LAW OF FAMILY

COURSE MATERIAL

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General Course Introduction

It is clear that family is the fundamental unit and the core of a given society. That is why family has become the concern of different disciplines such as sociology, anthropology, history, law and others. These disciplines give attention to the institution of family as the strength of a society to the largest extent hinges upon the strength of the family it has. It is because of this that we need to give recognition and protection to this unit of society by law. As a result, every country in the world has enacted laws which have recognized and protected the institution of family. In addition to domestic laws, there are international human right conventions which have accorded protection to the institution of family.

Ethiopia, being part of the international community, has put in place laws which have recognized and protected family. This course is, therefore, meant to expose students taking the course to the basic principles of family law incorporated under the Ethiopian legal system (the FDRE Constitution, Regional Constitutions, the Revised Family Code of the FDRE and other regional family laws).

In order to achieve this objective, the course deals with rationale behind recognizing and protecting the family, sources of familial relationship, formation and effects of marriage and irregular union, issues pertaining to filiation, adoption, the obligation to supply maintenance and settlement of disputes.

At the end of this course, students should be able to:

- analyze the rationale behind recognition and protection of the family;
- identify sources of family relationship and explain the effects of such relationships as incorporated under Ethiopian family laws;
- define marriage and discuss the essence of the institution of marriage;
- state the essential conditions for the validity of all forms of marriage;
- explain irregular union and analyze its distinguishing further as compared to marriage;

- identify and analyze the departure made by the new family laws of Ethiopia from the 1960s Civil Code particularly with regard to the rights of women and protection of children.
- discuss the rules pertaining to ascertainment of material and paternal filiations;
- identify and analyze mechanisms designed by the family laws to resolve disputes arising in marriage and irregular union;
- define adoption and discuss the essential conditions for establishments of adoption, its effects and causes of revocation of adoption;
- define the obligation to supply maintenance and analyze the rationale behind such obligation.

Chapter One: General Consideration

Introduction

Family is the basic unit of a society. It has social as well as economic importance in any society. Naturally, persons bound by consanguinity and affinity are united to form the community. 'With time, the growing family has a tendency to become a tribe.'[1] The formation of a tribe entails the splitting up or disintegration of the family, so as to make a new and additional family in the society. With the increase in the number of families arise various issues; like responsibilities and rights of the family members. The need to have a law governing the family relationship is somehow tied with the development of family through time. Considering this need, societies have developed one branch of law solely dealing with issues related to the family: Family Law.

Family Law is the branch of law which sets the rules to govern the ongoing responsibilities of family members to each other; both at the time families are formed and after relationships dissolve. The application of the family law begins at the time of formation of family either through marriage or irregular union. Its application extends throughout the life time of the existence of the family relationship as well as at the time of its dissolution.

In this chapter, you will learn about the sources of family law, the reasons for protecting and regulating the family, the sources as well as effects of family relationships.

Objectives

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

- discuss the meaning and sources of family law.
- analyze the rationale behind protection and regulation of family.
- understand the different sources of family relationship.
- discuss the effects of family relationship.

[1] Planiol, 385

1.1 Definition and Sources of Family Law

There is no generally accepted definition of family law. 'Family law is usually seen as the law governing the relationship between children and parents, and between adults in close emotional relationships'[2]. Many areas of law can have an impact on family life: tax laws, immigration laws as well as insurance laws have great connection with family law. As Dewar noted:

> *Most legal disciplines would claim to possess at least one of two forms of coherence. The first stems from the organizing legal concept from which the discipline in question derives its name: 'contract', 'negligence', 'trust'. The second relates to the set of 'real world' problems with which the discipline is concerned: labor relations, housing, land use, commerce, government and administration. At first glance, it would seem that the area of study designated as family law possesses a coherence of the second sort. After all, the term 'family' has in itself no legal significance (although attempts are often made to define the family for legal purposes); and the subject usually comprises a mixed bag of legal rules and concepts, such as those concerned with marriage, divorce, parents and children and property, each possessing a different historical origin and pattern of development. The only justification for studying them together is that they all in some way concern the family, a social phenomenon constituted outside the categories of the law. For this reason, family law has grown over the years to include parts of other legal disciplines of relevance to the family, such as property, criminal and housing law, taxation, social security, evidence and procedure; as well as incorporating legal aspects of phenomena thought to have a 'family' connection, such as domestic violence, child abuse, marital rape, surrogacy, homelessness and pensions (to name a few).*
>
> *In spite of this, can it still be said that family law is a coherent area of study? It has already been suggested that it cannot satisfy the first criterion of coherence mentioned above; and if it were to satisfy the second, the subject would be a good deal broader than it is now, probably unmanageable so. For*

[2] Jonathan Herring, 9

if we were really to take the family as the starting point, and were to consider all areas of law relevant to the family, we would want to include much that is not currently considered part of the subject. For example, we might wish to consider the welfare state, the fiscal system and the labor market in more detail than is customary; and we may also want to consider the areas of education and health services. These are all areas of relevance to families and in which the family is encountered as a necessary relay in the implementation of programs of social action. But family law has not been interpreted as broadly as this. Instead, it focuses primarily on the more traditional question of status and is thus primarily concerned with the means by which status is conferred, such as marriage, parenthood and cohabitation, and on the means by which status may alter, such as divorce or state action to remove children from parents. More recently, it has become concerned with the problem of individuals abused by members of their own family.

[Excerpts from: John Dewar, Law and the Family, 2nd ed, Butterworths, London, 1992, p.1-2]

1.2 Rationale Behind Protection and Regulation of the Family

There are various reasons for regulating and protecting the family through the adoption of legislative interventions. Before looking at these reasons it is necessary to define a family. The legal definition of family is not a unitary concept. However, we can find some suggested definitions.

Planiol defines a family as a group of persons who are united by marriage, by filiation or even, but exceptionally, by adoption.[3] Another more or less similar definition is given by Murdok. In that definition, family is considered as ' a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one and more children, own or adopted, of the sexually cohabiting adults.'[4]

[3] Planiol, Vol. 1 part 1, 384

[4] Murdok, Social Structure, (problems of the Family, 162

From the definitions given above, one can categorize the family into nuclear and extended family. The first and basic type of family organization is the nuclear family.

> *The nuclear family basically consists of a married man and woman with their offspring.*[5] *'The nuclear family is a universal human social grouping. Either as the sole prevailing form of the family or as the basic unit from which more complex familial forms are compounded, it existed as a distinct and strongly functional group in every known society.'*[6]
>
> *An extended family, on the other hand, consists of two or more nuclear families affiliated through an extension of the parent-child relationship rather than of the husband-wife relationship, i.e, by joining the nuclear family of a married adult to that of his parents.*[7]

This way of defining the family has been criticized recently by many, especially by authors in the western society, for its lack of accommodating the changes in the circumstances and societal values. As will be seen shortly, establishing a family relationship will have its own effects, like for instances on issues of child custody, maintenance and other rights and obligations. Defining family in the above manner restricts persons engaged in nontraditional relationships from having those rights and obligations. (Harvard Law Review, vol 104, p 1642-1659)

Do you believe that formation of the family needs to be regulated by the law? Why? Why not?

The family is a very important constitutive part of a society. It has natural, economic as well as social importance. 'The state of the weakness and of destitution in which the child is born, the amount and length of care he needs, impose upon his parents duties which are

[5] problems of the Family, 162
[6] Murdok, 163
[7] Murdok 162-63.

not fulfilled in one day and which create the solid foundation of all of the family relation.'[8]

The family is the nucleus of the society, and hence much depends on its safety and security. As Planiol correctly notes, 'the small family group is the most essential element of all those which compose the great agglomerations of men which are called nations. The family is the irreducible nucleus. And the whole is worth what it itself is worth. When it is impaired or dissolved, all the rest crumbles.'[9] Though the family may contain only few people, the impact that this unit has on the whole society is great. Factors affecting a single family will later on have the effect of affecting the whole society.

Due to the fact that the marital status as well as the family entails community rights and obligations far beyond those implicit in the ordinary civil contract, it is conceded that the states may prescribe the conditions on which the status may be assumed.[10] As a result, marriage laws are subject to the control of the state government; and the interest of the state in the marriage of its citizens has long been recognized. 'The state, it is said, is a party to every marriage. This means simply that the state is interested in the well ordered regulation of the family organization of the persons within its borders.'[11]

The state uses different means to regulate and control the formation as well as the effects of forming a family. One basic means of doing so is through legislations. Laws have various functions within a state.

> *'Laws do more than distribute rights, responsibilities, and punishments. Laws help to shape the public meanings of important institutions, including marriage and family. The best interdisciplinary studies of institutions conclude that social institutions are shaped and constituted by their shared public meanings. According to Nobel Prize winner Douglass North, institutions perform three unique tasks. They establish public norms or rules of the game that frame a particular domain of human life. They broadcast these shared meanings to*

[8] (planiol, 385)
[9] (planiol, 386
[10] (murdok, 76)
[11] (Marriage laws, 4 Albert Jackobs)

society. Finally, they shape social conduct and relationships through these authoritative norms.[12]

Hence, the state protects and regulates the family by using its legislative power.

1.4 Sources of Family Relationships

What do you think are the different sources of family relationship?

There are three sources of family relationships namely, marriage, filiation and adoption. The status of the persons as well as the rights and obligations of the persons differs with the difference in the source of the relationship. This section deals with the different sources of family relationships and the effects of the relationships.

1.4.1 Relationship by consanguinity

Relationship by consanguinity results from the birth. It is 'the tie which exists between two persons, such as the son and the father, the grandson and the grandfather; or those who descend from a common ancestor, such as two brothers, or two cousins.'[13]

Hence, relationship by consanguinity is a natural fact which is derived from birth.

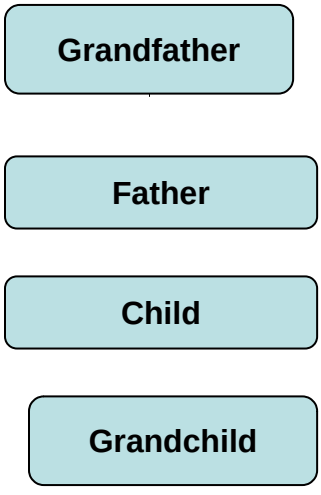
Excerpts from Planiol pages 387-389

The series of relatives who descend from each other form what is called a line. It is a direct relationship: it is represented by a straight line going from one relative to the other, no matter how many intermediaries there may be. As to the relationship which unites two relatives descending from a common ancestor, it is called collateral relationship: its graphic relationship is formed by an angle. The two relatives occupy the inferior extremity of the two sides and the common author is at the top. Two collateral relatives are thus not in the same line; they form part of two different lines which started from the common author, who represents the point where the junction is made; the two lines travel side by side, which fact explains the word 'collateral'; each of the two relatives is, in regard to the other, in a line parallel to his own, collateralis. …

[12] (Future of family, 10)
[13] Planiol, 387

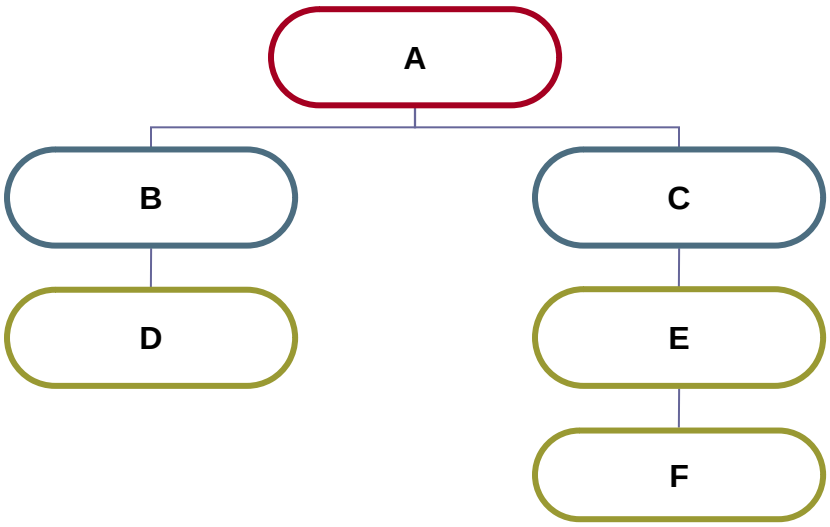
In each line relationship is counted by degrees, i.e. by generation. So the son and the father are related in the first degree; the grandson and the grandfather in the second degree, and so on.

Method of calculation of relatives in the direct line is easy.: there are as many degrees as there are generations going from one relative to the other.
When it comes to collateral relationship there are two ways of computation. The one used by the civil law count the number of generations in the two lines by departing from the common ancestors and by adding the two series of degrees. Thus, two brothers are related in the second degree (one generation in each branch); an uncle and his nephew are related in the third degree….in the Canon law another way is used to compute the degrees: the generations are counted only on one side. When the two lines are equal, either may be taken. When they are not equal, the longest one of the two is chosen and no attention is paid to the other. The result of this Canonical computation is that two first cousins are related in the second degree, while according to the civilian computation they are related in the fourth degree…..
The following diagrams illustrate how the computation is to be undertaken



To reach to the degree of relationship between persons related in the direct line, we simply count the number of lines between them. Here, the grandfather and the grandchild are related in the third degree in the direct line.

In calculating the degree of relationship in the collateral line, there are two way, which will lead to different results. Let us have a look at the following diagram to have a clear understanding of the two systems



The children of A are related in the collateral line. If we are using the Civil law system to calculate the degree of relationship between B and C, who are brothers, we will add the two lines which are departing from the common ancestor A. Hence, B and C are related in the second degree. B, who is the uncle of E, is related to E in the third degree. And B is related to F in the fourth degree.

On the other hand, if we use the Canon law, the result will be different. As mentioned earlier, the cannon law tells us to count only on one side. When the two lines are equal, we will simply take one line. Accordingly, the degree of relationship between B and C is one. Conversely, if the lines are not equal, the longest line is to be taken. Hence, in the above diagram, B is related to F in the third degree.

When we look into the Ethiopian Civil Code of 1960, it does not govern how the relationship in the direct line is to be computed. Article 551 tries to give some highlight on how the computation of relationship in the direct line is to be conducted. The Amharic version of the Code states as follows

የስጋ ዝምድና አቆጣጠር የጋራ ከሆነው የግንድ ወላጅ የዝምድና ደረጃ ጀምሮ ግራና ቀኝ ካለው ትውልድ መስመር እስከ ሰባት ትውልድ ድረስ ነው።

However, this article only tells us that calculation of degree of relationship in consanguial line is to be done by taking the common ancestor as a bench mark.

Does the Revised Federal Family Code regulate the manner of computation of degree of relationship? Why do you think is the reason?

1.4.2 Relationship by Affinity

Relationship by affinity is created as a result of marriage. 'Relatives through marriage are persons who are not relatives, but which join the family by means of a marriage.'[14] When a marriage is concluded, the relationship is formed between one of the spouses with the blood relatives of the other spouse. The woman who marries becomes the daughter in law (by marriage) of the father and mother of the husband and the husband becomes the son in law of the mother and father of the wife. 'The two spouses are considered as being only one, so that all the relationships of the one become, by the effects of marriage, common to the other.'[15] One thing which needs to be noted here is the fact that the relationship created does not go beyond this. That means, a relationship does not exist between the relatives of one spouse with the relatives of the other spouse.

1.4.3 Relationship by Adoption

Relationship by adoption is created as a result of a special contract between the adopter and the original families of the adopted child. Unlike blood relationship, it is a fictitious relationship which resulted from the agreement of the parties to the adoption contract.

[14] Planiol, 391
[15] Planiol, 392

However, it is also an imitation of the real relationship. Chapter eight deals in detail about adoption, and hence, it is not necessary to go to the details under this section.

1.5 Effect of Family Relationship

What do you think are some of the effects of family relationship?

There are various effects which resulted from the relationship. Relationships give rights; they also create obligations, and also carry incapacities. Hence, we can talk about three effects of a relationship: creation of rights, creation of obligations and making the related persons incapable of performing some juridical acts.

Rights emanating from a relationship:- relationship results in the right of the relatives to take the estate of the deceased relative. That is to say, a right of succession is one of the effects of a family relationship. Secondly, there is also the right of destitute relatives to get maintenance from the other relatives. Parents will also have a right over the person and the estate of their children. For instance, article 198 of the RFC provides that the obligation to supply maintenance exists between ascendants and descendants and also between persons who are related by affinity in the direct line.

Obligations emanating from relationship: there are also various obligations which will subsist among the relatives. The first obligation is that of alimony. Relatives have the obligation to provide alimony for the destitute relatives who cannot have their own means of income. Moreover, there is also the duty on the parents to take custody and raise their children. In this regard, article 219 of the RFC puts an obligation on the father and mother of the minor child to be the joint guardian and tutors during the life time of their marriage. Taking custody of children also involves making decisions in respect of the health, education as well as social contacts of the child. Articles 255 and the following articles of the RFC provide by way of obligation on the parents to take care of the health, residence, education as well as social contact of the minor child. On top of this, there may be property inherited by the child. The parents or in their absence, the ascendants will have the obligation to administer the property on behalf of the child.

Apart from the above mentioned duties and rights, relationships may also result in incapacities of the persons involved. The law prohibits marriage between close relatives. The incapacity to marry is one type of incapacity resulting from relationship. Under 32 of the RFC as well as the regional family codes relationship is provided as one essential condition for the conclusion of marriage.

Activity 1. Form a group of five and discuss amongst yourselves what family is in the Ethiopian law and the sources of family relationship. Make sure to consult family laws of at least two regions.

Activity 2. Discuss in groups the theories of computing family relationships. By drawing a diagram, try to calculate the degree of relationship between you and your grandparents on the one hand and between you and your nephews/nieces on the other hand. Use both the canonical and civil law modes of computation.

Chapter Two: Marriage

Introduction

The previous chapter, presented the meaning of family as well as the sources of relationship of family. As you have correctly observed, one and the major source of family relationship is marriage. What is marriage? What are some of the conditions which need to be fulfilled to conclude marriage? Considering the difference in the custom and religion of the society, the FDRE Constitution as well as the Revised Family law recognizes marriages as celebrated in accordance with the custom and religion of the spouses. One very important question which needs to be considered here is "Are spouses who are concluding their marriage according to their custom or religion required to observe the essential conditions of marriage?" what will happen if two persons proceed to

conclude their marriage despite the non-fulfillment of one or more of the essential conditions? These and other related issues are the subject of discussion in this chapter.

Objectives

After completing this chapter, students will be able to

- define marriage
- identify the difference between betrothal and marriage
- identify the different modes of conclusion of marriage
- analyze the essential conditions for the conclusion of marriage as incorporated under the Family law
- identify the purpose of opposing conclusion of marriage and the persons entitled under the law to make such oppositions
- identify and discuss the effect of violation of the essential conditions of marriage

2.1 Betrothal

In earlier times, before two persons conclude marriage, they would go through the process of betrothal. Mainly the betrothal was concluded between the parents of the future spouses. Betrothal is defined under article 560 of the civil code as a contract between the members of two families that a marriage shall take place between two persons, the fiancé and the fiancée, belonging to these two families. Hence, under the Civil Code, the betrothal contract is to be concluded between family members of the future spouses and more emphasis is given to the choice, consent and interest of these family members rather than the future spouses. Moreover, in many circumstances the practice shows that betrothal was concluded when the future spouses are underage and

sometimes not yet born.[16] This means, the interest and choice of the future spouses was not considered at all.

On the other hand, the Constitution of 1995 recognizes the right of individuals to form a family with their own free and full consent. As result, the provisions of the Civil Code dealing with betrothal were found to be contrary to this fundamental right of individuals. Hence, the RFC has excluded the concept of betrothal as a whole.

However, some regional family codes maintain the concept of betrothal with modification. The major modification made relates to the definition given to betrothal. All the regional laws which incorporated the concept of betrothal defined it as a pact between the fiancé and fiancée to conclude marriage sometime in the future.[17] This is unlike the definition given by the Civil Code which involves only the parents or guardians of the future spouses.

The Family Code of the Amhara region requires the contract of betrothal to be made in a written form signed by four family witnesses, two from each side.[18] On the other hand, the family code of the Benishangul Gumuz region allows betrothal to be concluded pursuant to the custom of the area. This may be either in writing or orally, whichever is customarily practiced in the region. When we look into article 4 of the SNNP regional family code, both options are included.

The family codes have also provided a time framework for the duration of the betrothal. Article 6 of the SNNP family code leaves it open for the parties to determine the duration of betrothal. However, if the parties fail to mention the time for the conclusion of marriage, it requires them to tie the pact within a year after the conclusion of the betrothal contract. The family code of the Benishangul Gumuz, on the other hand, gives only six months after the conclusion of the betrothal contract. The time framework given under

[16] ምናለ አለሙ፤ የተሻሻለው የቤተሰብ ህግ ያካተታቸው አብይ ለውጦችና የሚኖረው ማህበራዊና ኢኮኖሚያዊ ጠቀሜታ፣ ያልታተመ፤ ፍትህና ህግ ስርአት ምርምር ኢንስቲትዩት፣ 5

[17] See article 1 of the Family Code of Amhra and SNNP Regions, as well as article 8 of the Benishangul Gumuz region.

[18] See article 5 of the Amhara regional family code

article 6 of the Amhara regional family code is two years. Hence, the marriage has to be concluded within two years following the betrothal contract.

The family codes have also envisaged a situation for the invalidation of the betrothal contract. If one of the parties to the betrothal contract communicate their intention to invalidate the betrothal, or refuse to conclude marriage within the intended period or engaged in any act to impede the conclusion of marriage, the betrothal contract will be invalidated.[19] The consequences of breach of the contract are also illustrated in the subsequent articles.

2.2 Definition of Marriage

The family in the Ethiopian Constitution is recognized as the natural and fundamental unit of a society and an important legal and social institution. As a result, it is given legal protection. One thing that should be noted here is that a marriage may be regarded as either a status or a contract. As Jonathan Herring noted[20]

> *Marriage could be regarded as either a status or a contract. In law a status is regarded as a relationship which has a set of legal consequences which flow automatically from that relationship, regardless of the intention of the parties. A status has been defined as 'the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities.' So the status view of marriage would suggest that, if a couple marry, then they are subject to the law governing marriage, regardless of their intentions. The alternative approach would be to regard contract as governing marriage. The legal consequences of marriage would then flow from the intentions of the parties as set out in an agreement rather than any given rules set down by the law.*
>
> *Marriage is perhaps best regarded as a mixture of the two. There are some legal consequences which flow automatically from marriage and other*

[19] see article 7of the Amhara regional family code, article 17 of the Benishangul Gumuz family code and article 7 of the SNNP region family code

[20] Jonathan Herring, Family Law, (2001), 33

consequences which depend on the agreement of the parties. The law sets out: who can marry, when the relationship can be ended and what are the consequences for the parties of being married.

In Ethiopia, marriage is regarded in both the Civil Code. The Revised Family Code and the regional family codes as an institution, rather than a contract.[21] However, when it comes to defining this institution, neither laws are helpful. Hence, to have a common understanding of the institution, it is necessary to resort to the definitions given by other foreign laws.

In the English legal system, marriage, as defined by Sir James Wilde in the land mark case of Hyde Vs Hyde, is the voluntary union for life of one man and one woman to the exclusion of all others. [22] This same definition is also upheld under the Australian Marriage Act of 1961. The definitional part as well as Section 46 of the Australian Marriage act defines marriage as the voluntary union of one man and one woman for life to the exclusion of others. This definition has been taken from the English definition of marriage. Both definitions contain three common elements. First, the marriage has to be concluded between a man and a woman, there is no legal marriage between same sex persons. Secondly, the institution of marriage is to be entered into with the absolute consent of the parties i.e., voluntarily. In addition, the marriage is expected to last for a life time, death being the only cause for dissolution.

The Philippines Family Code of 1987, on the other hand, defines marriage as 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.[23] In addition to the elements that are present in the English and Australian definition of marriage, the Philippines family code considers the establishment of conjugal and family life as essential elements for marriage.

The definitions given by the different legal systems have their own shortcomings. All the documents tend to be ideal in the sense they expect the union to last for life, while in reality marriages breakdown for different reasons other than death. Moreover, the central

[21] Tilahun Teshome, International survey of family, 157
[22] definition of marriage in UK, 1).
[23] article 1, Family Code of Phillipines

aim of concluding marriage seems to be establishment of a family, while in reality, some couples conclude marriage knowing that they cannot have their own children.[24]

Taking into account the insufficiency of the definitions given by many foreign laws, the Ethiopian legislature opted not to give any definition at all.

Look into Chapter One section two of the RFC and try to infer a definition which may incorporate various aspects of family.

2.3 Modes of Conclusion of Marriage

The Revised Federal Family Code as well as the Regional Family Codes recognized three modes of conclusion of marriage. These are: Civil Marriage, Religious Marriage and Customary Marriage.

2.3.1 Civil Marriage (Marriage Concluded before an Officer of Civil Status)

For a marriage to be considered as being concluded before an officer of civil status, a man and a woman need to appear before the officer for the purpose of concluding marriage and give their respective consent to enter into marriage.[25] Hence, the phrase civil marriage basically refers to the fact that the marriage has been solemnized in front of an officer who is empowered to accept the consent of parties wishing to enter into marriage.

The 1960 Ethiopian Civil Code provides for the establishment and the duties of the office of civil status. However, implementations of the provisions which deal with this office have been made to wait for the issuance of an Order to be published in the Negarit Gazeta, which has never come into life.[26] As a result, currently there is no established office of civil status. In municipal areas, the functions of the officer of civil status are

[24] Mehari p. 12
[25] article 2 of the RFC
[26] Article 3361 of the Civil Code

assumed and performed by the municipalities. For instance in Addis Ababa the offices of the *Kifle ketemas* are the ones who oversee the performance of civil marriages.

In order to conclude civil marriage, there are certain formalities and requirements which are stipulated by the RFC. The first formality is that of a residence. Pursuant to article 22 of the code, civil marriage is concluded before the officer of civil status of the place where one of the future spouses or one of the ascendants or close relatives of one of them has established a residence by continuously living there for not less than six months before the conclusion of the marriage. Hence, the solemnization of a civil marriage is to be conducted in the place in which one of the aforementioned has established a residence for a minimum of six months. Residence, on the other hand is defined by the Civil Code as the place where a person normally resides.[27] The code also tries to distinguish between residing in a place and a mere sojourn in a particular place. In determining existence of a residence, the notion of normality and intention of the person concerned are vital. In addition to this, article 175/2 requires staying in a particular place for a minimum of three months to constitute residence. 'Although the code does not settle the point, it seems that the period of three months must be uninterrupted.'[28] However, when it is for the purpose of conclusion of marriage, this article of the Civil Code is qualified by virtue of article 22 of the RFC. As a result, those persons enumerated under article 22 of the RFC have to reside in the place for a continuous period of six months. This article also answers the question as to whether the period should be interrupted or uninterrupted one.

The other formality is that of giving notice. The RFC requires the future spouses to inform the officer of Civil Status of their intention to conclude marriage not less than a month before the celebration of the marriage.[29] The purpose of notifying the officer is to make sure that there are no impediments to the conclusion of marriage and to allow anyone who want to oppose to the marriage to do so in accordance with the law. This can be understood from the requirement on the part of the officer to publicize the notification stipulated under the same article as well as the subsequent articles of the Code.

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[27] article 174 civil code
[28] Vanderlinden, Law of Persons, 34
[29] article 23 of the RFC

The process of notification and waiting period (or the formal requirements for conclusion of marriage before an officer of civil status) are available in other countries' laws as well. For instance, all states in America prescribe some formalities for conclusion of marriage. And the regulations are categorized into two classes: licensure and solemnization.[30]

As Ellman et al put it:

> *'All states have marriage license laws. Applicants provide certain information to a governmental office concerning age, prior relationship by blood or marriage, previous marriage etc. This information helps in compiling vital statistics and could facilitate enforcement of substantive marriage regulations by permitting the clerk to screen out ineligible applicants. For example, if the application revealed the bride and groom were siblings, the license would be denied under laws prohibiting incestuous marriages. In practice, the license law does little to restrain intentional violation of substantive regulations, because little effort is made to confirm the truth of the license application information.'*[31]

On the issue of waiting period, the authors have noted that:

> *'Most states impose a waiting period (of either 3 or 5 days), either between the application and issuance of the license or between issuance and performance of the ceremony. …the waiting period requirement as well as the entire licensing procedure is explained as impressing upon the parties the seriousness of the entry into marriage.'*[32]

The 1949 Marriage Act of the UK also stipulates some formalities for conclusion of marriage. Under this law, the parties are required to give notice in prescribed form to their local superintendent registrar (in whose area they must have been resident for seven days preceding the giving of notice) of their intention to marry.[33] Here one should note the difference in the requirement to constitute a residence under the Marriage Act of the

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[30] Ira mark Ellman, Family Law: cases, text, Problems, 56
[31] Ira Mrk Ellman, family law cases…, 56-57
[32] Ira mark Ellman, 57
[33] John Dewar, Law and the Family, (1992), 34

UK with that of the Ethiopian Revised Family Code. Under the 1949 Family Act of the UK, the requirement is only seven days while in the Ethiopian context, the parties have to reside in that particular area for a period not less than six months. In addition to the notice requirement, the parties are also expected to provide a declaration that there are believed to be no lawful impediments to the marriage.[34]

Once these preliminary formalities are fulfilled and the work of publicizing the intention of the parties to marry has been made by the civil status officer, the next step is the celebration (solemnization) of marriage. Celebration of marriage is to be made publicly in the presence of the future spouses and two witnesses for each of the future spouses.[35] One requirement stipulated under article 25 of the RFC is that the future spouses have to personally appear for the solemnization process. In connection to this requirement, the issue of proxy marriages can be raised.

Do you think that the future spouses need to be present before the officer of Civil status to celebrate their marriage? Is it always mandatory for the future spouses to be present or is it possible to conclude marriage through representation?

The question of whether marriage can be concluded by proxy is of little practical importance in modern times. However, there may be circumstances which would necessitate the use of representation for marriage. Historically, the late Roman law and the Canon law allowed in a clear manner celebration of marriage by proxy. In the words of Pomponius:[36]

> *A man who was away from home might marry a woman by letter or messenger, but marriage could not be contracted in this manner by a woman who was absent from the man's place of residence. The reason for this difference between the man and the woman resulted from the requirement of the Roman law that the wife be led to the husband's home.*

[34] Section 28 of the marriage Act of 1949.
[35] Article 25/1 of RFC
[36] Digest XXIII as cited by Ernest G. Lorenzen, (1919), Marriage by proxy and the Conflict of Laws, Harvard law Review, Vol 32, no.5, 473-474

The Code Napoleon, on the other, does not prohibit proxy marriage in express terms. It simply puts an obligation on the officer of civil status to read the parties the requirement of the law with respect to marriage and the mutual right and duties of the parties which emanates from the marriage.[37] In order to achieve this purpose, it seems that the parties need to personally be present at the ceremony. However, some French writers held the view that in the absence of express provision which made marriage concluded by proxy void, it should be considered as valid.[38]

Marriage by representation is necessary when one of the parties cannot be present for the ceremony. 'While its most prominent use has been in wartime with one party on duty overseas, sometimes it is used by prisoners.'[39] The First World War was the main reason for many European countries to allow in their laws for the conclusion of marriage through representation.

