Civil Procedure Code, that prohibits the attachment of more than one-third of the salary of a person?**

If the husband is a spendthrift or a prodigal or an extravagant person, the wife can apply to the court to get the authorization to collect her husband's salary, for the good of the family.

As stipulated in sub-Article (1) of Article 66, both spouses shall administer their common properties conjointly. But the same sub-Article also provides that the spouses may vary this provision by their contract of marriage. That is, they may agree in the contract of marriage that a part or the whole of their common the property to be administered only by one of the spouses. This will give the power of administering their common property either to the husband or wife only. Consider sub-Article (2) of Article 66. According to this sub-Article, if one of the spouses becomes incapable (sicken, judicially interdicted, away from home, etc.) to involve in the administration of the common property, the other spouse alone shall take the responsibility of administering their common property. Article 67 of the RFC, states that the spouse who is in charge of the administration of the common property, is duty bound to inform (to give notice to) other spouse about the administration of their common property.

Exercise

Why do you think such notice is necessary?

Unless there is a duty of notification about the administration of the common property of spouses, the spouse that is engaged in the function of administration may abuse his power. He may unduly appropriate some part of the common property as his personal property. Or he may take an action that might negatively affect the interest of the other spouse.

Management of property is not something as the ownership of property. Management means the right and responsibility to control property. Management of property involves the right to take care of it, the right to improve it and the right to spend it or apply it to a debt. Management of property also involves the responsibility to maintain the property and avoid its loss or destruction. Although the language of the RFC is clear and direct, the custom and practice in marriage in most societies differ from what is written in the law. It is important to consider the experience of people in their lives in order to see how changes may or may not occur in the future. Let us consider the following examples of management of property during marriage. For each example, consider first, what the law requires for an answer, and second, what your experience is with these examples are handled in real life:

Example

- 1. Berhanu and Hanna have been married for 10 years. They own a small business together. Berhanu wishes to expand the business but Hanna does not want to spend their savings to increase the business. She fears they will lose everything. She even thinks of asking a lawyer to give her a piece of advice.**
- 2. Mammo and Sinidu have been married for 25 years. They own a building, which they rent for their income. Mammo want to construct an additional building. Sinidu wants to pay for the education of their son in one of the famous universities in Europe.**

Exercise

Art 656(1) of the Civil Code of 1960 states that:

“Common property other than the earnings, salaries and income of the wife, shall be administered by the husband.”

The RFC has repealed this rule. Explain the need to repeal this old rule in light of the rights of married women.

The FDRE Constitution recognizes the property rights of women and according to this constitutional rule, women have equal rights with men to administer, control use and transfer property. Since women have equal rights with men in marriage, as prescribed by the FDRE Constitution, the family law should be enacted in line with this right of women.

FDRE Constitution Art 35

2. Women have equal rights with men in marriage...

7. Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land...

3.2.4. Requisite of Agreement

Exercise

- 1. “H” and “W” are husband and wife respectively. Can “H” borrow some money from his friend “X” by mortgaging their common house without having “W” ’s consent? Why? Why not?**
- 2. “C” and “D” who are husband and wife respectively and they agreed in their contract of Marriage that “D” shall administer all of their common movable property. Now “D” wants to sell their old National Panasonic television set, the value of which is Birr 2500 and buy a new SONY television set. She came to you seeking your legal counsel whether or not she can unilaterally do that. What will you advise her?**
- 3. “E” and “F” who are husband and wife respectively, have “X” as their best friend. “X” wanted to borrow Birr 3,000 from the Credit Association of their office. The Credit Association informed “X” to bring a person who stands surety for the debt. So “X” went to “E” and asked him to stand surety for Birr 3,000. Can “E” stand surety to the debt of “X” without having the agreement of “F”, his wife? Why? Why not?**

You are now going to study one of the very important provisions of the RFC. The Provisions deal with the problem, which is the source of most litigation between spouses. The RFC provides that common property may be sold or given away with the consent of both spouses, otherwise it may not. However, the law does not say how each party is to express his consent. Sometimes it may be difficult to know if both spouses have given their consent. One way to prove that both parties consent is to require both parties to sign any papers required to sell or give away the property. Some countries have this type of requirement.

Study Article 68 of the RFC very carefully.

According to Article 68, the agreement of both spouses is necessary to do one of the following, even if only one of them is empowered to administer their common property.

- a) To sell, exchange, rent out, mortgage or alienate in any way a common immovable property to give a right to third parties on such property. As far as common immovable property is concerned, one of the spouses cannot act in any way on such property to the effect that a third party can have a right upon such immovable property. Both spouses, by their common decision, can give their common immovable property to a third party, so that this third party would have a right on the common immovable property. You should note that the husband or the wife could not unilaterally even rent a common property, which is immovable.
- b) One of the spouses alone has no power to sell, exchange, pledge or alienate in any other way, a common movable property or securities registered in the name of both spouses when the value of such properties is greater than Birr 500. Therefore, to transfer a movable property the value of which is more than Birr 500, the agreement of both spouses is necessary. Here the purpose of the law is protecting the common properties of the spouses. That is why it prohibits the transfer of any common immovable property or a movable property whose value is more than Birr 500 by a unilateral decision of only one spouse. From this we can understand that the common

property of the spouses is indivisible as long as the marriage is there. Hence, one of the spouses cannot dispose of any part of the common property simply claiming that he has right on the common property.

- c) One of the spouses is not allowed to give by way of donation any property the value of which is more than Birr 100 or cash that exceeds Birr 100.
- d) One of the spouses cannot borrow or lend money exceeding Birr 500 by his own unilateral decision. Nor can he stand surety for a debt of another person to such amount of money.

Exercise

What do you think would happen if one of spouses violates the rules under Art. 68?

Article 69 of the Revised Family Code deals with this issue. You may have realized from the reading of Art. 69 (1) that if one of the spouses enters into obligations in violation of the provisions of Art. 68, the court may, at the request of the other spouse, invalidate such obligations.

Example

"A" (husband) without making an agreement with his wife "B", sold their common car, which was registered in the name of "A". He sold the car to "Y". Now "B" can apply to the court to cancel the contract of sale made between "A" and "Y". The court may invalidate the contract of sale.

Exercise

What does invalidation of a contract mean?

When a contract is invalidated, the parties to the contract ("A" and "Y") shall be, as far as possible, reinstated in the position which would have existed, had the contract not been made. Reinstating in the previous position means, "Y" shall return the car to "A", and "A" shall give

back to “Y” his money. However, you should also note Article 69 (2) has put a time limit for filing an application for revoking an obligation made in violation of Article 68. In the above example, for instance, “B” can bring an action to the court within six months from the date she came to know of the existence of the contract. In other words, she will lose her right to bring an action for the invalidation of the contract. In any case, she cannot bring an action for the invalidation of the contract, once two years have elapsed since the conclusion of the contract.

The ideas of Art 69 of the RFC were not there in the 1960 Civil Code. As a result of this, courts have no clear guideline when one spouse violates Art 658 of the Civil Code. (Art. 658 of the Civil Code is the corresponding Article of Art. 68 of the RFC). By the same token, the RFC does not incorporate the possibility of objecting the occupation of one spouse by another in the interest of the household.

Cases

1. Ato Yirga Techane vs. Ato Mekonnen Ali (Civil Appeal File No. 24/91)

In this case, Ato Mekonnen Ali received from Ato Yirga Techane Birr 17,500 in loan without getting the consent of his wife Wro. Workie Fantaw. Because Ato Mekonnen failed to pay back the money to Ato Yirga, he sued the debtor and got a judgment in favor of him. According to the judgment, the money shall be paid to the creditor from the proceedings of sale of the house that was the common property of the debtor and his wife Wro. Workie. Wro. Workie alleged that the loan agreement should be invalidated since it was made without her consent. Ato Yirga, the creditor, argued that: “Ato Mekonnen is a trader and he took the money to promote his business. Hence Wro. Workie’s allegation has no ground. Because she did not object his trade according to Art 645 of the 1960 Civil Code and Art 16 of the Commercial Code. In such cases, the debt of a trader is recovered on the personal estate of each spouse and on common property, according to Art 19 of the Commercial Code.”

The High Court dismissed the allegation of Wro. Workie on the ground that her husband is a trader and the debt shall be recovered on the common property of the spouses.

2. Sister Sewasew Kifle vs. Ato Kassa Yikalu (Civil Appeal File No. 231/71)

In this case Ato Kassa Yikalu, creditor of Ato Kiros G. Mariam, got the High Court judgment to get his money back from the proceedings of sale of properties of Ato Kiros. Sister Sewasew, wife of Ato Kiros intervened in the suit and opposed the allegation of Ato Kassa in her appeal to the Supreme Court. She claimed that the property of spouses is an undivided unit and it cannot be attached for the debt of one of the spouses. The respondent and the creditor, Ato Kassa Yikalu, argued that the property he was pursuing has been registered in the name of Ato Kiros. Therefore, it must be the sole property of the husband. The appellate court reasoned that: "...The fact that a property is registered in the name of only one spouse does not make it his personal property." However, the appellate court decided that Ato Kassa should recover his claims from the common property.

3. Wro. Yeshareg Tsegaye vs. Ato Hailu W. Medhin and Ato Chanyalew Tasew (Civil Appeal File No. 832/75)

Wro. Yeshareg Tsegaye and Ato Chanyalew Tasew are spouses. As Wro. Yeshareg claims, her husband sold their common vehicle to Ato Hailu W. Medhin without her knowledge. She requested the High Court to invalidate the sale contract concluded between her husband and Ato Hailu. Ato Hailu on his side argued that he was a good faith acquirer of the property pursuant to Art. 1161 of the Civil Code and the contract should not be invalidated. Moreover he claimed that the vehicle was registered in the name of Ato Chanyalew and he had no chance of knowing whether the property was personal property of the seller or it was common property of spouses. He further argued that his only duty was to check the property was that of the seller.

The High Court held that the sale contract should not be invalidated. Because, the interest of a party who has acquired a property in good faith should not be affected. Moreover a purchaser has no any duty to scrutinize whether a property was a common property of spouses so long as it was registered in the name of the seller spouse. Invalidating such a sale contract would seriously affect a business transaction. Upon appeal to the Supreme Court, the appellate court with a majority vote affirmed the decision of the High Court.

Exercise

- 1. What special benefits have been obtained as a result of the introduction of Art. 69 the RFC?**
- 2. Do Arts. 68 and 69 of the RFC adequately allow one spouse, particularly a wife to exercise her property right? According to the customs of most societies in Ethiopia, in whose name (husband or wife) properties are registered?**

4. Appellant: Ato Berhe Amdetsyon

Respondent: Ato Amanuel Elias

The present appeal is lodged against the decision of the High Court rendered on the 17th of Tikimt 1977 (E.C.). The original plaintiff (present appellant) alleged that the original defendant (the present respondent) had given him a Tombola ticket numbered 06086 before its drawing date; after affixing his signature and a sign of the cross on it, he gave it back to the respondent saying that it be their “common property”. Thereafter, the ticket won the first prize, a Mercedes Benz Automobile, and the appellant demanded to be paid half the value of the Automobile (Birr 50,000). The defendant in his reply said that one who claims a donation to have been made to him must be in possession of the gift according to Article 2444 of the Civil Code. Alternatively, argued the defendant, since the money used to purchase the ticket is regarded as part of the common property of his wife and himself he cannot donate a thing which does not fully belong to him. Thirdly argued the defendant since the ticket is bought by money common to the couple pursuant to Article 652 of the Civil Code, and since the benefit deriving from the ticket is not separable from the ticket itself, and since he made the donation without the consent of his wife, the donation is not sustainable at law in accordance with article 568 of the Civil Code.

The High Court in its ruling of Tikimt 17, 1977 (E. C.). Reasoned as follows:

Though the plaintiff in this case claims that a donation of an automobile has been made to him, there was no delivery effected nor a written contract entered into. (Article 2443 and 2444) The automobile was not in the hands of the defendant at the time of the making of the said donation, nor was it a property belonging to him (owned by him). According to Article 2451 of the Civil Code a donation is considered void, if the object of donation was not the property of the donor at the time of the donation or if the donation is made in respect of an object which is to be acquired in the future. For these reasons the High Court ruled that the plaintiff's claim be struck-out.

The appellant has in his appeal memorandum of Tikimt 26, 1977 E.C. stated his dissatisfaction as his grounds of appeal which, inter alia, are that:

- The appellant did not sue the respondent for an automobile donated to him, he sued for donation of a Tombola ticket and the automobile is the fruit of the ticket.
- The ticket and the benefit deriving there-from are not separable.
- It cannot be said that a Tombola ticket is not property.
- The ticket with its fruits had been conjointly donated to the appellant.
- Since it cannot be said that one who makes a donation of lottery ticket is not making a donation of the prize thereof the appellant begged for the reversal of the decision of the High Court and that the money proceeds of the ticket be given to him in accordance with the donation.

In his reply of Tir 12, 1977 E.C. the respondent said that though the ticket is a movable property the respondent was not the owner of the automobile. Moreover, the appellant did not possess the ticket, nor did he prove the existence of donation pursuant to Article 2447 of the Civil Code. Leaving aside the above, since the ticket commonly belongs to the spouses and according to the Civil Code Articles 647 and 658 a spouse cannot make a donation amounting to more than Birr 100 without the consent of the other spouse, the appellant's claim is not acceptable and the appeal should accordingly be rejected.

Later on, the appellant after reiterating his original grounds asked for the reversal of the decision of the High Court in his reply dated 21/6/77.

The court after the completion of the presentation of the respective arguments by both sides, heard the testimony of their witnesses and from the evidence adduced ascertained that the respondent had given the appellant Tombola ticket No. 06068 that won the controversial property and that the appellant instead of keeping the ticket for himself alone returned it to the respondent with the intention and declaration that he hold it on their behalf.

We will examine the points of contention as invoked by both parties here below.

Had the appellant accepted the donation and kept the ticket with him, the respondent would not have succeeded if he claimed the ticket back or that he did not donate the prize with the ticket. Similarly, the court could not allow the respondent to be the sole beneficiary of the prize just because he had the ticket with him.