> *The French Law of April 4, 1915 authorized soldiers and sailors with the colors to marry for grave reasons by proxy with the permission of the minister of justice and of the minister of war or the minister of the navy…. Soldiers and sailors, employees of the Army and Navy, and persons in the service of the Army and Navy, were authorized in Italy to marry by proxy by a decree of June 24, 1915.*[40]

Considering the need to conclude marriage by representation, the Civil Code of 1960 as well as the RFC allowed by way of exception for the conclusion of marriage through representation. One should note here that in principle each of the future spouses are required to appear personally and give their consent to the marriage at the time and place of celebration.[41] However, if one of the parties, for serious cause, could not be personally present, marriage by representation may be allowed by representation. Here one question that needs to be addressed is, what does it mean by 'serious cause'?

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[37] Ernest G. Lorenzen, (1919), Marriage by proxy and the Conflict of Laws, Harvard law Review, Vol 32, no.5, 477 see also article 75 of the Code Napoleon
[38] Ernest G. Lorenzen, (1919), Marriage by proxy and the Conflict of Laws, Harvard law Review, Vol 32, no.5,477
[39] Ira Mark Ellman, 58
[40] Lorenzen, 479
[41] Article 12/1 cum article 25/1 RFC

The RFC does not go beyond requiring the existence of a serious cause and the existence of consent of the represented person and define what a serious cause could be. We can attempt to identify what a serious cause is by looking into the laws of other countries and the reason for these countries to allow marriage by proxy. As discussed above, many countries allow marriage by proxy when one of the spouses are away on military work or in the navy and sometimes also for prisoners, among others. Hence, one can conclude that 'serious cause' in the Ethiopian Family Code will also be interpreted in light of these grounds.

Compare article 12/1 cum article 25/1 of the RFC with article 586 of the Civil Code. Try to look into similar provisions of one or two regional family codes.

The other formality incorporated under article 25 of the RFC is the obligation on the witnesses to declare, under oath, that the essential conditions for marriage are fulfilled.[42] As mentioned earlier, one purpose of imposing these formality requirements is to make sure that the substantive requirements for conclusion of marriage are fulfilled. One way of achieving this purpose is by requesting the witnesses to confirm under oath the fulfillment of these conditions. As can be grasped from the next sub-article, the taking of the oath has its own consequences, and the consequences should be explained to the witnesses by the Officer.

The third formality requirement for celebration of civil marriages is that the future spouses need to declare openly that they have consented to enter into the marriage. Marriage is an institution which is to be entered into by the parties of their free will. The existence of their free will has to be openly communicated to the officer of civil status. Apart from the open communication of their will, the future spouses as well as the witnesses are required to sign in the register of the Civil Status.[43]

After the fulfillment of all the above mentioned formalities, what is left is for the Officer of civil status to pronounce them united in marriage and issue a certificate of marriage.[44]

[42] Article 25/3. The essential conditions of marriage are discussed in detail in section….
[43] Article 25/5 of the RFC
[44] Article 25/6 of the RFC

2.3.2 Religious Marriage

The second type of marriage which is given recognition by the RFC is religious marriage. Pursuant to article 3 of the RFC, a religious marriage takes place when a man and a woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them. As a result, the formal requirements for the conclusion of religious marriage are dictated by the religion itself. This is further corroborated by article 26/1. Hence, the conclusion of the religious marriage as well as the formalities to be followed are as prescribed by the concerned religion. However, one should note here that the essential conditions that are stipulated by the RFC need to be observed whatever the manner of celebration of marriage is.[45]

2.3.3 Customary Marriage

Ethiopia is a nation which is believed to be home for more than eighty nationalitites. These different nationalitites have their own peculiar customs. The diversity in the customs of the people has been recognized by the 1995 FDRE Constitution. Particularly, Article 34/4 of the Constitution stipulates for the enactment of a specific law which gives recognition to marriage concluded under systems of religious or customary laws. In light of this obligation, the RFC gives the future spouses the option to conclude their marriage in accordance with customary practices.

Pursuant to Article 4 of the RFC marriage according to custom takes place when a man and a woman have performed such rites as deemed to constitute valid marriage by the custom of the community in which they live or by the custom of the community to which they belong or to which one of them belong. One important thing which needs to be noted here is that for a marriage to be concluded according to custom, the custom referred to is of three: the custom of the community in which they live, or the custom of the community to which both future spouses belong or alternatively to which one of them belong. This is in contradistinction to the Civil Code of 1960. Article 580 of the Civil

[45] See article 26/2 of the RFC

Code considers a marriage to be customary marriage when it is concluded under the rules of the community to which the future spouses belong or to which one of them belongs. Defining customary marriage in such manner has the effect of excluding marriages concluded by two persons belonging to a certain tribe but the marriage was concluded using the rites of a different tribe. For instance if a man from the Oromo tribe concludes marriage with a woman from the Tigray tribe and the marriage was concluded in Amhara region by fulfilling the rites of the Amhara tribe, such marriage will not be considered as a customary marriage concluded by fulfilling the requirements of the Amhara tribe, because neither of the spouses belong to that tribe. Considering the shortcoming of article 580 of the Civil Code, the RFC included the custom of the community in which the parties are living at the time of conclusion of marriage.

The conclusion of the marriage as well as the formalities, hence, is to be prescribed by the concerned community. Here also note should be made to the effect that the customary marriages also need to observe the essential conditions of marriage stipulated by the RFC.

What does celebration of marriage mean? When do we say a marriage is celebrated?

2.3.4 Marriage Celebrated Abroad

The other new introduction in the RFC is the recognition of marriages that are celebrated abroad. This is necessitated by the increase in the movement of people from one place to another. Not recognizing a marriage which is concluded by fulfilling the legal requirements of the place of celebration would result in unfair and undesirable consequences. As a result, article 5 of RFC provides for the recognition of marriages which are celebrated abroad as valid in Ethiopia. Here, two things are worth mentioning. The marriage whose recognition is sought in Ethiopia has to be concluded by fulfilling the legal requirements of the place of celebration. This can be gathered from the phrase

'…in accordance with the law of the place of celebration…'. Hence, when recognition of the marriage is sought, it has to first be identified whether the legal requirements of the place of celebration were fulfilled. Moreover, the law puts public morality of the Ethiopian people as a limitation on the recognition of marriages celebrated abroad. That is to say, the foreign marriage will be recognized in Ethiopia only in respect of its formality and not as to its substance.[46] A good example here is the case of same-sex marriage. Some western countries and one African country[47] have made same-sex marriage lawful. Hence same-sex marriages could be concluded lawfully in these countries. However, these types of marriages cannot be recognized in Ethiopia for different grounds. First, the law, though indirectly, considers marriage to be a union between a man and a woman, not between the same sexes. Hence, same-sex marriage does not fulfill the definitional requirement of marriage under Ethiopian law. Secondly, article 629 of the new criminal Code made sexual activity and any indecent act with persons of the same sex a crime. For stronger reason, marriage between same sexes will be prohibited. In addition to this, article 5 of the RFC provides for the recognition of marriages celebrated abroad as far as doing so will not be contrary to public morality. The ground for criminalizing sexual activity between same sexes is that it is repugnant to the morality of the Ethiopian people. For the grounds discussed above, marriage between same sexes will not be recognized in Ethiopia.

Can we apply article 5 of the RFC to marriages concluded in the regions by way of analogy?

2.4 Essential Conditions of Marriage

[46] Mehari Redae, 17

[47] Republic of South Africa is the only country in Africa and the fifth in the world to make same-sex marriage lawful. In a landmark ruling, the Johannesburg-based Constitutional Court ordered that the definition of marriage be changed from a "union between a man and a woman" to a "union between two persons".

Essential conditions for validity of marriage pertainto biological, psychological and sociological factors.[48] The biological factors relate to age, sex and state of health of the future spouses, whereas the psychological factor relates to the freedom of will of the parties. On the other hand, the sociological aspect pertains to issues like marriage between persons related by consanguinity and affinity as well as by adoption and it also incorporates bigamy. When we come to the sources of such restriction, O'Donovan had the following to say[49]:

> *Such impediments were known to the Feteha Negest and covered obstacles to the union arising from prior relationships, from previous marriage, or from age. Also included were defects arising from the ceremony itself. Such marriages were prohibited and in some cases gave rise to penal sanctions. Many of the impediments found in the Feteha Negest have been retained in the Civil Code. But those related only to the rules of religion have been dropped.*

The essential conditions that are found in the RFC are derived from the Civil Code, which in turn is derived from the Feteha Negest. So we can say that most of the conditions are derived from the Feteha Negest.

In the following sub topics, discussion will be made on these essential conditions for the conclusion of a valid marriage.

2.4.1 Consent

Marriage is an institution which is to be entered into by the parties with their free and full consent. The UN Convention on Consent to Marriage, Minimum age of Marriage and Registration of marriage as well as the Recommendation of the UN General Assembly which was adopted in 1965 provide consent as a prerequisite for the conclusion of marriage.

Pursuant to article 1 of the UN Convention, no marriage shall be legally entered into without the full and free consent of both parties. This requirement is further strengthened by the Recommendation. The Convention as well as the Recommendation put an obligation on member states to make sure that future spouses have decided, of their free

[48] Tilahun Teshome, International Survey of family law, 159
[49] O'Donovan, 442

will and consent, to enter into marriage. One way of compliance with this obligation is the harmonization of domestic laws in line with the international commitments of the countries. Ethiopia is one of the countries who have acceded to this Convention. As a result, the Constitution as well as the RFC and the regional family codes incorporate consent as a validity requirement of marriage.

In some parts of Ethiopia, the culture does not require the consent of the future spouses for conclusion of marriage; rather what really matters is the willingness of their parents to tie their children in bond of marriage.[50] In effect many marriages have been concluded not on the basis of the willingness of the spouses but of their parents. This has been considered as a ground for many disputes in families. Considering this deep rooted culture, many efforts have been made to bring change, particularly through the use of legislations. In this respect what comes in the fore front is the 1995 Constitution. Article 34/2 of the Constitution reiterates the requirement that marriages should be entered into upon the free and full consent of the parties. In addition to this the RFC considers the free and full consent of the parties as a validity requirement for conclusion of marriage.

When the international as well as domestic legal instruments require existence of consent as a requirement for marriage, it implies that 'there must be no duress or force inducing the marriage or any misunderstanding as to the effect of the marriage ceremony.'[51] Hence, the RFC recognizes some grounds which would vitiate the consent of the spouses.

- **Fundamental Error**

The first ground which is considered as a base for vitiating consent of the parties is error. However, it is not all types of errors which would vitiate the consent, rather, as per article 13/2 of the RFC; the error has to be a fundamental one. What the law considers to be fundamental errors are illustrated under sub article 3 of article 13. These include:

1. Error on the identity of the spouse where it is not the person with whom a person intended to conclude marriage: - here the mistake has to be as to identity rather than as to attribute. Cases of impersonation can be considered as fundamental error falling under this category. However, if

[50] Mehari redae, 18-19

[51] Malcolm C. Kronby, Canadian family Law, 7th ed. 1997, Stoddart Publishing c., 5

the error pertains to the attribute of the person like for instance if one party mistakenly thought that the other was rich, it can not be considered as a fundamental error as per the requirement of the article and hence, will not be a ground to invalidate the marriage.

2. Error on the state of health of the spouse who is affected by a disease that does not heal or can be genetically transmitted to descendants:-
3. Error on the bodily confirmation of the spouse who does not have the requisite sexual organ for the consummation of the marriage
4. Error on the behavior of the spouse who has the habit of performing sexual acts with person of the same sex.

- **Violence (Duress)**

The other ground which would vitiate the consent of spouses to enter into marriage is violence. If the consent to marry was extracted by violence, it cannot be said that the party has freely consented to the marriage. As a result, article 14 of the RFC considers a marriage concluded when consent is extorted by violence as an invalid marriage. Moreover, the article further illustrates situations which might lead the court to determine whether the consent was extorted by violence or not. Hence, if the consent was given to protect himself/herself or one of his/her ascendants or descendants or any other close relative from a serious and imminent danger or thereat of danger, it can be said that the consent was extorted by violence.

Some of the issues which need further clarification on consent extorted by violence include the following[52].

i. What must the threat or fear be of? At one time it was thought that it was only possible for duress to render a marriage voidable if there was a threat to life, limb or property. Recently the court of appeal in Hirani vs Hirani suggested that the test for duress should focus on the effect of the threat rather that the nature of the threat. In other words, the threat can be of any kind, but it must be shown that the threats, pressure or whatever it is, is such as to destroy the reality of the consent and overbear the will of the individual. In the case of Hirani vs. Hirani the court accepted that social

[52] Jonathan herring, family law, 2001, pearson education limited, 49-51

pressure could overbear the consent. The woman was threatened with ostracisation by her community and her family if she did not go through with the marriage and the fear of complete social isolation was such that there was no true consent. The effect of the Hirani decision is that those who have undergone an arranged marriage in the face of a serious threat have the choice of either accepting their culture and the validity of their marriage or accepting dominant culture's view that marriage should be made voidable. This could be regarded as an appropriate compromise between respecting the cultural practice of arranged marriages and respecting people's right to choose whom to marry.

ii. *Must the fear be reasonably held? What if threat was made, but a reasonable person would not have taken it seriously? In Szcher it was suggested that duress could not be relied upon unless the fear was reasonably held. Against this is Scott v Selbright in which it was suggested that as long as the beliefs of threats were honestly held, duress could be relied upon. The second view is preferable because it would be undesirable to punish a person for their careless mistake by denying them an annulment.*

iii. *By whom must the threat be made? The thereat can emanate from a third party; it need not emanate from the spouse.*

- **Judicial Interdiction**

Judicial interdiction exists in the cases where a person is insane according to article 339 of the Civil Code and where he has bee n interdicted by the court. The court orders interdiction of the person because his health and his interest so requires or because his heirs' interest so require.[53] These two conditions have to simultaneously be present for the court to give order of interdiction. The order of interdictions means the interdicted person will have lessened capacity and hence need to be protected. 'The basic idea underlying these protective measures is to ensure that the physical person who holds rights and duties but cannot exercise them is provided with the assistance of some other

[53] Article 351/1 and 2 of the Civil Code

person who shall act on his behalf in most acts of juridical life.'[54]As a result of the lessened capacity, an interdicted person may conclude marriage only with the authorization of the court.[55]

2.4.2 Age

As discussed above, under Ethiopian law, marriage is an institution to be entered into by the full and free consent of the parties. In order to freely consent to the marriage, the parties should understand the consequences of their acts, and hence need to attain a certain age. The Convention on Consent to Marriage, Minimum age of Marriage and Registration of Marriage under the preamble, by making cross reference to the Universal Declaration of Human Rights provides that it is only those men and women who attained full age who can enter into marriage. This being the requirement, the next question would be as to who could be considered as being of full age. Specifying the minimum age for marriage is left for the individual countries to govern through legislation.[56] However, this power of the state is not without any limitations. As can be seen from the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly resolution 2018 (XX), principle II, Member States shall take legislative action to specify a minimum age for marriage, which in any case shall not be less than fifteen years of age. Hence, the minimum marriageable age in any country will be 15 years, though it can be set at higher age than this.

There are different reasons which can be raised as a ground for limiting the minimum marriageable age of spouses.

> *'The standard justification for age restrictions has been the claim that "[m]arriage involving teenagers are more unstable than other marriages and are more likely to end in divorce than other marriages." It is not clear, however, that the youth of the participants is what causes their marital*

[54] Catherine O' Donovan, The law of Physical Persons, 69
[55] Article 15 RFC
[56] Article 2 of the Convention

failure. A number of studies point to non-age related factors as important predictors of marital failure.' [57]

When we come to the RFC, the minimum marriageable age is 18 years for both sexes. Hence, any person who has not attained the full age of 18 years may not conclude a valid marriage. However, there are circumstances in which a valid marriage could be concluded without the fulfillment of this requirement. This is provided as an exception under sub article two. If the Minister of Justice, for serious cause, grants for dispensation, on application of the future spouses, or the parents or guardian of one of them, marriage could be validly concluded. The dispensation, however, may not be more than two years. This means, the maximum year that can be dispensed by the Minister is 2 years, and hence, the lowest age of marriage can be 16 years.

This exception provided under the RFC is in line with the power given to states by the Convention as well as the Recommendation. Both documents recognize the power of the appropriate authority to grant dispensation for serious reason in the interest of the future spouses. The very basic question here is as to how the serious cause can be identified.

2.4.3 Relationship

The other essential condition for the conclusion of marriage is relationship, or rather the existence of prohibited degrees.

Although it would be true to say that restrictions on certain types of sexual relations are a universal feature of primitive and advanced societies, it should be remembered that 'this must be understood as meaning that some sort of prohibition on mating is universal, not that a particular set of relations is universally tabooed'. Thus a wide variety of restrictions are possible, ranging from 'elementary' systems in which prohibitions on certain relations are accompanied by a requirement that individuals marry only from

[57] Ira mark ellman, family law, 109-110

> *within a certain group, to 'complex' systems in which only certain relations are excluded and the choice of partner is left to the individual.*[58]

In many societies across the world there are laws which prohibit marriage between people who are related. The same is true in Ethiopia. The restrictions under the RFC are based on two groups of relations: those based on blood relationships i.e. consanguinity and those based on marriage, i.e. affinity. These restrictions were also maintained under the 1960 Civil Code, though with a different degree of restriction.

The prohibited consanguinity restrictions involve marriage between persons related in the direct line between ascendants and descendants.[59] Hence, marriage between parent and child, grandparent and grandchild is prohibited. On the collateral line, article 8/2 prohibits marriage between a man and his sister or aunt and also a woman and her brother or uncle.

There are different reasons given for prohibiting marriage between related persons. The first argument is the fear of genetic danger involved in permitting procreation between close blood relatives.[60] In technologically advanced countries, however, it is argued that the availability of genetic screening could avert the danger, and hence the restriction cannot be supported.[61]

The other arguments raised for the restriction include[62]

> '*…permitting marriage between close relations may undermine the security of the family. The argument is that children should be brought up without the possibility of approved sexual relations latter in life with the members of their family. The third argument can be based on the widespread instinctive moral reaction against such relationships*.'

At the time of debating on the draft RFC, the reason for restriction as well as up to what degree the restriction should be was discussed thoroughly. Under the 1960 Civil Code,

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[58] John Dewar, 45
[59] Article 8/1 of the RFC
[60] John Dewar, 46
[61] Herring, 38
[62] Herring, 38

marriage between ascendants and descendants as well as collaterals up to the 7th degree was prohibited. Some suggested that the ground for this restriction is Christianity and the culture of the Northern parts of the country, and hence is not representative of the whole society.[63] However, as discussed above, the restriction is also available in other countries of the world and is also supported by medical evidence. Hence, in order to reconcile the different religions and culture in the country with the science a limited restriction as far as collaterals is concerned, is adopted by the RFC.

Marriage between persons who are related by affinity in the direct line is also prohibited under the RFC article 9. On the collateral line, marriage between a man and the sister of his wife, and a woman and the brother of her husband is also prohibited. When we analyze the restriction in light of the grounds for restriction, not all the arguments hold water. Though there are genetic dangers involved in permitting procreation between close blood relatives, these dangers do not exist at all between affinies.[64] Hence, it can be argued that the reason for such prohibition in the affiny is one of moral, rather than scientific.

2.4.4 Bigamy

The other essential condition for the conclusion of a valid marriage is the absence of prior marriage. As stipulated under article 11 of the RFC, a person is not allowed to conclude marriage when he is bound by the bonds of a preceding marriage. Many countries have laws which prohibit bigamous marriages. For instance, if we look at article 35/4 cumulative article 41 of the Family Code of the Philippines of 1987 contraction of marriage by a person during subsistence of a previous marriage makes the subsequent marriage null and void.

On the issue of bigamy Herring has the following to say in relation to the English law

> *If at the time of the ceremony either party is already married to someone else, the 'marriage' will be void. The marriage will remain void even if the first*

[63] Mehaari, 23
[64] Dewar, 46

spouse dies during the second 'marriage'. So if a person is married and wishes to marry someone else, he or she must obtain a decree of divorce or wait until the death of his or her spouse. If the first marriage is void it is technically not necessary to obtain a court order to that effect before marrying again, but that is normally sought to avoid any uncertainty. In case of bigamy, as well as the purported marriage being void, the parties may have committed the crime of bigamy.

Many cultures do permit polygamous marriages, although in British society monogamous marriages are the accepted norm. There are concrete objections to polygamous marriages. Some argue that polygamy may create divisions within the family, with one husband or wife vying for dominance over the other, and particularly that divisions may arise between the children of different parents. Supporters of polygamous marriage argue that polygamy lead to less divorce and provide a wider family support network in which to raise children. Polygamy could also be regarded as a form of sex discrimination unless both men and women were permitted to take more than one spouse. There have also been suggestions that permitting polygamous marriages involves an insult to the religious sensitivities of the majority.

These arguments in favor and against polygamous marriages were also reflected at the time of debating on the draft RFC. Ethiopia is a multi religious and multi cultural country. Some consider condemnation of polygamous marriage against their culture and religious beliefs. Some followers of Islam religion were arguing at the time of the debate that it would be against the right that they obtain by virtue of their religion, and hence polygamous marriages should not be prohibited. However, there was also division of opinion on the part of the followers of Islam on this.[65] On the other hand, female right advocates were arguing that it is against the Constitutional right of female to allow polygamous marriage.[66] Taking into account the diverse views on the issue, the law opted for the first view. Hence, for a person to conclude a valid marriage there should not be a preceding marriage.

[65] Mehari, 26
[66] Ibid (mehari, 26)

2.4.5 Period of Widowhood

The concept introduced here by the legislature relates to the fact that a woman is under prohibition to remarry within the next one hundred and eighty days following the dissolution of her former marriage.[67] This condition was also included in the Civil Code of 1960 and was subject to criticisms from different parties, particularly from female right advocates. They construe this provision as limiting the right of female to conclude marriage at any time she wants, mainly because the limitation does not apply for males. However, when one looks into the rationale for this restriction, it will be clear that the limitation is nit designed to discriminate between the two sexes.

The rationale for the limitation under article 16 is to respect the right of children enshrined in the Constitution and other international human right instruments to which Ethiopia is a party. Article 36/1/c of the 1995 FDRE Constitution provides that each child has the right to know and be cared for by his/her parent or legal guardian. This principle is also enshrined under article---- of the UN Convention on the Right of the Child (CRC) to which Ethiopia is a party. In addition to this right, article 128 of the RFC provides a presumption as to the duration of pregnancy. In order to respect the right of children and also to comply with the presumption, it is necessary to avoid any circumstances which would create a doubt as to who the father of that child is.[68] Hence, by requiring the female to wait for a period of 180 days following the dissolution of a previous marriage, the law tries to avid any conflict of paternity.

Taking into account the modern advances of medical science in which the existence of pregnancy can easily be identified, it may be argued that the condition is unnecessary. However, we have to also look into the fact that many women in the country do not have access to facilities providing the service. In addition to this, the article also provides for some exceptional circumstances in which the 180 days restriction need not be observed.

The first of such exceptions is if the woman gives birth after the dissolution of marriage and before the lapse of the 180 days.[69] In such a situation, it is presumed that the child is born from the previous marriage and hence there will not be any conflict on paternity.

[67] Article 16 of the RFC
[68] Mehari, 30
[69] Article 16/2/a of the RFC

Hence, she may remarry even before the 180 days lapsed. Remarrying the former husband will also avoid the conflict on paternity and hence if the woman is marrying her previous husband, she may do so without waiting for the 180 days. In addition to this, if she can prove by medical evidence that she is not pregnant, she need not wait for the lapse of the specified time before concluding another marriage.[70] Taking into account the fact that it is impossible to list all the grounds which may dispense a woman from observing the period of widowhood, the law gives discretion for the court to dispense her from observing the this requirement for any other valid reason.

2.5 Opposition to Marriage

As discussed earlier, marriage is an institution to be entered into with the full and free consent of the parties. This assertion suggests that it is primarily the parties themselves who will have a say on whether they should be joined by matrimony or not. However, from our discussion on chapter one, what we can also infer is that the society and the state also have interest in the marriage of the two individuals. The society and the state regulate and provide protection for the institution of marriage. The law, by way of regulating the relationship, has provided certain conditions which are essential for the validity of a marriage. The society as well as the executive organ of the government, on the other hand, has the obligation to oversee the observance of these essential conditions prior to the conclusion of the marriage.

In the following section the discussion will focus on as to who may bring an opposition for the conclusion of marriage, to whom this opposition may be made, when this opposition should be made and the form of the opposition.

Who may oppose?

Depending on the essential condition which is violated, the persons who may oppose to the conclusion of the marriage differ. When the condition violated is age, there are potentially three groups of persons who are given the right to oppose. The first one is the parents of the minor. If one of the future spouses have not attained the minimum marriageable age stipulated by the law i.e. 18 years, then the parents of that minor may

[70] Article 16/2/c

oppose to the marriage. In many instances underage marriages are arranged by the parents of the minor themselves. In such situations obviously other persons should be given the right to oppose for the marriage. This is where the public prosecutor comes into picture. Apart from the fact the parents of the minor are involved in the planning of the marriage and hence not opposing to its conclusion; underage marriage is considered as a criminal act. Moreover, the state has also the obligation to see the respect for the essential conditions of marriage. Therefore, the law gives the public prosecutor the right to oppose the underage marriage. Last but very importantly, the law gives 'any other interested person' a right to oppose the underage marriage. Here, one very important question is as to who can this 'any interested person' be. Does it refer to any passerby or it has qualifications?

In civil suits persons who may by plaintiffs are qualified under article 33/2 of the Civil Procedure Code. This article requires a person to have a vested interest in the subject matter of the suit, to be qualified as a plaintiff. That is to say, the outcome of the suit has to affect the person either positively or negatively so that he can be the real party in the suit. Article 18/a of the RFC should also be construed in this manner even if we are not talking about court proceedings. As a result, when the law refers to 'any other interested person' it refers to those parties who may be directly or indirectly affected by the conclusion of the underage marriage. Under this group are included those NGOs which are working on the prevention of underage marriages.[71] If they oppose the conclusion of an underage marriage, it means they are achieving one of the goals of their establishment, and hence making them an interested party.

When the essential condition violated is relationship by consanguinity or affinity, the right to oppose the marriage is given to the ascendants of both or one of the future spouses as well as their brothers and sisters who have attained the full age of 18 years. Apart from these persons, the public prosecutor, as the organ having the obligation to safeguard the interest of the society and the state, is given the right to oppose this marriage.

[71] Mehari, 34

In cases of bigamous marriages, there are two persons who may oppose. The first one is the previous wife or husband of the bigamous spouse.[72] Bigamy is considered under the criminal code of 2004 as a crime, unless it is justified by the religion or custom of the person. Hence, the public prosecutor has some interest in the prevention of conclusion of this kind of marriage. As a result, article 18 also provides the public prosecutor a right to oppose such marriages.

In the case of judicial interdiction, it is the guardian of the interdicted person and the public prosecutor who may oppose to the marriage.[73]

As we can see from the above discussions, the persons who have the right to oppose conclusion of marriage is different with the difference in the type of condition violated, with the exception of the public prosecutor. One of the functions of the public prosecutor is to see that the peace, security and interest of the general public are fulfilled (respected). The public, on the other hand, has an interest in the marriages of individuals. Hence, the public prosecutor will have the duty to take action (by way of opposition) whenever essential conditions of marriage are to be violated.

The next question to be raised in relation to opposition is 'to whom should it be made?' this is answered by referring article 19 of the RFC. The Amharic version of this article provides that opposition is to be made to the marriage celebrating officer while the English version limits it to the officer of civil status. Following the English version will have its own dangers. First, it makes reference only to civil marriages because it makes only the officer of civil status the competent organ to receive complaints (oppositions). This means, if the marriage is either religious or customary marriage, there is no organ empowered to entertain the opposition, as the officer of civil status is not empowered to celebrate these marriages. Secondly, one of the rules of interpretation of laws as enshrined under article 2/4 of proclamation 3/95 (Federal Negarit Gazeta establishment Proclamation) states that in cases of discrepancy between the Amharic and English version of the negarit gazeta, the Amharic version prevails. Hence, for these two reasons we have to follow the Amharic version of the code.

[72] Article 18/c of RFC
[73] Article 18 of RFC

Accordingly, opposition is to be made to the organ which has the power to celebrate the marriage. If the marriage to be celebrated is a civil marriage, opposition will be made t the officer of civil status. On the other hand if it is a religious or customary marriage, the opposition has to be made to either to religious fathers or to the elderly people celebrating the marriage, depending on the situation.[74]

In order to show the seriousness of the case, the opposition is required to be made in a written form. Hence, there is no oral opposition to marriage. There is also a time limit attached. The opposition has to be made 15 days before the celebration of marriage. In civil marriages, there may not be that much of a problem in the time limit at least as far as the law is concerned. Article 23 of the RFC requires the future spouses to notify the officer of civil status of their intention to conclude marriage, a month before its celebration, and the latter has the obligation to publicize the same. The idea here is everyone will have access to the notification publicized by the officer of civil status and hence within two weeks those interested persons will make opposition. (there will be 2 weeks left prior to the conclusion of the marriage). However, when it comes to the other modes of conclusion of marriage, this kind of stipulation is not provided, making observance of article 19 somehow impractical. The law provided the maximum time within which the opposition has to be made. This limitation takes into account various societal values and the burden on the future spouses. Hence, the observance has to be strictly followed.

The other very important issue in relation to opposition is issue of appeal from the decision on opposition. The person to whom opposition is made has to make its decision within five days.[75] If the celebrating officer rejects the opposition and decides to continue the celebration of the marriage, the decision will be final one. However, if the decision is to accept the opposition and suspended the celebration of the marriage, the future spouses or one of them may appeal to the court against the decision. [76] This article shows the weight given to the right of the future spouses to form family.

2.6 Effects of Violation of Essential Conditions of Marriage

[74] Mehari, 35
[75] Article 20/1 RFC
[76] Article 21/1 RFC

The law has provided for certain conditions which need to be fulfilled for the conclusion of a valid marriage. In addition to stipulating conditions, it also provides the chance for certain group of persons to oppose and therefore prevent the conclusion of marriage which does not fulfill the necessary conditions. However, what would happen to a marriage which was celebrated when one of the conditions is absent? In the forgoing discussions an attempt will be made to answer this question.

Before looking into the consequences of violation of each and every conditions, we have to first identify the difference between void and voidable marriages and if such a distinction exists under Ethiopian law.

Katherine O'Donovan had to say the following on this issue[77]:-

> *The term void and 'voidable' are found in the common law system. They have their counterparts in the laws of continental European countries. In both legal systems he terms used lack a clearly defined meaning and the transposition of a term from one system to another is virtually impossible, in the Amharic version of the civil code there is no exact term to convey the concept 'void' or 'voidable'. Nevertheless these terms will be used since they are the most apt terms available for elucidating the law.*
>
> *A void act is an empty act. It does not achieve what it sets out to do so. It does not achieve its intended legal consequences. "quod nullum est, nullum producit effectum." An act is void due to a defect therein which is so fundamental as to deprive the act of its very existence. 'A defect may make a juristic act either void or voidable. If the defect is such that the act is devoid of the legal results contemplated, then the act is said to be void." The conventional wisdom concerning the void act is that it has no legal effect, but this is not strictly so as the act may have effects unforeseen by the actor, such as those of criminal prosecution, because of the illegality of the act. The point about the void act is*

[77] Katherine O'Donovan, 1972, Void and voidable marriage in Ethiopian law, JEL vol. VII, No. 2, 439-441. It should be noted here that though the comments made by the author of the article makes reference to the Civil Code of 1960, they still hold water.

that it achieves no part of its intended legal consequences and in so far as these are concerned it has no effect and can be ignored.