Next we shall see: - (1) Whether or not the ticket and the benefit deriving from it can be viewed separately. (2) If it is proved that the respondent donated the ticket without disclosing the fact that it was a property of someone else could he succeed if he later argued that it was a common property and therefore could not make the donation alone?

As it is gathered from the file that the High Court in its ruling that the plaintiff should be entitled to share in the prize won by the ticket based its decision on the nature of the cause of action i.e. the plaintiff's claim was not for the ticket but the benefit derivable there from in the future. Moreover, the file indicates that the defendant had given the ticket; this cannot be taken as giving along with it the right, which may arise from it. The reason stated by the High Court for this was that according to Civil Code Articles 2443 and 2444, in order to validly donate a movable property delivery should be effected, and that in this case the car which the plaintiff alleges to have been given hasn't yet been realized and pursuant to Art. 2451 of the Civil Code, the defendant cannot give property which does not belong to him on the date of the donation; gift relating to future property is of no effect.

As far as, we are not in agreement with this ruling for it would be inappropriate to envisage the ticket and the benefits deriving therefrom separately and because the appellant's initial claim was

that he was given a Tombola ticket No. 06068 which has won an automobile worth Birr 100,000 and that he is entitled to share the proceeds of the ticket with the respondent.

As everyone knows, one buys a Tombola ticket or a lottery ticket to be a beneficiary of the right, which it might entail. If there may be somebody buying such a ticket for purpose otherwise, it may still be deemed that he purchased it to avail himself of the proceeds unless he makes the purpose for which he buys the ticket is known.

Since what one might get in the form of a prize are clearly specified and listed in the ticket itself, it is definite that anyone buying either a lottery or a Tombola ticket does so hoping to win one of the prizes listed.

Accordingly it is not debatable that anyone who donates a Tombola or lottery ticket does so with the intention of entitling the donee to the prize for which the ticket number turns out to be a winning one.

Thus, we have found the statement that the respondent merely donated the ticket to the appellant without the changeful benefit it might entail to be unacceptable and contrary to the purpose of donation. A look at Article 2444 of the Civil Code which states bearer titles may be donated by mere delivery also covers this present case in which the respondent, as already stated above, transferred the controversial ticket by delivery. What the appellant is in effect demanding is that the ticket be re-delivered to him so that he may draw the proceeds, take his share and give the remaining to the respondent. As a result, we resolved that there is no disparity between the law and the circumstances of the case under consideration.

Article 2451 of Civil Code provides, “*a donation may only relate to a property belonging to the donor on the day of the donation*”. In this case, the respondent donated ticket No. 06068 to the appellant from his own pocket which may be equaled to a situation where somebody takes out a legal tender currency from his pocket and gives it to another which is deemed to be donating one’s own money. By the same token, we feel that there is no better alternative other than taking it for granted that the respondent donated his own ticket.

As has already been stated above, since the ticket and the benefit it entails are not separable, in no way could it be considered that the respondent donated something out belonging to him.

The legal provisions cited viz. Arts. 647 and 658 of the Civil Code do not support the defendant because the respondent donated the ticket bought for Birr ten with the list of the possible prizes listed on it and with the embodied uncertainty of the value of the prize that may be won.

Therefore, since it has been proved that the respondent, with full consent and from his own pocket gave Tombola ticket No. 06068, bought from the ECA to the appellant and since witnesses have testified and the respondent himself, has by a written memo admitted that it was he who insisted that the appellant accept the donation, and that the respondent however, did not establish that the appellant returned the ticket to him with the intention of renegotiating the full bearer title back to him, we have pursuant to Article 348 of the Civil Procedure Code, quashed the decision of the High Court and ruled that “Tombola ticket No. 06068 be common to both the appellant and the respondent. Furthermore, since the ticket and its resultant proceeds cannot be envisaged separately, we have hereby decided that the parties share it equally.

The respondent shall pay a lump sum of Birr 300 to the appellant, this amount representing court fees and costs incurred.

The freezing order given on Hidar 5, 1977 E.C. is hereby lifted.

3.2.5 Debts of spouses

Exercise

"A" (husband) is a personal debtor of "C". However, "A" has no any personal property. But he has a common property with "B" (his wife). The total value of the common property is Birr 25,000. If the amount of the debt is Birr 30,000, how can "A" recover the debt?

According to Article 70, if one of the spouses is a personal debtor (e.g. he borrowed the money before he/she concluded the marriage, i.e., ante nuptial debt) such debt may be recovered from his/her personal property.

Exercise

If the debtor spouse has no personal property, how can the creditor get his money?

In other words, a personal debt of one of the spouses may be recovered on the common property of the spouses, if the debtor spouse has no personal property or his personal property is not sufficient to recover the debt. In such cases, the debtor spouse can go only up to half of the common property leaving the other half untouched. But some legal scholars do not agree with this concept. They argue that common property of spouses is an undivided unit so long as the marriage is there. Common property shall split only at the time of dissolution of the marriage.

Exercise

Can't this concept of "undivided unit" of community of property affect the property interest of one of the spouses, particularly that of the wife? For instance, the husband may, in violation of Art. 68 of the RFC, sell, exchange, alienate, mortgage, etc. the common property. Or he may take some money by loan from a third party and he may spend the money not in the interest of the household. If we adopt the idea of "undivided unit", the wife is obliged to pay the debts of her husband that was concluded without her knowledge and with no benefit to the family. What is your opinion on the idea of an "undivided unit"?

The draft family code prepared by the Ministry of Justice (Art. 74(1)) and the Tigray Family Code use similar words to indicate how a personal debt is going to be paid. The words in these materials could be roughly translated as follows:

"Debt due by one spouse shall be recovered on the personal property of the indebted spouse. When the personal property of the indebted spouse is not sufficient to cover the debt, the debt shall be recovered on the common property of his share."

In one case, (Wro. Sofia Yacob vs. Ato G. Hiwot Abraha and Ato Begashaw Zergaw, Civil Appeal File No. 821/92), Wro. Sofia claimed that her husband Ato Begashaw Zergaw received Birr 65,000 from Ato G. Hiwot Abraha without securing her consent. She further argued that her husband incurred the money for his personal interest. As a result of this, she opposed the decision of the Federal First Instance Court that ruled the sale of the common property to cover the debt. The Federal First Instance Court reasoned that, Ato Begashaw was a trader and the wife cannot oppose the allegation of the creditor. Wro. Sofia lodged an appeal against this decision of the lower court. The High Court recognized the right of the creditor to go against the properties of the debtor. It also indicated in its decision that the wife can oppose the execution of the decision on her share.

Exercise

Is this decision of the High Court in favor of the “undivided unit” or against it?

Although the debt is concluded by one of the spouses, if it is incurred in the interest of the household, according to Article 70 (2), both spouses are considered to be common debtors. In such a case both of them are liable for paying the debt back. The debt can be recovered on the common property or on the personal property of the spouses.

Exercise

- 1. Which debts are debts in the interest of the household?**
- 2. Assume that A had a child before he concluded marriage with B in 1994. A, in 1987 decided to enroll his child in one of the best kindergartens in town, where the tuition fee was beyond his economic capacity. But he received 5000 birr in loan from his friend X. He did not pay the money back to X until he concluded his marriage with B in 1994. Now it is 1996. A and B have now a lot of common property. A wants to pay his debt to X from the common property. However, B opposes this on the ground that ante nuptial debts shall not be paid from common property of the spouses. She further argued that A’s child had completed his kindergarten education before she concluded marriage with A.
Comment on B’s argument.**

3. A usually entertains himself with games of chance such as betting and gambling.

- a) If he loses 2000 birr in the game by borrowing the money from H, is that the common debt of A and his wife?**
- b) If he wins 1000 birr in the game, is the money a common or a personal property?**

Both spouses are expected to contribute to their household expenses according to their respective means. (Art.72). This rule should not be taken to mean that each spouse should contribute in proportion of his income to the household expenses. The provisions of this Article become meaningless when we think of the situation that only one of them is gainfully occupied. It is believed that the house-making spouse (usually women in our situation) is contributing equally with the spouse who is the breadwinner of the family. The lawmaker's intention in this case is, each spouse should try to the best of his ability for the well-being of the household.

The whole point here is that, the spouses are jointly responsible for the support of the family. The expenses for such support and other conjugal obligations shall be paid from the common property such as income and fruits of their common or personal properties. In case of insufficiency or absence of said income or fruits, such obligations shall be satisfied from the separate (or personal) properties.

Exercise

Read Art. 73 of the RFC and explain its contents by envisaging possible examples.

Contracts made between the spouses after they have concluded their marriage have similar effects with that of contract of marriage. These contracts, like contract of marriage have to be approved by the court.

Example

Okelo and Abebech were husband and wife respectively. They were blessed with two children. Abebech died of malaria last year. Okelo now married another woman called Woyini. If Okelo wants to share his personal property (e.g. half of the property that he

owned as a common property with the previous wife) to the new wife, whenever he concludes a contract to this effect, the court should approve such contract. The legislature is very reasonable in introducing such an imposition on those spouses who make such contracts. Because, it is the safest mechanism of protecting rights of third parties.

One very important thing that is missing in the RFC is the idea included in Art. 645 of the Civil Code of 1960. Art. 645 reads as follows:

Art. 645. — Occupation of spouses.

- (1) Each of the spouses may carry on the occupation or the activity of his choice.*
- (2) The other spouse may, in the interest of the household, object to the carrying on of a given occupation or activity.*

This means, either spouse may exercise any legitimate profession, business or activity without the consent of the other. However, the other spouse may object the activity of his spouse only on valid, serious, and moral grounds. If there is no agreement reached between the spouses, the court may decide on the case.

SUMMARY

- All forms of marriage will produce effects just from their conclusion and the law makes no distinction between different kinds of marriage as far as producing effects is concerned.
- Contract of marriage as is referred in many countries, as a marriage settlement, is not a very common practice in Ethiopia. A contract of marriage is an agreement reached between the future spouses before they got married. The future spouses shall determine their personal as well as their pecuniary relations in their contract of marriage. That is, they shall determine prior to the conclusion of the actual marriage they agree as to how

they shall govern their personal and pecuniary relations. Concluding a contract of marriage is not equivalent to celebrating marriage. Contract of marriage is a special contract that needs the deposit of the document in the court or with the office of civil status. The last date to conclude a contract of marriage is the date of celebration of marriage.

- When the spouses govern their marriage by a contract of marriage, it is said that their marriage is governed by a contractual regime. However, in many cases there is no contract of marriage and the provisions of the law regulate such spouses' marriages. When the law regulates the personal and pecuniary relations of spouses, it is said that their marriage is governed by a legal regime.
- Personal effects of marriage result from the closer relationship between the spouses. These effects are concerned with the person of the spouses. Personal effects of marriage include: the obligation to respect, support and assist each other; the living together of the spouses under the same roof; the sexual intercourse between the spouses; duty of fidelity, etc.
- Pecuniary effects of marriage are the property relations that are created in marriage. The Ethiopian family law allows two types of property relations between spouses. These are personal properties and common properties. Personal property is the one that was owned by one of the spouses before the marriage or the property that is acquired in marriage by way of donation or succession by one of the spouses. Incomes from personal efforts of each of the spouses and incomes generated from common or personal properties are common properties of the spouses.
- To sell, exchange, rent out, mortgage or alienate in any way a common immovable property; or to sell exchange, pledge or alienate in any other way a common movable property whose value is greater than 500 Birr; or to donate a common property or give to someone money that is greater than 500 Birr; or to borrow or lend money exceeding 500 Birr, the consent of both spouses is necessary. That is, to do one of the above activities, a unilateral decision of only one spouse is not sufficient. Both spouses must agree. If only one of the spouses does one of the above acts without getting the consent of the other spouse, the act could be invalidated.

- Spouses may have personal or common debts. Personal debts may be recovered on the personal property of the indebted spouse. If the indebted spouse has no personal property or if his personal property does not cover his debts, it may be recovered on the common property. Common debts shall be recovered on the common property, or on the personal property of either of the spouses.

CHAPTER 4

DISSOLUTION OF MARRIAGE

INTRODUCTION

As it has already been discussed earlier, marriage is a serious commitment, which creates important rights and duties for both spouses. Because of the importance of the family unit to the society, the government has a strong interest in regulating the dissolution of marriage.

Thus, just as two people cannot conclude their marriage unless they meet certain requirements in the law, two people cannot dissolve their marriage unless they meet certain legal requirements. A marriage ceases to exist as a result of its dissolution. The causes of dissolution of marriage are death of one of the spouses or declaration of absence of one of them, dissolution by court order (invalidation) or divorce.

Divorce is the most frequent means of dissolving marriage. Divorce involves the difficult question, as to how to liquidate the pecuniary relation between spouses and custody of children. The liquidation of pecuniary relations is also made when marriages are dissolved by the death of a spouse and court orders.

There may be various types of divorce exist, of which the main three types will be treated here very briefly. These are: fault-based divorce, no-fault divorce, and divorce by mutual consent. Under fault-based divorce, a spouse may only divorce if he or she can prove that the other spouse has committed a fault, which the society recognizes as serious enough to justify ending the marriage. Generally, the faults that the society has decided are serious enough to justify ending a marriage will be listed in the family law.

Fault-based divorce is based on the idea that marriage is a lifelong commitment from which a person should not be easily released. Fault-based divorce recognizes, however, that under certain circumstances a spouse should be allowed to quit the marriage relationship. These circumstances generally exist when one spouse has committed a serious breach of his or her marital duties.

Traditionally, many countries have used a fault-based system. Obtaining a divorce in a fault-based system is difficult. This is because the spouse who desires the divorce must prove to the court the existence of one of the faults listed in the law. In some cases this is difficult to do. For example, if the guilty spouse denies committing the fault, and there is no other evidence of the fault, the court may not believe the complaining spouse.

It should be noted that the general rule in countries adhering to fault-based grounds for divorce is that only the injured spouse may file a complaint for divorce on one of the fault grounds. The spouse who is at fault may not use his own fault as a ground for a complaint for divorce.

In contrast, under no-fault divorce, a spouse need not prove fault by the other spouse in order to terminate the marriage. Thus, under no-fault divorce, one spouse may obtain a divorce simply because he is no longer happy in the marriage. It is usually much simpler to obtain a divorce under no-fault rules than under a fault-based system, since the party seeking to divorce does not have to prove fault.