A voidable act is an act which, although it contains a defect, has its intended legal effect. The defect in the voidable act is not so serious as to prevent it from coming into effect.

> *"An act that is incapable of taking effect according to its apparent purport is said to be void. One which may take effect but is liable to be deprived of effect at the option of some or one of the parties is said to be voidable."*

The defect contained in the voidable act is sufficiently serious to enable the act to be subsequently attacked by one of the parties and declared void by the courts. If, however, it is not avoided the act will take effect as a valid juristic act. One learned writer has suggested that the correct way to view the voidable act is as "an act which gives rise to the intend-ed legal consequences, but at the same time gives rise to a counteractive right which may neutralize those consequences in so far as one of the parties is concerned."

A void marriage, if such exists in Ethiopian law, is one to which there is such a serious objection in law because of a grave defect that, should its existence be in question, it will be regarded as never having taken place and can be so treated by all affected or interested parties. Any court declaration made would merely have the purpose of affirming that the marriage never existed and of clarifying the status of of the parties as never having been married. Any person having an interest therein could petition for a declaration of non existence of the marriage at any time, even after the death of the parties. Since the parties never had the status of husband and wife none of the normal consequences of marriage would follow. …..…

A voidable marriage is quite different from a void marriage. The marriage will be regarded as a valid subsisting marriage unless and until it is attacked. As to the effects of a voidable marriage, a distinction must be drawn between a marriage which, although voidable, is never attacked and therefore never

avoided, and a marriage which is avoided. In the former case the marriage will be valid and all the normal legal consequences of marriage will follow. In the latter case, a further distinction must be made between those marriages which are given effect up to the day of avoidance. It is here that the use of the word "voidable" may be criticized. It fails to distinguish between the act which is not void ab initio but is declared void retroactively by a court, and the act which is deprived of all future effect by the court but which retains such effect as it has had up to avoidance.

Three categories then emerge. The marriage which is void ab initio, that is which never came into being or had any effect; the marriage which is void retroactively, (ex tunc), that is which came into being, would have been valid had it not been found out, but is not deprived of all effect: and the marriage which is void ex nunc, that is which is deprived of effect for the future but which holds good for the past. The only category into which the Ethiopian marriage law clearly falls is that of void ex nunc.

What is the difference between void and voidable marriage? Does this distinction exist in the RFC? What about the regional family codes?

As we can see from the above discussion, unlike other legal systems the Ethiopian law recognizes only voidable marriages. A marriage which has been concluded when one or more of the essential conditions are lacking will be invalidated.[78] That is to say, from the date of invalidation, the marriage will cease to exist, and the consequences of dissolution of marriage will follow. However, for the time being that the marriage was intact, it will be considered as a valid marriage.

The other very important thing that needs to be noted here is the change made by the RFC in respect of provisions dealing with punishment for violation of essential conditions. The Civil code, apart from providing for the civil consequences of violating

[78] However, we should keep in mind that this assertion does not work for all conditions. For instance, in the case of violation of period of widowhood, the marriage will not be invalidated. Article 37 of RFC

essential conditions, also makes reference to the Penal Code for criminal punishment. However, the civil code did not show the exact punishments accompanying. As a result maintaining these provisions was not necessary. The RFC provide only the civil consequences and if one wants to know the criminal consequences, reference has to be made to the Criminal code.

In our subsequent discussion, we will look into the civil as well as criminal consequences of violating each essential condition.

As far as the consequence of violation of essential conditions is concerned, we may classify the conditions into three categories. The first one is the impediment to the celebration of the marriage which does not affect its subsequent validity, its purpose being only prohibitory.[79] The first condition which falls under this category is period of widowhood. As discussed earlier, the purpose of this condition is to avoid conflict of paternity and to ensure the right of children to know their parents. If, however, marriage is concluded without the lapse of the 180 days stipulated by the law, the marriage will not be dissolved.[80]

Civil marriages are to be concluded before an officer of civil status, who is competent enough to celebrate marriages, and by fulfilling certain formalities. However, the fact that the officer does not have competence to celebrate marriage will not be a ground to dissolve the marriage.[81] Moreover, article 25/3 requires the officer to tell the future spouses and the witnesses the consequence of their declaration before taking an oath. The failure of the officer to inform this fact to the future spouses and the witnesses will not be a ground to dissolve the marriage. Another formality related to celebration of marriage, as incorporated under article 25/6 is, the requirement on the part of the officer to pronounce the parties united in marriage after they have fulfilled all the requirements and issue certificate of marriage. The failure to fulfill this requirement is also not considered as a ground for dissolution of marriage. [82]

[79] O'Donovan, 443
[80] Article 37 of RFC
[81] Article 38 RFC
[82] Article 39RFC

The other group of impediments relates to those which will prevent the marriage from taking place and make the marriage voidable if it takes place, but for reasons occurring after the marriage, the impediments cease to exist and the marriage becomes valid. 'The distinguishing aspect of this group is that the marriage, although voidable after celebration and thus open to dissolution, can be subsequently validated. This means that the marriage which is voidable after its celebration due to a defect therein can subsequently become valid through the *ex facto* removal of the impediment or by the passage of time. This process is known as validation'[83]

Those marriages which are voidable, but may be validated include underage marriages, bigamous marriages, marriages concluded by judicially interdicted persons, marriages concluded under the influence of violence, marriages concluded in the existence of fundamental error.

Underage marriages: - the RFC under article 31 states that marriages which are concluded by a man and a woman who have not attained the full age 18 years can be dissolved. The dissolution obviously is to be made by the court by application. As to who may apply for the dissolution of this marriage, article 31 states that any interested person and the public prosecutor may do so. The term 'any interested person' for purposes of application for dissolution should be construed in a similar manner as it is construed in article 18.

What makes this condition a relative condition is that the dissolution of the marriage may not be sought once the spouses have attained the minimum marriageable age.[84] Hence, even if the marriage is voidable for non fulfillment of the required age, it may latter be validated as a result of attaining the required age.

The Criminal Code, on the other hand, attached criminal sanction on this voidable but validatable marriage. A person who concluded marriage with an underage, knowing that she has not attained the minimum marriageable age stipulated under the family law, will be subject to rigorous imprisonment for not more than three years. This is so if the victim

[83] O'Donovan, 443
[84] Article 31/2 RFC

is 13 years and above. However, if the victim is below 13 years, the punishment will be a rigorous imprisonment not more than seven years[85].

Bigamous Marriages: - the bigamous marriage also falls into the category of marriages which are voidable but validatable. Either spouses of the bigamous marriage and the public prosecutor are given the right to apply for the dissolution of the bigamous marriage.[86] The application for dissolution may be made only as long as the former spouse of the bigamous marriage is alive. If however, the former wife dies, it can be validated. A presumption of validity is attached to bigamous marriages until avoided by dissolution. 'Nevertheless the bigamous marriage is unique in that its validation does not come about automatically after a lapse of time; its validation occurs upon the death of the first spouse.'[87]

Article 650 of the Criminal Code, on the other hand, stipulates the criminal consequence of concluding a bigamous marriage. The party who concluded a bigamous marriage will be sentenced to a simple imprisonment, but if he/she concluded the second marriage by concealing the truth and deceiving the new spouse, the punishment will be five years rigorous imprisonment. On the other hand, if the new spouse was aware of the previous marriage of the bigamous spouse, he/she will be sentenced to simple imprisonment. One thing that needs to be noted here is that bigamy is not always a punishable act. Bigamous marriages may be allowed in some religions and cultures. If the family law of a certain region allows the conclusion of a bigamous marriage, there is no reason for the criminal code to penalize those who concluded a bigamous marriage.[88]

Defective Consent: - consent constitutes the basic element for the conclusion of marriage. There are various grounds which may vitiate the consent of a person. Articles 34-36 of the RFC deal with the fate a marriage which has been concluded in the absence of the consent of one or both of the parties. Whatever ground causes the defective consent, the marriage concluded in such manner will be dissolved. However, there is a difference in the time limit within which the application for dissolution may be made to the court.

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[85] Article 648 of the Criminal Code.
[86] Article 33 of RFC
[87] O'Donovan, 446
[88] Article 650 of the Criminal code.

In case of a judicially interdicted person, it is the judicially interdicted person and the guardian who are given the right to request the dissolution of the marriage. The JIP may not apply for dissolution six moths after the date of termination of his/her disability. And as for the guardian, the application has to be made within six month after the day on which the guardian becomes aware of the existence of marriage, and in any case after the disability has ceased. Here we arae dealing with two types of limitations. The first one is a relative limitation in that it depends on when the guardian becomes aware of the existence of the marriage. The second is an absolute limitation. In all the circumstance, unless an application is made within the specified time the marriage will be validated.

When the consent is vitiated as a result of an act of violence, the party who concluded the marriage under the influence may apply to the dissolution of marriage. However, the application cannot be made six months after the cessation of the violence. So, the party seeking for the dissolution of the marriage has to make application at the time when the violence is still intact or alternatively within six months after the cessation of the violence[89]. There is also a two year absolute limitation which will be counted beginning from the date of conclusion of marriage. Once these time limitations have passed, the marriage becomes a valid one.

In case where the consent was vitiated by error, whosoever has concluded marriage due to fundamental error may apply for the dissolution of the marriage. The application has to be made within six months after the discovery of the error[90]. Otherwise, the marriage will be valid. It also has a two year absolute period of limitation.

Apart from dissolution of marriage which suffers from a defect in consent, there is also a criminal sanction attached. The party who has concealed the existence of one or more conditions which will cause the dissolution of marriage will be punished by simple imprisonment not exceeding two years and a fine not exceeding five thousand birr.[91]

[89] Article 35 RFC
[90] Article 36 RFC
[91] Article 646 of the Criminal Code

One very important thing which needs to be noted here is it is not only those persons who concluded the voidable marriage who will be liable to criminal punishment. Rather the law also includes those persons who celebrated such marriages.[92]

The third category of impediments is absolute impediments. Under this falls relationship by consanguinity and affinity. 'These obstacles are so grave that they can never be cured and therefore the marriage can never be validated….if a couple are married despite this impediment their marriage remains voidable.'[93] That means it may be dissolved at any time. The public prosecutor and any other interested person are given the right to apply for the dissolution of such marriage.

Review Questions

1. Does the Federal Revised Family Code consider family as an institution or a contract? Is there any difference in the regional family code? Consult at least two family codes from the regions.

2. Is there any difference on the effects of marriages which is concluded before an officer of civil status and religious or customary marriages? What do you think Is the purpose of including religious and customary marriages in the RFC?

3. What do you think is the rationale of the law to allow for an opposition to be made? When do you think is the proper time to make an opposition?

4. Discuss the criminal as well as the civil effects of violating the different essential conditions.

5. Which kinds of errors are considered as fundamental, warranting the dissolution of marrriage?

[92] Article 647 of the Criminal code. The code further classifies those persons who celebrated such marriages with intention and negligently. Obviously the difference lies on the accompanying punishment.
[93] O'Donovan, 445

6. Do you think the right of individuals will be violated by maintaining the definition given to betrothal ubder the Civil Code? Why/ why not?

Chapter Three: Effects of Marriage

Introduction

People conclude marriage for different reasons. But in many circumstances, it is the need to have the support and assistance of others which is considered as the driving force for the conclusion of marriage. The effects of marriage are mainly derived from the purposes its conclusion. Generally we can classify the effects into two: personal and pecuniary. The personal effect relates to the obligation of the spouses to support, respect and assist each other as well as to cohabit among others. On the other hand, the spouses may

acquire property either before the conclusion or during the lifetime of the marriage. One important issue which arises as a result is the ownership of such property. In connection with the ownership of property, it is also essential to see the right of third parties who are creditors of the spouses. In this chapter you will learn the effect of concluding marriage on the spouses' personal life as well as its effect on the property.

Objectives

After completing this chapter, students should be able to

- Discuss the personal effects of marriage
- Distinguish the difference between contract of marriage and certificate of marriage
- Analyze the pecuniary effects of marriage

3.1 General overview

Marriage is the organizing legal concept for the purposes of defining and attaching significance to a certain set of legitimate heterosexual familial relations.[94] The definitions given and the conditions attached to the conclusion of marriage serve a purpose only to the extent that marriage makes a difference to the legal rights and remedies of those who marry. That is to say, marriage confers a status on married couples. As a result, marriage has a significant effect on the legal position of spouses. In the following sub section, a discussion will be made on the different effects a marriage may entail between the couples.

In discussing about the effects of marriage, one thing that needs to be always taken into account is the fact that all marriages produce the same legal effect, without considering the mode of their celebration.[95] As far as the marriage is concluded in compliance with the essential conditions of marriage, which are valid for all modes of conclusion of marriage, the effects of all marriages are identical. This is similar with the French law. As Planiol clearly stated[96]

[94] Dewar, 51
[95] Article 40 of RFC
[96] Macel Planiol, 513

The effects of marriage are always identical. There is but one French marriage. This was not always the case everywhere. Among the Romans there was the matrimonium injustum for foreigners and Latins, and the contubernium for slaves. The latter did not produce the effects of justae nuptiae. Certain legislations (Prussia, old Russia) recognized morganatic marriages, a type of legitimate union, inferior to marriage. They did not give to the wife or to the children the rights they would have had as a result of a veritible marriage, particularly as regards equality of rank with her husband or their father.

In addition to considering all marriages as having the same legal effect, the law also avoided the requirement of consummation as a condition for the marriage to have legal effect.[97] Hence, a marriage, once celebrated will have an effect without having regard to the fact of consummation of the marriage.

What do you understand by the phrase 'contract of marriage'?

As mentioned earlier, marriage engenders special obligations between husband and wife which are the result of their status as spouses. However, in many legal systems the parties themselves were given some degree of freedom to determine the effect their marriage will produce through the conclusion of a premarital agreement.

A premarital agreement, also referred to as an ante-nuptial or pre-nuptial agreement, is a contract entered into by a man and woman before they marry. The agreement usually describes what each party's rights will be if they divorce or if one of them dies.[98] There are different reasons for drawing a pre-nuptial agreement. 'Premarital agreements help clarify the parties' expectations and rights for the future. The agreements may avoid uncertainties and fears about how a divorce court might divide property if the marriage fails.'[99]

[97] Article 41 of the RFC
[98] http://www.abanet.org [accessed on March 10, 2008]
[99] ibid

A prenuptial agreement will be enforceable by the court as far as it has fulfilled the requirements stipulated by the law. In some developed countries some voiced their concern on the effect of enforcing the premarital agreement on the rate of divorce. The assumption being, the enforcement of prenuptial agreements will lead to more divorce. However, recent developments show otherwise.

> *The increasingly routine enforcement of premarital agreements is another clear representation of a changed attitude toward private ordering of the terms of marriage and divorce. At one time, courts declined to enforce premarital agreements on the grounds that such arrangements encouraged parties to divorce. Even today, many courts intervene when premarital contracts that are fairly executed ex ante lead to what seems to be inequitable results ex post." In general, however, the formerly hostile judicial response has been replaced by a presumption of enforceability…. The move toward private ordering of marital relationships represents a major shift in the law's stance toward intimate relations, a shift that has been correlated empirically with an increased incidence of divorce.*[100]

Under Ethiopian law as well the freedom of the parties has been recognized by allowing them to sign contract of marriage before or on the date of their marriage. Here we have to distinguish between a contract of marriage and certificate of marriage. Certificate of marriage refers to the document to be drawn by the officer of civil status which shows the conclusion of marriage of the parties. On the other hand, as per article 42/1 of the RFC, a contract of marriage is a contract which is signed by the spouses before or on the date of their marriage for the purpose of regulating their personal relations and the pecuniary effect of their marriage.

Though the spouses are given the freedom to regulate the personal and pecuniary effect of their marriage, this freedom is not without limitation. As per article 42/3 of the RFC, the parties are not allowed to derogate from the mandatory provisions of the law. Moreover, the parties may not also impose an obligation on third parties.[101] The contract

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[100] Virginia Law Review [Vol. 84:1225]
[101] Article 46/1

of marriage is signed by the parties to regulate their relationship, and not the relationship between the spouses with third parties. Hence, this limitation was imposed in the law.

The Civil Code on Obligations provides four elements for the formation of a contract.[102] The first requirement is that of capacity. The contracting parties have to be capable of giving their consent which is sustainable at law. As a rule, a person has to be capable to enter into marriage. However, when it comes to judicially interdicted persons, article 15 of the RFC allows a JIP to conclude marriage after securing authorization from the court. Then the next point will be what will be the effect if the JIP wants to sign a contract of marriage as well?

Article 43 of the RFC provides an answer for this. The contract of marriage has to be entered into by the JIP himself or herself and that it also has to get the approval of the court. Unless it fulfills this condition, the contract will not be valid.

One other requirement provided by the Civil Code under article 1678 is that of form. In principle, parties are free to choose any form at the time of contracting. However, if the law provides for a special form, that special form has to be observed by the contracting parties. When we come to contract of marriage, article 44 of the RFC stipulates a special form to be observed by the parties. The contract of marriage has to be made in a written form and needs to be attested by four witnesses, two from each side. A contract of marriage is somehow peculiar than the other contracts owing to the nature of relationship existing between the contracting parties. As a result of the special nature of the relationship which exists between the spouses, it is hard to accept that there will be the free consent and willingness of the parties to sign the marriage contract. That is why the law requires the attestation of four witnesses who are also required to represent the husband and the wife. Apart from the requirement of attestation, the contract also has to be deposited with the court or the office of civil status.[103] One question which can be raised in relation to this last requirement is what will be the effect of not depositing the contract? Does it mean the contract will lose its validity?

[102] Look in to article 1678 of the Civil Code for further information.
[103] Article 45 of RFC

There are two views reflected in respect of this issue. The first one tends to favor the assertion that the contract of marriage, unless deposited with the office of civil status or the court, will lose its validity. While the second position is that the contract will have binding effect as between the parties, but not as regards third parties.[104] The second line of argument is based on the rationale for the requirement of deposit. The reason for requiring the deposit of the contract is to make it available for third parties so that they will take precautions. Hence, the failure to deposit the document should not make the document to lose its validity; rather it will not have effect on third parties.

After looking into the rationale for depositing the contract and the fact that article 45 does not attach any consequence for the failure, one tends to favor the second line of argument, especially when we compare article 45 with that of article 44. If the form requirement is not fulfilled, the law provides that the contract will not be valid, whereas this kind of stipulation is not present for article 45. If, the legislature planned to require deposit of the contract at the pain of losing its validity, it would state that, in the same manner as it did under article 44.[105]

The contract of marriage, if valid under the law, will govern the pecuniary effects as well as the personal relationship of the spouses. However, if the parties did not conclude a contract of marriage, or if the contract is not valid, the law intervenes and regulates their relationship. In the next section, the discussion will be on the personal and pecuniary effects of marriage as regulated by the law.

3.2 Personal effects of Marriage

Marriage produces special obligations between the husband and the wife as a result of their status as spouses. Under the 1960 Civil Code, some of the obligations were common to both spouses while some were peculiar to the husband (the duty to give protection to the wife-article 644) and some special to the wife (the duty of obedience-article 635/2). The 1995 FDRE Constitution guaranteed the equality of both spouses at the time of

[104] Mehari, 51-52
[105] Mehari, 52

entering into and during marriage. These provisions of the Civil Code are contrary to the Constitution. As a result, these conditions are abandoned under the new RFC. What we have under the RFC is obligations which are common to both spouses.

3.2.1 Respect, Support and Assistance

Both spouses owe respect, support and assistance to each other[106]. It is the first of all duties and it acts as the foundation as the object of marriage is the establishment of family which requires the assistance and respect of each other. Article 68 of the Family Code of the Philippines also incorporates more or less the same type of obligation. Under that article the husband and wife are obliged to observe mutual love, respect, and render mutual help and support. In some countries, the spouses are even required to take an oath before witness (the audience) saying that they will respect, honor, love, support and assist the other partner until death.[107] The duty to respect, support and assist each other is a fundamental duty on both spouses which serves as the foundation of the family. The duty is always to be observed irrespective of the health of the spouse.

3.2.2 Family Management

The other personal effect of marriage is related to the management of family and care of the children. The Constitution under article 34/1 recognizes the equal right of the spouses at the time of entering into, during marriage and at the time of divorce. By virtue of this article both spouses will have equal right in all aspects, including the management of the family. In line with this assertion of the Constitution, article 50 of the RFC reflects the equal right of both spouses in te management of the family. Moreover, the spouses are required to cooperate in protecting the security and interest of the family.

Guiding children to be responsible citizens of the society is one of the obligations of the parents towards their children. In this respect, article 50/2 of the RFC requires both spouses to cooperate in the bringing up and ensuring the good behavior and education of the children. Since the parents are the joint custodians of their children, the responsibility

[106] Article 49 RFC
[107] Mehari, 55

in relation to the education, health and behavior o the children is to be shared jointly. However, if one of the spouses is under disability, absent or abandons the family, or is away, the responsibility to manage the family rests upon the other spouse. Hence, if, for instance, one of the spouses is away from home for education or work, the responsibility of managing the family and bringing up the children rests upon the spouse who stayed at home.

One thing which will be point of discussion in relation to family management is the case of children from previous marriage. In this regard, article 52 RFC provides the exclusive right of each parent to make decision in matters concerning the upbringing of children whom that parent had before the marriage.

3.2.3 Cohabitation

The other fundamental obligation of the spouses is the duty to cohabit.[108] One of the purposes of formation of marriage is to establish life in common. If the duty of cohabitation is not fulfilled, the union of the spouses is destroyed.[109] The obligation of living together includes the conjugal duty. 'The jurisprudence holds that the unjustifiable refusal to have sexual relations with the spouse constitutes a violation of the obligations of marriage.'[110] The RFC also requires the spouses to have sexual relations normal in marriage unless these relations involve a risk of seriously prejudicing their health. As a result of this obligation, one cannot talk of marital rape under the Ethiopian law.

One important outcome of this obligation is the determination of residence of the spouses. Who will determine the common residence of the spouses?

In earlier times, the Civil Code gives the right of determining the common residence to the husband.[111] It is only when the residence is established in a manner manifestly abusive or contrary to the contract of marriage that the wife may voice her concern to the family arbitrators. This provision obviously is against the constitutional right of the wife which

[108] Article 53 RFC
[109] Planiol, 514
[110] Planiol, 514-515
[111] Article 641 of the Civil Code

guarantees the equality of both spouses at the time of entering marriage, during marriage and at the time of divorce. As a result, the RFC under article 54 gave both spouses equal say on determining the common residence. Hence, currently both the husband and wife have equal right on determining their common abode. What if the spouses could not reach to agreement?

The Family Code of the Philippines also entails the same obligation on the spouses. Article 69 of the code gave both spouses the right to fix the family domicile. If, however, there is disagreement, the court may intervene and make the decision for them. When we come to the RFC, it does not particularly address this issue. However, if the spouses have differences on this matter, it can be referred to family arbitrators as it can be considered as dispute arising out of marriage.[112] However, if the parties request to dissolve the marriage on the ground of their disagreement, the petition is to be given to the court, and not to the arbitrators.

The duty of cohabitation is a conditional duty. 'It is conditional in the sense that it is subordinated to the accomplishment of all the obligations flowing from marriage.'[113] If one of the partners fails to perform his/her part of the duty, the other partner may require the cessation of the obligation to cohabit. In addition, one of the partners may have to leave for study or on the job. In such circumstances, the duty of cohabitation cannot be fulfilled. In view of these circumstances, article 55 of the RFC allows the parties to make agreement to live separately for a definite or indefinite period of time.

3.2.4 Duty of fidelity

From the moral point of view, the principal duty created by marriage is the duty of fidelity. In this respect article 56 of the RFC stipulates that both the husband and wife owe fidelity to each other. 'The duty of fidelity is not a duty of mere morality; rather it is sanctioned by positive law.'[114] Article 652 of the Criminal Code makes adultery a crime punishable upon complaint. In earlier times in some foreign countries several differences

[112] Article 118 RFC
[113] Planiol, 517
[114] Planiol, 518

were noted in the repression of adultery, depending on whether it is committed by the husband or the wife. In many instances the wife will be subjected to a stricter and rigorous punishment as compared to the husband. The reason given for such discrimination is that:

> *The adultery of a wife can have much more dangerous moral and physical consequences than that of the husband. When a husband has a mistress the children born of her do not enter the family. They remain strangers to his family. When the wife has a lover, if she has children, they will be the legitimate children of her husband. He may bring a suit in disavowal, but the proof necessary to drive out of the family the children who are not his, may often fail him….*[115]

3.3 Pecuniary Effects of Marriage

Marriage also affects the pecuniary relationship of the spouses. In discussing the pecuniary relationship of spouses, one major question which needs to be answered is 'who owns the family property?' There are several reasons as to why it is important to know who owns a particular piece of property in the marriage, some of which includes[116]:-

i. *If someone becomes bankrupt then all of their property falls into the hands of the trustee in bankruptcy. The property of the bankrupt's spouse or partner does not. It is therefore, necessary to know whether certain property belongs to the bankrupt person or their partner.*

ii. *If a third party wishes to purchase property it may be important to know who the owner is. Particularly when a house is to be sold, it is necessary to know who the owner of the house is so that he or she can sign the appropriate paperwork. There have been cases where husbands have sold the family home behind their wives' backs. In such cases it is*

[115] Planiol, 519
[116] Jonathan Herring, 118

important to know whether the wife had an interest in the property and, if so, whether the purchase is bound by her interest.

iii. *On the death of a family member it is important to know who owns what. So, if a wife left all her books to her brother in her will, it would be important to know which books were hers and which books belonged to her husband.*

iv. *Ownership of family property has important symbolic power. At one time the husband owned all of his wife's property. This reflected the fact that he was regarded as in control of all the family's affairs. It is arguable that if the law were to state that family property is jointly owned, this would reflect a principle of equality between spouses in marriage.*

For the above listed and other reasons, it is necessary to determine as to who the owner of a particular property is. As mentioned earlier, contract of marriages play a great role in determining such issues. However, the spouses may not draw a contract or the contract drawn may not be valid for different reasons. In such situations, the law will intervene. In this respect, the law should seek to track three aims. 'First, the law should produce as high a degree of certainty as possible. Secondly, the law should reflect the wishes and expectations of most couples. Thirdly, the law should be practical and easy to apply.'[117]

In the following subsection, a discussion will be made as to how the RFC governs the pecuniary relations of spouses.

3.3.1 Personal property

Marriage results in the unification of the spouses and not their property. As a result, the law recognizes the existence of personal property in marriage. Hence, the property which the spouses possess on the day of their marriage, or which they acquire after marriage by succession of donation, will remain their personal property.[118] In addition, if the spouses

[117] Jonathan Herring, 118
[118] Article 57 RFC

get property through either succession or donation, then that property will remainto be the personal property of the successor or donee.

In theory marriage is an institution which the spouses enter into for life long. The assumption is that the parties will remain married for several years to come. In such situations, there will be a probability of mixture of personal with common property. For instance, the husband may need to sell the car which he succeeded from his late father and buy a new one. Would the new car remainto be his personal property or would it change to common property?

In principle properties acquired by onerous title after marriage through the exchange of personal property will remainto be personal property of the spouses.[119]However, for this principle to work, the party claiming to retain the personal property has to apply for the declaration of the court of such facts. Failure to get the declaration has the effect of making the property common property. In the hypothetical case mentioned above, unless the husband seeks the approval of the court, the newly acquired car will be common property of the spouses.

One important thing that can be understood from the above discussions is that the mere fact of conclusion of marriage will not create common property regime. There is the possibility of retaining and having personal property. Then which property will be considered as the common property of the spouses? In the next section, this question will be answered.

3.3.2 Common Property of Spouses

The notion of community of property interest between the husband and wife has had a long and interesting history. Traces of this idea are found in Babylonian legislation over 4,000 years ago, as well as in ancient Egypt and more modern Greece. There is no evidence, however, of any connection between these ancient vestiges and the system as we know it. Neither shall we find its beginnings in the

[119] Article 58 RFC

Roman law. The origin of the system seems rather to lie in the customs of certain Germanic tribes. The migration of these tribes throughput Western Europe were very extensive and resulted in widespread diffusion of the community idea. Thus, the Franks introduced it into northern France and the Goths into Spain where distinct evidences of the community appear in the second Visigothic code in the 7th century.[120]

The concept of common property of spouses is also incorporated under the 19960 Civil Code well as the RFC. The first category of property which is considered as common property is the income of the spouses. The sources of the income can be three: personal efforts of the spouses, meaning the income acquired through employment, income derived from the common property, or thirdly, income derived from personal property. Irrespective of its source, income is the common property of both spouses. Income of the spouses is made common property because it is the means of living of the spouses themselves as well as the children.[121] In relation to income derived from the property of the spouses (personal and common) the argument raised is the risk of not being able to cover the cost of family; moreover, it is also related with the obligation of the spouses to cooperate for protecting the security and interest of the family. In addition to this, as far as the income from personal property is concerned, there is a belief that the other spouse has contributed to the up keeping of the property and hence the generation of income. As a result, the income is made common property.

In light of the above discussion, do you think pension benefit is a common property?

The major practical problem concerning income of spouses is the pension. Would pension be considered as common property of spouses? In an attempt to give an answer to this, Wondewossen had tried to see the practice of the courts in light of the pension law of the country. The relevant part of the article is reproduced here[122]:-

[120] M.R. Kirkwood, (1950), Historical background and objectives of the law of community property in the Pacific Coast States, selected essays in Family law the foundation press, Brooklyn, pp 514-515

[121] Dr. Kifle, 91

There is a split between judges as to whether the retirement pension is a common marital property or not. The federal first instance court, in Civil File no 3361 ruled that a retirement pension is the personal right of the one who is employed in the public service and rejected the claim of a wife to be awarded part of the pension, in file no 767/93, the same court reached the same conclusion, arguing that the source of the pension was the respondent's employment in the public service. The employment existed before the petitioner and the respondent concluded marriage. As such, the court rejected the petitioner's claim to part of the retirement pension attributable to the contributions made by the ex-spouse during the 14 years of their marriage….

Retirement plans differ depending on who pays for the plan and how benefits are determined. One is a pension plan system where both the employee and the employer contribute to the pension fund. The other is a system where only the employer deposits to the pension fund. Ethiopia does not have the latter kind of pension plan. The public servant's proclamation No. 345/2003 requires both the public servant and the employer to contribute to the Civil Service Fund.

In some jurisdictions that have contributory plans, the employee is entitled to receive what he has contributed even if he quits participating in the plan by terminating his relation with the employer. So, what the employee contributes in such pension plans vests immediately.

However, the employee's interest in the amount attributable to the employer's contributions may not vest until the employee has worked for a definite period of time.

One has to note the difference between vested pension rights and matured pension rights. When a pension benefit is vested but not matures, an employee is absolutely entitled to benefits, though he is not entitled to actual payments until future date. According to Ethiopian pension law, neither the employee's not the employer's contribution is vested before the employee has provided service for certain period of time in the public office.

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[122] Wondwessen Demissie, Implementation Problems of the Revised Family Code, Berchi issue no. 7

Under article 21/3 of the Public Servant's Pension proclamation, a public servant who leaves his work before completing ten years is not entitled to what he contributed. His contribution is vested and hence can be collected if he resigns after working for 10 years or more. As regards the contribution made by the employer, contributions are said to be vested if the employee is entitled to a retirement pension for life….
Generally the amount to be deposited to the Civil Service Fund, from which retirement pensions are paid, is ten percent of the salary of he public servant. The public servant contributes four percent, and the remaining six percent is contributed by the employer.