There are various types of no-fault laws. For example, under some no-fault laws, the spouse who wants the divorce must show simply that the marriage is “irretrievably broken” or that there are “irreconcilable differences” between the spouses. Under other no-fault laws, divorce is permitted if the couple has lived apart for a specified length of time.

No-fault divorce is based on more modern notions of personal liberty than fault-based divorce. One idea behind no-fault divorce is that people should be free to terminate relationships that are no longer a source of personal satisfaction. No-fault divorce is also based on the idea that if one spouse really desires to divorce, it is not good to force that person to remain in the marriage. Finally, no-fault laws have also developed because some people felt that requiring a spouse to provide evidence of fault made it too difficult to divorce under the fault system.

No-fault divorce has become more common in many countries in the past few decades. During that time, some countries have completely eliminated fault-based divorce and adopted no-fault divorce.

The rise of no-fault divorce has not been without criticism. Some people have criticized no-fault divorce for making divorce too easy to obtain. These critics argue that no-fault divorce encourages a frivolous or silly attitude towards the marriage commitment. Some critics argue that if one spouse faithfully has performed his or her marital duties, it is not fair to allow the other spouse to divorce him or her.

A third general approach to divorce is, divorce by mutual consent. Under this approach, divorce is allowed when both parties voluntarily consent to the divorce.

Objectives

At the end of this chapter, you will be able to:

- List down the causes of dissolution of marriage;
- Propose the mechanisms as to how the pecuniary relations between the spouses are liquidated at the time of dissolution of marriage;
- Distinguish between divorce by mutual consent and divorce by petition.

In Ethiopia, the RFC has revolutionized the divorce provisions. Under this Code, to get divorce is not a difficult process. In the Civil Code too, a spouse always had the right to get divorce. But in the Civil Code there were grounds in which the party who required divorce was penalized. In the RFC, there is no penalty imposed on either party as a result of the dissolution of marriage by divorce. In this section you will study how and why duly established marriages are dissolved.

All forms of marriage stand on the same foot as far as dissolution of marriage is concerned. This means, any cause that dissolves, say a civil marriage will also dissolve a religious marriage. This is also true for customary marriage. The effects of dissolution of marriage are also similar in all cases. The causes and effects of dissolution of marriage are the same regardless of the form of marriage celebration.

According to Article 75 of the RFC the dissolution of marriage will be caused by:

a) Death of one of the spouses, or declaration of absence.

Death of either of the spouses or both of them simultaneously shall dissolve a marriage. When the law says “death of one of the spouses” is to indicate that death of only one of the spouses is enough to dissolve the marriage.

b) Court order to invalidate the marriage.

The court orders dissolution of the marriage when the marriage is concluded by violating one of the essential conditions of marriage.

Exercise

What are the essential conditions of marriage?

To refresh your memory of the essential conditions of marriage, let us take one of the essential conditions — age. You know that the minimum marriageable age is 18 years to both men and women. Therefore, attaining the full age of 18 years is an essential condition to conclude marriage. If a man or a woman marries before he/she attains the full age of 18 years, the court, upon application, shall invalidate the marriage, by any interested person or the public prosecutor. Similarly, the court can order the dissolution of marriages that violate any of the essential conditions of marriage upon the application of the appropriate persons at the right time.

c) Divorce.

As a result of disagreement in marriage, spouses may decide (both by their mutual agreement) or only one of them may decide to discontinue the marriage. If marriage is discontinued on such decision, the dissolution of the marriage is said to have been caused by divorce.

When the spouses feel that they can no more live together they may agree to dissolve their marriage by their mutual consent.

Exercise

Can spouses dissolve their marriage (say, by physically destroying their certificate of marriage), without following any additional procedure? Why? Why not?

According to the RFC, marriage shall dissolve by divorce in two ways; namely, divorce by mutual consent of the spouses where their consent is accepted by the court and divorce by petition of both spouses conjointly or by a petition made only by one of the spouses. (Art 76).

4.1 Divorce by Mutual Consent

Divorce by mutual consent and divorce by petition are discussed in detail in the article entitled, “Divorce Under the Ethiopian Legal System: An Overview” which is reproduced below.

Divorce by mutual consent was not allowed in the Civil Code. But the Civil Code’s intention is not to prohibit divorce totally. Its intention seems to prohibit divorce by a simple agreement of the parties without fulfilling the legal requirements. The Amharic version of the Code is clearer on this point than the English version. In the RFC, parties are allowed to divorce each other by their agreement. However, still they are required to fulfill the legal requirements. That is, they cannot quit their marriage relation by their agreement without following the procedures of divorce that are required by the law. Although the parties are allowed to dissolve their marriage by their mutual consent, it is the court that makes the final pronouncement on the divorce.

The parties, while they are submitting the document of their agreement, they are expected to include the regulation of the consequences or conditions of divorce in the document.

Exercise

What are the consequences or/conditions of divorce?

4.2 Divorce by Petition

This is the second divorce procedure in which both of the parties jointly or either of the two presents his petition to the court. The basic difference between divorce by mutual consent and divorce by petition is that, in the former case the parties dissolve their marriage more amicably than the latter one. That is, they dissolve their marriage at their home and they go to the court to get its approval. This means the parties simply prepare the draft of their recommendation to dissolve their marriage by their mutual agreement. It becomes effective only when the court approves it.

The two divorce procedures have certain differences and similarities. (For more details see below)

As a result of divorce, the spouses are going to live separately. With which parent should the custody of children be? With the father or with the mother? When the spouses submit their mutual consent of divorce to the court, they are also expected to regulate such consequences of divorce.

According to sub Article (3) of Article 77 the spouses are not obliged to state their reason for dissolving their marriage. The court also cannot force them to express the reasons for divorce. But this was not the case in the provisions of the Civil Code. In the Civil Code there were serious and non-serious (other) grounds for divorce. The consequences of divorce in both cases (serious and non-serious causes) were different. However, in the RFC there is no distinction as to a serious or non-serious cause of divorce.

The serious causes of divorce in the Civil Code were generally divided into two. These were; causes that were imputable to one of the spouses and causes that were not imputable to one of the spouses. Serious causes that were imputable to one of the spouses were adultery and deserting life in common. There were also serious causes of divorce that were not imputable to one of the spouses. These were, when one of the spouses was confined in a lunatic asylum for not less than two years, or when absence of one of the spouses was judicially declared, or when the religious authorities nullified a religious marriage.

Divorce was also validly ordered for non-serious or other causes. Non-serious or other causes are causes other than serious causes. Therefore, any reason can serve as a serious cause. The only sanction against the spouse who petitions for divorce in the absence of a serious cause is unequal division of the common property in favor of the innocent party. The penalty may even go to the extent of giving one-third of the personal property of the guilty spouse (the spouse that petitioned for divorce without having a serious cause in his favor) on the top of allotting the whole common property to the innocent spouse.

Divorce is one of the highly revised areas of the Civil Code. Most of the reasons for its revision are related with rights of women.

Exercise

- 1. What useful purposes have been served as a result of the changes made in the rules of divorce?**
- 2. What advantages/disadvantages do you observe in the new divorce law, especially in relation with rights of women?**

Study the following hypothetical case and then answer the exercise given below.

“A” and “B” are husband and wife respectively. They mutually agreed to divorce each other. Pursuant to their mutual agreement, they presented their application or petition to the court. They jointly told to the court that they could not live together in whatever circumstance. Additionally, they expressed their intention that their divorce should be made within short period of time, without the need to give them a cooling period. The spouses also regulated the consequences of their divorce. Accordingly, they agreed to give the whole common property to the husband and the custody of all children shall be with the mother and the father is freed from any obligation in the upbringing of the common children.

Exercise

- 1. If you were a judge in the court where this application is presented, what will you decide? Why?**
- 2. Who do you think will decide on the conditions or consequences of divorce in case of divorce by petition?**

You may have noted that the court, after pronouncing divorce, shall request the spouses to agree on the conditions/or consequences of divorce. If the spouses fail to agree on conditions or consequences of divorce, the court shall, by itself, decide on the conditions of divorce. However the court may seek the assistance of arbitrators, experts or other persons to pass decision on the conditions of divorce. You must at this point, also note that the court must approve the

conditions of divorce that are agreed upon by the spouses or decided upon by arbitrators or experts. The court may order a payment of indemnity (payment as a means of compensation) to one of the spouses if the divorce was a result of the fault or misconduct of the other spouse. For instance, if the husband commits adultery, the court may order him to pay some amount of money as a compensation for the damage the wife has sustained as a result of the dissolution of the marriage. Art. 84 of the RFC provides that when the divorce is imputable to one of the spouses, the court may order payment of indemnity to the innocent party by the one who has caused the dissolution of the marriage by his fault or negligence. But the court would pass such a judgment only when justice so requires.

Exercise

- 1. If a husband and a wife decide to divorce each other, and they have no idea as to the procedures of divorce by mutual consent and divorce by petition which one of these two do you advise them to follow? Why?**
- 2. Is the indemnity stipulated in Art 84 related to only moral damage or both moral and material damage?**
- 3. What does it mean by “where justice so requires”?**

Dissolution of a marriage may not be as easy as we may think. It has so many complications in the case where the marriage dissolves as a result of divorce. The complications were even so severe in the Civil Cod. For instance one of the things that add to the complication in the divorce procedure was, the restitution of presents and matrimonial benefits, which were received by the spouses on the occasion of the marriage.

Art. 691 of the Civil Code is read as follows:

Art. 691. — Presents and matrimonial benefits.

- (1) On the request of the persons who have given presents or of their heirs, the family arbitrators may order the restitution of such presents as may have been received by the spouse on the occasion of the marriage or by reason of the existence of the marriage,*

whether by one spouse from the other or from the ascendants of one of the spouses or from other persons.

(2) They may invalidate such other benefits as may have been made or promised to the spouses or to one of them, by one of the spouses or by a third person on the occasion or in consideration of the marriage.

This idea seems to be very logical. Because it protects the interests of those persons who have given some gifts and donations to the spouses believing that the marriage shall persist longer. However, when the spouses dissolve their marriage through divorce, the ones that have given their property by expecting the persistence of the marriage may be disappointed with the dissolution of the marriage. That is why the Civil Code gave them the right to request the restitution of the property they had given by way of gift or donation on the occasion of the marriage. It seems that the RFC is much more concerned with the time that is wasted to accommodate all these procedures and litigations.

Cases

1. Wro. Engidazer Nega vs. Ato Worota Alemayehu, Civil Appeal File No 1174/73

In this case, the family arbitrators proposed that the wife has left life in common and lived for five years outside marriage. Moreover, she confirmed that she needed no partition of the common property and she waived her status of being wife of Ato Worota. Hence according to the decision of the family arbitrators, the marriage was dissolved by this behavior of the wife. Wro. Engidazer reappeared after five years of separation to demand partition of the common property. The family arbitrators denied her allegation. She appealed to the High Court against this denial. The High court approved the decision of the family arbitrators.

Wro. Engidazer made another appeal to the Supreme Court opposing the decision of the High Court. The Supreme Court examined the events occurred, particularly the document in which Wro. Engidazer confirmed her intention not to live with her husband. It reads as follows:

“I, Wro Engidazer Nega no more want to live with my husband. Moreover I do not need any property of the marriage. I hereby renounce my status as wife of Ato Worota.”
(Translation mine)

The Supreme Court rejected the document as an illegal one. Because spouses cannot make such an agreement. According to the court’s ruling, marriage is created through legal formalities; also it shall come to end through legal formalities.... Therefore, the marriage between Ato Worota and Wro. Engidazer did not dissolve and she can now claim her share of the common property, if she has an evidence for the existence of the common property.

2. Private Genet Kabtimer vs. Corporal Mogus Kitaw (Civil Appeal File No.487/92)

In this case, the appellant at the Federal High Court claimed that her husband was beating her hard and he was spending some nights outside home. Because the family arbitrators ruled that she should be penalized property-wise by receiving only one third of the common property, since there was no serious ground in her favor. The Family arbitrators said that Private Genet refused to live together with her husband without a good cause. And they passed the penalty decision against her on this ground. The High Court also affirmed the decision of the family arbitrators. It reasoned that the appellant did not produce any evidence that puts her husband at fault and hence she was imputable to the dissolution of the marriage. Private Genet opposed this decision of the High Court and appealed to the Supreme Court. The Supreme Court based its decision on the RFC and quashed the decision of the High Court. The Supreme Court reasoned that one could not be penalized because he/she has refused to live together with his/her spouse or because he/she petitioned for divorce. Consequently it ruled that the spouses should divide their common property equally.

3. Public Prosecutor vs. Sitotaw Tafese (Criminal Appeal File No. 571/88)

As it can be observed from different court cases, there is a tendency of liberalizing the seemingly strict formal requirement by law that has to be observed by the divorcing spouses. That is, courts show some degree of inclination to accept the dissolution of marriage by divorce even if the

procedural requirements of divorce are not fulfilled. This case supplies additional strength to this argument. In this case, the husband was accused of a crime of bigamy and sentenced a six months imprisonment by the Federal First Instance Court. Upon appeal to the Federal High Court, the man was acquitted of the crime of bigamy. Because, the Federal High Court considered the former marriage was dissolved, although the divorce was conducted in front of the elderly people without being approved by the court, that is, without a court homologation.

In larger parts of this country the parties end their marriage through customary ways. Various reasons could be forwarded to such divorce proceedings. Firstly, most people live away from courts and they are unaware of even the need to take their divorce cases to the attention of the court. Secondly, many people do not like the publicity of their family affairs and avoid court proceedings for divorce purposes. The prevalence of the situation would seem to suggest the legal recognition of an extra-judicial divorce.

Read the following article on divorce carefully.

DIVORCE UNDER THE ETHIOPIAN LEGAL SYSTEM: AN OVERVIEW

By: Mellese Damtie^{*}

I. INTRODUCTION

Divorce is the legal separation of man and wife, effected by the judgment or decree of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties.¹

This definition reveals the following important points.

- Divorce is pronounced by a court of law,

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¹ Henry Campbell Black, Black's law Dictionary (6th ed), west publishing Co., 1990

- Divorce is of two types.