In so far as the employee contribution is made during the marriage, there is no doubt that the four percent contributed each month is a marital property. This is because the contributed money is part of the salary, which is common property of spouses. The employer's contribution is also a marital property to the extent it was made during the marriage and that such contributions made because the employee spouse was providing service to the public. Though not salary, the contribution made by the employer is an employment-related benefit that should be treated as common property lie salary, which is perhaps the primary employment-related benefit. Therefore, as ling as they are made during the marriage, it is the contribution made by both the public servant and the employer which should be treated as marital property.

The second category of property which is considered as common property of the spouses is property acquired during marriage by an onerous title.[123] Hence, all property which has been purchased by the spouses ore either of them during their marriage will be considered as common property. This article should be read conjointly with article 58/2 of the RFC. As a result, it has to be fist checked whether that particular property has been declared as personal property of one of the spouses by the court. In addition to this category of

[123] Article 62/2 RFC

property, property donated or bequeathed conjointly to the spouses will also be considered as common property.

One important thing which needs to be considered in relation to community property is the legal presumption provided by the law. Article 63 of the RFC basically provides a presumption in favor of community property. Meaning, all property in the marriage will be considered as the common property, unless the other spouse proves otherwise. As Dr. Kifle succinctly elaborates it:[124]-

> የጋብቻ አንዱ አላማ ባልና ሚስትን በንብረት በማገናኘት ለራሳቸው ሆነ ለልጆቻቸው ቅርስ ማበጀት በመሆኑ ከጋብቻ በፊትም ሆነ ከጋብቻ በኋላ የተገኘ ወይም የሚገኝ ንብረት ሁሉ የባልና ሚስት የጋራ ንብረት እንደሆነ የህግ ግምት ተጥሏል። ይህም ግምት ተፈጻሚ የሚሆነው ተጋቢዎቹ ንብረታቸውን በተመለከተ ውል ያላደረጉ ወይም ውሉ በህግ የማይጸና ከሆነ ብቻ ነው፡ ይህ ድንጋጌ ቀደም ሲል ከተመለከተውና ስለተጋቢዎች የግል ሀብት ከሚናገረው የህጉ ክፍል ጋር የሚጋጭ አይደለም ወይ? የሚል ጥያቄ ሊነሳ ይችላል። በመሰረቱ [ስለ የግል ንብረት] የተጻፈው የተጋቢዎች የግል ንብረት የሚባለው ከተጋቢዎቹ የጋራ ንብረት ተብሎ በህግ ከተነገረው የተለየ መሆኑን ለማመልከት ነው። የህጉ አላማ ግልጽ ነው፡ ተጋቢዎች ንብረታቸውን በተመለከተ ስምምነት ለማደረግ ይችላሉ ይህ ስምምነት ሳይደረግ ቢቀር ወይም ስምምነቱ በህግ የማይጸና ቢሆን ግን በተጋቢዎቹ እጅ ያሉ ንብረቶች ሁሉ የባልና ሚስት የጋራ ንብረት እንደሆኑ ነው የሚቆጠሩት። ንብረቱ የጋራ ሳይሆን የግሌ ነው የሚል ተጋቢ ካለ ንብረቱ የግሉ መሆኑን በማስረዳት በህጉ የተመሰረተውን ግምት እንዲያስተባብል ህጉ ይፈቅድለታል። ከመደበኛው የማስረጃ ህግ አቀራረብ ዘይቤ በመለየት የማስረዳቱ ሃላፊነት የተጣለው በጠያቂው ላይ ሳይሆን በተከላካዩ ማለትም ንብረቱ የግል ነው በሚለው ተጋቢ ወይም ይህ ተጋቢ የሞተ እንደሆነ በወራሾቹ ላይ ነው። ተጋቢው ወይም ወራሾቹ የሚያስረዱትም አንድም በህጉ መሰረት ንብረቱ ከጋብቻ በፊት የእሱ መሆኑን አለበለዚያም የግል ንብረቱን ሽጦ በተገኘው ገንዘብ አከራካሪውን ንብረት የገዛ መሆኑን ይህንንም ሁኔታ ለፍ/ቤቱ አሳውቆ ንብረቱ የግሉ መሆኑ የተረጋጠለት መሆኑን በመ Ú ረሻም ንብረቱ በውርስ ወይም በስጦታ ለግሉ የተሰጠው መሆኑን ማስረጃ በማቅረብ ነው።

One basic question which could be raised in relation to this legal presumption is whether the presumption holds water in a situation where the property is registered in the name of one of the spouses only. Proving ownership of some types of property like vehicles and house need license. And in many circumstances a license is issued in the name of only one of the spouses, even if the property is obtained during the marriage. This will have a

[124] ደ/ር ክፍሌ ፣ 95-96

negative impact on the right of the other spouse. Various disputes resulted from this during the time when the 1960 Civil Code was applicable, and the views of the courts were diverse. In order to rectify this, the RFC provides a qualification for the presumption. Hence, the legal presumption would still be applicable even if the property is registered in the name of only one spouse.

In this connection a question may be asked as to the fate of a house whose construction was finalized after the conclusion of marriage, but the land on which to construct the house was obtained prior to marriage by one of the spouses. Would this be considered a personal or common property?

In the case between heirs of w/ro Amelework Gelete vs. Ato Bishaw Ashame et al[125]., the Federal first instance court after establishing the fact that the house in dispute was common property, proceeded in stating that the land on which the house was built belong to the deceased. Then the court gave an order for the separate estimation of the price of the land and the house and decided that only the proceeds from the sale of the house is subject to partition. As such, the claimant (now respondents) would be required to pay only half of the estimated price of the house without considering the price of the land on which the house was built. The case was brought to the Cassation division of the Federal Supreme court. The court in its reasoning stated that private ownership of urban land has been abolished by virtue of Proclamation 47/67, and land is the property of the state. Hence, there cannot be separate estimation of the price of the house and the land. With this reasoning the court repealed the decisions of the lower courts.

In another case, between Ato Mekonen belachew vs. w/ro Alemitu Adem,[126] the construction of the house in dispute began few months before the conclusion of the marriage. The respondent obtained the land as a result of being a member of a cooperative society and she also took loan for construction. However, the loan was paid after the marriage and through the claimant. The FFIC as well as the FHC held that since the construction of the house began prior to the conclusion of marriage, the house is the personal property of the wife and hence the claimant should be refunded the amount

[125] Cassation File no 19479
[126] Cassation file no 25005

which he had spent on the house. The Cassation court on the other hand held that since the house got its current structure as a house, and since the loan was paid from the income of the spouses, which itself is a common property, after the conclusion of the marriage, the house is the common property of the spouses. Hence, as per the decision, what matters is not the time in which the land was acquired, rather whether there was sharing of burden in the construction of the house.

3.3.3 Management of Personal and Common Property of Spouses

The other important issue which needs to be discussed in relation to personal and common property is the management of such property. Who has the power to administer and manage the personal property of the spouse? What about the common property? This section addresses these questions.

As the law clearly stipulates under article 59, each spouse is to administer his respective personal property. However, through the contract of marriage, administration of the property may be entrusted on the other spouse. Moreover, there is also the possibility of assigning the other spouse through the contract of agency.[127] One question which needs to be raised here is whether the contract of agency concluded between the spouses require the approval of the court as per the requirement under article 73 of the code. This article requires contracts entered into between spouses during marriage to be approved by the court on pain of invalidation. The assumption under article 73 is that considering the special nature of the relationship existing between the two spouses, they may not freely consent to the contract. Then, should we extend this reasoning also to contracts of agency entered between the spouses for the administration of the personal property of one of the spouses? In this respect Ato Mehari has the following to say:[128]

> የውክልና ውል የራሱ የሆኑ ልዩ ባህርያት እንዳሉት ይታወቃል። ወካዩ ለተወካዩ ሰጥቶት የነበረውን ስልጣን መልሶ መውሰድ ይችላል። ተወካዩ በወካዩ ስምና ለወካዩ ጥቅም የሚሰራ ሲሆን ሃላፊነትም የሚያስከትል ድርጊት ቢፈጽም ከውክልና ስልጣኑ እስካላለፈ ድረስ ወካዩ የሚጠየቅበት ይሆናል። በመሆኑም ይህን የውክልና ውል ልዩ ባህርይ ግምት ውስጥ በማስገባት አንደልዩ ሁኔታ የፍ/ቤት ይሁንታ ሳያስፈልገው በተጋቢዎቹ ስምምነት ብቻ የሚከናወን ይሆናል።

[127] Article 61 RFC
[128] Mehari, 66-67

Hence, the contract of agency entered in between the spouses for the administration of personal property of one of them will not require, unlike other contracts, the approval of the court.

As far as the management of income of the spouses is concerned, each spouse is given the mandate to receive his earnings.[129] This power of the spouses to receive their respective income can be transferred for the other spouse. However, in such situations the receiving spouse has the obligation to give account. The law also recognizes the possibility of having joint bank account in which the spouses may deposit the income.

In respect of other common property, article 35/7 of the constitution recognizes the fact that women have equal rights with men with respect to the administration of property. This includes the right to administer the marital property. In line with this provision of the constitution, the RFC stipulates that the common property is to be administered jointly by the spouses. However, in cases where one of the spouses is declared incapable or for any of the other reasons stated under article 66/2, the other spouse alone will administer the common property. The spouse who administers the common property alone is duty bound to inform the other spouse about the administration.

One issue which can be raised in respect of common proeprty is the freedom of the spouses to dispose of the common property. Can the husband or the wife dispose of a common property without the knowledge of the other spouse?

Various cases have arisen in relation to this issue at different times. In one of the cases[130], the husband sold a car which is common property. However, due to his refusal to perform the contract, the buyer brought an action in the court. The wife also joined the case as an opposition claimant, saying that the sale contract was entered into without her knowledge and requested for the invalidation of the contract. The High Court rejected the arguments of the wife saying that since the car is registered in the name of only the husband, the buyer is not expected to know the existence of marriage. The Supreme Court, after asking the wife as to her grounds for opposing the performance of the contract, held, by

[129] Article 64/1 RFC
[130] Civil Appeal No. 367/74

majority, that invalidating the contract will threaten the security of transaction. Hence, the claim of the wife was not accepted.

In this respect, the RFC has tried to take into account two interests: the need to ensure that common property is transferred to third parties with the knowledge and decision of the spouses, on the one hand and the need to have security of transaction, on the other hand.[131] Having this consideration in mind, the legislature has restricted the freedom of the spouses to transact with third parties, by requiring the existence of consent of both spouses for alienating any common property in any manner, be it by sale, donation, exchange or other.[132] The next question which can be raised here is 'what will be the fate of a contract which is concluded in violation of such stipulation?'

Article 1808 of the Civil Code provides for the grounds of invalidation of a contract and as to who may request for the invalidation of the contract. As such, it is only a party to a particular contract who may request invalidation. The case of contracts entered into in violation of the above mentioned stipulations of the RFC are somehow peculiar in the sense the invalidation is being requested by a spouse who was not party of the contract. This obviously is not what is envisaged in article 1808 of the Civil Code. Article 69 of the RFC by way of exception, allows the spouse without whose consent the contract was entered to request for the revocation (invalidation) of the contract. Hence, it can be concluded that this provision of the RFC provides for an additional ground for invalidation of a contract.[133] However, it should also be noted that the right of the spouse to request for invalidation has a period of limitation. The application has to be made within six months in which the other spouse came to know the existence of the contract or in other cases within two years after the obligation has been entered.[134] By providing the opportunity to apply for invalidation on the one hand and limiting the time framework

[131] Mehari, 78

[132] If the property in question is an immovable property, there is an outright prohibition of such common property without the knowledge of the other spouse, irrespective of the value of the property. In cases of movable property or securities registered in the name of both spouses, the prohibition applies only if the value of the good concerned is above five hundred Ethiopian birr. On the other hand, if the mode of transfer is donation, the value of the good should not exceed one Ethiopian hundred birr. Moreover, borrowing or lending money exceeding five hundred Ethiopian birr or standing surety for such amount also requires the permission of the other spouse. For further information, see article 68 of the RFC

[133] Mehari, 78

[134] Article 69/2 RFC

in which the application may be made, on the other, the law has tried to strike a compromise on the two competing interests of the spouse and the security of transaction.

3.3.4 Debts of Spouses

In their day to day life, the spouses may incur different debts either personally or for the benefit of the family. The right of third parties on the property of the spouses as a means of payment for the debt varies with the type of debt incurred. Generally, debts of spouses may be classified either as personal debt or debt incurred in the interest of the household. If the debt is a personal debt incurred by one of the spouses, third parties will first proceed on the personal property of the indebted spouse. However, if the indebted spouse does not have personal property, the debt will be recovered from the common property of the spouses.[135] The reason for allowing recovery of personal debt from common property seems to be the need to give creditors wider right.[136] However, in this circumstance the right of the other spouse should also be considered. In this respect, Ato Mehari had the following to say

> በእርግጥ የግል እዳ ከጋራ ሃብት ከተከፈለ በ`ላ ጋብቻው በፍቺ ከፈረሰ በንብረት ክፍፍሉ ጊዜ ይህንን ግምት ውስጥ በማስገባት ከጋረ ሃብቱ ለእዳው የተከፈለውን መጠን የሌላውን ወገን ድርሻ ከባለእዳው ድርሻ በካሳ መልክ እንዲከፈለው የመጠየቅ መብት ማመቻቸት ይገባ ይሆናል።ይህም በተሻሻለው ህግ አንቀጽ 87 በተመለከተው ስር ይወድቅ ይሆናል የሚል እምነት አለ።

On the other hand, debts incurred in the interest of the household are considered as joint and several debts and will primarily be recovered from the common property of the spouses. [137] Here, if the common property is not enough to cover the debt, the creditor may proceed to the personal property of either of the spouses. Since the spouses have the obligation to support each other and contribute to the household during their marriage,

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[135] Article 70/1 RFC

[136] Mehari, 81

[137] Debts incurred in the interest of the household include debts incurred to fulfill the livelihood of the spouses and their children, debts incurred in order to fulfill an obligation of maintenance to which both he spouses or one of them is bound and other debts which are acknowledged to be such by the court at the request of either of the spouses o the creditor. See article 71 of the RFC

debts incurred for the household are made recoverable even from the personal property of either of the spouses.

Review Questions

1. What do you think is the difference between contract of marriage and certificate of marriage? Compare article 604/3 of the Civil Code and article 28/2 as well as article 42 RFC and 625 of the Civil Code

2. Discuss the personal effects of marriage.

3. What is the difference between personal and common property? Can a spouse obtain personal property while in the marital union?

Chapter Four: Proof of Marriage

Introduction

Family is the basic component of any society. Marriage is one of the means in which this basic element of the society may be established. Through the institution of marriage, the family which is the fundamental unit of the society is founded. As a result, marriage entails its own consequences and the spouses who are joined by marital bond assume different obligations towards each other. As a result, any person who can show the existence of marital bond may request the fulfillment of these obligations. One important question that can be raised in this relation is how does one prove the existence of marriage? As Planiol clearly stipulated, if a person desires to draw a juridical consequence from the existence of a marriage, he must begin by proving its

celebration.[138] However, there may also be other possible ways of proving the existence of marriage. In this chapter you will learn the different available means on the basis of which one can prove the existence of this institution.

Objectives

After completing this chapter, students are expected to:

- analyze international legal instruments to which Ethiopia is a party and domestic legal instrument requiring the registration of marriage.
- discuss the need to register marriage.
- identify the modes of proof of conclusion of marriage.
- distinguish the difference between proving marriage by certificate of marriage and possession of status.

4.1 Registration of Marriage

The Revised Family Code declares mandatorily that marriage shall be registered by a competent officer of civil status. Such registration is to be conducted irrespective of the form of celebration of marriage.[139] The officer of civil status who has celebrated the marriage has also the obligation to issue a certificate of marriage to the spouses. This requirement of the RFC is in line with the country's international commitment. Article 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, to which Ethiopia is a party, mandates the registration of marriage in an appropriate official register by the competent authority. In addition to this, one of the principles which need to be given effect to by taking necessary legislative or other

[138] Planiol, 497
[139] Article 29/1 RFC

measures by virtue of article 1 of the Recommendation on consent to marriage, minimum age of marriage and registration of marriage is registration of marriages.[140]

When we come to the particulars of the record of marriage, article 30 of the RFC requires the record to show the full names, dates and places of birth, of each of the spouses and their witnesses including their addresses. This indicates that some of the purposes of issuing the certificate are to control the fulfillment of essential conditions of marriage, to protect the family institution and for evidentiary purpose. One thing that should be noted here is the fact that the effects of marriage begins at the time of conclusion of marriage and not at the time of issuance of marriage certificate. The law accommodates a situation in which the certificate might be issued at a latter time. In such circumstances, the effect of marriage dates back to the conclusion of marriage and not to the date of issuance of the certificate.

In relation to the requirement of registration of marriage, article 321 stipulates for the establishment of necessary institutions in areas where the code has application, within six months from the coming into force of the code. However, this institution is not yet established.[141] However, until the establishment of the Office of Civil Status, article 321/2 gives the mandate for appropriate authorities of the administration to issue certificate of marriage.

4.2 Proof of Marriage by Certificate of Marriage

The law considers certificate of marriage as the primary means of proving marriage. As indicated in the preceding section, the officer of civil status has to register all marriages either at the time of celebration or even after the celebration. The obligation of the officer goes to the extent to register marriage of his own motion whenever he becomes aware of the marriage.[142] One way or another, the certificate issued by the officer serves as a primary means of proving the celebration of marriage.

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[140] See article 1 of the UN Recommendation on Consent to Marriage, Minimum age of Marriage and Registration of marriages, General Assembly resolution 2018 (XX)

[141] ፊሊዶስ አይናለም፣ (1997 አ.ም)፤ ጋብቻ ስለመፈጸሙ በትዳር ሁኔታ ስለማረጋገጥ፡ ህጉና አተገባበሩ፤ህጋዊነት፤ቅጽ 3 ቁጥር 1, ገጽ 36

[142] Article 29 RFC

The documentary evidence can be relied on by parties who wish to benefit from the effects of marriage. That is to say, the availability of the evidence is not limited to the spouses only. As Planiol puts it

> *'The rule is general, in the sense that it is applicable to all persons. It is not restricted to the spouses. It applies to third parties and particularly to the children of the marriage….The law maker imposes the burden of producing an act of civil status upon any person who sets up in his own behalf a civil effect of marriage…. The law is also general in that it excludes all means of proof other than the act of civil status. No kind of written instrument can take its place. As a matter of fact there is no other kind of written instrument whose purport id to attest the fact of celebration of marriage. Neither the publication nor the contract of marriage proves that the intended marriage has taken place. A fortiori, oral proof is not admissible.'*[143]

Hence, the certificate of marriage can be relied upon by those persons who seek to get some benefit from the conclusion of marriage. This includes the spouses themselves as well as the children. The certificate of marriage proves the fact of celebration of marriage. That is why other documents like the contract of marriage are excluded. However, this is treated somehow differently under the Revised Oromiya Family Code. Under this code, marriage certificate serves as primary means of proving marriage. However, article 93/1 of the code allows proving conclusion of marriage by adducing any credible evidence.

As discussed above, civil marriages will be registered at the time of celebration whereas the registration or religious and customary marriages is to be performed after their celebration either upon the application of the spouses or upon the officer's own motion. 'However, due to the fact that there is no specific law on registration coupled with lack of awareness among the society, it is hard to say that the registration of religious and

[143] Planiol, 498

customary marriages has been undertaken.'[144] This will have a negative impact on the judicial system as far as proof of existence of marriage is concerned.

4.3 Proof of Marriage by Possession of Status

What does possession of status mean?

In many circumstances, marriages may not be registered with the appropriate organ for various reasons. There are also some exceptional circumstances in which the marriage certificate duly drawn may be lost or destroyed. In such circumstances, the law, by way of exception, allows proving marriage by possession of status.

Planiol defines possession of status as the fact that a man and a woman who live together are deemed to be married by those who know them.[145] More or less the same definition is given under article 96 of the RFC. This article states 'A man and a woman are deemed to have the possession of status of spouses when they mutually consider themselves and live as spouses and when they are considered and treated as such by their family and the community.' So, in proving the existence of marriage through the possession of status, the opinions of the spouses themselves, their family and the community is pertinent. The major question which needs to be considered here is as to what is to be proved. Should there be a strict interpretation of article 96 and not bother about the celebration of marriage? Or should the possession of status prove that the alleged marriage was celebrated in one of the three forms provided under the RFC?

In relation to this, we may find two views.

'The first view advocates for a strict interpretation of the definition provision of article 96 and argues against the requirement of proving the celebration of marriage. According to this view, if one who alleges the existence of marriage is allowed to prove it by possession of status; he or she needs to prove two facts. The first fact is concerned with how a man and a woman treat each other. The two should consider themselves and live as

[144] ፊሊዶስ አይናለም፣ (1997 አ.ም)፤ ጋብቻ ስለመፈጸሙ በትዳር ሁኔታ ስለማረጋገጥ፡ ህጉና አተገባበሩ፤ህጋዊነት፤ቅጽ 3 ቁጥር 1, ገጽ, 40

[145] Planiol,

spouses. The second point of concern is how the external community and the families of the alleged spouses view the relationship. Both the community and the family should consider the relationship to be a marriage and treat the two as husband and wife.'[146]

The view of families and community is to a greater extent influenced by the religion and culture followed. On this point, Ato Philipos has the following to say[147]:

> *'Family treatment may vary with variation in culture and religion. According to the family law, family relation refers to both consanguinity and affinity relations, and family acceptance is one requirement for proof of marriage by possession of status. The law never admits any individual as competent and relevant witness other than the family and community members. The fact to be proved by the family has also limitation. The limitation is the family shall testify not the possession of status or their living together as spouses, but they must testify their acceptance as spouses. Logically, it is believed that the family will commonly accept the parties as spouses because of their participation in marriage ceremony, seeing observable evidences about conclusion of marriage, and etc.' [translated]*

The second view advocates for the need to show "Celebration of marriage". The requirement under this view is that a person who would like to prove the existence of marriage has to prove that the marriage was celebrated in one of the three forms of marriage provided under the RFC. The main point here is, if the fact of celebration of marriage is not required for proving marriage by possession of status, it will have the effect of confusing marriage with irregular union. Moreover, as can be clearly inferred from the title of the chapter for proof of marriage and its article 95 the fact to be proved by possession of status is conclusion of marriage. The basic issue that needs to be proved in courts is whether there is conclusion of marriage or not; hence, the basic issue should not be about existence or non-existence of possession of status of spouses.[148] This second

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[146] Wondwossen Demissie, (2007), Implementation Problems of the Revised family Code, Berchi issue no. 6, page 3

[147] ፊሊጶስ አይናለም፣ (1997 አ.ም)፤ ጋብቻ ስለመፈጸሙ በትዳር ሁኔታ ስለማረጋገጥ፡ ህጉና አተገባበሩ፤ህጋዊነት፤ቅጽ 3 ቁጥር 1, ገጽ, 45

[148] Id., 42

view is also reflected by Ato Mehari. According to him, to prove existence of marriage by possession of status, the parties have to show that the marriage was concluded following one of the three modes of celebration of marriage.[149]

This second view is also reflected in the Tigray Family Code as well as the Revised Oromiya Family Code. Article 123/2 of the Tigray Family Code, in respect of who may be witnesses to prove possession of status, requires the witnesses to be those persons who were present at the time of celebration of marriage. This requirement of the law shows that the witnesses are supposed to prove the fact of celebration of marriage.
The Revised Oromiya Family Code, on the other hand, under article 93/2 states that if a person can prove that marriage is concluded, the court will take presumption of conclusion of marriage. What is required by the law is proving the conclusion of marriage. The law also provides for three ways by which marriage is concluded. So, proving marriage under article 93/2 means proving that the marriage was celebrated by one of the three modes of conclusion of marriage.

The directive which was issued by the Supreme Court in 1981 EC also reflects the same position. Article 3/1 of the directive stipulates that proof by possession of status is used to prove the celebration of marriage in one of the three modes of celebration of marriage. Hence, what is expected of the witnesses is to show to the court that the parties treat themselves as spouses, that the family and other persons treat them as married and that they know of the celebration of the marriage at some point in time.[150]

When we look at the practices of courts, these two different views are reflected in the decisions. In the case between w/ro Abrehet Akele vs. Social Security Authority (SSA), the petitioner W/ro Abrehet prayed the court to rule as to the existence of marriage between her and the deceased so that she would be lawfully entitled to claim a widow's pension allowance from the respondent SSA. As the certificate of marriage was not available, she also requested the court to prove the existence of marriage through possession of status. After hearing the witnesses, the court ruled in her favor. The

[149] Mehari, 119
[150] Higina fithe (1981 EC), vol. 1 no.2, 34

respondent appealed from this decision to the high court saying that since the witnesses did not testify as to the time, place etc of celebration of marriage, it cannot be concluded that there was marriage between the deceased and the claimant. However, this argument of the appellant was not accepted by the High Court. The High Court in its reasoning stated that in order to establish possession of status of spouses, article 96 of the RFC requires that a man and a woman treat each other as husband and wife, and that they are treated as such by their families and the community. Hence, the witnesses are not expected to testify as to the celebration of marriage

In the case between Wro Wagaye vs. Wrt Etsub[151] the claimant brought an action to the FFIC asking the court to pronounce her as the wife of the late Shaleka Hailemickael. She requested documents to be produced from the work place of the deceased and the kebele administration, which will show that she was registered as the wife. The FFIC after looking into the evidence produced held that the claimant has not shown the conclusion of marriage, so the relationship is one of irregular union. The High Court, on the other hand, held that the witnesses testified to the existence of possession of status of spouses as per the requirement of article 96 of the RFC, it can be said that the claimant (now appellant) is the wife of the deceased. This decision of the High Court was reversed by the Federal Supreme Court. The Supreme Court in its holding stated that the witnesses testified as to the existence of possession of status of spouses, and not to the conclusion of marriage between the two. One cannot reach to a conclusion as to the existence of marriage without ascertaining the celebration of marriage, because doing so would confuse marriage with irregular union.

Review Questions

1. Why do you think is there is a need to prove existence of marriage?

2. How is existence of marriage to be proved?

3. What is a claimant supposed to prove by possession of status; Having the status of married person or celebration of marriage?

[151] Wrt Etsub Hailemichael vs. Wro Wagaye Demisse, Civil File no. 8872

Chapter Five: Dissolution of Marriage

Introduction

Marriage ideally is a life mateship of a man and a woman based upon mutual and continued choice and affection. However, the ideal is not always realized in practice, and marriages dissolve and disintegrate for different reasons. ‘The dissolution of marriage is the breaking of the conjugal bond and the cessation of the effect the union of the spouses

produce either as regards them or as regards third parties.'[152] There are various reasons for the dissolution of marriage. These causes can be classified into two: operation of the law and act of the parties i.e., divorce. In the next sections, you will learn about the various grounds for the dissolution of marital union as well as the consequences of dissolution.

Objectives

After Completing this chapter, students should be able to:

- distinguish the different grounds of dissolution of marriage
- understand the development of divorce in selected legal systems
- identify the reasons for adopting a no fault divorce system
- discuss the effect of dissolution of marriage

5.1. Grounds of Dissolution

As mentioned above, most of the time marriages are concluded to last forever. However, the reality shows us otherwise and many reasons can be enumerated for the dissolution of marriages. Generally, we may classify the reasons into operation of the law and acts of the parties.

5.1.1 Dissolution by Operation of the Law

What grounds are considered as causes of dissolution of marriage by operation of the law?

The first ground for the dissolution of marriage as provided under article 75/a of the RFC is the death of one of the spouses, which brings the marital conjugal to an end. Apart from actual death of one of the spouses, the law also recognizes declaration of absence as another ground for dissolution. 'Absence, as a legal institution, is justified by the

[152] Planiol, 625

necessity of dealing with situations where a person cannot be considered as being dead, but where it is likely that such is the case.'[153] The manner and condition in which absence of a person will be declared is dealt under the Civil Code. One of the effects of declaration of absence, as stipulated under article 163 of the Code is the dissolution of marriage of the absentee. So, the reading of articles 75 RFC coupled with article 163 of the Civil Code will lead us to conclude that declaration of absence is a cause for dissolution of marriage.

The other ground for dissolution of marriage is the non fulfillment of the essential conditions of marriage. As discussed in chapter two, the law has put in place various conditions which need to be fulfilled for the conclusion of a valid marriage. If, however, the marriage is concluded without the observance of one or more of these essential conditions, the marriage will be dissolved by the order of the court.[154]

Apart from these three causes for dissolution of marriage by operation of the law, the actions of the parties could also be a reason for dissolution. In the next section the development of divorce laws in different countries as well as Ethiopia and the different types of divorce as well as the consequences will be discussed.

5.1.2 Divorce

What do you understand by the term divorce? Discuss the development of divorce laws in few selected countries.

Divorce has been defined by Planiol as the rupture of a valid marriage during the life of the two spouses.[155] Currently, divorce is an extremely common legal ac;, however, this is not always so. Many of the early laws of countries were influenced by the Catholic

[153] Catherine O'Donovan, (1969), the Law of physical persons, 125
[154] Article 75/b RFC
[155] Planiol, 630

Church and in many instances divorce was not allowed. For instance, prior to 1857, divorce was not allowed in England for any ground. As Friedman noted:[156]

> *'England was a "divorceless society,"…until 1857. There was no …judicial divorce. The very wealth might squeeze a bill of divorce out of parliament. Between 1800 and 1836 there were, on average, three of these a year. For the rest, unhappy husbands and wives had to be satisfied with annulment (no easy matter), or divorce from bed and board (a mensa et thoro), a form of legal separation which did not entitle either spouse to marry again…'*

Jonathan Herring further elaborated the situation in England back then in the following manner:[157]

> *Prior to 1857 the ecclesiastical (church) courts determined the law on divorce. This meant that although nullity decrees could be made, divorce was not available through the courts. The only form of divorce was by an Act of Parliament. This was a hugely expensive procedure that was only open for a few people. The Matrimonial Causes Act 1857 was the first Act to create an alternative to divorce by Act of the Parliament. The Act created a divorce procedure through the courts. However, there was a difference between the grounds available to a husband and to a wife. For example, a husband could rely on his wife's adultery, but a wife could only rely on a husband's adultery if there were aggravating circumstances (e.g. the adultery was incestuous or there was some 'unnatural offence'). The Matrimonial causes Act 1923 put the husband and wife in the same position-simple adultery was a ground for divorce for both. The grounds were extended further in the Matrimonial Causes Act 1937 to include cruelty, desertion or incurable insanity. The last ground was of particular significance because for the first time it recognized that a party could be divorced even though they have not behaved in a blameworthy way.'*

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[156] Friedman, L.M., A History of American Law, as cited by Ira Mark Ellman, Family Law cases, text, problems, 187

[157] Herring, 80-81

The situation that existed in England was also reflected in other countries. The laws of many countries at that time were very restrictive in the sense divorce was available for very few persons. However, the 19th century has witnessed an increase in the demand for a simpler way of divorce. Consequently, easy divorce laws grew out of the needs of the middle-class mass.[158] However, one should note here that though divorce was relatively easier when compared to earlier times, divorce was not fully liberalized. In this connection, Friedman observed the following:[159]

> *[Divorce] statutes were never simple, facilitative laws. To begin with, the law recognized no such thing as consensual divorce. It was in form an adversary lawsuit: plaintiff had to allege and prove "grounds" for divorce against defendant. In some states, only innocent plaintiffs were allowed to marry again. Guilty parties were left to stew in their juices…..*
>
> *The moral goals of divorce law were reflected in the statutory lists of "grounds." Adultery was always on the list. … Desertion was commonly included. Other grounds included fraud, impotence, conviction of a felony, or habitual drunkenness.*
>
> *The dramatic changes in divorce law in the early nineteenth century lend themselves to a standard kind of economic explanation based on property interests, the demands of a broad-based, active land market, the need for clear titles, and for devolution and disposition of property along rational lines.*

With change in time, the number of divorce in many countries has increased significantly. There were also pressures to adopt laws which will make divorce an easy task. In the twentieth century, the discussion changed from consensual divorce to no-fault divorce. 'No-fault goes beyond consensual divorce. Either partner can end a marriage simply by asserting that the marriage has broken down. The older laws did not recognize consensual divorce, let alone no-fault divorce. No-fault made divorce cheaper abolished

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[158] Ira Ellman, 189

[159] Lawrence M. Friedman, (1984), Rights of Passage: Divorce Law in Historical Perspective, *Oregon Law review*, Vol. 63, 653-655

the double standard and closed the gap between reality and appearance.'[160] Currently, many laws have adopted a no-fault divorce. 'The no fault divorce has as its major goal a reform in the grounds for divorce, supplemented by accompanying changes in the financial awards thought necessary to prevent considerations of marital misconduct from reappearing in another guise.'[161] In many legal systems, there has been much debate over whether there should be fault based or no-fault based divorce system. In that process many arguments were forwarded to defend the no-fault divorce. These arguments include:[162]

a) *'Empty Shell':- it has been maintained that if only spouse wishes to divorce there is little value in forcing the couple to stay married. There is no point in keeping 'empty shell' marriages alive. Making divorce available only on proof of fault does not lead to happier marriages, but to parties separating, although legally married, or to cantankerous divorce.*

b) *The 'right to divorce':- some argue that it is now a human right to divorce. Forcing someone to remain married against their wishes is an infringement of their right to marry or right to family life.*

c) *Bitterness: - a common complaint is that a fault-based system promotes bitterness. By focusing on the spouses' minds on the past and the unhappiness of the marriage and making these public it is argued that fault-based systems exacerbate the anger and frustration they feel towards each other.*

d) *The impossibility of allocating blame: - the law cannot really determine who was truly to blame for the break-up. There are practical difficulties in discovering the facts of the case, particularly as the husband and the wife*

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[160] Lawrence M. Friedman, (1984), Rights of Passage: Divorce Law in Historical Perspective, *Oregon Law Review*, Vol. 63, 664

[161] Herman Hill Kay, (1987), Equality and Difference: A Perspective on No-fault Divorce and its Aftermath, *Cincinnati Law Revie*w, vol.56 no. 1, 14

[162] Jonathan Herring, 101

are often the only two witnesses. But even if all the facts were known, the court may still not be in a position to allocate blame.