One type totally and absolutely dissolves the marriage (*Divorce a vinculo matrimonii*). The other type simply orders the legal separation of the husband and wife without totally breaking the matrimonial relation of the spouses (*Divorce a mensa et thoro*). The latter is commonly referred to as “**separation from bed and board**.”

The idea of separation from bed and board was developed from the conception that “marriage is indissoluble in any way other than death”. This was predominantly the Catholic precept of marriage. In this arrangement, a party to a marriage was absolved from his duty to live with the other without being freed, however, from the tie of the marriage. That is, each spouse is prevented from a remarriage during the lifetime of the other spouse.² The decree of separation would be granted only when a party to a marriage had been guilty of a serious breach of marital duty, such as adultery on the wife’s part, or extreme cruelty or abandonment on that of the husband.³

Strict divorce laws were a later development in the history of divorce. For instance, the classical divorce law of Rome was extremely liberal. A marriage could be dissolved by the mutual agreement of the spouses or at the will of either party.⁴ Even there was no requirement by the spouses to give the reasons, which led them to separate. Nor did the law determine the grounds of the rupture.⁵ It was as a result of religious intervention that marriage became an indissoluble institution and consequently divorce was avoided.

However, to create absolutely permanent and indissoluble marriage was not as such successful, since annulment and separation had to be permitted for various reasons. The impossibility of forcing people to live together in the intimacy marriage compelled the Church to authorize separation from bed and board.⁶ This separation is commonly known as a judicial separation. A

² Max Rheinstein, “Trends in Marriage and Divorce Law of Western Countries,” Law and Contemporary Problems, (1953), Vol. 18, p. 4

³ Ibid., p.4.

⁴ K.W. Ryan, Introduction to Civil Law, (1962), p. 252.

⁵ M. Planiol, Treatise on the Civil Law, 11th ed, (1939), Vol. 1, Part 1 p. 639.

⁶ Frank H. Hankins, Encyclopedia of Social Sciences, Vol. 5, (1977), p. 177.

judicial separation was considered to be a punishment for a guilty spouse and a reward for an innocent, since it was granted in favor of the innocent party.⁷

Absolute divorce was not granted in various parts of the world until recently. Instead, grounds for judicial separation were increased. In England, in 1897 adultery, cruelty and desertion were grounds for the judicial separation or *divorce a mensa et thoro*.⁸

As recently as 1963, the English law denied divorce except to those who could provide evidence sufficient to convince a court of a partner's adultery or other matrimonial offence.⁹ In that year, a determined attempt was made to change the law to allow divorce where a couple had lived apart for at least seven years. But the attempt failed.¹⁰ Surprisingly enough, however, in less than a decade later the Divorce Reform Act of 1969 allowed divorce if the parties had lived apart for two years (and both consented) or five years (if one did not consent).¹¹

In France, keeping with the Catholic character of the state, marriage was treated as indissoluble all through the *ancien regime*. But the 1789 Revolution brought the extremely liberal divorce law of 1792, which even provided the possibility of the dissolution of a marriage upon the mutual agreement of the parties.¹² Through Napoleon's Civil Code of 1804 divorce was made more difficult, and under the Bourbon restoration, the wheel was turned back fully and divorce was completely abolished in 1816, not to be reintroduced again until the Third Republic's liberal law of 1884.¹³ A practice of continuously increasing liberalism was again reversed by the legislation of Marshal Petain's Vichy government, but this, in turn, was repealed upon the liberation of France in 1945.¹⁴

⁷ Cited above, at note 2, p. 4.

⁸ David M. Walker, *The Oxford Companion to Law*, (1980), p. 370.

⁹ Stephen Cretney, *Law, Law Reform and the Family*, (1998), p. 33.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Cited above at note 2, p. 6

¹³ *Ibid.*

¹⁴ *Ibid.*

Unlike the case of England and some other countries, in America, there were no ecclesiastical courts.¹⁵ Family law was thoroughly secular in the United States. However, in the colonial period the south was generally faithful to the English tradition.¹⁶ There was no absolute divorce and divorce from bed and board was rare in the south. Later, easy divorce laws grew out of the middle class mass.¹⁷ In 1969, California adopted the first no-fault divorce law in the United States.¹⁸ In 1987, no-fault divorce was available in all fifty states.¹⁹

In Muslim society, marriage is not a sacrament, but it is considered as a virtuous act.²⁰

Hence divorce may be effected by the mutual agreement of the spouses or even by the unilateral repudiation of the wife by the husband and his motive in doing so is not subject to scrutiny by the court or any other official body.²¹

Today in most part of the world, the notion of “indissolubility of marriage” has no place at all. In some parts of the world, the evolution of divorce reform passed through rules of no divorce to fault-based divorce and finally now no-fault divorce is becoming the rule in many countries. It is believed that the proliferations of individual liberties have contributed a lot in the liberalization of stricter divorce laws.

A recent proposal for divorce law in Namibia²² indicated that its existing law, which is based on the Roman-Dutch common law inherited from South Africa provides for divorce on the basis of fault. It further indicated that, today most countries including South Africa adopted a no-fault divorce recognizing that a fault-based divorce process is complicated and as a result almost impossible for individuals to navigate without the assistance of a legal practitioner. Moreover the proposal considered that-it serves no legitimate social purpose for a court to try and to force

¹⁵ William Bridgewater, The Colombia Encyclopedia, 3rd ed, (1977), p. 580.

¹⁶ Lawrence M. Friedman, A History of American Law, 2nd ed, 1985. p. 202.

¹⁷ Ibid.

¹⁸ Herma Hill Kay, “Equality and difference: A perspective on No-fault Divorce and its Aftermath,” Cincinnati Law Review, (1987), Vol. 56, No. 1, p.1

¹⁹ Ibid., p. 2.

²⁰ K. N. Ahmed, The Moslem Law of Divorce, (1972), p.33.

²¹ Encyclopedia Britannica, Vol. 22, (1993), p. 33.

²² <http://www.lac.org.na/acrobat/summary.pdf/visited> 10 May 2002.

parties to maintain a dead marriage, and such an enquiry unnecessarily forces parties to reveal intimate details of their lives ...

In most Islamic Countries only men are allowed to file for divorce. But recently changes are being made in these countries too. Among the countries that have allowed women to file for divorce include Egypt,²³ Tunisia²⁴ and Jordan.²⁵

Marriage in Ethiopia was dissolved by mutual consent of the spouses or even unilaterally.²⁶ According to the Fetha Nagast, “*the Law of Kings*”, which is a collection of laws that had been in use in Christian Ethiopia for many centuries, there were three grounds for divorce.²⁷

“ Marriage may be dissolved on three grounds; First, if husband and wife choose a religious life [as monk and nun] by mutual consent. The second is the will of one of the spouses, that is, if one refuses the partner the marital union, the performing of [carnal] union, which is the end of marriage... and lack of news for many years concerning one of the spouses, due to imprisonment ...
The third concerns the marriage in which another end of it is not attained: these are adultery and if there is damage to the life of one of the couple by the other, and their quarrel result in bitter violence involving enmity.”

Moreover, the Fetha Nagast required some Christian formalities to be fulfilled by the marrying spouses indicating that marriage is a sacrament.²⁸ But it did not consider marriage as indissoluble. Apart from the Fetha Nagast, there was no law of marriage in Ethiopia. The courts, when dealing with matters concerning marriage, apply customary law only.²⁹

Divorce rate in rural Ethiopia, long before the coming into force of the Civil Code was high and as a result only the minority of marital unions ended in the death of one of the parties.³⁰ The

²³ <http://www/library/world/mideast/030100egypt-divorce.1.jpg.html>, Visited 25 May 2002.

²⁴ *Ibid.*

²⁵ <http://www.straitstimes.asia1.com.59>, Visited 25 May 2002.

²⁶ Conti Rossini, *Principles of Customary Law in Eritrea*, (19), p. 36.

²⁷ Abba Paulos Tzadua (Translator) *The Fetha Nagast*, (1968), pp148-9.

²⁸ *Ibid.*, p. 142.

²⁹ N. Marein, *The Ethiopian Empire-Federation and Laws*, (1955), P. 160 as cited in Aklilu Wolde Amanuel, (“Fallacies of Family Arbitration Under the 1960 Ethiopian Civil Code”, *JEL.*, Vol. IX, No. 1, P. 181.

³⁰ John H. Beckstrom, “Divorce in Urban Ethiopian Ten Years after the CC, *JEL.*, (1969), vol. VI, No. 2.

situation was aggravated with the growth of cities.³¹ Various forms of easy divorce proceedings were available in the pre-code Ethiopia. These were: divorce by mutual consent,³² divorce by unilateral repudiation of the wife by the husband,³³ divorce by filing a suit in a court of law (when the wife does this, the husband cannot refuse divorce unless they were married by taking the sacrament together),³⁴ and divorce conducted before the elders or by arbitrations.³⁵

Conti Rossini reaffirms this fact by saying:

“Marriage was dissoluble by mutual consent of the couples or even unilaterally; in fact it is even enough that only one of them should no longer feel willing to continue that marital life, even without special reason and the marriage will come to an end, even against the will of the other party.”³⁶

It could be discerned from these facts that, before the coming into force of the Civil Code not only men but also women had a freedom to dissolve their marriages even against the will of their husbands. The Ethiopian society considers marriage as a very important social institution. Every parent wishes to see his son or daughter to have a good marital life. But the society is not that shocked by divorce although its prevalence is so high. Divorce was practiced in the society across all the social classes ranging from ordinary citizens to the members of the ruling classes. Now also it is being widely practiced.

II. THE CIVIL CODE

The Civil Code has restricted the freedoms available to either of the spouses in the pre-code period by providing grounds for the divorce. The grounds for divorce are divided into serious causes and other causes.³⁷ But the existence or the non-existence of these causes is irrelevant as far as the order of divorce by the family arbitrators is concerned. The existence or non-existence

³¹ Ibid.

³² Digest of Old The Ethiopian Judgment, Vols. 1 and 2.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid., Vols. 1, 2 and 4.

³⁶ Cited above at note 26, p. 36.

³⁷ Civil Code of the Empire of Ethiopia, (1960), Art. 667.

of serious causes is relevant only in the determination of the conditions on which divorce is ordered and the effects of divorce.³⁸

When there is a serious cause for divorce, it shall be pronounced within one month from the petition.³⁹ However, when divorce is pronounced for other causes (other than serious causes), it shall be pronounced within one year from the petition for divorce.⁴⁰ This period may be extended up to five years having regard to the agreement made between the parties.⁴¹ Moreover, the liquidation of pecuniary effects is highly affected by the existence or non-existence of a serious cause.

As a rule, the family arbitrators grant divorce whatever the case may be. Proving fault of the other party is not important to get the declaration of divorce. Hence Ethiopia has incorporated a no-fault divorce into the 1960 Civil Code from its custom, having made some important modifications to the customary practices.

There are five serious causes of divorce and only two of them put a party at fault. These are adultery and deserting the conjugal residence for at least two years and the other spouse does not know the where about of the spouse who has deserted.⁴² Except these two, there are no other serious causes that put a party at fault. On the other hand, there are countless non-serious (other) grounds of divorce for which a divorce may validity be ordered.⁴³ For instance, a party may petition for divorce claiming that he is disinterested to live with his spouse because his spouse has gained much weight or he can no more love his spouse.

Effects of putting a party in a fault

A party may be put in a fault as a result of three factors. Of these, two are related with the serious causes imputable to a party. When a party commits adultery or when he deserts the

³⁸ Ibid.

³⁹ Ibid., Art. 668.

⁴⁰ Ibid., Art 678(1).

⁴¹ Ibid., Art. 678 (2).

⁴² See Ibid., Arts. 669-71.

⁴³ Ibid., Art. 673 (2).

conjugal residence for at least two years combined with the lack of knowledge of his whereabouts by the other party is considered to be an unsavory behavior that seriously injures the matrimonial life. Therefore, these intentional acts of the party make him responsible for the dissolution of the marriage. The third factor that makes a party responsible for the dissolution of the marriage is his petition for divorce without having a serious ground of divorce in his favor. In all the three situations, the party who is responsible shall be penalized property-wise during the liquidation of the pecuniary relations between the spouses. The penalty may go to the extent of giving the whole of the common property to the innocent party or even to give one-third of the personal property of the guilty spouse to the innocent spouse, on the top of the whole common property.⁴⁴

When petition is made for a divorce in the absence of a serious cause either by two spouses conjointly or by one of them according to Art. 666(1) of the Civil Code, the family arbitrators are duty bound to attempt to reconcile the parties and to make them renounce the petition for divorce.⁴⁵ If the family arbitrators succeed in the attempt, the divorce proceeding stops then and there. If they do not succeed, they have to allow the parties to agree on the conditions of divorce and where the required agreement is reached, the judgment of divorce shall be made in accordance with the agreement.⁴⁶ When divorce is pronounced in this circumstance, the penalties ordered in Art. 694 shall not be imposed on the party who has lodged petition for divorce although he has petitioned without a serious cause in his favor. Hence divorce shall be pronounced without imposition of a penalty even where divorce is sought in the absence of a serious cause, if the parties agree on conditions of divorce.

The term “**conditions of divorce**” interchangeably used by the law with the term “**consequences of divorce**”. Agreement on the conditions or consequences of divorce is an agreement made on the custody and maintenance of minor children born of the marriage and on the liquidation of pecuniary relations between the spouses.⁴⁷ When the parties are unable to live together, the law advises them to dissolve their marriage amicably.

⁴⁴ See Ibid., Arts. 690-95

⁴⁵ Ibid., Art. 676 (1).

⁴⁶ Ibid., Art. 677.

⁴⁷ See Ibid., Art. 679

Where the amicable dissolution is not possible, i.e., when one of the parties opposes the divorce, the penalty discussed above shall be imposed on the party who has petitioned for the divorce in the absence of a serious cause in his favor and the other spouse shall not be penalized.⁴⁸ Because it is believed that the party who intends to dissolve the marriage without a good cause is responsible for the dissolution of the marriage and the other party is innocent. The law takes as one of the “divorce hindrance devices” the imposition of penalty.⁴⁹

The system of fault divorce is the one in which one of the parties proves a fault committed by the other party; the fault that is recognized by law as a ground to demand divorce. In this system, divorce is a privilege granted to an innocent spouse.⁵⁰ That is, unless one of the parties proves a fault recognized as a ground for divorce, no divorce would be granted. This situation is totally inexistent in the Ethiopian setting and a party is not required to prove the fault of the other party for the purpose of getting a divorce pronouncement.