When we come to the development of divorce law in Ethiopia, Ato Phillipos has succinctly drawn the map in the following manner:[163]

የፍቺ አፈፃፀም ሥርዓት ከ *1952* ዓ.ም. የፍትሐብሔሩ የቤተሰብ ሕግ በፊት

ከ *14* ኛው ክፍለ ዘመን ጀምሮ እንደ መንፈሳዊና ሥጋዊ ሕግ ለማገልገሉ ታሪክ በመዘገበለት በአብዛኛው ምንጩ የክርስቲያን ሕግና ሥርዓት በሆነው ፍትሐ ነገሥት እንደ አጠቃላይ መርህ/ደንብ ፍቺን የሚከለክልና የሚያወግዝ የነበረ ሲሆን በልዩ ሁኔታ ግን በዝሙት ምክንያት ብቻ መፍታት እንደሚቻል የሙሴን መጽሐፍ ማጣቀሻ በማድረግ ይነገራል። ይህ የፍቺ ሥርዓት በክርስትና ሃይማኖት መሠረት ጋብቻቸውን ለሚፈፅሙ ተጋቢዎች ተፈፃሚነት ቢኖረው እንጂ ሙሉ በሙሉ በሃገሪቱ የነበረውን የፍቺ አፈፃፀም ሁሉ ይገዛል ለማለት አያስደፍርም። ምክንያቱም ቢያንስ በ *1930* ዎቹ በወጡ ህግጋትና የፍ/ቤት ውሳኔዎች የሲቪል ጋብቻና ባህላዊ ጋብቻ እውቅና ተሰጥ ~ቸው ስለነበር በባህልና በፍርድ ቤት በተለያዩ ምክንያቶች ፍቺ ይፈፀም እንደነበር መረዳት ስለሚቻል ነው። ከዚህ ጋር በተያያዘ ሁኔታ ከ *1952* ዓ.ም. በፊት በነበረው የኢትዮጵያ የሕግ ሥርዓት ሕጋዊ ጋብቻ በሃይማኖት እና በሲቪል ጋብቻ ሥርዓት መፈፀም እንደሚቻል በዘመናዊ ሕግ እውቅና ተሰጥቶት እንደነበር በ *1922* ዓ.ም. የወጣው የዜግነት አዋጅ ድንጋጌዎች ያመለክታሉ። በ *1936* ዓ.ም. ከወጣው የቃዲዎችና የናኢባዎች ጉባኤ ማ ▯▯ሚያ አዋጅ ለመረዳት እንደሚቻለውም የጋብቻን የመፋታት ሥርዓት በእስልምና ሕግ *(*ሸሪዓ*)* መሠረት እንዲፈፀም የሕግ ሥርዓቱ ይፈቅዳል።

በኢትዮጵያ የዳኝነት ታሪክ የከፍተኛው ፍ/ቤት ዳኛ የነበሩት "ናታን ማርይን" የፍትሐብሔር ሕግ ከመውጣቱ በፊት በፃፉት ጽሑፋቸው ከ *1952* ዓ.ም. የቤተሰብ ሕጉ መውጣት በፊት በኢትዮጵያ ከፍትሐነገሥት በስተቀር ሌላ የጋብቻ ሕግ እንደሌለና ፍ/ቤቶች ጋብቻን የሚመለከት ጉዳይ ሲያጋጥማቸው የሚጠቀሙት በልማድ ሕግ ብቻ እንደነበር ገልፀዋል። ጸሐፊው ስለ ፍቺ የገለፁት፣ "ልዩ ልዩ የፍቺ ሕግ አለ። የከፍተኛው ፍ/ቤት ዳኞች የሚፈርዱት የሀገር ልማድን ተመርኩዘው ሲሆን አንድ ጉዳይ ሲቀርብላቸው የሚመለከቱት ያንኑ የሚያውቁትንና በየቦታው የሚለያየውን የአገር ልማድ ነው። ስለዚህ ሕጉ እንደ ባለጉዳዮች የተለያየ መሆን አለበት..." በማለት ነበር። ከጸሐፊው ገለፃ ለመረዳት እንደሚቻለው ከ *1952* ዓ.ም. የፍትሐብሔሩ ሕግ መውጣት በፊት ፍቺ የሚፈጸመው በልማድ ሕግ መሠረት በመሆኑ በየቦታው በየብሔርና ብሔረሰቡ የሚለያየውን የአገር ልማድ ተከትሎ እንደነበር ነው። ይህም የፍቺ ሥርዓት ተጋቢዎች ያሉበትን ማኅረበሰብ ባህልና ነባራዊ ሕይወት ከግምት ያስገባ እንደነበር ያመለክታል። ነገር ግን ፀሐፊው ከፍትሐ ነገሥት በስተቀር ሌላ የጋብቻ ሕግ እንደሌለ የገለጹት ቢያንስ የእስልምና የጋብቻ የሸሪዓ ሕግ እና የሲቪል ጋብቻ ሥርዓት በሕግ እውቅና የተሰጠው ስለነበር አስተያየታቸው የተ ▯ላ መረጃን የፈተሸ ነበር ለማለት አይቻልም።

የፍቺ ክርክር አወሳሰንን በተመለከተ የነበረውን ሥርዓት ለመረዳት እንደሚቻለው "ስለ ቤተዘመድ የሽምግልና ዳኝነት" በጥልቀት ጥናት ያደረጉት አቶ አክሊሉ ወልደ አማኑኤል በአዲስ አበባ ከፍተኛ ፍርድ ቤት ከ *1939* ዓ.ም እስከ *1948* ዓ.ም ፍርድ የተሰጠባቸውን የፍቺ ክርክር ጉዳዮች ዋቢ አድርገው እንደጻፉት ከ *1952* ዓ.ም. በፊት የፍቺና ውጤቱ /የንብረት ክፍያና ልጆች አስተዳደግ ጉዳይ/ ባልና ሚስቱ በፈቃዳቸው በሚመርጧቸው ሽማግሌዎች በልማድ ደንብ መሰረት እንዲሁም በአማራጭ በፍ/ቤት ውሳኔ የሚሰጥበት ሁኔታ/ ተግባር ነበር። ይህም የሚያስረዳው የፍቺ ውሳኔ ለመስጠት ሁለት አማራጭ መንገዶች እንደነበሩ ነው። አንደኛው በባልና ሚስቱ ፈቃድ በሽምግልና ዳኝነት ሥርዓት ማስወሰን ሲሆን ሁለተኛው ደግሞ ፍቺ ለመወሰን ፍ/ቤትም ሥልጣን የነበረው መሆኑን ነው። ይህ

[163] ፊሊፖስ አይናለም፤ (January 2008)፤ ሳይፋቱ (ዲ ፋክቶ) ፍቺ፣ *Mizan Law review*, volume 2 no. 1, 228-121

በሃገራችን ከ 50 ዓመት በፊት የነበረው የፍቺ ሕግ ሥርዓት አሁን ባለንበት ዘመን በዓለማችን በፍጥነት በማደግ ላይ ያሉትን የዲሞክራሲ መርሆዎች፣ የሕግ ዘርፉ ብዙነትን እና አማራጭ የሙግት መፍቻ መንገዶችን ያካተተ እንደነበር ፍንጭ ይሰጣል። የፌዴራሉ ሕገ መንግሥት በአንቀጽ 34/5 የግልና የቤተሰብ ሕግን በተመለከተ በተከራካሪዎቹ ፈቃድ በሃይማኖቶች ወይም በባህሎች ሕጎች መሠረት መዳኘትን መፍቀዱ እንዲሁም በክልሎች ሕግጋት መንግሥት ተዛማጅ ድንጋጌዎች መካተታቸው የዘመናችንን ሥነ-ሕግ እንቅስቃሴ ያገናዘቡ ናቸው።

የፍቺ ሥርዓት አፈፃፀም ሥርዓት ከ **1952** እስከ **1992** ዓ.ም.

ለመጀመሪያ ጊዜ ለቤተሰብ ነክ ጉዳዮች ዘመናዊ ሕግ ሆኖ የታወጀውን የፍትሐብሔሩን የቤተሰብ ሕግ መውጣት ተከትሎ ከሕጉ መታወጅ በፊት ከነበረው የፍቺና ውጤቱ አወሳሰን ሥርዓት ከፍተኛ ልዩነት መፈጠሩን አቶ አክሊሉ ወልደ አማኑኤል ከላይ በተጠቀሰው ጥናታዊ ጽሑፋቸው አስምረውበታል። ይኸውም ከሕጉ መውጣት በፊት የፍቺ ጉዳዮች በሁለት መንገዶች ማለትም በባልና ሚስቱ ፈቃድ በሽምግልና ዳኝነት ወይም በፍ/ቤት ውሳኔ ያገኙበት የነበረው ሥርዓት ሙሉ በሙሉ ተቀይሮ በይግባኝ ካልሆነ በስተቀር የፍ/ቤት ሥልጣን ቀሪ ሆኖ በግዴታ በሽምግልና ዳኝነት ብቻ እንዲታይ መደረጉ ዋነኛው እንደችግርም የሚወሰድ መሆኑን ጸሐፊው በዝርዝር ገልፀውታል። ፀሐፊው የሕግ አርቃቂውን ሃሳብ ከአክብሮት ጋር በመተቸት አዲሱን የቤተዘመድ ሽምግልና ዳኝነት ከጥንቱ ጋር ሲያነፃፅሩ "የጥንቱ የሽምግልና ዳኝነት ለህልውናው አስፈላጊ የሆኑትን መሠረታዊ ነገሮች ተገፎና ባዕድ ነገሮችን ተሞልቶ የሚገኘው ያ የተከበረው የአገር ልማድ የጥንቱ የሽምግልና ዳኝነት ሥርዓት አሁን ጸንቶ የሚገኘው ቀድሞ በነበረበት አ□ኳን ሳይሆን ያልተ □ላና የተፋለሰ አ □ም ይዞ ነው" በማለት ይገልጹታል።

በፍትሐብሔሩ የቤተሰብ ሕግ አንቀጽ 727 እንደተደነገገው ከባልና ሚስት ወይም ከሁለቱ አንደኛው ወገን የሚያቀርበው የመፋታት ጥያቄ እንዲወሰን የሚቀርበው ለሽምግልና ዳኞች ነው። የፍ/ቤት ዳኞች የመፋታት ውሳኔ የተሰጠ መሆኑን አለመሆኑን አስመልክቶ ክርክር የተነሳ እንደሆነ ብቻ ለመዳኘት ሥልጣን ተሰጥቶአቸው ነበር።

በፍትሐብሔሩ ሕግ መሠረት ለጋብቻ በፍቺ መፍረስ ከባድና ቀላል የሚባሉ የፍቺ ምክንያቶች ተደንግገው የነበረ ሲሆን ሚስት ባልዋን ወይም ባል ሚስቱን አልፈልግም ማለትንም ሕጉ አይፈቅድም ነበር። ሕጉ በባልና ሚስት ስምምነት የሚደረግ መፋታትንም በሕጋዊ መንገድ ከተፈጸመ እንደሚፈቀድ በአንቀጽ 665/1/ የአማርኛው ንባብ ደንግጎ እንደነበር ይታወሳል። ፍቺ የሚወስኑት የቤተዘመድ ሽምግልና ዳኞች ብቻ መሆናቸውን ባልና ሚስቱ በፈቃዳቸው እርስ በርሳቸው ፍቺ ሊወስኑ እንደማይችሉ የሚገልፀት ዶ/ር ክፍሌ ታደሰ "ይህ ቢፈቀድ ብዙ ትዳር በከንቱ በፈረሰና ልጆችም ሜዳ በቀሩ ነበር" በማለት ይደመድማሉ። ለፀሐፊው ሃሳብ አክብሮቴን እየገለፅኩ በመደምደሚያው ግን በከፊል አልስማማም። ምክንያቱም ጋብቻ የተጋቢዎች የግል ጉዳይ እንደመሆኑ መጠን ፍቺስ ቢያንስ በከፊል ለምን የእነሱ ጉዳይ አይሆንም? ባለንበት የኅብረተሰብ ተሳትፎ ወሳኝ በሆነበት የዲሞክራሲ ግንባታ ሥርዓት ዘመን ፍቺ የመወሰኑ ሥልጣን የፍ/ቤት ብቻ መሆኑና ለተጋቢዎች ሥልጣን ቅድሚያ አለመስጠቱ ውጤታማ ነውን? አንድ የዩኒቨርስቲ የሕግ ምሁር በአግራሞት እንደሚያሰምሩበት "ለጋብቻ አፈፃፀም ሥርዓት ሦስት መንገዶች/በሮች ተፈቅደውለት እያለ ለፍቺ ሥርዓቱስ ለምንድነው አንድና አንድ መንገድ ብቻ ማለትም በፍ/ቤት ውሳኔ ብቻ እንዲከናወን የሚደረገው? ያሉት በዚህ ረገድ አወያይ ጭብጦችን ያስነሳል።

As can be understood from the above discussion, the Civil Code has classified the grounds for divorce into grave and simple. It has introduced "divorce hindrance devices" which would discourage parties from seeking divorce.[164] The aim of the law in introducing these divorce hindrance devices was to protect the family from disintegration.

[164] John H. Beckstrom, (1969), Divorce in Urban Ethiopia Ten Years After the Civil Code, JEL, vol. 6 no. 2, 283

However, whether family unity can be kept by making divorce hard to get was a debated issue.

Studies conducted at the time of drafting the RFC show that the fault based divorce system has its own drawbacks.[165] Since the party who is found to be at fault will be penalized by deduction from his share of the common property, the spouses would engage in fierce and strong debate in the courts. This has negative impact on the future relation of the spouses and will also affect the children. It is also proved to be the cause for the delay of divorce cases in the courts. Moreover, the fact that drunkard ness, beating and other actions which affect the marriage were not considered as serious grounds for requesting divorce has a negative consequence in that the victims, mainly females, are forced to be in the marriage despite those actions.

At the time of drafting the RFC, diverse views were reflected on the issue of divorce. Some suggested that the law should give protection to the institution of marriage and to the family; however, this protection should not be manifested by prohibiting the parties to divorce or punishing the defaulting party on the share of common property. Doing so will have a negative impact on the future relationship of spouses, which will affect the children.[166] On the other hand, others were arguing that the law should provide for simple and grave grounds for divorce.[167]

Taking into account the diverse views which were reflected at that time, the law classified divorce into divorce by mutual consent and by petition. One thing that needs to be noted here is that in both types of divorce, an application has to be made to the court. That is to say, the power of declaring divorce is given only to the court.[168]

5.1.2.1 Divorce by Mutual Consent

The RFC allows parties to seek for divorce by mutual consent. Considering the freedom of the parties, the law allows the spouses to petition for divorce by agreement. However,

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[165] See ምናለ አለሙ፤ የተሻሻለው የቤተሰብ ህግ ያካተታቸው አብይ ለውጦችና የሚኖረው ማህበራዊና ኢኮኖሚያዊ ጠቀሜታ፣ ያልታተመ፤ ፍትህና ህግ ስርአት ምርምር ኢንስቲትዩት፣, 11-12

[166] Mehari, 86

[167] Mehari, 87

[168] Article 117 of the RFC makes the court to be the only competent organ to decide on divorce.

it cannot be said that divorce even in cases of mutual consent is automatic. Since the state has the obligation of safeguarding the family, the courts are required to make some interventions. The intervention of the court in mutual consent divorce is limited to counseling the spouses separately to renounce their divorce.[169] If on the other hand, the parties are not willing to renounce the divorce, the court may order a cooling period.

The divorce by mutual consent is not necessarily a divorce without a cause. The spouses may have, and in many situations, do have causes for separation. However, under the mutual consent divorce, they are not required to divulge their reasons to the court. The spouses are saved the necessity of revealing their reason and of reciprocally covering themselves with hatred and ridicule.[170] This is reflected under the RFC. Article 77/3 of the code relives the parties from stating their reason in cases of divorce by mutual consent.

Divorce by mutual petition is not available for everyone. Those newly weds, whose marriage has not lasted for six months may not seek divorce by mutual consent. It should be noted here that the fact that newly weds are prohibited from seeking divorce by mutual consent does not mean that they will not divorce at all, rather, they may seek the other alternative which is divorce by petition.

The power of the court in cases of divorce by mutual consents is limited to counseling the spouses either jointly or separately to renounce their wish to divorce. If they are not willing to renounce their intention, the court will give them a maximum period of three months as a cooling time to reconsider their decisions.[171] If they still wish to proceed with the divorce after the end of the cooling period, they may reapply to the court to approve their agreement. The court, at the time of approving their request, has to make sure that the agreement to divorce is the true expression of the intention and free consent of the spouses as well as that the agreement is not contrary to law or morality.[172]

5.1.2.2 Divorce by Petition

[169] Article 78/1 RFC
[170] Planiol, 643
[171] Article 78 RFC
[172] See articles 79 and 80 of the RFC

The other way of ending the conjugal union by divorce is when on of the parties requests the court to end the marriage. In the case of mutual consent divorce, both parties have agreed as to the separation as well as the consequences of their separation. In divorce by petition, it may be only one of the spouses who requests for the ending of the union; or alternatively, both the spouses my request the divorce. Here also, the spouses are given the discretion either to state their reason or not.[173] In cases of divorce by petition, the court has an obligation to speak to the spouses either separately or jointly, with a view of convincing them to renounce their petition.

The code also envisages a possibility of referring the case to family arbitrators. Arbitration of family cases under the Civil Code, unlike the RFC, was compulsory. Different justifications were suggested by the drafter of the Civil Code for preserving the institution of family arbitration under the Code.

The following excerpt from Akliul Wolde Amanuel's article will show one as to the nature and reason of the family arbitration institution[174].

> *Betrothal, marriage, divorce and concubinage are susceptible of raising numerous legal difficulties. Chapter IX, which comprises of article [722 to 737] refer to and deal with the manner of solving these difficulties. We have tried, on this subject, to take account of the customs and to preserve e the institution of arbitration which is so much diffused in Ethiopia….The provisions of chapter IX aim at maintaining a well-established, and which appears to be an eminently respectable, tradition. On the other hand, they are inspired by the idea that the judges who are appointed by the state are not perhaps the best placed and the best qualified to resolve disputes of a family nature: this consideration has led different countries, such as Brazil, to create special jurisdiction for family litigation. This trend can correspond to that which has led many countries to establish special jurisdiction for the adjudication of cases, civil or criminal, concerning young persons. Moreover, there are at the moment few qualified*

[173] Article 81 RFC
[174] Aklilu Wolde Amanuel, (1973), The Fallacies of Family Arbitration Under the 1960 Ethiopian Civil Code, Journal of Ethiopian Law, Vol. 9 no. 1, 176-179

lawyers in Ethiopia; and for this reason, there is ground to dread the crowding of courts, which is the present evil all over the country; this consideration has strengthened, our opinion, which is materialized by the provision of Arts. [722-737]

To be more precise and concise, the drafter incorporated the institution of family arbitration in the Civil Code for the following three reasons

1. It is a well established and respectable tradition worth preserving for purposes of solving family conflicts

2. It is a means of settling family disputes through arbitrators who are more qualified for this purpose than the judges of the regular courts; and

3. Family arbitration reduces the congestion of courts by providing a special forum for the settlement of family disputes….

The general features of the family arbitration under the Civil Code were

1. It is compulsory: the code compels resort to arbitrators whenever there is a family dispute by making family conflicts out of the jurisdiction of the regular courts except when they come by way of appeal. … The law forces the parties to consent to the arbitration of their dispute by persons selected by them. Thus there is no such thing as arbitral submission or an agreement to arbitrate a dispute and to be bound by its result. In family disputes there is no choice but arbitration, there is no way to go to the courts but through appeal and that only in cases of "corruption of the arbitrators or fraud in regard to third persons" or in cases of illegality or " manifest" unreasonableness of the award.

2. It is not before fulltime arbitrators: generally the arbitrators are those persons who have been witnesses to the marriage or betrothal though the parties or the court or the arbitrators may appoint other persons to act as arbitrators

3. It is seemingly speedy under certain circumstances: the arbitrators are required by ;as to pronounce divorce within one month counting from the date

of the petition in case pf serious cause of divorce and within one year in other cases which period may be extended to five years in the latter case, by agreement of the parties. In all cases they are bound to deliver the supplementary judgment within six months from the date of the judgment of divorce.

4. It depends to a large extent on the substantive provisions of the law and to a much lesser extent on the agreement of the parties: the parties may regulate their pecuniary relations by the contract of marriage which, to be valid must be in writing and attested by four witnesses to or other contracts concluded during marriage which must be approved by the family arbitrators for purposes of validity. To this extent the arbitrators may refer to agreements made between spouses. But in all other cases they are bound to refer to the provisions of the law.

5. Reconciliation is part and parcel of family arbitration: it is one of the legal duties of the arbitrators to be performed where there is no serious cause of divorce.

Unlike the Civil Code, the RFC provides for optional arbitration of family disputes. That is to say, the court is given the discretion to refer the case for arbitrators. However, if the spouses do not agree to settle their disputes through arbitration, the court will dismiss the case by giving them a cooling period of up to three months.[175] Hence, as far as arbitration is concerned, the role of the court will be to advise the parties to solve through arbitration. Where the reconciliation process either through the arbitrators or the cooling period fails, the court is duty bound to pronounce divorce within a month from the receipt of the arbitration report or end of the cooling period.

The other important thing which needs to be accomplished by the court prior to the pronouncement of divorce is to give a temporary order on maintenance of the spouses, custody and maintenance of children and also of the management of the common property. The temporary order on these matters needs to be entered by the court

[175] Article 82/2 and 3

immediately after petition for divorce has been filed. The order also needs to consider as to manner of living of the spouses. The biggest question to be answered here is 'Is it possible for the spouses to live in the same house? If not, who should leave the common abode?' In this regard, what the law requires is for the court to take into consideration the interest of children and the condition of the spouse who may be affected more by leaving the common abode.[176]

One corresponding issue which may be raised in relation to dissolution of marriage is the status of couples who were married but have ceased to live together for a long period of time, but without securing divorce from the court. Can we consider the marriage to be still intact?

This issue has been raised at different times to the courts. As discussed above, one of the causes for dissolution of marriage, divorce, is to be pronounced only by the court. This means, when the law allows various ways of entering marriage which takes into account the custom and religion of the parties concerned, such option is not open for divorce. What if one or both of the spouses have concluded another marriage, thinking that the previous marriage is dissolved, even if there is no formal pronouncement of divorce by the court? Can we consider the first marriage as existing?

There are diverse views on this issue even among lawyers on this issue. Some advocate for the strict interpretation of the law to the extent that the marriage will be considered to be still intact even if the spouses were actually separated for a long time, and hence, property acquired after the separation will still constitute common property.[177] On the other hand, others hold the view that when the spouses have lived separately for a long period of time there will not be common property acquired after the separation. In this respect Ato mehari has said[178]:

> በመሰረቱ ጋብቻ በፍቺ የሚፈርሰው ፍ/ቤት የፍቺ ውሳኔ ሲሰጥ ብቻ ነው። ይሁንና ባልና ሚስቱ በዘላቂነት በተለያዩበት ዘመን በየግላቸው ያፈሩት ገቢ/ሃብት ፍቺ ባለመፈፀሙ ብቻ የጋራ ይሆናል

[176] Article 82/6 RFC
[177] Philipos, de facto divorce, 116
[178] ፊሊፖስ አይናለምኝ፤ ሳይፋቱ (ዲፋክቶ) ፍቺ፣ 115

ማለት አይቻልም። የህጉም አላማን ግብ አይደለም። ጋብቻ በንብረት በኩል የሚኖረው ውጤት በግላዊ ግንኙነት ላይ ካለው ውጤት ጋር አብሮ መታየት አለበት።

This issue was raised in the Federal Supreme Court Cassation Division in the case between w/ro Shewaye Tesema vs. w/ro Sara Lengane.[179] In that case, the applicant prayed the First instance court to declare her as the wife of the deceased person. The respondent, on the other hand, opposed to this request saying that she is the wife. The respondent stated that she concluded marriage in 1966, but they ceased living together since 1985, but since the marriage is not dissolved by divorce, she claims to be the wife of the deceased. The Cassation court in its decision stated:

ጋብቻ የሚፈርሰው ህጉ ባስቀመጣቸው ውሱን ምክንያት መሆኑን ይህም ፍ/ቤት ይቀበለዋል፤ በሌላ በኩል ለጋብቻ መፍረስ ምክንያት የሆኑ ነገሮች መኖር አለመኖራቸውን የሚረጋገጠው እንዴት ነው የሚለው ጥያቄና ነጥብ በሁለቱም ተጋቢዎች ከነበረው ሁኔታ ጭምር መረዳት የሚቻል ነው። ጋብቻ የሚፈርስበትን ምክንያት መፍረሱን ከማስረዳት መለየትም ያስፈልጋል። አሁን በቀረበልን ጉዳይ የመልስ ሰጪ መከራከሪያ ፍቺ መፈጸሙን አመልካች አላስረዳችም የሚል ነው። ነገር ግን የመልስ ሰጪና የሚች ግንኙነት ማንም ሌላ ማስረጃ ሊያስረዳ ከሚችለው ከሚገልፀው በላይ በመካከላቸው የነበረው የጋብቻ ግንኙነት መፍረሱ ሁለቱም ሌላ ህይወት ገምረው ሚች የአሁንዋን አመልካች ማግባታቸውን የህንንም ጋብቻ የአሁንዋ መልስ ሰጪ ያውቁ እንደነበር ያስረዳል። ይህ መሆኑ በተረጋገጠበት ሁኔታ ያሁንዋን መልስ ሰጪ ቀደም ሲል ፈጸመችውን ጋብቻ መሰረት በማድረግ ብቻ ሚስት ናት ብሎ መወሰኑ ትክክለኛ የህግ አተረጓጎም አይደለም።

What can be understood from this holding is that the fact that spouses have lived separately for long time will be a ground to presume that the marriage has been dissolved, even if the divorce is not pronounced by the court.

The other important thing which needs to be raised in connection with divorce is the issue of representation. Can one of the spouses request divorce through their representatives (lawyers)? The RFC does not directly give response to this question. However, as can be seen from the divorce procedure itself, one of the obligations of the court is to speak to the spouses either separately or jointly. Allowing divorce through representation will make this requirement of the law meaningless. The court is expected to speak to the spouses directly, and not with the representatives or lawyers. Moreover, marriage in its

[179] Cassation file number 20938

very nature is very personal. As a result, the law requires the personal appearance of the parties at the time of celebration of the marriage. This argument should also be extended to divorce cases. Hence, just like marriage, in case of divorce also the parties have appeared before the court personally unless for exceptional reasons they are exempted to do so. For instance, in the case between Ato Mohammud vs. w/ro Ejigayehu the application for divorce was made through representation and this fact was contested by the respondent. The respondent claimed that since marriage and divorce are personal matters, it is the claimant himself who should appear before the court. The court in that case affirmed that divorce is very personal and hence in principle the parties have to appear before the court for divorce cases. On the other hand, the court also took into consideration the exceptional circumstance in which representation may be allowed in divorce cases. In that case, the claimant has sent also a letter though the Ministry of Foreign Affairs which shows his clear intention of dissolving the marriage. As a result of this letter and other evidences, the court granted the divorce, allowing divorce by representation only in exceptional circumstances.

The other thing which needs to be considered in relation to the dissolution of marriage is the issue of compensation. As discussed above, both spouses will be treated equally in terms of the partition of common property. However, the law recognizes under article 84 of the RFC the power of the court to award compensation to either of the parties.

As discussed above, the Federal Family Code as well as the regional codes follow the no-fault divorce approach. In this regard, the first question which arises from the reading of article 84 is whether or not fault has to be committed by one of the parties for the purpose of the application. As per the opinions of Ato Mehari, fault is not without any relevance in divorce cases. He said:[180]

> እዚህ ላይ መነሳት ያለበት ሌላው ነጥብ በተሻሻለው የቤተሰብ ሕግ የፍቺ ምክንያቶች ከባድና ሌሎች ብሎ መከፋፈል ተቀባይነት ያላገኘ ቢሆንም የፍቺው ምክንያት ምንነት በአሁኑ ህግ ፋይዳ የለውም ማለት አይደለም። የፍቺው ምክንያት ለፍቺው አስፈላጊ ባይሆንም ለውጤቱ በተለይም ለጋራ ንብረት ክፍፍሉ ግን ግምት ውስጥ ሊገባ ይችላል። ለምሳሌ ፍቺው የተጠየቀው አንደኛው ወገን በፈፀመው ዝሙት ወይም ድብደባ ምክንያት

[180] Mehari, 98-99

ከሆነ ፍቺው ተወስኖ በሚደረገው የንብረት ክፍፍል ወቅት ንብረቱ በእኩለ መከፋፈሉ ቀርቶ ይህንኑ ጥፋት ግምት ውስጥ ያስገባ ክፍፍል ሊከናወን ይችላል ማለት ነው።

The other important element in relation to this article is the requirement that the other spouse has to sustain some damage or injury. As the last sentence of article 84 states, the purpose of awarding compensation is to make good the damage sustained by the other spouse. One question which may be raised here is 'are we going to consider the damage caused by the termination of the relationship or the damage caused by the fault that leads to the termination of the relationship?' In response to his question, Wondwessen had made the following findings:[181]

> *In contrast with the damage caused by the termination of the relationship, courts have struggled to asses the damage caused by the fault that is found. In the case of w/ro Alem vs Ato Lakew the plaintiff alleged the adulterous behavior of the respondent with her daughter was the ground for divorce. The first Instance court accepted her allegation and awarded 10,000 birr by way of compensation for the damage caused by the fault committed by her husband. It did not assess the damage caused by the divorce…. [On the other hand, other judges from the Federal Supreme court] reflect a different view. The opinion is that the damages to be compensated are those for termination of the marriage….*

The other important issue in connection with this article is determining the nature of the compensation. Is article 84 referring to moral damage or material damage? Determination of this issue is very pertinent as the amount due in respect of each type of compensation varies greatly. The view reflected by Ato Mehari is that the type of compensation referred to under article 84 is both material and moral.[182] When the law generally refers to 'damage' instead of specifically providing the nature, it implies that both types of damage are envisaged.

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[181] Wondwessen, 45-46
[182] Mehari, 99

The corresponding issue raised under article 84 is the amount of compensation payable. There is diverse view on the amount of the damage to be paid.

> *'In the case of w/ro Sofia vs. Ato ketsela, the Federal Supreme court held that because the damage envisaged under article 84 was moral damage, the compensation to be awarded should not exceed one thousand birr. In support of its conclusion, the court resorted to tile XIII of the Civil Code and cited article 2116/3…..'*[183]

The other view in this respect is based on the assertion that article 84 refers both to the moral as well as material damage. For instance, Ato Mehari holds the position that the party who claims to have sustained damage should prove the amount of damage sustained; in a situation where assessing the damage is difficult, the court will decide by looking into the circumstances.[184]

5.2 Effects of Dissolution of Marriage

As you have seen in the preceding subsection, spouses may reach a point where they find their life together impossible and hence may resort to the dissolution of the marital conjugal. On the other hand, one of the spouses may pass away or is declared absent while the marital union is still intact, causing its disintegration. Conversely, the disintegration of the family will have its own consequences on children born from the marriage and the property acquired during the lifetime of the marriage. The next sections discuss these consequences.

5.2.1 Child Custody

What does the best interest of the child mean? How is this principle reflected in Ethiopian legal system?

Persons who have lessened capacity cannot engage in any juridical act, and hence need to be represented. Moreover, there is a presumption to the effect that persons with lessened capacity do not distinguish what is good from what is bad, making the need for

[183] Wondwessen, 50
[184] Mehari, 100

representation more pertinent. One of such groups who have lessened capacity and need the protection of others are minor children. When a marriage is dissolved through divorce, one of the questions which need to be answered by the court is as to who should have custody of those minor children.

Custody of a minor child encompasses various set of rights and obligations under it, like the right to live with the child in a shared residence, authority over the discipline of the child and education as well as medical treatment. The visitation right of the non custodial parent is also an issue to be determined at the time of deciding on the custody of the minor. In earlier times, the views reflected by many legal systems shows that the father is preferred and trusted to take care of the minor children than the mother. As a result, there was no debate as to the custody. This, however, has changed through time.

> *Roman law vested absolute power in custodial matters in the father. In fact, in ancient Rome a father could sell his children or even put them to death. By contrast, a mother was not considered the child's natural guardian, even where the father died intestate. These rules eliminated custody disputes between parents in Roman courts, because the father's will was practically absolute, and no amount of cruelty, neglect of duty or immorality on his part affected in the slightest degree his claim to the custody of his children.*
>
> *English law adopted the Roman view of absolute paternal power and right to custody. ..a mother as such is entitled to no power, but only to reverence and respect. The father has no right, however, to kill or sell a child. [On the other hand], the broadly-stated paternal preference rule of England and Roman law never gained a significant foothold in the United States; the American rule quickly became the "best-interest of the child"….*
>
> *The "tender years" year doctrine, under which the mother was deemed to be the more suitable custodian for young children, was developed in the mid 19th century. In 1813, one US court reasoned " considering the children's tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother." The presumption favoring the mother was justified both by*

the assumed biological superiority of mothers as parents and by social custom, which assigned responsibility for parenting to mothers…..

The tender years presumption was the predominant rule for resolving custody disputes through much of the twentieth century. It eroded in the 1970's and has been abolished latter. The decline of the presumption can be attributed in part to a general cultural rejection of the traditional ideal of clear gender roles. … Courts in the 1980's described the tender years presumption as based on "outdated stereotypes"

Currently, what is envisaged under many laws is the principle of "best interest of the child" in determining custody issues. The principle of the best interest is incorporated in different international human right instruments. One of such international human right instruments is the United Nations Convention on the Right of the Child. Article 3 of the CRC states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
Providing an authoritative definition of what this principle entails, however, has been one of the major problematic tasks.

The concept of the "best interests" of children has been the subject of more academic analysis than any other concept included in the Convention on the Rights of the Child. In many cases, its inclusion in national legislation pre-dates ratification of the Convention, and the concept is by no means new to international human rights instruments. The 1959 Declaration of the Rights of the Child uses it in Principle 2: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

The principle is included in two articles of the 1979 Convention on the Elimination of All Forms of Discrimination against Women: article 5(b) requires States Parties to that Convention to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of children is the primordial consideration in all cases." Similarly, article 16(1)(d) provides that in all matters relating to marriage and family relations "the interests of the children shall be paramount".

The Working Group drafting the Convention did not discuss any further definition of "best interests", and the Committee on the Rights of the Child has not as yet attempted to propose criteria by which the best interests of the child should be judged in general or in relation to particular circumstances, aside from emphasizing that the general values and principles of the Convention should be applied to the context in question.[185]

On the other hand, the committee on the implementation of the CRC has repeatedly stressed that the Convention should be considered as a whole and that emphasis should be given to those principles which it had elevated to the status of general principle.[186] Hence, at the time of interpreting the principle of best interest of the child, resort should be made to these three principles, i.e. the principles of non-discrimination, right to life and maximum survival and development, and respect for the views of the child. The domestic laws o countries should also be in line with these requirements of the Convention.

And consideration of best interests must embrace both short and long-term considerations for the child. Any interpretation of best interests must be consistent with the spirit of the entire Convention – and in particular with its emphasis on the child as an individual with views and feelings of his or her own

[185] Implementation handbook for the Convention on the Rights of the Child, 2002, UNICEF, pages 41-43

[186] Principles which have been elevated to the status of general principle are articles 2 on the elimination of any form of discrimination among children, article 3 best interest of the child, article 6 on the right of the child to life and maximum survival and development as well as article 12 on respect for the views of the child

and the child as the subject of civil and political rights as well as special protections. States cannot interpret best interests in an overly culturally relativist way and cannot use their interpretation of "best interests" to deny rights now guaranteed to children by the Convention, for example to protection against traditional practices and violent punishment.[187]

However, one also needs to be careful in that the best interest of the child will not be the only consideration in any decision. What is required by the Convention is that the interest of the child being a primary consideration, not the sole consideration. This can be gathered from the last phrase of article 3/1 of the convention which says: **"...shall be a primary consideration".** Hence, other competing interests like the interest of other children and of adults needs to be considered as well; and the requirement under the Convention is that children's interests have been explored and taken into account as a primary consideration.

The domestic laws of various countries have incorporated the three general principles in different manners when they provide a guideline on the interpretation and application of the principle of best interest of the child. For instance, the State of Minnesota statute of 1997 came up with a list of various parameters to determine the best interest. The statute states:[188]

The best interest of the child means all relevant factors are to considered and evaluated by the court including

i. The wishes of the child's parent or parents as to custody
ii. The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference
iii. The child's primary caretaker
iv. The intimacy of the relationship between each parent and the child
v. The interaction and interrelationship of the child with a parent or parents, siblings,
vi. The child's adjustment to his home, school, and community

[187] Implementation handbook for the Convention on the Rights of the Child, 2002, UNICEF, 42
[188] Ira mark Ellman, Family Law: cases, text, Problems, 621

vii. The mental and physical health of all individuals involved

viii. The child's cultural background…

These are some of the lists enumerated in the legislation. As can be observed, emphasis is given to the survival and manner of upbringing of the child as well as the views of the child.

When we look into the Ethiopian family law on the issue of child custody, the Civil Code under article 681 requires the court to determine issues of child custody having regard solely to the interest of the children. The best interest of the child principle had acceptance even under the Civil Code. Hence, the courts have to investigate what would be best for the child at the time of deciding as to where the child will be placed after the dissolution of the marriage. The "tender years" principle is also reflected under the same article. Children under five years of age will be placed with their mother unless there is a reason for not doing so. It seems that the law gives priority for the mother because children under five years require the care and protection of their mother than their father.[189] However, if there is any reason in which the mother should not be granted custody, the children may be placed with their father even if they are not five years of age. This can be seen from the first sentence of sub article 2 which qualifies the application of the "tender years" doctrine on some grounds. Causes for such disqualification of the mother could be, if the mother suffers from a disease as a result of she cannot take care of the child.[190]

The 1995 FDRE Constitution under article 36 recognizes the different rights of children. The best interest provision of the Convention on the Right of the Child is also incorporated under sub article 2. Hence, on two grounds courts and any other bodies are required to look into the best interest of the child in determining any issue which affects the child. First, by virtue of article 9/4 as well as 13/2 of the Constitution, international treaties ratified by Ethiopia are the integral parts of the law. The CRC, which is ratified by Ethiopia, is made the integral law of the land, and hence reference must be made to it by the concerned organs at relevant times. Secondly, the Constitution itself mandates the observance of the best interest of the child in all matters concerning children. As a result,

[189] Dr. Kifle, 122
[190] Dr Kifle, 122

the actions of public organs, courts as well as legislatures should take into account this principle.

Article 113 of the RFC deals with the role of the court in determining custody of children after the pronouncement of divorce. By virtue of this article, there are three questions to be addressed by the court at the time of determining custody case. The first is who should have custody of the child? The second question is in relation to the maintenance of the child, how much should the non custodial parent give for the maintenance of the child? The third important question is the right of the non custodial parent to visit the child. How often should this visitation be? For how long can the non custodial parent stay with the child and other related questions are to be given a response by the court.

In relation to the question of custody, the RFC provides guidelines which need to be observed by the court. First of all, if the divorce is made by mutual consent, the parties are also expected to determine the consequences of their divorce, including custody of their children, by their agreement.[191] However, in the case of any other divorce, article 221/2 gives the mandate to the court to determine as to who should be the guardian or tutor of the child. In doing so, the court is expected to observe the guidelines enumerated under article 113/2. These guidelines include consideration of income, age, health and condition of living of spouses on the one hand and the age and interest of the child on the other hand. The requirements under this sub article are derived by the principle of the best interest of the child. As mentioned earlier, the best interest principle takes into consideration the principles of non discrimination, right of the child to life, survival as well as respect for the views of the child. So, the decision to be made is 'which one of the two parents can best provide the things necessary for the child to achieve his right to life, survival, development and respect of his views?' Obviously, the answer to this question depends on the age, health and income as well as living condition of the spouses.

However, care should be made not to assume that the financially well to do parent is always in a position to provide the necessities of the child. Bringing up a child involves

[191] Article 221/1 RFC

nurturing the behavior of the child as a result of with the living condition and also of the behaviors of the parent need to be considered. On top of this, interpretation of the best interest of the child requires one to consider the view of the child. Hence, if the child is in a position to manifest his wishes, the court should seek to find out. However, care needs to be made at this time. '*The court should ascertain that the child's choice was not a result of undue influence from the chosen parent, as there is a strong possibility of the parent withinterim custody to counsel the child to his or her choice. This influence may assume different forms; that which tends to convince the child that one of his parents is better than the other, that which manipulates the child's immature desire for less discipline or restraint; or simple attempts by one parent to turn the child against the other parent.'*[192]

In the case between w/ro Martha Hailemariam vs. Ato Berhane Derso[193] , the father had interim custody of the child who was five years old. The court, at the time of deciding on custody, requested the opinion of the child. The child responded that he wants to be with his father because his father could take him to good school, buy him things that he needs and also because his mother is a bad person. Considering the age of the child, which was only 5 years, the court stated that the child cannot by himself, without the influence of the father say such things about his mother, and by considering other factors, it awarded custody to the mother.

When seeking the opinion of the child, two factors need to be considered. The first one is age of the child. The court has to be sure that the child has reached the age group in which he can make a reasonable preference. For instance the Statute of Georgia provides that a child of 14 years have the right to select the parent with whom he desires to live.[194] Hence, under that law, the court will listen to the opinion of the child if that child has attained 14 years of age. On the other hand, other statutes instead of limiting the age, provide for the child's preference to be considered and given weight if it reflects a level

[192] Wondwesson, 31
[193] File number 476/93
[194] Ellman, 652

of mature judgment.[195] Hence, in the second situation, the court is required to make its own assessment of the preference of the child.

The preference of the child is also to some degree influenced by the circumstances in which he is interviewed. So, the second essential thing which needs to be considered is the environment in which the child's preference is to be obtained. The presence of the parents may intimidate the child, and hence it is better if the court interviews the child without the presence of the parents.

All in all, one can conclude that child custody determinations under the best interest standard differ significantly from other forms of adjudication. Their difference pertains to the following[196]

> *First, child custody determinations are 'person-oriented' disputes. Most legal rules require a determination of the fact relating to some event and are thus 'act-oriented'. Child custody determinations under the best interest standard, in contrast, are 'person-oriented' making relevant "the attitudes, dispositions, capacities and shortcomings of each parent"*
>
> *Secondly, child custody determinations require predictions about the future. Most adjudications require determinations of past acts and facts. Child custody determination under best interest standard, on the other hand, requires individualized predictions; with whom will this child be better off in the years to come?*

The regional laws have also incorporated the best interest standard with slight difference in some regions. The family laws of Amhara, Oromiya and Tigray Regional States have made reference to the 'tender years' principle[197]

The best interest standard is also given more emphasis in the recent decision of the Cassation Division of the Federal Supreme Court in cassation file no. 23632. In that case, the parents of the child were separated at early age of the child, and the child was living

[195] Ellman, 653
[196] Ellman, 620
[197] See article 111/2 of Tigray Family code, article 124/3 of Amhara family code and article 127/3 of the Oromiya family code

with his aunt (sister of his mother). After 12 years, the mother passed away leaving some property to the child. The father, who had contributed nothing in the last 12 years for the upbringing of the child, brought an action claiming custody of the child to the *woreda* court, which the court granted. The case was brought to the cassation court by the aunt. The cassation court, in determining who should have custody of the child reasoned that the best interest of the child should be always a priority as is required by the Constitution as well as CRC, which is the integral part of the law of land. And all laws concerning children should be interpreted in light of this principle. With this major reasoning, the court awarded custody to the aunt, rather than the father. Two important points emerged out of this decision. First, international treaties ratified by Ethiopia are confirmed to be part and parcel of the law of the land and hence the courts have to resort to these international instruments by the mere fact of ratification, i.e. without requiring their interpretation in the working language of the court. Secondly, the best interest of the child standard is always to be observed and the courts have to make sure the compatibility of the provisions of the law to this standard on a case by case basis.

One other thing which needs to be considered about custody decisions is the possibility of revision of the decision with change in circumstances. As stipulated under article 113/3, the court is given the power to revise decision of custody and maintenance with change in circumstances.

5.2.2 Liquidation of Pecuniary Relations

The matrimonial property is indivisible for the time being the marriage stayed intact. One of the issues which need to be addressed by the court at the time of pronouncing divorce is the partition of the matrimonial property. The law has given discretion for the spouses to agree upon the management of their property. This discretion is also extended in respect of the partition of property. If the parties have addressed the issue of property in their contract of marriage as per article 83/3, then the contract will be effected by the court.

However, if there is no contract of marriage or if the contract of marriage concluded is not valid, then the court has to decide on the right of the parties in respect of the

properties. As discussed in chapter three, there is a presumption that all property in marriage is common property of the spouses. The spouse who claims to be the personal owner of the particular property in question has to prove the fact. Once the property is determined to be the personal property, the owner of that property may retake it in kind.[198] If the personal property has been mixed with the common property, the spouse will be given an equivalent sum of money or a thing of value corresponding to such price from the common property.[199]

The next thing would be the payment of debts. As discussed in chapter three, debts incurred in the interest of the household are considered to be common debts and hence need to be recovered from the common property. In this respect, article 89 of the RFC requires the payment of common debts prior to the partition of common property between the spouses.

5.2.3 Partition of Common Property

Once what constitutes common property has been ascertained, the next thing to do is to decide on the manner of partitioning this common property between the spouses. The rule in partition, as is reflected under article 90 RFC is that common property shall be divided equally between spouses. This is a reflection of the Constitutional provision which gives both spouses equal right in respect of property at the time of entering, during and at the end of marriage.

As far as the manner of partitioning is concerned, the rule is that partition will be made in kind in such a way that each spouse receives some property from the common property; any inequality will be set off by the payment of sums of money.[200] If the property is difficult or impossible to divide, or alternatively if the spouses do not agree as to who should have the property, it will be sold and the proceeds will be divided between them.

Review Questions

[198] Article 86 RFC
[199] Article 86 RFC
[200] Article 91 RFC

1. Discuss the grounds for dissolution of marriage.

2. What is the difference between fault based and no fault divorce? Which one of the two is adopted by the RFC? What are some of the reasons for doing so?

3. Discuss the consequences of divorce.

4. When a court is faced with a case relating to custody dispute, what things does it need to consider?

5. What is the difference between the ‘tender years’ approach and ‘best interest of the child’?

6. Can any couple request to get divorce by mutual consent under the RFC? Why/why not?

CHAPTER SIX

IRREGULAR UNION

6.1. Introduction

As you may understand, there are various intimate relationships between men and women. Among these relationships, marriage formally concluded has remained throughout the world a fundamental relationship. That is why society and the law give recognition and protection to the institution of marriage. Despite this, on account of various reasons, men and women live together as a husband and a wife without concluding formal marriage. It is this aspect of non-marital relationship that you will study under this chapter. Therefore, this chapter will concentrate on the meaning of such non-marital cohabitation, (irregular union to use the parlance of the law), the need to protect such relationship, the legal effects of such union, proof and termination of irregular union. Here, one thing that you need to bear in mind is that because the provisions of regional family laws on irregular union have made no departure from the Revised Family Code of the Federal Government, no mention of regional family codes will be made in order to avoid an unnecessary duplication of legal provisions.

6.2. Objectives

After completing this chapter, students will be able to:

- discus the essence of irregular union.
- differentiate irregular union from marriage.
- analyze the need to protect irregular union.
- analyze the effects of irregular union.
- discuss modes of proof of irregular union

- discuss termination of irregular union.

- apply the rules on irregular union to actual life situations.

6.3. The Concept of Irregular Union

Although the living together of a man a and woman in marriage has been considered the most socially desirable relationship, different kinds of close relationships between men and women have existed in different societies. Those relationships perform partly the function of marriage producing similar effects as marriage. The existence of irregular union and its significance throughout the world is not debatable and various terms have been used to denote this relationship depending upon the prevailing religious, cultural and political situations.

In Ethiopia, irregular union has been recognized by the 1960 Civil Code although such union is not a recent phenomenon. As it has existed since long ago. Currently, there are a number of couples living in such relationship for various reasons. Besides, the Ethiopian society, as a multi-cultural society, has undergone fundamental transformation in matters of sexual companionship, marriage and family formation. (Read Tilahun Teshome, Saygabu Nuro Duro Na Zendro," Ethiopian Bar Review, Vol. 2 No 1, August 2007, pp-61-113). In this regard, another author writes:

> *"Fundamental shifts in attitudes within a society are very often accompanied by rapid swings in the usage of particular language. The choice of legal terminology should thus follow the changes of attitudes about non-marital cohabitation for otherwise the law appears to be even more archaic than is in fact the case because it is couched in terminology redolent of another age. A choice of language which brands this relationship with moral disapprobation is out of touch with the views of substantial segment of the community. In fact, modern usage has not clearly evolved to provide an everyday word that is certain in its meaning and correct in its moral tone" (Peter Sparks, "The Language of Cohabitation," Family Law Quarterly Vol.19, p.328).*

In Ethiopia, the 1960 Civil the Code the Revised Family Code of the Federal Government and the new regional family laws use the term irregular union. (See Arts. 788-721 of the

civil code, Art 18 of the Revised family code (RFC) and the relevant provisions of the regional Family laws).

If you were one of the drafters of the Ethiopian family laws, would you employ the term "irregular union? Why? Why not?

Although there are various terms to the relationship under consideration, we conventionally use the term irregular union as used in the laws and try to define it as such.

In legal theory, the term is defined as the union of a man and woman established solely by the consent of both parties. Like the institution of marriage, it is intended to be potentially indefinite in duration and the parties cohabit in the same household as a man and wife. Actual domestic cohabitation is essential. In other words, cohabitation does not mean mere sexual gratitification. Rather it means to live together, to have the same habitation. (Read P., Sarcevic, "Cohabitation without Marriage: The Yugoslavian Experience," American Journal of Comparative Law, Vol.29 No 2, 1981, p. 315.

What do you understand by cohabitation? What constitutes cohabitation?

Because cohabitation is the essential element of irregular union, it is necessary to have a clear picture as to what is meant by this word?

Black's Law Dictionary defines the term as:

> *"To live together as husband and wife; the mutual assumption of those marital rights, durations and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations"*. (H.C. Black, Black's Law Dictionary (6th ed, 1990, p.260).

What do you understand from this definition? From the above definition, it is possible to gather that the parties (necessarily a man and a woman in Ethiopia) to an irregular union live as husband and wife, assume mutually and voluntarily those rights, duties and obligations which are also assumed in the institution of marriage. Despite the fact that the

above definition demonstrates the outward similarity between marriage and irregular union, it appears to be confusing as regards what rights, duties and obligations are assumed by the parties when evaluated in the light of the limited recognition given to this relationship in the laws of many countries.

In Ethiopia, the first legal instrument which tried to define irregular union is Art.708 of the Civil Code which provides that an irregular union is the state of fact which is created when a man and a woman live together as husband and wife without having contracted marriage. Art.709 of the code gives further explanation by stating that:

(1) It is necessary and sufficient in order to have an irregular union that the behaviors of the man and of the woman be analogous to that of married people.

(2) They need not represent themselves to third parties as being married.

(3) The mere fact that a man and a women keep up sexual relations between them, even if repeatedly and notoriously, is not sufficient by itself to constitute an irregular union between such man and woman.

What has been provided under Art.709 of the Civil Code has been reiterated by Art.99 of the Revised Family Code and the regional family laws.

By having a close reading of these articles, it is possible to understand that irregular union is established where the relationship is analogous to marriage. It is this analogy which is the distinguishing feature of irregular union as compared to other male-female relationships. It is because of this feature that irregular union is quite different from what is known in Ethiopia as “kept woman” or “kimit” whereby the man keeps the woman mainly for sexual gratification and as a sign of social position and prestige to whom the women also gives emphasis to the financial position and social standing of the man who serves as her patron and benefactor.

It has been said above that irregular union is analogous to marriage. How do you explain the analogy between marriage and irregular union? In what respects irregular union analogous to marriage? Try to compare and contrast the institution of marriage and irregular union.

Generally, according to a certain author, two important elements may be drawn as regards the similarity between marriage and irregular union:

> *"The first element is composed of intimate life as between husband and wife and is founded on the relationship of affection and love, devotion and loyalty, that is indicative of their having pledged themselves to common fate. This actual domestic cohabitation is essential. The second element is the running of a common household, not simply out of personal need, convenience, narrow financial considerations, or as a self- standing arrangement, but as a natural function of the joint family life, as is customary and usual between husband and wife attached to each other by the bond of common destiny. A household of this kind is different from, for instance, the situation of employing a housemaid or a nursemaid, even though it happens that the employer engages in sexual relations with her." (D. Friedman, The "Unmarried Wife in Israel,"* Israel Yearbook on Human Rights, Vol.2(1972) p.290).

6.4. Why Do People Live in an Irregular Union?

Why do you think do a man and a woman live together without concluding formal marriage?

Traditionally, the relationship of unmarried cohabitees was considered to be meretricious and usually criminal as well. People forming such union were thought to be scoundrels. In contradistinction to this, the family based on marriage was and is favored by legislatures and courts as the desirable and productive unit of society. The descriptions connoting severe moral disapprobation such as meretrials or living-in-sin could not, however, deter people from forming such unions.

According to one writer, the legal and much of the social stigma of illegitimacy is gone. Whatever implications it may have to the institution of marriage, irregular unions is both increasingly prevalent and increasingly being recognized as a theoretically defensible lifestyle and contrary to the widely held public opinion, some of these unions outlast the present day ceremonial marriages". (C.S, Bruch, "Property Rights of Defacto Spouses Including Thought or the Value of Home Maker's Services," Family Law Quarterly, Vol.10, No.2 1976 pp.101-102).

There are actual and possible reasons that necessitate living in an irregular union in the world in general and in Ethiopia in particular. Generally, the reasons encompass roots in cultures of societies that have accepted or tolerated informal families, socio-economic changes and especially in Ethiopia absence of knowledge of the legal consequences of one's relationship with another. Although there is no an empirical research conducted on the area, it is generally believed that in Ethiopia there are a number of people living in an irregular union in which one or both parties believe that their relationship is marriage while it is not from the view point of the law.

As an alternative to marriage concluded in accordance with the requirements of the law, irregular union is not a result of the sexual revolution experienced by the modern world. With no doubt, a man and woman have lived together since time immemorial without concluding marriage. (Read Tilahun Teshome, work cited previously and A. Skolnick, "Social context of cohabitation," American Journal of Comparative Law, Vol.29, No. 2 1981 p.350) According to O. Donovan, irregular union has a long history but has only recently moved back from the sinful category into the acceptable behavior category. The revival has, of course, been aided by the gradual social and psychological changes in matters of sexual conduct, marriage and family formation to which the laws of different countries have been responding. (O' Donovan, "Legal Marriage-Who Needs It?" The Modern Law Review, Vol.47, N. 1 1984 p.114. Besides, read Tilahun Teshom's work cited previously).

Historically, in almost all earliest societies, marriages and irregular union existed side by side although each had their own effects in the existing system. Although after the spread of Christianity in Europe, Christianity vehemently condemned all sex relations unless concecrated by indissoluble marriage and exalted celibacy over the latter, it continued during the early centuries to sanction in practice the established Roman and Barbarian usages of having a concubine. The tacit toleration of concubinage did not give place to general reprobation in catholic and protestant countries until after the protestant reformation. Then the legal disabilities attaching to the relationship to the relation become added the ruthless penalties of social condemnation and ostracism. Finally, although it was originally a legitimate form of union (as marriage), later it became

illegitimate and then illicit and immoral. (Read the discussions made in this regard by Robert Briffault in Encyclopedia of the Social sciences, Vol.4 1931, pp.171-173).

It is obvious that Ethiopia is one of the earliest countries which accepted Christianity. Despite this, much of the matters relating to marriage have been governed by customs even in the Christian community. Strict adherence to the rules of Christianity in matters of marriage such as receiving the Holy Communion on marriages is still considered as something to be observed by deacons and priests alone. As regards the law, concubine was prohibited by the Fetha Negast which provides:

"Having a concubine is forbidden in our saintly law since it is contrary to lawful marriage,- (it) is continuous fornication. If there is one who has a concubine and if she is his slave, he must abstain and marry according to the law…No man shall be permitted to live with a concubine in his house…If he likes to live with her, he must marry her according to requirements of lawful marriage…who has a wife and illicit relations with his woman slave shall be punished". (The Fetha Nagast, chapter 25, translated from Geez by Abba Paulos Tsadua, Faculty of Law, Haileselassie I University, 1968, p.279).

Although concubinage was categorically prohibited by the Feta Nagast, the traditional practice continued as there was no effective way of communication between state officials and the people which would enable the general public to be aware of the law. Let alone in the past, even today such relationship is preserved in the countryside.

In addition, every society has undergone profound transformation in the 20th century resulting in, **inter alia**, new attitudes about marriage, sexual companionship and family formation. Today (in the 21st century) marriage is not always viewed as either a sacrament or a status necessarily extablished for life. Rather, there is a shift from institutional to companionship marriage. According to the suggestion of one study, many marriages, if not all, are utilitarian relationships based on convenience, economic benefits and mutual affection, the systematic understanding and the comradeship of the spouses. So, the rise of non-marital cohabitation may represent a working out the logic of companionship without the institution of legal marriage at all. (W.D. Wyrauch, "Metamorphoses of Marriage", Family Law Quarterly, Vol.13, No4 (1980) p.420).

In addition to the historical background of non-marital cohabitation (irregular union) and the cultural transformations, people may choose irregular union over marriage due to different motivations.

Some couples feel that the commitments and burdens of marriage outweigh its advantages and hence engage in irregular union. The other reason is that no costly legal procedures are required to establish and terminate the relationship. Besides, irregular union, as a **de facto** relationship, gives the opportunity to define and specify the terms of their relationship individually. They can define the terms of their personal property relations freely irrespective of the essential rights and duties which are inherently and compulsorily attached to a formal marriage.

It is believed that for some women, an irregular union confers upon them freedom from the old-age and world-wide gendered-biased oppression through traditional male dominance to concluding a formal marriage. (H.D. Krause, Family Law in a Nutshell 3rd ed., 1995, pp.71-72). **Do you agree with this assertion? Why/why not?**

There are also some additional reasons which make couples enter into an irregular union. Motivations of economic nature are the first. It may also happen that the parties decline to go through a marriage ceremony. As a result, they simply agree to live together without any ceremony or formality. Financial constraints in affording the expenses of a wedding, the presence of legal impediments (for instance the inability of obtaining divorce for those who have already concluded an indissoluble marriage) militate against formal marriage). (C. Foote, R.J. Leuy and F.E.A Sander, Cases and Materials on Family Law 2nd ed., 1976 pp.708).

As regards why people live together in an irregular union, a writer summarizes:

> *"In my opinion, the main reason for why people live in irregular union is the unawareness of the parties, usually women, about what constitutes customary marriage in the eyes of the law from the many cases brought by women to our courts [Ethiopian courts] based on an alleged marriage or to establish one's status as a surviving spouse of the deceased, it is easy to guess that the parties lived [together] believing that they were married while they were not so. Some may also live in an irregular union*

> *knowing that they are not married but one party, usually the women, may fear that raising the issue of marriage will end the relationship, perhaps because of her economic dependence or she may hope that they will get married in the future".*

(Birru Gebeyehu, Problems Arising Out of Non-marital Cohabitation: Ethiopian Experience, Addis Ababa University, Faculty of Law, Senior Thesis, unpublished 2000, p.8).

Comment the assertions made by the author. If you agree with his assertion, explain your reasons.

6.5. The Need for Legal Protection

Why do various jurisdictions accord legal protection to irregular union?

As you may have undress and from the previous units, in all societies, the family has been the prime mechanism which serves as a bridge for linking individuals to the larger society for providing them with the motivation to participate in the economic and occupational structure of the society, and for protecting them from the harnesses of that participation by providing effective emotional support and a sense of individual dignity and security.