Divorce by mutual consent of the spouses

በባልና በሚስት ስምምነት የሚደረግ መፋታት በሕጋዊ መንገድ ካልተፈጸመ በቀር አይፈቀድም።⁵¹ This is the Amharic version of the Civil Code that deals with divorce by mutual consent. It means, “divorce by mutual consent between spouses is not allowed unless it is made in accordance with the law”. (Translation mine) This is quite different from the English version that states, “Divorce by mutual consent is not permitted by law.” According to the English version, divorce by mutual consent is prohibited. But this is not the case with the Amharic version, which is the controlling version. The Amharic version allows divorce by mutual consent if it is made by fulfilling the legal requirements for divorce. For instance, the spouses cannot end their marriage by simply tearing their certificate of marriage to pieces and go away from each other. Instead they are required to observe the divorce procedures prescribed by the law after mutually deciding on the issue of divorce.

⁴⁸ *Ibid.*, Art. 694.

⁴⁹ See John H. Beckstrom, cited above at note 30.

⁵⁰ Lawrence M. Friedman, “Rite of passage; Divorce Law in Historical perspective,” *Oregon Law Review*, (1984), Vol. 63, P. 653

⁵¹ Cited above, at note 1, Art. 665 (1), (Amharic Version).

Accordingly they have to present their petition for divorce to the family arbitrators.⁵² The parties, in this case, are not required to prove the existence of a serious cause for divorce. Proving the existence of a serious cause results in the penalty of the guilty party, which defeats the purpose of friendly divorce by the mutual consent of the spouses. The spouses who need to end their marital relationship by their mutual consent shall conduct their divorce proceedings on other grounds (other than the serious grounds) or they have to conceal the serious ground even if there is one. Finally, they are expected to regulate the conditions or consequences of divorce. Parties who dissolve their marriage in such friendly manner are said to have divorced by their mutual consent in accordance with the law. The door for such divorces is not closed under the 1960 Civil Code.

Problems of putting a party at fault

As we have noted above, proving the guilt of the other party serves two important purposes.

- i) The party at fault shall be penalized by losing some property in favor of the innocent party.
- ii) The divorce pronouncement shall be ordered within relatively shorter period.

However, when divorce is ordered in the absence of a serious cause, the innocent party cannot require the divorce procedure be shorter. In this case, such party can require that the other party be penalized to the benefit of him. The following are some of the problems associated with putting one party at fault.

a) Problem of evidence

When divorce is ordered for a serious cause, the innocent party is expected to prove either adultery or desertion of the conjugal home by the other party.

⁵² Ibid., Art. 666 (1).

This work deals only with the case of adultery.

Before we embark on the discussion of problems associated with the proof of adultery, it is proper to give a meaning to adultery. Neither the Civil Code nor the Penal Code defines adultery and therefore, there is a problem in framing the meaning of the word. So we have to resort to a dictionary definition of the word.

According to the Black's Law Dictionary, adultery is a “**Voluntary sexual intercourse of a married person with a person other than the offender's husband or wife...**”⁵³ This definition requires the actual act of sexual union (penetration of a female by a male), that puts the proof in a profound difficulty. The plaintiff (usually the wife) claims that her husband has committed adultery. In most cases the defendant denies that he has committed adultery. The nature of the offence compels those who involve in adultery to perform it in a clandestine manner. We are not certain that the court would presume adultery on the ground of certain circumstantial evidence. Can one be sure that the court would presume adultery, if opposite sexes are seen coming out of a hotel room or any other similar place? In one case,⁵⁴ the High Court did not accept the husband's allegation that the wife committed adultery by living with a certain Mehret Desalegn, sleeping in the same bed. Because the woman responded that the man was her aunt's grandson and she denied that she had committed such incestuous sexual relation. But upon appeal to the Supreme Court, the appellate court presumed adultery on the ground that the woman failed to call the father's name of the man with whom she lived for a long time and on the fact that the “relative” of the woman and her husband did not know each other.

“Based on the allegation of a spouse (usually a wife), it is not possible to presume adultery. Most women who have the courage to reveal the acts of their husbands simply claim that they have discovered prints of lipstick or strands of hair on the clothes of their husbands. Some others allege that they caught red handed their husbands while kissing their maidservants, etc. Some or even most of these allegations may be true. But none of them can validly prove adultery”.⁵⁵

⁵³ Henry Campbell Black, Black's Law Dictionary 6th ed., (1990) P. 51.

⁵⁴ Priest Mekonnen Altaseb V. W/ro Zeneb Mengiste, Civil Appeal File No. 718/81, Supreme Court.

⁵⁵ Interview with Ato Debebe H.Gabriel, a judge at the Federal High Court, May 30, 2002.

The following case⁵⁶ illustrates the situation well. In this case, the appellant at the Federal High Court claimed that her husband was beating her hard and he was spending some nights outside home. She petitioned for divorce on the ground of adultery. However, the family arbitrators ruled that she should be penalized property-wise by receiving only one third of the common property, since there was no serious ground in her favor, as she did not prove adultery. The High Court also affirmed the decision of the family arbitrators. It reasoned that the appellant did not produce any evidence that puts her husband at fault and hence she was imputable to the dissolution of the marriage.

In Ethiopia the society does not strongly disprove marital offences committed by men (such as adultery and domestic violence). The law requires a wife, irrespective of these situations, to prove her husband's adultery. The consequence of failure to prove her husband's adultery is a pecuniary penalty, since she has nothing as a serious cause on her behalf. This system has opened the door for husbands who are inspired by malice, to unduly benefit at the expense of their wives' economic interest, using the arms of the law.

b) Problem associated with revealing the fact of adultery when it is committed between relatives:

Sometimes it occurs that a spouse may commit adultery with brother or sister of the other spouse, or even with the child of the other spouse (usually with a step-daughter). In such circumstances, spouses may get it shameful and indecent to reveal such facts, although they may have sufficient evidence. Because they may feel that the publicity of such facts may injure the reputation of the family. As one judge says,

“...Let alone such kind of sexual intercourse between relatives, parties are disinterested to reveal the committing of adultery of the other spouse with an outsider. As the result of this, divorce shall be ordered to the prejudice of the innocent party. Because, he has no any serious cause in his favor”⁵⁷

⁵⁶ Private Genet Kabtimer V. Corporal Moges Kitaw, Federal High Court Civil Appeal File No. 417/88 (unpublished)

⁵⁷ Interview with Ato Bushra Tsegaw, a judge at the Federal First Instance Court, May 30, 2002.

Regarding the above two problems, women take the more disadvantageous place because of two obvious reasons. Firstly, although we have no empirical data, it can be judged from observations that men are more likely to commit adultery than women. Secondly, women are less vigorous, when compared to men, in proving the adultery committed by their spouses, owing to their economic and social positions. Consequently, they will remain victims of such divorce proceedings since they are penalized property-wise for failing to prove the fault of their husbands. It appears from this that women are placed in double jeopardy by this system of divorce.

c) Incrimination

Putting a party in a fault means incriminating that party against the alleged offence. Incrimination does not necessarily serve the intended purposes. It would lead the parties into a fierce and protracted litigation, which would in turn enhance enmity between the parties by blocking the possibilities of friendly divorce proceedings. The incrimination may not also be on genuine grounds and it could be a mere perjury. Moreover, the defendant may resort to a furious recrimination, adding fuel on already burning fire.

d) Distinction between the poor and the rich

Proving fault can be applied for those who are better off economically. For those who have little or no property, it is meaningless to put the other party at fault. Whether the other party is at fault or not is pointless so long as there is no property to partition. Because only those who have common property shall continue in the litigation, by trying to get any sorts of evidence in their favor. Those who have no common property have no reason to prove the fault of the other spouse.

III. THE TIGRAY FAMILY CODE

The Tigray Family Code of November 1998 has introduced a landmark change in the divorce proceeding of the spouses. That is, it abolished the penalty of the spouse who is imputable to the dissolution of marriage by divorce. Moreover, it explicitly stated that divorce is a right.⁵⁸ According to Art. 102 of this Code, when one or both of the spouses claim that they can no more live together in their marriage, their right to get divorced is respected. (Translation mine) This idea finds its root in the FDRE Constitution, which prescribes that, “Marriage shall be entered into only with the free and full consent of the intending spouses.”⁵⁹

This constitutional rule has to be interpreted to mean that consent is required not only at the conclusion of the marriage but also during the whole lifetime of the marriage. The Tigray Family Code allowed the parties to divorce without the need to put one of them in fault and hence without the need to penalize him. It seems that the Code is of the opinion that, to exercise one’s constitutional right, one should not be penalized. At the same time, the Code liberalized divorce proceedings owing to the easy divorce practice of the society. In practice, Tigrayan marriage is a civil contract and may be dissolved at the request of either partner.⁶⁰ As we have noted above, this situation holds true for other parts of the country too.

The Code also provides for the compulsory counseling of the parties by the social courts so that the parties are advised to reconcile and renounce their intention to divorce.⁶¹ This step is considered; it seems, as a “divorce hindrance device.”

As a concluding remark, it could be said that the Tigray Family Code has paved the way in expressly prescribing that divorce is the right of spouses when they feel that they cannot live together and in avoiding the proof of fault by one spouse to penalize the other.

IV. THE REVISED FAMILY CODE (RFC)

⁵⁸ Art. 102 (particularly see that title).

⁵⁹ FDRE Constitution, Art. 34(2)

⁶⁰ Bauer D. Franz, Household and Society in Ethiopia: An Economic and Social Analysis of Tigray Social Principles and Household Organization, (1977), P. 127 as cited in Daniel W. Gabriel, Family Law Reform in Ethiopia A critical Analysis of some Major Departures of the New Tigray Family Law from the 1960 Civil Code, (unpublished, AAU, Law Library) (2000), P. 22

⁶¹ Cited Above, at note 19, Art. 107(1)

The Revised Family Code of the Federal Government was enacted in July 2000.⁶² According to this Code, marriage shall dissolve by divorce in two ways; namely, divorce by mutual consent of the spouses where their consent is accepted by the court and divorce by petition of both spouses conjointly or by a petition made only by one of the spouses.⁶³ There is no major departure from the Civil Code with respect to both types of divorce. Because, as we have seen above, both types of divorce proceedings were prescribed by the Civil Code, especially by the Amharic Version. The only difference one can note here is that, regarding divorce by mutual consent it is prescribed in a negative or prohibitive way in the Civil Code but the approach of the Revised Family Code is a permissive or a positive one.

According to the rules of divorce by mutual consent, divorce is allowed when both parties voluntarily consent to the divorce. Accordingly, the parties are expected to appear before the court after deciding that their marriage is dissolved by their common agreement. They are also required to submit their proposal as to how they have regulated the consequences or conditions of their divorce.⁶⁴ What they beg is the court's approval of their divorce agreement.

It does not mean that the court would immediately approve the agreement of the parties to the divorce. Spouses whose marriage lasted for less than six months shall not be permitted to divorce by mutual consent.⁶⁵ Moreover, the court may counsel the parties separately or jointly so that they could renounce their intention to divorce or where this is not possible it may dismiss them by giving them a cooling period of not more than three months.⁶⁶ This step may be considered as a "divorce hindrance devise." Of course, the court is not bound to counsel the parties. It does so only when it thinks appropriate depending on the circumstances. For instance, arbitrators may have attempted to reconcile them since long time ago, but in vain. In such circumstances, the court may approve the divorce agreement of the parties instead of counseling them. According to the estimates of one judge, some 90% of the cases appear before the court after exhausting all remedies available to reconcile the parties through arbitrators.⁶⁷ In any case,

⁶² The Revised Family Code, Faedral Negarit Gazetta Extra Ordinary Issue, No. 1/2000.

⁶³ *Ibid.*, Art. 76

⁶⁴ *Ibid.*, Art. 77(1)

⁶⁵ *Ibid.*, Art. 77(2)

⁶⁶ *Ibid.*, Art. 78.

⁶⁷ Interview with Ato Thomas Gebreab, a judge at the Federal First Instance Court, May 30, 2002.

this author believes that the courts should make every effort to make the parties renounce their intention to divorce.

The court approves the divorce agreement of the parties when they still stick to their intention to divorce after completing the cooling period. The court also approves the divorce agreement when it thinks that dismissing the parties by giving them a cooling period is not appropriate. In both cases, before the court approves the divorce agreement it insures that weather such agreement is the true intention of the spouses, which is an expression of their free consent, or not.⁶⁸ Moreover, the court shall investigate whether their agreement is contrary to law and morality or not.⁶⁹ This step is believed to avoid the possibility of intervention by third parties that could maneuver the parties or hitting of a strategic advantage by one party over the other.

The court's function is not only restricted to the approval of the divorce agreement. It shall also approve the consequences or the conditions of the divorce together with the approval of the divorce agreement.⁷⁰ The court shall not simply approve every proposal made by the spouses regarding the conditions or consequences of the divorce. When such proposals outrageously affect the interest of one of the parties or their children, the court may approve only the divorce agreement by making its own decision on the conditions of the divorce.⁷¹ If for instance, the parties agree to give the whole common property to one of them, the court may disregard this agreement and may decide what it thinks appropriate by its own initiative, depending on circumstances.

The other mechanism by which parties could proceed their divorce is through petition for divorce. In this case, either both spouses together or only one of them can lodge his petition for divorce to the court.⁷² The difference of this procedure from the previous one is that, there is no prior agreement as to the dissolution of their marriage. But either both of them together or one of them requires the court to end their marriage by way of divorce. When seen in depth, there is no fundamental difference between two procedures.

⁶⁸ Cited above, at note 62, Art. 80(1).

⁶⁹ Ibid.

⁷⁰ Ibid., Art. 80(2)

⁷¹ Ibid., Art. 80(3)

⁷² Ibid., Art. 81



In both of the procedures:

- The parties are not bound to state their reasons. They can state them if they want to.⁷³
- The court's powers in relation to counseling the parties and dismissing them by giving a cooling period are more or less similar.⁷⁴

Irrespective of these similarities there are certain differences between the two procedures.