If the traditional legal regulation of marriage, an old legal institution as a union of man and women uniquely involving the procreation and rearing of children within a family, is to protect and preserve the family, some argue that there is no reason that irregular union is not protected by law since the living situation in an irregular union is as much as familiars as marriage (L.J. Weitzman, "Legal Regulation of Marriage: Tradition and change;" California Law Review, Vol.62, No 4 (1974) p.12 42). Generally, legal regulation of marriage serves four state interests: promoting public morality, ensuring family stability, assuring support obligations and assigning responsibility for the care of children (Ibid). The states traditional interest in promoting public morality was thought to be saved by requiring and regulating legal marriage. Some argue that allowing persons to engage in sexual relationships without first going through marriage ceremony results in decline in public morality. The law of marriage protects society against being confounded

by laxity of morals, promiscuity, free love and generally profligacy. While this view might be accurate in the past, present standards of public morality are such that it is not unusual for people to have intimate relations or to live together without marrying. Further, one may seriously question the legitimacy of the state's interest in regulating intimate personal relations under the banner of "promoting public morality." (Ibid). Evaluate this above assertion in the light of the current Ethiopian situation.

In relation to preserving public morality, religious authorities raise strong opposition to the entire phenomena of irregular union. Their attitude is that the religions monopoly in matters of men-women relationships should remain unimpaired. Despite this, it should be taken into account that, religious law cannot always give answers to many problems in the domain of personal laws as far as the secular public is concerned. Moreover, in areas where there are cultural and religious diversities and where there is separation of state and religion as is the case in Ethiopia today, it cannot be appropriate for the legislature of a secular government to take an overly restricted ideological attitude concerning people's private choices of life. Some writers have made it clear that irregular union was as old or even older than the institution of marriage (see for instance the discussions made by Tilahun Teshome, work cited previously, pp.65-71).

Despite this, its legal protection and regulation is of a recent phenomena compared to the institution of marriage. In spite of its long history, the unmarried opposite-sex conjugal relationship has not been a subject of legal protection and regulation for the reasons mentioned above. However, as time went by, the **de facto** relationship of a man and woman was changed from the sinful category into the category of acceptable behavior. People who wouldn't have considered such a relationship many years ago began to openly cohabit without concluding a formal marriage. The social disapproval and stigma of a de facto union faded into the background. In short, irregular union has become more acceptable and a frequent social behavior becoming relatively stable and sometimes outlasting ceremonial marriages. This gave an impetus to the growing need of the legal regulation of irregular unions in many jurisdictions (C.S. Bruch, "property Rights of De facto Spouses including Thoughts on the Value of Homemaker's services," Family Law Quarterly, Vol.10, No 1-4 (1978) p.101,).

As the objective reality on the ground shows, a great number of people do live together as husband and wife without having undergone a formal marriage. Although irregular union does not comply with the formality required by laws, an irregular union creates a family, children are born to such union, a man and a woman like marriage. Seen from economic, social and psychological perspectives, irregular unions are functionally identical to marriage. What happens in the family created by marriage happens in the family created by an irregular union. This is the visible social reality. Hence, failing to give legal recognition and protection to such relationship is unfair. Hardships and injustice would result unless the law intervenes and regulates such relationships to the extent necessary. Reasons of equality like the protection of children born in a de facto union or the protection of the weaker party in the union justify the recognition of a de facto relationship. Failing to recognize such relationships may, for instance, impose unfair burdens on those who are most vulnerable or who have contributed more to the relationship. One can imagine the injustice that would occur in the absence of legal recognition and protection of irregular unions (Refer to the following materials: N. Bala and R. Jaremko," Non-marital Unions, Finality of Separation Agreements and Children Issues," The International Survey of Family Law, 2002; S. o. Pais," Defacto Relationships and Same Sex Relationships in Portugal," The International Survey of Family Law, (2002).

Coming to the Ethiopian situation, it was the 1960 Civil Code of the Empire of Ethiopia which gave recognition and protection to irregular union although the protection was much less than the protection given to such relationship by the current family laws of the country and other jurisdictions.

As you can see from the discussions made under the previous chapters of this course material, the need to revise the 1960 Civil Code on matters of family was felt and the first move was made in the middle of 1980s (Tilahun Teshome, "Reflections on the Revised Family Code of 2000;" The International Survey of Family Law (2002) p.165). A committee was established with a view to reforming the family law. The committee came up with a draft family law for consideration by the pertinent bodies. However, the work did not continue for reasons that were not made known. (Ibid).

After the change of government in 1991, the move towards family law reform was begun anew. The need for family law reform was strongly felt following the adoption of the 1995 Constitution of the Federal Democratic Republic of Ethiopia since the constitution ensured equality of sex in all respects while that was not the case under the 1960 Civil Code. Besides, the FDRE Constitution has provided that family is the fundamental unit of society and it needs protection by the state and the society. Hence, because family law gives recognition and protection to irregular union is in line with the constitution. In addition to the FDRE Constitution, Art.16(3) of the UDHR, which has been made part and parcel of the Ethiopian law since the adoption of the 1991 Transitional charter of the country, the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. This is also reiterated under Art.23(1) of the convention n civil and political rights to which Ethiopian is a party.

During the drafting process of the Revised Family Code the FDRE, irregular union was one of the areas which provoked heated debates in the various public discussions held in different forums. Generally, two opposing views were reflected in the discussions. The first view objected to the recognition and protection of irregular union while the other view was in favor of recognition of irregular union. Those who opposed the recognition of irregular union argued that the only constitutionally recognized relationship between a man and a woman is marriage. The FDRE Constitution is not concerned with irregular union nor does it recognize it specifically as it did so with marriage. Hence, it was argued, it should be for the protection of the institution of marriage that the government has to enact laws. Enacting laws for the protection and regulation of irregular union is not justified which was not envisaged by the constitution. Moreover, it was maintained that irregular union is unacceptable by various religions. The group contended that giving recognition to irregular union would undermine the institution of marriage and endanger the sanctity of marriage. Members of this group further strengthened their position by maintaining that since irregular can easily be terminated at any time at the wish of the partners, it is detrimental to the interests of children and women in particular and the society in general.

The proponents of the second view, the view that advocates the recognition and protection of irregular union, however, strongly argued that the view that irregular union is not recognized by the FDRE Constitution is not acceptable. The silence of the constitution about irregular union does not amount to non-recognition. Since the constitution does not specifically deny recognition to it, protecting and regulating irregular union by enacting specific law is not contrary to the ideals of the constitution. Furthermore, this group argued that, the phenomenon of the living together of a man and a woman as husband and wife without concluding marriage is a fact that has been commonly practiced by the Ethiopian community for many years. It is also a practice prevalent in the urban areas of Ethiopia (Mehari Redae, Yeteshashalawn ye Beteseb Hig Lemegenzeb yemiredu Andand Netiboch Vol.1 1995 E.C pp.120-127).

The reality on the ground as to irregular union is that a number of people are presently involved in this relationship and it is more likely that a number of people who will involve in such union will increase in the future for various reasons (Ibid). As has been mentioned previously, many people enter into this kind of relationship due to economic problems, inability to get the assent of their parents for marriage or failure to fulfill customary obligations, inability to cover expenses for wedding ceremonies and the like. Hence, denial of such reality is impossible since to do so would be tantamount to "closing one's eyes not to see the visible social reality."

The other argument of the second group was based on the protection of the rights of women. The absence of legal recognition to irregular union is detrimental to women particularly from the view point of common property. **Would this argument be tenable if women were economically strong?**

Despite the above arguments against the recognition of irregular union, it was the second view that was accepted by the legislature and the Revised Family Code of FDRE and Regional Family Laws have accorded better protection to irregular union as compared to the protection given to it in the 1960 Civil Code of Ethiopia. **What departures have the current family laws of Ethiopia made from the 1960 Civil Code as far is irregular union is concerned?**

6.6. Legal Effects of Irregular Union

6.6.1. Introductory Remarks

Under the previous units, you have understood that marriage produces legal effects-personal as well as pecuniary effects where it is established in accordance with the requirements set forth by the law. Now the question that may cross your mind here is whether or not the requirements that must be fulfilled in case of marriage (essential conditions of marriage without which no valid marriage is established) are also to be fulfilled in irregular union.

The 1960 Civil Code as well as the current family laws of Ethiopia do not say any thing as to the requirements for the formation of a valid irregular union. (Read for instance, Art. 708-721 of the Civil Code, Arts. 120-130 of the family law of Tigray, Arts. 128-139 of the family law of Oromia Arts. 109-118 of Amhara Family Code).

Does this mean that irregular union can be formed between two minor couples? Can it be formed against the will of one of the partners? How about other impediments to marriage?

Although the laws are silent, it is not possible to maintain that any one under any condition whatsoever can form irregular union, as he/she pleases, with another opposite sex. The condition that need to be satisfied in marriage must be satisfied in irregular union too. **Do you agree? Why/Why not?**

(A) Consent

Cohabitation without marriage (irregular union) is defined as the union of a man and a woman established solely by the consent of both parties (P. Sarcevic, "Cohabitation without Marriage: The Yugoslavian Experience," American Journal of Comparative Law, Vol.29, No (1981) P.315). By the same token, under the draft provisions of the Civil Code prepared by Rene David, temporary union or concubinage was included resulting from a legal agreement other than marriage between a man and a woman to cohabit during a limited or indefinite period. This was replaced by the codification commission's definition of irregular union in Art.708 of the Civil Code as a mere state of fact. This

change did not, however, mean the irregular union does not require the consent of the parties. No one can be forced to do anything without his consent. (Read Birru Gebeyehu, work cited previously)

(B) Capacity

In the Civil Code, the RFC and Regional Family Laws, one of the essential conditions of marriage is capacity although this not provided in irregular union. Despite this, based on the nature and requirements of a valid juridical act, incapables do not have the requisite ability to comprehend the nature and consequences of juridical acts. Capacity in marriage refers to the attainability of marriageable age as defined by law and mental capacity.

Regarding age, the FDRE Constitution under Art.34(1) provides that marriage is concluded when the spouses attain the marriageable age. The marriageable age is determined by the Ethiopian family laws to be eighteen years of age for both spouses.

The family laws do not, however, have comparable provisions which expressly or impliedly prohibit the formation of irregular union by minors. In spite of the absence of such provisions, it is tenable to maintain that the minimum age limit prescribed for marriage should be applicable to irregular union by taking into account the policy consideration for the requirement of age and from the view point of protecting children. **Do you agree with conclusion? Why/Why not?**

(C) Prohibited Degrees

In Ethiopia, both under customary law and codified laws, marriage between persons related within certain degrees (either by consanguinity or affinity) was prohibited and the social taboos against incest have been reinforced by the criminal law. From 1960 to the establishment of the Federal system in Ethiopia, the 1960 Civil Code was meant to be uniformly applied throughout Ethiopia since Ethiopia before 1991 was a unitary state. Hence marriage between blood relatives up to the seventh degree was prohibited (Art.551 and Art.582 of the Civil Code). Coming to the current situations, degrees of consanguinal relationships differ from region to region since each region is constitutionally empowered to come up with its own family law reflecting its social and cultural realities. Any ways,

although the degree varies, each regional family law prohibits marriage between blood relatives. (Read Art.8 of the Revised family code, Art.3 of the family code of Amhara and Art.27 of the Family Code of Oromia, and Arts.19 and 18 of the SNNP Family Code, for instance.

However, the same prohibition is not noticeable under the Ethiopian family laws as regards irregular union. But by taking into account the rationale behind prohibition of marriage between persons who are relatives by consanguinity, it is possible to conclude that it is not acceptable to form an irregular union by violating the prohibitions provided by law.

Another prohibition both under the Civil Code and the current family laws is marriage between affines. However, the degree of prohibition varies from region to region as you can understand by having a look at the relevant provisions of the law.

(D) Other Impediments

From the above discussions, it is possible to conclude that consent, capacity and fulfillment of conditions with regard to consanguinal and affinal relationships are elements of formation of a valid irregular union. How about period of widowhood and the existence of another irregular union?

The purpose of making a woman to observe period of widowhood (180 days in Ethiopia) is to avoid the conflict of paternity. If that is the case, can't we make a woman to observe this prohibition since one of the main effects of irregular union, as we will see later, is presumption of paternity for children born of an irregular union? In marriage, the justification for prohibiting remarriage before the lapse of a period of widowhood is that conflict of paternity will arise since marriage has clear beginning. However, although many irregular unions may have beginnings which the public cannot in any way ascertain, it is desirable, to make our policy consistent, to provide a period of widowhood during which an irregular union cannot be formed where such irregular union can have ascertainable and definite beginning. Otherwise, the same problem feared in case of remarriage will occur.

Another point worth raising at this juncture is whether an existing irregular union constitutes a bar to form another irregular union. The law does not have clear provisions in this regard. How would you go about this issue?

6.6.2. Legal Effects of Irregular Union

(A) General Considerations

As has been discussed in our previous discussions, irregular union existed in Ethiopia long before the adoption of the 1960 Civil Code. The 1960 Civil Code also gave recognition to such union and regulated the effects of such a union in relation to certain matters. However, the new family laws of the country have made departures from the 1960 Civil Code. The major departure is the creation of community property. On the following pages, discuss the most important effects of irregular union as incorporated under the Ethiopian Family Codes (Note that since the provisions of regional family laws are verbatim copies of the Revised Family Code, we may not reproduce the provisions of each regional family law. Hence, citing the relevant provision of the Revised Family Code suffices to avoid unnecessary repetitions).

(B) Absence of Bond of Affinity

Valid marriage creates a bond of affinity between the man and the relatives of the woman and vice versa. Consequently, marriage between person related by affinity in the direct line and marriage between a woman and the brother of her husband or marriage between a man and the sister of his wife is forbidden. As you will note under chapter Nine, as a consequence of the creation of bond of affinity in marriage, the obligation to supply maintenance between persons related by affinity in the direct line is imposed by the law (Art.198 of RFC).

In contradistinction to marriage, as provided in Art.100 of the RFC in irregular union, a bond of affinity is created neither between the man and the relatives of the woman nor between the woman and the relatives of the man. However, sub-article 2 of the above article provides that the legal impediments to a lawful marriage in the case of affinity are applicable to it. Accordingly, by virtue of Art.9 of the RFC marriage between persons

related by irregular union in the direct line is prohibited. In the collateral line, marriage between a man and the sister of his partner in an irregular union and the brother of her partner is prohibited. Because Art.19 of the Amhara Family Law is the verbatim copy of the RFC, what has been said in relation to the latter explains the former.

However, since degrees of impediment to marriage in Oromiya and Tigray, for instance, are different from the RFC, irregular union as an impediment to marriage should be seen accordingly. (Read Art.28 of the Oromiya family law and Arts.3-5 of Tigray Family Code). When it is broadly interpreted, it may also be said that the woman cannot engage in an irregular union with a man who is the relative of the man with whom she had been previously engaged in such union. But is it not contradictory, as far as the law is concerned, to say that there is no bond of affinity in irregular union on the one hand and prohibit marriage between the man and the relative of the woman or marriage between the woman and the relatives of the man on the other hand? Obviously, there is a clear contradiction. However, despite this contradiction the prohibition is justified on the ground of policy considerations. The prohibition is justified so long as it is done in the interest of protecting and maintaining the good relations between relatives and also maintaining peace and order in society. One can imagine the attendant chaos if a man is allowed by the law to marry the sister of the woman with whom he had been previously engaged in irregular union leaving her aside. The same crisis arises if the woman does so. Hence, in the light of such complicated problems, the prohibition is justified.

(C) Duty to Contribute to the Common Expenses

It has been discussed under effects of marriage that couples in a marriage are duty bound to contribute to the household expenses in proportion to their ability and respective means. Similarly, the man and the woman in irregular union are obliged to contribute to the common expenses they may incur during their union in proportion to their respective means (Art.101 of RFC). If both the man and the woman have similar means, the common expense is shouldered equally by both parties. If, however, one of the parties is unemployed and without means, he/she is not required to contribute any thing. In this case, the duty is to be assumed only by the other. Expenses incurred for the benefit of either of the parties are not considered as common expenses even if it is done during the

union. Common expense is one which is done for the interest of the partners in the union. **What are such as expenses?**

(D) Community Property

Because the 1960 Civil Code did not create community property in irregular union, partners irregular of union did not historically enjoy the same property rights as spouses of lawful marriage. The law, by its refusal to recognize the creation of community property in such union, seriously handicapped judges in their ability to relieve the inequity and hardships to one of the parties and prevent unjust enrichment of either of the parties.

A woman may engage in irregular union assuming that some legal protections are available to her relationship with the man or without any ideas as to the legal consequences of her relationship, or may be with the assumption that no legal distinction is made between her relationship and that of marriage. (See C.C Bruch "Property Rights of **De facto** Spouses Including Thoughts on the Value of Home Maker's services; Family Law Quarterly, Vol.10, No 1-4 (1978) p.135). During such union, common property may be created through the effort of the man and the woman. However, after a certain period, this relationship may be terminated for one reason or another. In this case, woman was evicted from the house by the man without any share of property. In such situations, the man could acquire wealth by unduly exploiting the woman.

In order to understand the injustices caused to parties in an irregular union, the following two Ethiopian court cases are presented.

In one case, a certain Beletu Achame brought suit against a man named Ato Gebresadik Workneh in the former Addis Ababa Awraja Court alleging that she and the defendant were married since 1964 E.C and had five children from their relationship. Despite that he forced her out of the conjugal home. She requested the court to make an order of maintenance for her and refer the case to family arbitrators. However, the defendant denied the existence of marriage. She proved that she was registered as the defendant's wife in "Edir", kebele family form and pension forms. Besides, four witnesses testified that the two parties lived in the defendant's house as husband and wife but did not know

whether marriage was concluded or not. Based on this evidence, the Awaraja court decided that there was marriage. Because of this, the defendant appealed to the then High Court stating that the decision of the Awraja court was not appropriate. The High Court reversed the decision of the Awraja court by reasoning that the fact that there was a valid marriage was not proved. The Supreme Court affirmed the decision of the High Court. Hence, the woman could not share from the community property

Another case involving a substantial amount of property was the case of Ato Arusi Ketema and W/ro Zewde Yigletu. Ato Arusi Ketema applied to the Melka Belo Awraja Court (in Harar) stating that he and W/ro Zewdie were married since 1946 E.C and had children from the marriage. He added that during the marriage, she took some money from the common property and opened a "tej bet" in Melka Jebdu (Harar); they had a bar, a pension and "tej bet" in Melka Belo "Haretecha" Town. He requested the court so that order would be given for the coming back of the woman to the conjugal home with the property she took. She was summoned but did not appear. Then based on the testimony of witnesses, who testified that the two persons lived together as husband and wife, the court handed down an **ex parte** judgment that there was marriage and referred the case to family arbitrators. The defendant appealed to the High Court of Eastern Hararghe Administrative Region stating that there was no marriage but irregular union and that she terminated the union because of health reasons. She also said that there was no common property. The High Court reversed the decision of the court of rendition and reasoned that the testimony of the witness demonstrated that the relationship was an irregular union and the property acquired in an irregular union belonged to the one who acquired it. (Ato Arusi Ketema Vs. W/ro Zewde Yigletu, (Sup. Ct. 1986, Civ. App. No 47/86, unpublished). This means that no property was given to the man.

Bear in mind that the parties lived together for about thirty-six years, but all property was registered in her name and the man finally found himself without any share from the property acquired during their relationship.

From the above two cases, you can understand that although the woman lived for many years with the man, property should not be shared since under the 1960 Civil Code irregular union could not create community property.

It was upon termination of the union that the man might be ordered to pay to the woman an indemnity corresponding to not more than three months allowance by virtue of Arts.716 cum 717 of the Civil Code. This was done if and only if the judge felt that equity requires so. If the judge felt otherwise, the woman was not entitled to any indemnity and had to leave her house surrendering the common popery to the man. This was what was happening prior to the coming into effect of the RFC and Regional Family Laws. Under the current family laws, irregular union has been made to give rise to community property between the cohabitees provided the relationship lasts for three years or more. All properties that the man and the woman have acquired during their union are considered to have been acquired within the union and, therefore, are presumed to be common property of the man and woman although the presumption is a reputable one. (See Art 102 of the RFC and relevant provisions of the regional family laws).

Cohabitants in irregular union cannot agree that no community property is created during their union. This is against public policy. The law has its own policy reasons behind the creation of community property. The man and the woman, however, are at liberty to agree as to the administration of the common property.

As explained above, community property is created when the union of the man and the woman lasts for not less than three years. A union lasting less than three yeas, therefore, does not create common property and the parties can terminate the union without any dispute relating to common property. If, however, the one who terminated the union commits a fault, he/she is liable to pay damages. This can be assessed in accordance with the relevant provisions of the Ethiopian extra-contractual liability law (see Art.2090-2123 of the Civil Code).

When we come to effects of community property, community property gives rise to issues such as administration and liquidation of the common property. In this regard, the RFC, under Article 103, has stipulated that matters relating to the administration and liquidation as well as payment of debts in case of irregular union are to be governed in accordance with the provisions of the code that deal with community property and liquidation of pecuniary relations of spouses in marriage. (Hence it is important to relate this discussion with the discussions previously made under the foregoing chapter).

As matter of principle, the common property of the man and the woman in an irregular union is administered jointly with a view to ensuring equality of sex which is unequivocally guaranteed under the FDRE Constitution. Nonetheless, the above rule will not be applicable where it is agreed by the partners that one of them administer the whole jointly owned property or just a part of it. Nor is it applicable where one of the partners is declared incapable, deprived of his/her right of property management or incapable of administering the common property for any other valid reasons. In such cases, it is the other partner who is empowered to administer by agreement or not declared incapable or not deprived of this right of property management that takes the responsibility of administering the common property. However, in doing so, he/she has to account to the other when requested (Arts.66, 67, 68 and 103 of RFC).

All actions for sale, exchange, rent out, pledge, mortgage or alienation in any other way of the common property need the consent of both the man and the woman in the union. The same consent is also required for similar actions in relation to a common movable property and securities registered in the name of both partners the value of which exceeds 500 Birr. Neither the partners are allowed to borrow or lend money exceeding the above amount of money or stand surety for a debt of 500 Birr; nor is it possible for them to transfer a common property the value of which is greater than 100 Birr or money greater than such sum by way of donation lacking common consent. (Read Art.103 and Arts.85-93 RFC).

Non-observance of the above rules by one of the partners gives the other partner the right to bring an action for the cancellation of the obligations entered within six months after he/she became aware of the creation of such obligations or in any case within two years after such obligations have been entered. (Read Arts.68, 69 and 103 of the RFC and pertinent provisions of Regional Family Laws).

The other issue pertaining to community property of partners in an irregular union is when the union of the man and woman ends, it is mandatory that the common property has to be divided if there is any. In this regard, it has been provided that the division of the common property in irregular union will be effected in accordance with the agreement entered into for this purpose by the parties. In default of such agreement which

is usually the case between partners in such union, it is the provisions of the law on liquidation of pecuniary relation of spouses in marriage that apply to the division of the jointly owned property of cohabitants (Read Art.103 of the RFC with Arts 85-93 of the same code and the respective provisions of regional family laws).

Before establishing the share of the man and the woman in the common property, there are certain procedures that have to be complied with. In the first place, the cohabitees take back their personal property by proving that it belongs to them (Art.103 can 86(1) of RFC). They have to prove this fact because, unless proved, it will be taken as common property as per article 102(2) and hence no right of retaking. According to this article, any property which exists during the union is deemed to have been acquired within the union and hence constitutes common property unless it is proved to the contrary. Hence, a cohabitee can take back his property by proving that such property belonged to him/her.

Secondly, where the personal property of a cohabitee has been alienated and its price has fallen into the common property, he/she is entitled to recover it from the common property (Art.103 can Art.86(2)). A cohabitee is also entitled to indemnify if it is found out that the personal property of the other or the common property has been enriched to the prejudice of his property (Art.103 can Art.86). Damages may also be demanded before the physical division of the common property takes place by either of the cohabitants where the other partner, having been empowered to administer the jointly owned property, performs acts which adversely affect his/her partner or such acts are done without mandate, or constitute acts of bad administration or have been performed in fraud of the right of the partner making the claim (Id, Art.103 cum Art.87). In such cases, the aggrieved partner can not request the court to grant him damage if the above acts occur five years before the termination of the union. Debts of the cohabitants have to be also paid before the partition of the common property (Id, Art.103 cum Art.89) which is meant to protect creditors who may be in a disadvantageous position if partition is made before their claims are settled.

As mentioned before, partition has to be done only after all the procedures discussed above (i.e., retaking, withdrawal, indemnity, and payment of debts) have been completed. Once this has been done, the common property will be divided equally between the

cohabitees. Equal partition is realized, however, only on condition that no contrary agreement exists between the cohabitants. It is true that the manner of division can be determined by the cohabitants themselves where they conclude a division contract. As a rule, partition takes place in kind in such a way that each cohabitee takes some property from the common property. Where it is impossible to divide the jointly owned property equally, the inequality in kind should be compensated by payment of money. It should be noted that things which are most useful to a cohabitant should as far as possible be assigned to his/her share. For instance, if a certain property is relevant to the business or occupation of a cohabitant, it should be give to him/her. It may happen that a certain property is difficult or impossible to be divided because, for instance, the property in question cannot be taken apart by its nature or taking it apart would prevent its functioning or devalue it and the partners may not be in accord as to who will have this property. In this case, the property is sold and the money received is shared by the partners. In default of agreement on the condition of sale, the property will be sold by auction (Read Arts. 103 can Arts.85-93 of the RFC).

(E) Debts of the Man and the Woman in Irregular Union

During the union, the man and the woman may transact with third parties and incur debts. Such debts may be incurred either for the interest of both parties or for personal purposes.

If a debt is incurred either by the man or the woman for their maintenance and their children, it becomes a common debt and creditors will have a recourse against one or both (Read Art.102(3) of the RFC). In other words, such debts may be recovered from the personal property of each cohabitee and/or from the common property. Under Art. 714 of the Civil Code, it was provided that if a debt was contracted by the man for the maintenance of the children and of the woman and the man, the woman would not be held jointly and severally liable with the man. If, however, it is the woman who contracted the debt, the man would be held jointly and severally liable with the woman. Obviously, the RFC and regional family laws have not drawn such distinctions. **What do you think is the retainable behind this? Would it undermine equality of sex if the article were retained under the new family laws?**

If a common debt of the man and the woman is due after the termination of the union and the division of the common property, each of them is liable to pay the debt in proportion to his or her share (RFC, AA.103 cum Art.93).

Debts due by one of the partners for personal purposes to a third party are recovered on his personal property and when the personal property is not sufficient to cover the debt, the creditor will have recourse against the common property (RFC, Art.103 cum Art.70(1). Under the Civil Code since no community property exists between unmarried cohabitants, such right of recourse by the creditors against the common property was absent.

(F) Filiation

The other issue that is intertwined with irregular union is the issue of filiation. Because filiation is to be given a wide coverage in chapter seven of this course material, it suffices to say that a child conceived or born of an irregular union has as his father the man engaged in such union. This was the case under the Civil Code since Art.715 provides that filiations of the children born of an irregular union shall be established in accordance with the relevant provisions of the code and Art.745 of the same code stipulates that a child conceived or born during an irregular union has a father the man engaged in such union. The same thing has been reiterated in the RFC and the regional family laws. As to the details, we refer you to the discussions made under the next chapter.

6.7. Proof of Irregular Union

From the discussion under chapter four, you have seen that there is no presumption that persons are married and hence a party asserting the existence of marriage is required to adduce proof to it. Similarly, a party desiring to benefit from the legal consequences of an irregular union is also required to prove the existence of irregular union, when such union is provide in accordance with the requirements of the law, the legal effects of such union become operative.

As this juncture, you can understand that marriage may be proved by various modes of proof typical among which particularly in Ethiopia are certificates of marriage and possession of status.

When it comes to proof of irregular union, the primary and frequent mode of poof is possession of status as opposed to documentary evidence. This type of mode of proof is preferred because of its practical significance. Most frequently, a man and woman engage in an irregular union without a written agreement that evidences the fact of their union. It is a simple union in which it is hard to find a reliable documentary evidence to prove the fact of the union.

But the issue worth raising is as to what is meant by possession of status? Possession of status is said to have comprised some three facts known as *"nomen"*, *"tractus"*, and *"fama"*. *"Nomen"* is the fact of having the name which indicates the status; *"tractus"* is the fact of being generally reputed as having the status by all persons with whom family or business relations took place; and *"fama"* is the fact of being generally recognized and treated by the public as having the status. It is the addition of all these three facts that give rise to possession of status (M. Planiol and G. Report, Treatise on the Civil Law, (12th ed; 1939, Vol.1, part 1, 959 p.278).

Hence, brearing in mind the aforementioned facts, possession of status may be understood as the fact of bearing the name that designates the status and being treated and recognized as having such status by the community in general and by family members, friends and other acquaintances in particular.

Despite this, however, proof of irregular union by possession of status is not an easy task. The 1960 Civil Code of Ethiopia provided for two modes of proof by which the existence of irregular union may be established. These are proof by possession of status and proof by an act of notoriety (Read Art.718 of the Civil Code). However, proof of union using such modes of proof was problematic in the past due to lack of clarity on the part of the law.

As regards proof by possession of status, the problem with this mode of proof is its confusion with proof of marriage by possession of status. Some judges interpreted

Art.699 of the Civil Code which deals with proof of marriage by possession of status in the same a way as proof of irregular union by possession of status. According to these judges, if witnesses are able to prove the fact that the man and the woman lived as husband and wife and as a result of this, the witnesses themselves and other persons in the community could recognize them as such this by itself would suffice to prove marriage. Other judges, however, took a different position in relation to the above issue. They said that when marriage was to be proved by possession of status, the witnesses should testify the fact of the celebration of the marriage some time in the past in addition to those facts clearly provided under Art.699. According to this line of interpretation, the witnesses, in addition to testifying that the man and the woman behaved as spouses and as a result of this, their families and society consider them as such, has to testify they have witnessed the celebration of the marriage some time in the past. Unless we interpret it this way, they said, no distinction will be made between proof by possession of status in case of marriage and irregular union (Hig Ena Fitih, Journal of Law of the Federal Supreme Courts, Nehasie, 1981 E.C, p.22).

Having in mind the above two differing views and in response to the lack of uniformity with regard to the practice of courts in interpreting possession of status in marriage, the Plenum of the Supreme Court issued a directive that favored the second line of interpretation in accordance with the power given to it by article 22(2) of proc. No.9/1980. The directive under Art. 3 provided that proof of marriage by a possession of status should be understood as a mode of proof that establishes the fact of the celebration of the marriage in any of the three forms of marriage (i.e., civil, religious and customary). It stated that taking proof of marriage by possession of status as identical with that of proof of irregular union by possession of status will have the effect of uniting by marriage those who were not married and considering as unmarried those who were married. Hence, to avoid such unpleasant consequences, courts should make sure that witnesses have testified proving the celebration of the marriage as an additional requirement to Art.699 of the Civil Code.

The problem of proof relating to possession of status and the lack of uniformity of judgments by courts in this regard was thus solved as discussed above by the issuance of the directive.

The other problem relating to proof of irregular union under the Civil Code is that which pertains to act of notoriety. The Civil Code under article 720 states that the existence of irregular union might be proved by an act of notoriety when possession of status is contested. It further provides that the provisions of the Civil Code pertaining to proof of marriage by an act of notoriety (Art.702-706) are applicable to proof of irregular union. However, the problem with Art.720 is that proof of irregular union by an act of notoriety is impossible and incompatible with the very concept of irregular union (G. Krzeczunowicz, Problems in Ethiopian Family Law 1978, problem 18). An act of notoriety is used as proof of marriage only when the court authorizes so (Art-720(1) of the Civil Code. Such authorization is made by the court when, for instance, the registers of marriage have not been regularly kept or where it is impossible to the claimant to obtain the copy of the record in the register of marriage (Id, Art.703(a) –Art.147(1)). Such provisions of the law point to the prior celebration of marriage in either of the three forms of marriage and hence irrelevant to irregular union which actually does not result from a prior celebration. What is more, proof by an act of notoriety is governed by Art.146-153 of the Civil Code and as per Art.149 of this code, an act of notoriety is to be drawn having the same particulars as a record of marriage would. Evidently, a record of marriage, among other things, is required to show the date of celebration of the marriage (Id, Art.117(c)). This obviously is inconsistent with the state of fact definition of irregular union despite the fact that it is made applicable on irregular union by virtue of Art.720(2) of the Civil Code.