The following are available only in the cases of divorce by petition.

- The court may direct the spouses to settle their dispute through arbitrators of their choice, when its attempt to make them renounce their divorce petition fails.⁷⁵
- The court gives an appropriate order, immediately after receiving the petition for divorce, regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property.⁷⁶
- The court may order, when circumstances so require, one of the parties to leave the common abode,⁷⁷ and
- The court may invite arbitrators or even experts who decide the conditions of divorce for the spouses, where the spouses fail to agree on such conditions.⁷⁸

The court's intervention in the latter case is magnificent. The reason could probably be: in the case of divorce by mutual consent there is a certain degree of agreement, although it is an agreement not to agree. That is, the parties have chosen to dissolve their marriage more amicably than the latter case. In the latter case, there may even be a serious feud, especially when only one of the spouses petitions for divorce and the other opposes him. It seems that the

⁷³ *Ibid.*, Art. 77(3) and 81(2).

⁷⁴ *Ibid.*, Arts. 78 and 82(1), (3)

⁷⁵ *Ibid.*, Art. 82(2).

⁷⁶ *Ibid.*, Art. 83(5).

⁷⁷ *Ibid.*, Art. 82(6).

⁷⁸ *Ibid.*, Art. 83(2).

law has opted for such intense intervention by the court to soothe the grudge and resentment between the parties in the case of divorce by petition.

Problems that are Not Yet Resolved

a) Spouses who did not live together or those who lived separately for long time.

It is now a commonplace practice that people conclude a pseudo marriage for diversity visa (DV) and other purposes such as changing a work-place from rural to urban areas, to have a right on government owned rental houses, etc. Their motives for the conclusion of these marriages are different from founding a family and leading a real family life. It is believed that these people do not live together as spouses, although they have concluded a marriage that is sustainable at law. But the very essence of marriage is missing in these marriages. One of the most important personal effects of marriage is that spouses owe each other respect, support and assistance and this rule cannot be set aside by agreement.⁷⁹

To realize this rule, the law obliges the spouses to live together.⁸⁰ Where these rules are not observed, it would be difficult to imagine a true marriage. Of course the spouses can agree to live separately for definite or indefinite period of time⁸¹. This is an exception to Art 53(1) of the RFC. According to this provision, the marriage shall not be affected by the mere fact that the spouses lived separately. But, does this assumption work when the spouses live separately without any prior agreement and with the intention not live together in the future? Exceptional provisions should be interpreted restrictively and when spouses leave each other with such an intention, it would be inappropriate to consider that the marriage has not been affected.

It is true that there are three causes of dissolution of marriage namely: death of one of the spouses, or declaration of absence of one of the spouses; dissolution by court order; or divorce.⁸² As it has been discussed hitherto, divorce can take place only by fulfilling the legal requirements.

⁷⁹ *Ibid.*, Art. 49

⁸⁰ *Ibid.*, Art. 53(1).

⁸¹ *Ibid.*, Art.55(1)

⁸² *Ibid.*, Art. 75.

Any act short of this cannot bring a marriage to an end. But the literal application of this rule sometimes results in absurd consequences.

Let us assume that A and B concluded a DV marriage. Let us also consider the DV has failed. A and B continued in their own way of life, without bothering about their pseudo-marriage. Let us also assume that both have remarried and begot offspring. After the occurrence of all these circumstances, if A petitions for the divorce of his marriage with B, can he claim division of the property obtained by B?

In one case,⁸³ the man deserted his wife, mother of his seven children and stayed away for about fifteen years. During this time he fathered eight children from different women, while his deserted wife was taking care of the seven children alone. The man, with the intent of partitioning their common house and other properties that were the result of efforts of the woman during his desertion, petitioned for divorce. The court ordered payment of Birr 60 per month (for the man) as maintenance until the divorce and partition of property is decided. We can theoretically extend the case this way. The man deserted the woman as a result of severe poverty, together with her seven children. However, the woman had succeeded in making money through her arduous efforts. The man, after fifteen years of desertion and after being father of eight, comes back and petitions for divorce claiming that the marriage is still there. Should he succeed in partitioning of the property of the woman?

Of course the woman could have petitioned for divorce during the years of the desertion. However, should she be punished by surrendering half of her property to a philanderer who did not contribute anything?

Sometimes courts consider the marriage has ceased to exist when both spouses leave each other and remarry.⁸⁴ In this case, the spouses lived separately for twelve years without actually dissolving their marriage. The man remarried and the woman kept an irregular union during the twelve years separation. Upon death of the man, two women appeared claiming that each of

⁸³ Obbo Anbessie Mulata Vs. Adde Zewditu Kebede, Kersa Kondaltit Woreda, Civil Case File No. 3/93.

⁸⁴ Birtu Gerba Vs. Abebech Angere, Supreme Court Civil Appeal No. 80/76 (unpublished).

them was a wife. The High Court decided that the former marriage was dissolved by divorce as a result of the actual separation between the spouses and the fact that they maintained relations with other persons and hence, only the spouse of the later marriage was the wife of the deceased.

The spouse of the former marriage appealed to the Supreme Court. The Supreme Court ruled that: as marriage comes into existence through formal procedure, so is true for its extinction; the fact that the spouses had lived separately for long time and they had concluded another marriage does not dissolve the previous marriage; and hence both women are wives.

But, one of the judges of the Supreme Court explained in his dissenting opinion that:⁸⁵

“... I do not agree with the opinion that unless a marriage is dissolved through a certain formality, it would stay alive. Particularly when the parties lived separately and engaged in other relations, there is no reason to maintain the old marriage... It is clear that in many parts of the country people get divorced without going to a court... When a party appears before the court alleging that he had a marriage with a person by producing a certificate of marriage, after he had lived separately and after he had established another relation, on the mere ground that the previous marriage was not dissolved through a divorce procedure, I consider it dangerous to entertain their allegations in the positive ...” (Translation mine).

As it can be observed from different court cases, there is a tendency of liberalizing the seemingly strict formal requirement by law that has to be observed by the divorcing spouses. That is, courts show some degree of inclination to accept the dissolution of marriage by divorce even if the procedural requirements of divorce are not fulfilled. The following case⁸⁶ supplies additional strength to this argument. In this case, the husband was accused of a crime of bigamy and sentenced a six months imprisonment by the Federal First Instance Court. Upon appeal to the Federal High Court, the man was acquitted of the crime of bigamy. Because, the Federal High Court considered the former marriage was dissolved, although the divorce was conducted in front of the elderly people without being approved by the court.

⁸⁵ Ibid.

⁸⁶ Public Prosecutor Vs. Sitotaw Tafese, Criminal Appeal File No. 571/88 (unpublished).

As we have seen earlier, in larger parts of this country the parties end their marriage through customary ways. Various reasons could be forwarded to such divorce proceedings. Firstly, most people live away from courts and they are unaware of even the need to take their divorce cases to the attention of the court. Secondly, many people do not like the publicity of their family affairs and avoid court proceedings for divorce purposes. The prevalence of the situation would seem to suggest the legal recognition of an extra-judicial divorce.

b) Post-divorce maintenance

Women are economically dependent on their husbands in most parts of Ethiopia. But this does not mean that they are not working. According to the traditional thinking, their works are not valued in economic terms. Although a wife stays at home, her work at homemaking is more taxing regarding time and labor. Her contribution to the economy of the household is large. Yet, the man mainly controls the economy of the household. Lack of access to the control of the economy by the women would deny them the possibility of pursuing their property, especially when the man is extravagant and not considerate.

The RFC, like its predecessor, provides for maintenance between the spouses during their marriage and where they live separately after petition for divorce.⁸⁷ That is, after the pronouncement or approval of divorce by the court, there is no obligation to supply maintenance to a divorced spouse.

When divorce comes after many years of marriage life, its effects are disastrous particularly for women. The situation is worst when there is no common property that is going to be divided at divorce and when the marriage is a barren one. A vivid example that could clearly show the problem is the case of divorce after retirement of the husband. The couple may have no common or personal property. The only property may be the pension allowance.

Based on the principles of the Pension Proclamation, it is very difficult to argue on the possibility of allocating a certain proportion of the pension allowance of the X-husband to the

⁸⁷ Cited above, at note 62, Arts. 82(5), 198(1), 210(a).

divorced woman. Because the pension allowance was designed to maintain the members of the public service who have served faithfully.⁸⁸ However upon death of the pensioner there is a system of payment in various proportions to those who were supported by him under the title of survivors' pensions and gratuities. These are the surviving spouse, orphans and the parents.⁸⁹ The rights of the spouse, orphans or parents are not absolute ones. They may lose these rights when they become capable of earning their livelihood by their work or when they get someone who maintains them. For instance, the widow's pension shall be discontinued upon remarriage.⁹⁰ And the surviving child would be entitled to collect the pension allowance until he attains the age of eighteen years.⁹¹

Pension entitlement should be collected personally by the pensioner and it cannot be transferred to third parties by way of inheritance, contractual assignment, pledge nor it be waived.⁹² Moreover, it shall not be attached in respect of any debts other than public fines, taxes and public fees.⁹³ The special nature of pension allowance is more explained by the loss of right of the pensioner as an additional penalty, when he is sentenced to a minimum of three years of imprisonment and when the court orders such loss of right as an additional penalty.⁹⁴ Does a pensioner have a property right, as envisaged by Art. 40 of the FDRE Constitution, over his pension allowance considering the existing Pension Proclamation?

Having regard to these features of pension allowance, it is impossible to consider it as part of the matrimonial property and to grant a permanent allowance to a divorced spouse from the pension money. In cases where the pensioner remarried many wives, how can the pension be distributed among all the wives upon each divorce? When the pensioner commits a crime and sentenced by a court of law to lose his right of pension, also the wives who were entitled to receive some portion of the pension lose their rights as well?

⁸⁸ Public Servant's Pension Proclamation No. 209/1963, Preamble.

⁸⁹ *Ibid.*, Arts, 15-25.

⁹⁰ *Ibid.*, Art. 21.

⁹¹ *Ibid.*, Art. 17

⁹² *Ibid.*, Art. 32

⁹³ *Ibid.*, Art. 33

⁹⁴ Public Servants' Pension Proclamation (Amendment) No. 5/1974, Art.

Some may argue that, “...Since the fund of the pension allowance was partly contributed from the pensioner’s salary some portion of it should belong to the spouse of the pensioner.” This argument is basically correct. However, the Pension Proclamation impairs its application. Although the Ethiopian legal system strictly applies the community of the matrimonial property of spouses, particularly with respect to incomes, there are some exceptions to the rule of community of matrimonial property. One of these exceptions is the pension law. Another very important example for the departure from the strict application of the concept of community of property on every bit of income of spouses is insurance. Let us consider life insurance. According to Art. 701(1) of the 1960 Commercial Code, an insurance policy for the event of death may be made to the benefit of specified beneficiaries. From this it can be inferred that, even if a spouse pays premium from his salary, i.e., from the common property, the other spouse cannot claim anything from the insurer when the insurance is made to the benefit of another person. Whether the beneficiary is the spouse or another person, such beneficiary becomes the owner of the sums collected from the insurer. The spouse is deemed to be a specified beneficiary when the subscriber buys the insurance policy to the benefit of his/her spouse without specifically indicating the name of his/her spouse. This could be true even where the marriage took place after the policy was entered into. [Commercial Code, Art 701(2)(a)]

Any attempt to grant pension allowance to a divorced wife would lead to complicated legal problems, which may affect the administration of justice. Revision of pension laws may be required to persist in awarding a portion of pension money to a divorced spouse.

When court decisions with respect to awarding of portion of maintenance allowance to a divorced spouse, we observe lack of uniformity even among judges of the same bench. Some judges consider the pension money as a matrimonial property⁹⁵ and others totally exclude it from the coverage of the community of property. In an exemplary case,⁹⁶ the Supreme Court reasoned, “... although it seems appropriate to grant to a divorced woman half of the pension allowance of her ex-husband, the law does not clearly prescribe such division. When judicial

⁹⁵ See Asefash G.Giorgis Vs. Tesfaye Abraham, Supreme Court, Civil Appeal File No. 248/80. (This case is reported in the Book of Judgments of the Supreme Court Vol. I in Amharic).

⁹⁶ Asfaw H.Mariam Vs. Fanaye Alemayehu, Supreme Court Panel Division, Civil Appeal File No. 1291/75 (unpublished).

decisions are passed, care must be taken not to override the legislative intent. Because court decisions that may appear to be a panacea may lead to intractable problems....” (Translation mine)

The fact that the widow is entitled to a 50% of her deceased husband’s pension allowance does not mean that she has the same right at divorce. Although both death and divorce dissolve a marriage, sometimes they produce different effects.⁹⁷ There is no legally recognized method to grant half or other proportion of the pension money to a divorced spouse. Because, no government employee may refuse the periodic deduction from his salary and the system operates without the volition of the employee. Nor does the employee have a full control over the pension money. Although the money is destined to the benefit of the employee, it is quite different from the money deposited by him in his safe or his bank account. His rights over the pension allowance are always subject to the rules of the Pension Proclamation.

The issue of post-divorce maintenance is crucial in the Ethiopian context, having regard to the economic conditions of the Ethiopian women. Let alone in a country like Ethiopia, where many people, particularly women, live in a very difficult economic conditions, even in affluent countries like the United States of America and Germany there is a practice of post-divorce maintenance, depending on circumstances. In the USA, for instance, post-divorce maintenance is granted in certain circumstances.

“...The court may grant a maintenance order... only if it finds that the spouse ...(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.”⁹⁸

The German Civil Code (as amended) of 1992 provides for maintenance of a divorced spouse. The maintenance depends on various factors. According to this Code, after the divorce if one of

⁹⁷ For instance, See Art. 199 of the Revised Family Code and Art. 906 of the Civil Code.

⁹⁸ The Uniform Marriage and Divorce Act (section 308(a)), as cited in Harry D. Krause, Family Law, (1988), pp 148-9.

the spouses is unable to provide for his maintenance, he is entitled to claim maintenance from the other spouse⁹⁹. The conditions for the maintenance include:

- Maintenance for caring for a child,
- Maintenance for aged spouse,
- Maintenance for sickness; sickness means physical or mental sickness or other infirmity or weakness.
- Maintenance until appropriate and suitable employment is found; the divorced spouse is not required to engage in any gainful employment unless it is suitable for him.
- Maintenance on the ground of equity, etc.

Examples of post-divorce maintenance also available in the developing world. In Botswana, the Matrimonial Causes Act gives discretionary power to the court to give order for the payment of alimony to the wife 'as the court thinks just and equitable'¹⁰⁰. In Zambia, the law allows a divorced woman to get alimony from her ex-husband after the marriage is dissolved through divorce.¹⁰¹

We have a lot to learn from these examples to reconsider our laws regarding post-divorce maintenance. But the author is not of the opinion that every divorce should be accompanied by post-divorce maintenance. The duration in which the divorced spouses stayed in marriage, the health or other conditions of the needy spouse, etc.

V. CONCLUSIONS AND RECOMMENDATIONS

⁹⁹ Simon L. Goren (Translator), The German Civil Code Revised Edition, (as amended to January 1, 1992), (1994), Sections 1569-1580.

¹⁰⁰ Section 25(1) of Matrimonial Causes Act, as cited in Maintenance Laws and Practices in Botswana, National Institute of Development Research and Documentation, University of Botswana, (1992), pp 56-7.

¹⁰¹ Maintenance in Zambia, Women and Law in South Africa Research Project, (1991), pp37-8

Today we are living in the world that is moving toward liberalization of strict divorce laws. Strict divorce laws were mainly the result of the conception of indissolubility of marriage. The Roman Catholic Church played a great role for the dissemination of the idea of indissolubility of marriage. The world was not successful in having indissoluble marriages. Partial or qualified divorce known as separation from bed and board was introduced for the spouses who could not live together. Into this system of divorce, the matrimonial obligations of the parties are intact save that they are allowed to live separately. For instance, the spouses are not allowed to remarry.

This is not the culmination in the evolution of divorce law. Later divorce in its full sense was allowed on the ground of fault by one of the spouses. Adultery and deserting life in common by one spouse were most commonly accepted grounds of divorce. In many jurisdictions the grounds have been increased from time to time. For instance in the United States of America,¹⁰² divorce was allowed on the ground that the wife frequently visited her mother, considering her frequent visit as a cruel act against her husband. Increasing fault grounds was also considered unbearable since there is no point to stop. Finally, the world has moved to a no-fault divorce in which divorce could be granted without the need to prove the fault of the other party. Divorce by mutual consent of spouses has also been enacted in many countries.

In Ethiopia divorce is not a thing that is disquieting the society. It was a commonplace practice since longtime ago and most marriages dissolve through divorce than death. There is an established custom of handling family affairs through customary arbitration. The arbitrators, usually the elderly people, play a great role in resolving disputes between the spouses. They also involve in passing divorce decisions, even after the advent of the Civil Code.

The 1960 Civil Code came up with serious and non-serious causes of divorce. The serious causes are also divided into two; causes to which the party is imputable and those to which the party is not imputable. Adultery and deserting the conjugal residence are grouped under the former category. Declaration of absence, being an inmate of a lunatic asylum for a minimum of two years and condemnation of the marriage by religious authorities are grouped under the latter

¹⁰² <http://company.findlaw.com/jobs/index.html>, visited on May 8, 2002.

category. Divorce can also validly be ordered for non-serious causes. In such cases, the party who has petitioned for divorce is said to be imputable to the dissolution of marriage.

The whole purpose of considering one party as imputable to the dissolution of marriage is penalizing the guilty party property-wise in favor of the innocent party. But as it has been experimented for more than forty years, making one party imputable to the dissolution is not an easy task. Especially when one party alleges that the other has committed adultery, such party cannot succeed due to lack of cogent evidence that proves the alleged offence. Women remained victims of this system of divorce owing to their economic and social positions.

The Revised Family Code of 2000 has abolished proving fault of the other spouse for the purpose of penalizing him. According to this Code, no penalty is imposed against the party who is requiring divorce. This new rule is based on, it seems, on the conception that divorce is a right and nobody should be penalized because he has exercised his right.

This new law is expected to reduce protracted litigations between parties to make one of the parties imputable to the dissolution of the marriage. As the result of this new development in the divorce law, divorce can be easily granted. Although this is a positive step in resolving problems associated with divorce litigations, care must be taken that it should not create another set of problems.

It goes without saying that majority of women in Ethiopia are economically dependent on men and marriage is considered for many as an employment opportunity. Having regard to this and social background of women, it would be unwise to leave them without any post-divorce obligation on the side of their husbands.

The following are suggested as recommendations.

- Liberalizing stricter divorce provisions is a timely and modern action. Its importance in reducing endless disputes and court litigations between parties is immense. Moreover, it relieved women from the difficulty of proving fault, especially adultery to get their husbands punished. Easy divorce procedures may be disadvantageous to women, especially when the marriage is dissolved during the old age of women. Family law should introduce a post-divorce maintenance to a party who cannot earn his livelihood by his work. Consequently, the Pension Proclamation should be revised to allow a divorced spouse to have right over the pension allowance of his spouse.
- Our society commonly conducts divorce outside courtrooms, although the law empowers only the court to pronounce divorce. Sometimes even courts consider as though the marriage was dissolved through customary ways even if the court did not approve the customary divorce. Owing to the prevalence of this practice, the law should recognize divorces that have taken place through customary ways, without affecting the mandatory provisions of the law.
- Sometimes marriages become dead *per se*. This usually happens when the parties live separately for long time with the intention of not to live together again. Having regard to the conditions of the parties, the law must devise a mechanism to declare such marriages as non-existent.
- During divorce procedures, the law must make counseling parties by the court as a mandatory procedure rather than leaving it to the discretion to the courts

SUMMARY

- All forms of marriages are dissolved in similar manners. The cause that dissolves one form of marriage also dissolves another form of marriage. Of the causes that dissolve a marriage the most important one as far as legal issues are concerned is divorce.
- The Revised Family Code has brought a big change on divorce provisions of the Civil Code. In the Civil Code, the causes of divorce are divided into two. These are, serious causes and other causes. When a spouse proves on his favor the existence of a serious cause of divorce he shall escape penalty. For instance, if one spouse commits adultery, the other spouse can get the declaration of divorce without being penalized. It is the one who has committed adultery that is going to be penalized. In the Revised Family Code, there is no penalty at all. Moreover, the Revised Family Code allowed divorce by mutual consent.
- There are two procedures of divorce in the Revised Family Code. These are, divorce by mutual consent and divorce by petition. In the former case, the spouses who have decided not to live together shall agree to conclude their marriage by divorce. Then they appear before the court to demand the court to approve their mutual agreement of divorce. In the latter case, both spouses together or one of them alone petitions to the court that the court would pronounce divorce. Except the existence of slight procedural differences between the two kinds of divorce, there are no fundamental differences between the two kinds of divorce.

CHAPTER 5

LIQUIDATION OF PECUNIARY RELATIONS BETWEEN SPOUSES

INTRODUCTION

When marriage is dissolved by any cause (that is, as a result of death of one or both spouses, declaration of absence, court order or divorce) the pecuniary relations between the spouses shall also be liquidated. This is to mean that: if spouses are debtors they have to pay back what they owe to their creditors, or if they are creditors, they must collect their money from their debtors, and also divide their common property between themselves. Property division is one of the most difficult aspects of divorce, because usually the spouses disagree over who has the right to the property.

In the past, many countries have discriminated against women by giving them fewer property rights than men, both during marriage and divorce. Throughout the world, the laws of many countries have failed to recognize the important role that women play in the family economy.

The RFC provides that in case of divorce property of spouses shall be divided in accordance with agreement of the parties. If the parties fail to agree, division shall be made by the operation of the law. In some cases where there seems to be an “agreement”, that agreement may not really be voluntary. For example, if a person has been forced to agree by threat of violence, then the agreement is not voluntary. Similarly, if one party does not know all the relevant facts such as the amount of property or its value, an agreement may not be truly voluntary. In these and other cases, there may be questions whether the court should approve of the agreement between the parties.

Objectives

After completing the study of this chapter you will be able to:

- Describe the essence of liquidation of pecuniary relations between spouses;
- Indicate the conditions in which indemnity payment could be awarded to one spouse;
- Discuss the solutions that are designed by the law to the protection of the creditors of the spouses, during and after completion of the liquidation of pecuniary effects of spouses;
- Apply relevant provisions in resolving real and imaginary cases.

Exercise

- a) What does liquidation of pecuniary relation by agreement mean?**
- b) How is property partitioned between spouses when pecuniary relations are liquidated by agreement?**
- c) In the absence of a contract of marriage, or an agreement, pecuniary relation between spouses shall be liquidated in the event of divorce in accordance to the law.**
In such a situation: -
 - What will happen to the personal property of each spouse?**
 - How will the common property of the spouses be divided between the spouses?**
 - How is the debt, if any, by either or both spouses jointly shall be taken care of?**
 - How are debts of spouses that become due after the dissolution of the marriage are taken care of?**

5.1 Liquidation by Agreement

Read Article 85 (1)

Exercise

What do you think is the essence of this article?

The law respects the agreement made between the spouses concerning the liquidation of their pecuniary relations. According to Article 85 (1), where the marriage is dissolved in accordance with the provisions of the law, the pecuniary relation between the spouses shall be dissolved in line with the agreement made by the spouses or their marriage contracts. However the spouses cannot set aside any payment of indemnity as a means of compensation for an injury or damage on the common or personal property caused by fraudulent act or maladministration of one of the spouses.

5.2 Liquidation in Accordance with the Law

Exercise

If the spouses have not made any agreement in relation to the dissolution of pecuniary relations, how do you think can it be resolved?

Read Article 85 (2)

According to Article 85 (2), the pecuniary relations between spouses shall be liquidated in accordance with the provisions of the law. This would take place if the spouses have no contract of marriage in which they have agreed about the liquidation of their pecuniary relations, or they did not make any subsequent agreement on this issue, (See Article 86 and the provisions that follow it). Articles 86-93 shall apply if the spouses have not made any agreement concerning the pecuniary relations between them or their agreements are not valid in law.

5.2.1 Retaking of personal property

It has been indicated that spouses could possess both personal and common property. According to Article 86 (1), each of the spouses shall take his personal property in kind. But, such spouse has to show that the property belongs to him.

Exercise

How can a spouse show/prove that a certain property belongs to him?

Where the personal property of one of the spouses has fallen in the common property and if such spouse has proofs to this effect, he can withdraw the value of his personal property from the common property before it is divided between the spouses.

Example

Assume that “A” and “B” are husband and wife respectively. Assume again “B” had a motorbike, which would worth Birr 20,000 before she concluded marriage with “A”. After living for three years in marriage the spouses planned to build a house. They had Birr 60,000 (which was a common property) for the construction of a house. However, due to price appreciation of construction materials, Birr 60,000 was not sufficient to build the house. They needed an additional Birr 20,000 to complete the construction of the house. In view of this “B” sold her motorbike for 20,000 and the money was spent on the house construction.

Following this event, if now “A” and “B” agree to divorce each other, the money that “B” contributed from her personal property for the construction of the their common house must be withdrawn from their common property before the common property is partitioned between them. (See Art. 86(2)) The same shall be done if the other spouse (“A”) had spent his personal properties in the construction of the house. That is, both of them shall withdraw the value, which they have included in the common property from their personal property.

Exercise

Explain in the above example how “B”, can prove that Birr 20,000 belongs to her?

5.2.2 Indemnities

Both spouses administer common property of the spouses jointly. But they may agree that only one of them could administer the common property. Also the owner spouse administers his own personal property. However, the other spouse can be authorized to administer the personal property of his spouse. The spouse who is vested with the power of administering the common property or the personal property of the other spouse may be condemned to pay compensation to the other spouse. This could happen if the spouse has performed acts of bad administration, or if his administration constituted bad faith to the prejudice of the other spouse. When one spouse does such acts, the court may award damages or compensation to the aggrieved spouse, if the latter requests payment of damages. (Art. 87(1))

Exercise

How do you understand a bad administration?

A bad administration can be explained in many ways. The following example may illustrate a bad administration. Suppose “B” entrusts the administration of her personal property (that she acquired by way of succession) to “A”. Let the property is a grand villa, which is to be rented. If “A” does not make any effort to receive the monthly payment and he shows no any activity to stop the person who rented the house while he leaves without paying the arrears, “A’s” administration of the rental house is a bad one. Upon application by “B”, the court may order “A” to pay “B” some amount of money as an indemnity.

Exercise

What is the amount of compensation to be paid to the aggrieved spouse?

Indemnity payment shall also be awarded when one spouse enriches his own personal property or the common property by the personal property of the other spouse. There shall not be indemnity payment if there is an agreement against indemnity payment in such situations. (Art. 88)

However, the law attaches a time limit for claiming indemnities. According to Article 87 (2), claim for an indemnity cannot be made where the act that caused the damage was performed five

years before the dissolution of the marriage. In the above example, “B” loses her right of claiming indemnity payment if five years have elapsed between the act that caused the damage and the dissolution of the marriage.

As a result of dissolution marriage, creditors of the spouses should not lose their claims. The law tries to protect the interest of such creditors. Accordingly, the spouses are ordered to pay back the debt that one of them or both incurred before partition of property. (Art. 89) Creditors would benefit from this rule. Because it would be easy for them to get their money paid back before the spouses partition property and depart each other. Once spouses depart each other after partition of property, the creditors may be required to divide their claims.

5.2.3 Partition of Common Property

As a rule, common property of spouses is divided equally between the spouses. However, this is not always true. For instance, if one of the spouses is ordered by the court to pay indemnity, and such spouse does not have sufficient personal property, the indemnity can be paid from the common property. In such a case, there shall not be an equal division of a common property between the spouses.

Community of property is based on the idea that marriage is a partnership to which both husband and wife equally contribute. Thus, on divorce, the wife is entitled to a share of the common property equal to that of the husband. In many countries this is the rule today. In the past, however, in a number of countries women received lesser amount of the common property upon divorce. For example, in Cambodia women were taking only one-third of the common property while men were receiving two-thirds of it.

Identifying the common property is a very important work before the common property could be ready for the purpose of division. The first step in the division is to identify the items of property to be divided. In most cases identification of the property may be simple. Most people have their household belongings. They may own a bicycle and a motorbike. The family may have a little money or own a home. These are things that will need to be divided between the spouses on divorce.

In other cases, identifying the property to be divided is more difficult. Sometimes it is even difficult to define “property.” The identification of property may be different in different countries. In addition, the definition may change over time. For instance, in a country that does not allow the ownership of land by private individuals, there may be little problem of how to divide land in case of divorce. Later, if that country allows people to own land and a couple does in fact own some land, that becomes a piece of property that must be divided during divorce.

Other examples arise as the economy of a country becomes more complicated. New kinds of economic rights may become “property.” For instance, in an increasing number of countries, if a

person works in the military, the government may agree to pay a good deal of money in a lump sum or a monthly payment for the life time of the person in reward for his military services. This payment is considered as a “property” in many countries, including the United States. Hence at the time of divorce, the right to receive the monthly payment is divided between the spouses. As ideas of property change, the identification of property for purposes of divorce also changes.

Exercise

In Ethiopia, can the spouses divide the pension of one of the spouses upon divorce?

The second step in the process of property division is to classify each item of property. Each item of property must be classified as either common or personal property. It has been pointed out that classifying property as common or personal property during marriage is difficult. During the marriage these problems do not matter so much. At the time of divorce, however, the classification of property as common or personal property will affect how much each spouse will receive as a property settlement. Therefore, classification of the property is very important.

In order to classify the property, we must recall the definitions of personal and common property. Remember that personal property is (1) any property which a spouse possesses prior to the marriage, and (2) any property which a spouse receives as a gift, an inheritance, or a legacy during the marriage. Common property is any property a married couple acquires after the date of their marriage, except property either spouse received as a gift, inheritance, or legacy. Common property includes money which either spouse earned during marriage. It also includes anything either spouse bought with money earned during the marriage. Further, it includes money or property earned during the marriage which has not yet been paid to or received by the couple.

A husband and wife together own all their joint property. This is true even if only one spouse earned the money to buy the property. Thus, for example, assume that only the husband has earned money during the marriage. With his wages, the husband buys a motorbike. Under the RFC, both husband and wife own one-half of the motorbike, even though it was purchased with the husband’s wages and in his name.

The biggest problems in classifying property as common or personal property arise when the spouses have joined their resources together. For instance, consider the following example:

Example

Before marriage, the husband owned a broken down house that was not worth much. During the marriage he and his wife worked very hard and used a lot of their wages for five years to fix the house up and together made it a valuable house. Is the house still personal property or has it become common property?

Upon divorce, a court might consider the original value of the property before it was fixed to be the husband's separate property, and the value which the spouses added by their joint effort to be joint property. In applying this rule the court would set apart to the husband the value in the house which is his separate property and then divide between the two spouses the value in the house which is their joint property.

In many countries a piece of property has common and separate contributions to it (like the old house in disrepair in the above example that both husband and wife worked hard to fix it up). It is important to separate out the portion that is personal to one of the spouses and the portion that is common to both to determine the economic value of each portion.

The Ethiopian Family Law is not very specific. It does not contain clear rules for deciding cases like the above example. Different judges would probably decide these cases in different ways.

The third step in the process of dividing property is to value each item. "Valuing" each item, means determining its economic value. We need to know what the property is worth economically. If you do not value the property, it is not possible to divide it equally. For example, if the family has two oxen and two chickens, it would not be fair to give one party the two chickens. The two oxen are much more valuable than the two chickens.

Economic value is calculated in different ways depending upon the type of property which we need to value. Economic value is not the same as social value or moral value or sentimental value. Economic value is the amount of money or value you would receive if you were to sell the piece of property in the marketplace.

Art. 90 of the RFC states that common property shall be divided equally, except in certain circumstances. Dividing the property does not require that each person get half of each item. Dividing the property equally requires that each get half of the total value of the property. For instance, you would not cut an ox or a bicycle in half.

There could be many instances that justify unequal division of the common property of spouses. The interests of children may justify giving the parent with whom the children are living more than half of the property. For example, if the children remain with one spouse, that person may need the home the parties have been living in. It will probably be difficult for the children if they have to move from their home.

The employment situation of the spouses may also justify giving one party more than half of the common property. For example, if a wife has been raising the children and working in the home for many years, while the man has been working for wages, it may be very hard for that woman to go and find a job that will pay her enough money to support herself and the children. It may be fair for her to receive more of the property. However, these situations are not covered by the RFC.

The provisions of Art 91 deal with rule of partition in kind. According to the rule of partition in kind the spouses receive their portion from the common property in the form of goods or products, not in the form of money. For instance, if they have a house, a car and household furniture, as common property they are expected to divide these properties as they are, rather than selling and dividing the money. For instance, they can agree to give the house to the wife and the car and the furniture to the husband. In practice, however, this might sometimes be problematic.

If the value of:

- The house is Birr 100,000
- The car Birr 50,000,
- The furniture Birr 10,000, the value that each receives is not equal when partition is made in kind.

Exercise

How can this problem be resolved?

Pursuant to Article 91(2), the inequality in the shares of the spouses shall be set off by payment of a sum of money. In the above example the wife received a property whose value is Birr 100,000. The value of the husband's share is Birr 60,000. To balance their shares the wife has to pay Birr 20,000 to the husband so that each shall receive the value of Birr 80,000.

Moreover, when property is partitioned in kind, care should be taken to ensure that each spouse is given the things that are most useful to him/her.

Example

The husband has a house as his personal property. The wife has a car, which is her personal property. If they have also a house and a car as their common property, they must try to allocate the car to the husband and the house to the wife. (See Art 91(3))

Sometimes dividing properties in kind becomes very difficult or even impossible. If the spouses agree that one of them takes the property by paying an agreed sum of money to the other spouse, as his/her fair share of this property the problem may be resolved. Otherwise, according to Article 92 (1) the spouses are forced to sell the property and divide the proceeds of the sale. For example, if the spouses have a house, which is their only common property and if none of them is interested in taking the house by paying the necessary amount of money, it could be difficult to divide the house physically into two. In such a case, the spouses can sell the house and partition the money. Moreover, if the spouses fail to agree on the condition of sale, the sale shall be made by auction (92 (2))

There is also a possibility that some debts may become due after the dissolution of the marriage and after partition is completed. If it is a common debt, each of the spouses shall be liable in proportion to his share. (Art. 93(1))

Exercise

What is liability in proportion of one's share?

Example

Assume that the spouses had a common property whose value was Birr 100,000 and due to various reasons this common property was partitioned between the spouses unequally. Assume that Birr 60,000 was given to the wife and Birr 40,000 to the husband during partition. If their common creditor seeks Birr 10,000 from them after they had already made the partition, what amount should each of them pay? The rule is, each of them shall pay in proportion to what they received from their common property. Therefore, the wife shall pay 6,000 Birr and the husband shall settle the rest 4,000.

On the other hand, if the debt is the responsibility of only one spouse, according to Article 93(2) only such a spouse shall pay the debt.

The RFC does not specifically address the allocation of debts at divorce. Nevertheless, there must be some decision made regarding who will pay the debts that exist at the time of divorce. Just as property division can be done either by the agreement of the parties or by a judgment of the court, the division of debts can be made by agreement of the parties or by judgment of the court.

The steps for the responsibility for payment of debts of the parties after the divorce are very similar to the steps in dividing and distributing the property of the parties. The steps are: (1) identification of the debt; (2) classification of the debt as a common or personal obligation; and (3) allocation of the responsibility for payment of the debt.

In identifying the debt, it is important to know the following: (a) who incurred the debt; (b) the purpose for which the debt was incurred; (c) when the debt was incurred; (d) the initial amount of the debt and the amount still owed; and (e) the source of the fund for any partial repayment of the debt that has occurred during the marriage. After we have all the facts about the debt, the next step is to classify the debt.

Debts may be classified as personal and common debts. A personal debt is a debt, which a spouse incurs prior to the marriage generally, will be the separate debt of that spouse. If a debt has been incurred during the marriage, it will be a joint obligation if the spouses agreed together to the debt or one spouse agreed to the debt with the consent of the other spouse. In either case, both spouses have a joint responsibility to pay the debt. It is not clear how a court will determine whether one spouse has “consented” to a debt incurred by the other spouse. Moreover, a debt could be considered as a common debt when it is concluded by one spouse and incurred in the interest of the household.

A difficult situation arises in some cases when the parties have separated and then wait for many months or years to divorce. One spouse may incur a debt while the other spouse is not around.

In that case the spouse that was not there while the debt was incurred may deny that the debt was a common obligation. Such debt could be considered as a common debt if it was made for family purpose such as caring for the children or repairing the home, but would be a personal debt if the money had been used for the spouse's personal affairs.

After the debts have been identified as common or personal, the court (or the parties by their agreement) must decide who will be responsible for payment of the debts. In the same way that is entitled to receive his personal property, it seems likely that each spouse will be obligated to pay his personal debt. It is also likely that the couple will have to split equally any joint debts.

Property division is one of the most important aspects of divorce. Its impact on the future lives of the parties, and most especially of their children, is profound. The issues of identification, classification, valuation, and finally, division, that at first glance appear merely technical, in fact are central to a fair resolution of all of the issues surrounding the break-up of a marriage. The propriety of spousal support, child support, and even child custody, all depend to some degree on the economic circumstances of the parties after the property has been divided. As to the children, it is not an exaggeration to say that their life circumstances will be determined by the provision made for their economic wellbeing at the time of the judgment of divorce. This is a moment for the judges and lawyers to exercise all the wisdom and foresight of which they are capable.

Divorce legally terminates marriage. The termination of the marriage generally terminates the duties, which the spouses owed to one another as husband and wife. In many countries, under certain circumstances, however, the duty of support, which the spouses owed to one another during marriage, may continue after divorce. Thus, a former husband or former wife may have a continuing duty after divorce to pay money to help support his or her former spouse. This payment generally is called "spousal support" or "alimony." Therefore, spousal support is money or other property paid in fulfillment of a duty to support one's spouse after a divorce. Traditionally, in many countries, the husband had a duty to support the wife, but the wife did not have a duty to support the husband. Thus, in the past, in many countries, spousal support was

available only to wives, and not to husbands. In Ethiopia, there is no obligation to support a spouse after the pronouncement of the divorce.

During marriage parents share certain rights and responsibilities regarding their children. At the time of the divorce these rights and responsibilities must be divided between the parents. The rights include the right to spend time with the children and to make major decisions regarding the welfare of the children. The responsibilities include the responsibility to feed, clothe, shelter, and the responsibility to provide for their education. The legal issue referred to as “child custody” is a shorthand term for the process of allocating these rights and responsibilities between the parents at the time of divorce.

The term “child custody” is used in the family law statutes of many countries, but it is rarely defined. The RFC does not use the term itself, although the concept of child custody is included in the Code. Some countries tend to divide the general concept of child custody into four sub-topics: (1) legal custody; (2) physical custody; (3) sole custody; and (4) joint or shared custody.

The term “legal custody” refers to the legal right to make major decisions about the health, education, and general welfare of a minor child. These decisions include many matters. Some of them are:

- The right to decide where the child will go to school;
- The right to decide what religious training the child will have;
- The right to decide whether the child may take a job;
- The right to decide who will care for the child during the day if the custodial parent must go to work.

When the parents are married and living together, both parents have legal custody. They share responsibility for the child and they may make decisions jointly.

When a divorce occurs, the court must decide who will have the right and the duty to make these and other custodial decisions, if the parents of the child do not agree on the case. Legal custody may be either sole or joint. Sole legal custody exists when the court awards legal custody to only

one parent. That parent alone has the right and responsibility to make decisions regarding the child's welfare.

Joint legal custody exists when the court awards legal custody to both parents jointly. This means that the parents will continue to make decisions about their children together. There is a controversy as to whether joint legal custody is a good idea. Some scholars believe that parents cannot be expected to make decisions jointly about their children if they could not get along well enough to stay married. Other experts believe that joint legal custody is a good idea because it ensures that both parents will continue to be involved in the lives of their children.

Exercise

- 1. Which legal custody, joint or sole do you prefer? Why?**
- 2. Which type of legal custody do Ethiopian courts mainly order joint or sole custody?**

The term physical custody refers to the right of a parent to have the minor children of the marriage live with him. Physical custody may be either sole or joint. Sole physical custody exists when the court awards physical custody to only one parent. That parent is called the custodial parent. The parent who does not have physical custody is called the non-custodial parent. Usually the court will award to the non-custodial parent the right to visit with the children. (The right of visitation is not usually a bone of contention in Ethiopia.) Joint physical custody exists when a court awards physical custody to both parents together. When the award of physical custody is joint, the child may live a substantial amount of time with both parents. If the parties do not agree on the custody arrangements for the children, the court must decide which parent will receive custody of which child. In the United States and some other countries, the laws describe the criteria by which a court should make its decision. The EFC of Ethiopia does not include this guidance except in the case when a child is less than five years of age. Therefore, it seems likely that traditional criteria and standards for making decisions on child custody will be very important.

SUMMARY

- The Ethiopian family law does not prohibit agreement between the spouses as far as liquidation of their pecuniary relation is concerned. If the marriage was dissolved by their mutual consent, the spouses could prepare the liquidation of their pecuniary relations together with the proposal of divorce. In the absence of such preparations, they have the chance of making an agreement how they are going to liquidate their pecuniary relations. It is also possible to determine beforehand by the contract of marriage how they are going to liquidate their pecuniary relations.
- Sometimes, the spouses may be unable to agree on the liquidation of the pecuniary relations. In such circumstances, the provisions of the law shall be applied to liquidate their pecuniary relations. When the provisions of the law are applied:

Each spouse shall retake his personal property in kind by showing that he is the sole owner of such property;

Each spouse shall withdraw his personal property that is included in the common property;

Where one spouse has acted to the prejudice of the property interest of the other spouse, he may be ordered by the court to pay compensation to the prejudiced spouse;

Where there are creditors, their interests have to be protected and such creditors must get what they demand from the spouses before the partition of their common properties is made.

The law favors partition of common properties in kind, where such course is possible. Moreover the law favors the taking of a property that is most useful to a spouse.

When dividing properties in kind is not possible, they shall be sold by auction and the money will be divided.