To sum up, the provisions of the code (i.e., Arts.701-706) that deal with proof of marriage by an act of notoriety which were made applicable to proof of irregular union by article 720(2) are totally incompatible with the concept of irregular union to which no prior recording, registration and celebration is required.

Proof of irregular union by an act of notoriety is also impossible on another ground different from the above. It is true that an act of notoriety is prepared by an officer of

civil status or notaries (Id, Art 146(1)). The task of drawing up an act of notoriety is given solely to officers of civil status or notaries, not to any other organs. However, such offices have not been established in Ethiopia and hence proof by act of notoriety in case of irregular union was impossible.

How about the RFC and the regional family laws? Have the new family laws solved the problem of proof of irregular union?

The RFC and the regional family laws have adopted a single mode of proof by which an irregular union may be proved. They have singled out possession of status as a mode of proof of irregular union by ignoring proof by an act of notoriety. Thus, the problem relating to proof by an act of notoriety is no more a problem of proof of irregular union under the RFC for this mode of proof by itself was struck out from the ambit of proof of irregular union as unnecessary.

As mentioned in the foregoing discussions, possession of status is a concept that encompasses the fact of bearing the name that designated the status and the fact of being treated and recognized as having the status by relatives, friends and acquaintances in particular and the society in general.

The RFC under article 106, provides that irregular union is to be proved by way of possession of status and defined possession of status of persons living in an irregular union as the state of affairs in which the man and the woman, though not married, behave as married people and as a result of this, they are recognized as such by their families and the community as well.

As can be understood from the definition, three facts have to be proved to constitute possession of status of persons living in an irregular union. These are (a) the fact that the man and the woman behaved as married people (b) That they are considered as married people by their families and (c) The fact that both are considered as married persons by the community.

In the first place, the witnesses called upon to prove the possession of status of persons living in an irregular union have to testify that the persons behaved like married people.

They have to testify that the man and the woman conducted themselves and lived together like married people sharing the same house and exchanging love, loyalty and respect to each other. They must show to the court that the man and the woman perform acts which are analogous to those acts which are usually done by married couples.

Secondly, to constitute possession of status in case of irregular union, the witnesses are expected to show that the man and the woman are recognized and treated as married by their families and relatives. Being recognized as married by one of the families of the partners only is not sufficient to prove the possession of status of persons living in an irregular union. The fact that both the families and relatives of the man and the woman recognize the partners as married should be proved by the witnesses. This may be accomplished, for instance, when the witnesses testify they have seen the families of the partners visit them during holidays and in times of problem. (Read Habtamu Wuletaw, The Legal Effects of Irregular Union Under the Revised Family Code, Senior Thesis, Unpublished, Faculty of Law, A.A.U, 2004, pp.40-55).

Finally, the witnesses should convince the court that an irregular union existed between the partners by showing that the parties lived together so openly like husband and wife that the community within which they live recognize and treat them as married. They have to be able to establish the fact that their neighborhood, acquaintances and other persons who come into contact with the man and the woman consider them as married people. You need to bear in mind that the witnesses have to make it clear that the opinion of the community towards the relationship of the man and the woman is undivided and uniform. If there is a division of opinion in the community towards the relationship of the man and the woman, they will not be considered to have acquired the possession of status of persons living in an irregular union. (Ibid)

Under the current family laws of Ethiopia, proof by certificate of marriage is the primary mode of proof. However, proof by certificate of marriage is difficult, it may be proved by possession of status. (See Art.95 of the RFC). According to Art.96 of RFC, possession of status of spouses is established when the man and the woman mutually consider themselves and live as married and as a result of this, they are considered and treated as spouses by their families and the community as a whole.

As far as the law is concerned, possession of status of spouses is distinguished from possession of status of persons living in an irregular union in two ways. The first distinctive feature is that in the case of possession of status of persons living in an irregular union, it is not a requirement that the man and the woman should mutually consider and treat each other as husband and wife. Therefore, the witnesses called upon to prove the state of fact of irregular union are not required to prove the fact that the parties have lived together mutually considering themselves as married people. However, this is a requirement when it comes to possession of status of spouses. The fact that the man and the woman mutually consider themselves as married should be proved to establish possession of status of spouses. This distinguishing factor, however, is not that important practically. This distinction is present even under the Civil Code but it did not serve its purpose for it has no practical significance (Hig Ena Fitih). This is because, mostly the circumstances under which a man and woman introduce themselves to third parties that they are husband and wife are rare particularly in our society. Unless they are asked so or other situations dictate them, usually a man and woman do not explainto the community that they are married. The reality on the ground is that the people around them consider and recognize them as married by simple consideration of their behavior towards one another and in consideration of their joint life. The chance of overhearing the parties that they consider themselves as husband and wife is very much rare. Therefore, this distinction is a distinction that exists as far as the law is concerned. It does not serve its purpose to a layman witness who testifies on the basis of the overt conduct of the parties.

Though not specifically provided as in the case of the first distinctive feature, the second distinctive feature is one that which is capable of creating a real dichotomy between the two concepts (i.e., possession of status of spouses and possession of status of persons living in an irregular union) which, as discussed before, were a subject of debate prior to the coming into force of the current family laws of Ethiopia. It is to be recalled that under the Civil Code because of the lack of clarity on the part of the law, it was difficult to know the intention of the legislature regarding the interpretation of possession of status of spouses and as a result of this, some judges took possession of status of spouses as identical with possession of status of persons living in an irregular union while others

treated the two concepts differently. Under the RFC, however, attempt has been made to avoid the confusion that was created by the Civil Code (see Mehari Reader, ytššlWN yb@tsB ?G lmgNzB y¸rÇ xNÄND n ïC¿ Q{ xND ¼1995¼ p.115). With a view to avoiding the above confusion, the RFC has given a clue by which the intention of the legislature may be known for interpreting possession of status of spouses (Ibid). Even thought it is not clear from the English version of the title of Chapter Six of the RFC which is entitled "proof of marriage" in the same way as the Civil Code, the title of the Amharic version of this chapter gives a clue about the intention of the legislature in relation to the meaning of possession of status of spouses (Ibid). chapter six of the Amharic Version of the RFC is entitled «UBÒ lmfiÑ Sl¸qRB ¥Sr©´. As can be understood from this title, a proof of marriage is a proof that which is adduced to establish the conclusion of marriage. The Amharic version of the Civil Code, on the other hand, gave the following title «yUBÒ ¥Sr©´. This title, unlike the title of the Amharic version of the RFC, does not convey any additional message except that a proof of marriage is one that which is adduced to prove marriage. Hence, as it can be understood from the title given to proof of marriage by the Amharic version of the RFC which is the official version, any mode of proof (including possession of status) of marriage whatsoever should prove, **inter alia**, the fact that the marriage had been celebrated (concluded) in either of the three forms of marriage sometime in the past.

Accordingly, proof of marriage by possession of status of spouses is not limited to establishing the fact that the man and the woman mutually consider themselves as married and as a result of this, their families as well as the community consider and treat them as spouses as stipulated by Article 96 of the RFC. The fact of the celebration of the marriage in one of the forms of marriage (i.e., civil, religious or customary) should also be proved as an additional requirement of Article 96 of the RFC. This additional requirement obviously distinguishes proof of marriage by possession of status of spouses and proof of irregular union by possession of status of persons living in an irregular union for what has to be proved in case of irregular union is that the man and the woman behaved as married people and are regarded as such by their families and the community. Nothing more is required. The problem with this additional requirement, however, is that it is totally absent in the English version and also that it is not specifically and clearly

provided in the Amharic version. As shown above, it is by way of interpretation that one can arrive at the additional requirement that the fact of the celebration of marriage has to be proved to establish possession of status of spouses. Hence, it is very difficult to say that the RFC and other regional family codes have effectively and successfully avoided the confusion with regard to possession of status for they have failed to provide for the additional requirement that has been discussed above.

Because of the absence of a clear and specific provisions, courts might not consider the fact of the celebration of the marriage as an element in establishing possession of status of spouses. For instance, in the case of W/o Assebech Wolde Tsadic V W/o Timnit Gebreab, the Region 14 Administrative Zone Court decided that W/o Assebech is not the wife of the late Ato Gebreab since the witnesses did not testify that they had known and seen the celebration of the marriage between W/o Assebech and Ato Gebreab. W/o Assebech appealed to the Supreme Court against the decision of the Zone Court. The Supreme Court reversed the decision of the Zone Court and ruled that, even though the witnesses did not know about the celebration of the marriage, the testimony of witnesses that they as well as the families, relatives and the community know and recognize W/o Assebech and the late Ato Gebreab live as husband and wife and the register of 'Idir" members and the 'kebele' residents form produced by the appellant which confirms the testimony of the witnesses are sufficient to establish possession of status of spouses in the light of the requirements of Article 95 and 96 of the RFC. **Assuming that W/o Tminit Gebreab brought her case to the cassation division of the Federal Supreme Court alleging that the decision of the Federal Supreme Court contained fundamental erro of law, how would you go about the case**?

In another the case, W/o Muna Zeinu V W/o Seble Demeke, the court, however, considered the fact of the celebration of the marriage as an element in proving possession of status of spouses. In this case, the witnesses testified that W/o Muna and the late Ato Samuel Mamo had celebrated their marriage in accordance with their custom. Moreover, they testified that W/o Muna and Ato Samuel lived as husband and wife and that the late Ato Samuel had at one time introduced W/o Muna to his families as his wife. Taking into consideration the afore-mentioned remarks made by the witnesses, the court ruled that the

testimony of the witnesses in the case at hand established the status of spouses as per Articles 95 and 96 of the RFC (Yeka First Instance Court, 1995 Civil case No 00086/95).

As you can understand from the above two cases, there is still a possibility for inconsistency in interpreting possession of status of spouses which is attributable to the absence of a clear and specific provision that demands the fact of the celebration of the marriage be proved to establish possession of status of spouses.

Coming to the effect of proof of irregular union, if the fact that the man and the woman have openly cohabited as husband and wife and behaved as married people and as a result of this, their families and the community recognize and treated them as such is proved to the satisfaction of the court, this by itself gives rise to a presumption that the man and the woman had previously engaged in an irregular union ((Art.106(3) of the RFC). Upon proof of the above facts, the law presumes that the man and the woman lived in an irregular union and the legal effects that naturally flow from this union will be enjoyed by the party asserting its existence. Under such circumstances, the burden of showing that an irregular union did not exist lies on those who so asserting. That is, the presumption is not conclusive and, therefore, can be rebutted by a contrary proof (Art.106 (4) of the RFC.

Before we conclude this section, few points need to be raised as regards the manner of establishing possession of status in the case of irregular union. It is true that proof is the act of persuading the mind of the judge by showing evidence or the reality of a fact alleged. The parties have to be able to establish a requisite degree of belief concerning a fact in the mind of the tries of a fact or the court by way of proof. This act of persuading the judge or the court is usually accomplished through the aid of witnesses, documents, admissions and declarations.

Similarly, possession of status is the mode of proof of irregular union. Using the mode of proof of possession of status, parties are at liberty to persuade the court that an irregular union exists. But, how is possession of status of established? In other words, what is the manner of establishing possession of status of persons living in an irregular union? Under the Civil Code of Ethiopia, the manner of establishing such possession of status seems to be limited to testimony of witness and no other way of establishing possession of status

since Art.719 of the Civil Code provides that possession of status shall be proved by producing reliable witnesses and it may be contested by producing reliable witnesses.

Such limitations are not made under the RFC, Article 106(4) of the RFC has provided that the presumption of the existence of irregular union “may be rebutted by producing any kind of reliable proof”. Oversely, it may be that the possession of status of persons living in an irregular union is established by producing any kind of reliable proof. So long as the proof is reliable, possession of status may be established through the aid of witnesses and documentary evidence. But, what is reliable proof (evidence)? In the case W/o Muna Zeinu V W/o Sebel Demeke the court reasoned that even though a contract of marriage does not prove the existence of marriage, the testimony of witnesses who were mentioned as witness in the contract of marriage is a reliable proof to prove the existence of marriage by possession of status. The fact of the presence of their name in the contract of marriage makes the testimony of the witnesses reliable. Similarly, the testimony of the man who once upon a time reconciled the man and the woman while they were living in an irregular union and whose name had been mentioned as arbitrator in the document detailing the arbitration of the two parties may be taken as reliable proof. It should be noted that the code uses the same language which is “reliable proof (evidence)” when the presumption of the existence of irregular union and marriage are to be contested (Read Art.97 (2) cum Art.106 (4) of the RFC).

Furthermore, some documents that create a certain degree of belief like “kebele” residents register and members of “Idir” register that recorded the man and the woman as husband and wife are important to prove the existence of irregular union. This is because the kebele residents as well as members of the “Idir” will regard the man and the woman as married in consideration of such registers. Even though such kinds of documentary evidence may not independently prove the possession of status of persons living in an irregular union, it is advisable to admit them in evidence to corroborate testimony of witnesses and other documentary evidence.

6.8. Termination of Union

One of the distinguishing features of irregular union is its easy termination. The parties in the union may unilaterally or by mutual consent end the union. Irregular union is also terminated on the death of either of the parties and in some jurisdictions by de facto separation of the parties for over a year or when either of them get married with a third party (G.C. Cantero, "The Catalan Family Code of 1998 and other Autonomous Regional Laws on de facto unions, "The International Survey of Family Law (2000.ed) p.400.

As we have seen above, the unilateral will of either of the parties in irregular union suffices to end it and this actually makes the legal force of the union a loose one. However, the termination gives rise to certain juridical consequences. The end of the union does not totally cause the cessation of all effects. Some effects do in fact subsist after the cessation of the union. (Ibid)

In Ethiopia, the man and the woman are at liberty to end their union at any time they wish. Accordingly, an irregular may be terminated unilaterally or by mutual consent in addition to the clear instance of termination of the union by death. Though not clearly provided, an irregular union may also be dissolved by a court order when a man and woman previously engaged in an irregular union beginto live in an irregular union with the sister or brother of one another upon the application of any interested person or the public prosecutor (Read for instance Art.32 cum Art.100(2) of the RFC). It is worth noting that a man or woman who were previously engaged in an irregular union cannot marry or live in an irregular union with the brother or sister of the other as it is prohibited under Art.100(2) of the RFC. This legal effect of irregular union subsists even after the break up of the parties.

As mentioned before, under the Civil Code when an irregular union is terminated unilaterally by the woman, there is no obligation on the part of the woman to pay indemnity to the man for doing so. However, if it was the man that terminated the union unilaterally, he might be held liable to pay indemnity to the woman. Under the RFC and other regional Family Codes, however, no such obligation to pay indemnity is imposed exclusively on the man. For instance, according to Art.105 (2), of the RFC unless the

party that ended the union commits a fault, no obligation to pay damages is imposed by the law.

The other effect of termination of irregular union is that of the division of the common property if there is any. As has been said previously, if the union lasts for three years, the law presumes that property acquired during the union is a common property. Hence, when the union is ended either through the initiation of the man or the woman or by mutual consent, the fact of the termination results in the division of the jointly owned property between the parties.

If the death of a party ends an irregular union, the surviving partner is not entitled to inherit the property of the deceased unless the deceased provided for this right by way of a will in accordance with the rules of testate succession. All what the survivor gets is what is provided for him or her in the will of the deceased partner if there is any. It is to be noted that no right of succession exists even between spouses in a lawful marriage. Hence, termination of union by death results in partition of the common property between the surviving partner and a person considered as the deceased's heir by law.

6.9. Summary

Men and women establish various intimate relationships. Among such relationships, marriage is the typical one. However, men and women live together in an irregular union for various reasons. The causes that may make man and a woman to live together without concluding formal marriage may be economic, social and other reasons.

Because family is established under such union, the law should give recognition to such union with a view to protecting such family, particularly the rights of children born from this union and the rights of women with respect to their right to equality with men. That is why, Ethiopian family laws, both the federal family law and regional family laws, have given recognition and protection to irregular union although the protection accorded to partners in an irregular union is not equal to protections given to spouses in marriage.

In Ethiopia, irregular union produces certain legal effects. The first thing is that it creates community property so long as the parties have lived together for not less than three years. Secondly, partners are duty bound to contribute to the common expenses of the family in accordance with their means. Thirdly, if the parties entered into transactions and are indebted to third parties in the interest of the family, they are duty bound to discharge such debt according to the law. The other most important effect of irregular union is the fact that a child conceived or born in this union is deemed to be the child of the man who was with the women during conception or birth of such child.

Irregular union in Ethiopia is quite different from marriage in many respects. One difference is that irregular union is proved by possession of status while marriage is proved by record of marriage and possession of status. Even in the case of possession of status, proof of irregular union by possession of status is not similar to proof of marriage by possession of status.

Irregular union is freely formed by the parties without following the rigorous procedures of marriage. Similarly, it can be terminated by one of the partners without any reason although a partner who ended the union by committing fault is required to pay compensation to the other partner.

6.10. Review Questions

1. Discuss the differences between marriage and irregular union focusing on:
    (a) Procedures of formation and termination.
    (b) Personal and pecuniary effects.
2. It is clear that all the Family Codes of Ethiopia have given recognition and protection to irregular union although the effects attached to irregular union are not the same as marriage. Would it be necessary to upgrade irregular union to the status of marriage? Why? Why not?
3. During the adoption of the Revised Family Code of the FDRE, there were serious debates as regards the status of irregular union. A group seriously argued that irregular union should be done away with. The other group vehemently counter-argued that maintaining irregular union was meant to address social problems already on the ground. Despite such arguments, the Ethiopian family laws have given recognition to irregular union. Assume, however, that the same debate has recurred in Ethiopia. To which of the above arguments do you subscribe? Why? Why not?
4. Read closely the provisions of the 1960 Civil Code of Ethiopia (Arts.708-721) and Arts.98-107 of the Revised Family Code of FDRE or the relevant articles of any Regional Family Code and identify the departures made by the New Family Codes as compared to the provisions of the Civil Code. Discuss the rationale behind such departures in view of equality of men and women incorporated under the FDRE Constitution and other international human right instruments to which Ethiopia is a party.
5. If you closely read Arts.98-107 of the RFC, Arts.109-118 of the Amhara Family Code, Arts.128-139 Oromiya Family Code and Arts.120-130 of the Family Code of Tigray, you can understand that all the articles are one and the same. Are there any common cultural, religious and social grounds particularly in the three regions so as to come up with the same legal provisions on irregular union? How would you evaluate this in

the light the fact that Ethiopia is a multi-cultural society and it has adopted an ethnic-based federation?

6. Art.100(1) of the RFC provides that an irregular union shall not create any bond of affinity between the man and the relatives of the woman and between the woman and the relatives of the man. What are the legal effects of such absence of bond of affinity? What would the consequences (s) be if bond of affinity were created by irregular union?

7. The personal and pecuniary effects of marriage may be regulated by a marriage contract concluded between the spouses without derogating from the mandatory provisions of the law. Could personal and pecuniary effects of irregular union be regulated by contractual agreements made by the partners to such union?

8. The conspicuous personal effects of marriage are respect, support and assistance, joint management of the family, cohabitation and duty of fidelity (Read, for instance, Arts.49-56 of the RFC). Does irregular union produce the above personal effects as between the partners? Discuss critically.

9. What is the scope of application of possession of status as used in the Family Codes of Ethiopia? What does proof of irregular union by possession of status require?

10. By consulting relevant literatures or website, assess the historical development, status and effects of irregular union in foreign jurisdictions and compare and contrast the Ethiopian Family Laws on irregular union with such jurisdictions.

11. Ato Awulachew and W/ro Aberrash lived together in an irregular union as of October 1991. They had four children born in such union. Because W/ro Aberrash was a house wife, her role was confined to treating the children and managing the family. These responsibilities were assigned to her by Ato Awulachew since he was not able to handle the above affairs. However, he was an accomplished businessman and the whole expenses of the family were covered by his financial expenditure. To the dismay of the family, Ato Awulachew was knocked down by a car diver who (the latter) was an employee of ABC company. Because the pillar of the family collapsed,

W/ro Aberrash sued the driver and ABC Company on her own behalf for material as well as moral compensation.

Assuming that the case were brought to the bench where you sit as a judge, would you award W/ro Aberrash material as well as moral compensation. (In attempting this question, please try to consult the relevant provisions of the Ethiopian Extra-contractual Liability Law i.e., Arts.2027-2161 of the Civil Code of 1960)

12. Ato Gemechu and W/ro Letay have lived in an irregular union for the last 15 years. Although their earlier relations were full of joys and happiness, a serious problem cropped up as of the beginning of the Ethiopian Millennium since Gemechu suddenly became impotent. Because of this, W/ro Letay terminated the union without giving him prior notice. It is owing to this sudden termination that Ato Gemechu has brought suit against his partner claiming indemnity since she, according to his claim, committed a fault by suddenly terminating the union.

    Would she be required to indemnify Ato Gemechu? Why? Why not?

13. Ato Bedassa and W/ro Korse have lived together for the last 20 years without concluding marriage since both were hard workers, they were able to construct a splendid villa in Adama (Nazareth). Although it was agreed that the villa was a common property, Ato Bedassa sold the villa to Ato Chala without consulting W/ro Korse. Because of this, Korse wants to bring suit against Ato Bedassa and Ato Chala to get the contract cancelled/revoked/. Assuming that you, have been approached by W/ro Korse, what legal advice would you give her? What defense(s) would you raise, if any, in favor of Ato Bedassa and Ato Chala assuming that you are a lawyer retained by Ato Bedassa and Ato Chala?

14. In what respects was the 1960 Civil Code unfair to women engaged in an irregular union? Do you think that the current family codes have established just relationships between a man and a woman in an irregular union?

15. What are the major causes for the establishment of irregular union in general? Can you identify causes of such union in Ethiopia? Is it possible to maintain that this or

that is a cause for irregular union in Ethiopia without conducting a fulfilaged research?

16. Some people zealously argue that to give recognition to an irregular union is unconstitutional since it is only marriage that is embodied in the constitution. Others maintain that not to recognize and give protection to irregular union is unconstitutional since failure to give recognition and protection to irregular union is failure to give adequate protection to the family (the fundamental unit of society) which has been give protection under the FDRE Constitution. Which of the arguments appeals to you? State your reasons critically.

17. Ato Dagnachaw and W/ro Ayantu lived together as husband and wife, although no marriage was concluded between them, since Megabit 1970. On Miazzia 10, 1987, Ato Dagnachaw loaned 50,000.00 Birr to W/ro Ayantu from his personal property. In the contract, it was stipulated that the loan would be due on the 10th of Meskerem 1988. Despite that, she did not payback the money on the agreed date. Fearing that it would spoil their relationship, he (Ato Dagnachaw) did not ask her to pay back the money until the relationship (irregular) union was terminated unilaterally by W/ro Ayantu on the 10th of Tir 2000 E.C.

    Because the relationship was brought to an end, Ato Dagnachew asked her to pay his money to which she turned a deaf ear. On account of this, he brought suit against her so that decision would be given in his favor. In her preliminary defense, she among other things, raised that, the claim was barred by period of limitation by virtue of Art.1845 of the Ethiopian Civil Code. The plaintiff (Ato Dagnachew) on the other hand, argued that the case at hand is an exception to the rule which is regulated by Art.1853(1) of the same code which stipulates that the court may set aside a plea based on limitation where it is of opinion that the creditor failed to exercise his rights in due time on account of obedience he owed to or fear he felt of the debtor to whom he is bound by family relationship or subordination.

    If the case were brought to your bench, what would your ruling be?

18. Ato Mohammed and W/ro Kedija have been living together, though no formal marriage was concluded, for the last 10 years. Ato Mohammed felt the need to carry on trade and applied to the competent authority to grant him license. However, W/ro Kedija objected to his currying on trade and filed an opposition to the authority alleging that her partner had never obtained her consent.

    Before deciding on the objection, the head of the authority wants to hear from you whether her objection is acceptable under the relevant provisions of the Commercial Code of Ethiopia and the family law. Give your well reasoned opinion to the head of the authority. (Hint: Read Arts.16-19 of the Commercial Code of Ethiopia).

19. Art.701(2) (a) of the Commercial Code of Ethiopia states that the following persons shall be deemed to be specified beneficiaries not with standing that they are not mentioned by name:

    (a) The subscriber's spouse, even where the marriage took place after the policy was entered into.

    Assuming that you are a member of team of lawyers engaged in amending the Commercial Code of Ethiopia, would you draft the above provision so as to include partners in an irregular union? Why? Why not?

CHAPTER SEVEN

FILIATION

7.1. Introduction

This chapter of the course discusses filiation which is the most sensitive part of the family law. It is the most sensitive because it is under this part that an issue pertaining to child parent relationship is determined by law. Of course, for the time being, determining material filiation is not as difficult as paternal filiation. Determining paternal filiation is difficult because it is not easy to exactly know who the biological father of the child is. Hence, the law has provided certain important modes of establishment of paternity. It is these modes which will be discussed under this chapter to the extent possible. Because these modes are very much relevant particularly from the view point of the right of the child, due attention has been given to them. The chapter also discusses how filiation is proved and challenged.

One thing that we want to remind you at this juncture is that because the regional family codes have made no departure from the provisions of the Revised Family Code of Ethiopia regarding filiation, for purpose of convenience, and to avoid unnecessary duplication of legal provisions, the provisions of the Revised Family Code (The RFC hereinafter) have been used throughout this chapter.

7.2. Objectives

Upon the completion of this chapter, students should be able to:

- define filiation
- explain how maternal filiation is established and such filiation is contested.
- differentiate and analyze the modes of establishment of paternal filiation.
- analyze rules pertaining to disowning.
- discuss the rules applicable to proof of filiation.

- give ruling on actual issues pertaining both to maternal and paternal filiation.

7.3. Maternal Filiation

It must be clear to you that the maternal filiation is the basis for the whole consanguinal relationship since the relationship of kinship by blood emanates from this very relationship. The family relationship consists of three distinct statuses. The status of being brother and sister, father and child is established only after the establishment of maternal filiation. Without it, a child can't have the status of being a son or a daughter within a family for he/she will neither have a father nor a mother. (Alexander Cairns, Eversely on Domestic Relations 5th ed, 1973, p.393).

It is this basic formula, which is incorporated in all the means for the establishment of paternity. According to Art 740(1) of the 1960 Civil Code of Ethiopia and Art.125(1) of the RFC, the presumption of paternity flows from maternity. A person will be a father of a child because of the presumption if such a man had relationship provided by law with the mother. Hence, the ascertainment of the mother is a necessary requirement to attribute a certain child to a given person in all modes of establishment of paternity. This is because a husband of the mother or a man in an irregular union cannot be presumed to be the father of a child unless it is established that he had such relationship with the mother.

The same is true in the case of acknowledgment as the efficacy of acknowledgement presupposes the acknowledgment of the mother to the effect that the declaration of the person is well-founded. The establishment of maternal filation is also crucial in cases of establishment of paternity through judicial declarations. The court declares a defendant to be a father of a child if the court is satisfied that the requirements provided under Art.143 of the RFC are fulfilled. Now, the relevant query is as to how maternal filiation is established under Ethiopian Family Laws. According to Art.124 of the RFC maternal filiation results from the sole fact that the woman has given birth to a child. This is the provision the whole problem of establishment of maternal filation rests upon. As you can understand from the above article, the establishment of maternal filiation requires no more than the ascertainment of the fact that the child was born by the said woman. Thus,

a woman who is not in a position of proving that she did give birth to a certain child will not be able to do it by other means such as acknowledgment.

Hence, the maternal filiation is established from the sole fact of birth irrespective of the type of relationship that resulted in the conception of the child. Firstly, it is not a requirement that a definite relationship provided by law should exist between the mother and someone at the time of conception or birth of the child. The fact that the child was born in an illicit relationship cannot in any way affect the establishment of maternal filiation. For instance, adultery and incest are criminal acts in Ethiopia. Despite this, adulterine and incestuous children will have their maternal filiation established equally as those conceived in a legitimate relationship.

What elements must be fulfilled to say that, there exists the fact of birth for the establishment of maternal filiation? In this regard Planiol says, "in relation to French Law, [which is the most important source of Ethiopian family law] that maternal filiation could be said to have been established if it is proved that (1) the alleged mother has given birth to a child when the child in question was born and (2) it is this particular child whom the mother delivered to at that time" (Marcel Planio/ Treatise on Civil Law, (11^{th} ed.Vol.1 part 1, p.274).

These are the elements that evidence adduced to a court is expected to establish. The establishment of maternity is the creation of the legal bond as a result of birth. Whereas proof of maternal filiation, as the name indicates is a means by which a person purports to prove an already established filliation. It is a means by which a claimant proves the fact of birth by mere existence of which the maternal filiation is already established. The child is not, however, required to adduce evidence which directly proves the confinement and the identity tests. He may bring foreword any evidence apt to show that he had an established filiation. (Meanberetsehay Taddesse, Establishment and Proof of Filiation under Ethiopian Law, Senior Thesis, Faculty of Law, A.A.U, 1986, p.4).

In relation to the establishment of maternity, the issue worth raising is the legal problems surrounding artificial insemination. In our modern world, through this mechanism it has now become possible to fertilize the ovum and sperm out side the body and transplant the

embryo into the utrus of a third party or the “hostess” who carries the child for the duration of pregnancy and then give birth to it. The resulting infant is said to be “biologically the offspring of the woman who contributed the ovum and gestationally the offspring of the “hostess” who bore it, (Marry Ana B. Dakley, “Test Tube Babies; Proposals for Legal Regulations of New Methods of Human Conception and Parental Development,” Family Law Quarterly, Vol.8 No.4 (1974) p.391).

The issue that crosses your mind here is as to who is the legal mother of the child for the purpose of establishing maternal filiation. As it is possible to gather from Art.740(1) of the Civil Code and Art.125 of the RFC, the mother of the child is the one who gave birth to the child. Hence, in the case of artificial insemination, which of the two women has given birth to a child, the woman from whom the ovum is taken or the one who actually delivered the child?

Birth is not defined under Ethiopian law. Thus in the absence of any clear definition of the term you have to see as to what birth ordinarily means. According to Black’s Law Dictionary (8th ed, 2004), birth means the complete excursion of a new born baby from the mother’s womb. Lexically birth means the emergence of a new individual from the body of some person. According to Jacques Vanderlinden, it constitutes the “extrusion of the child from the mother’s womb whether in a natural way or by an operation like the caesarian section (Jacques Vanderlinden, Commentaries upon the Ethiopian Civil Code on the Law of Persons 1969, p.9). Birth, thus, presupposes the carriage of the fetus in a womb of a woman for a longer or shorter period of time. It is an event which ordinarily follows pregnancy. We may accordingly maintain that in Ethiopia it is the one who bore the child that may be considered to be the mother. We can, therefore, speak of birth only in relation to the “hostess”. The contributor of the ovum may not be considered to have given birth to a child. In the absence of the fact of birth, she cannot possibly be a mother of such child delivered from the “hostess” even if it is her own ovum that was actually fertilized. The agreement that may be made between the interested parties to consider the contributor of the ovum the mother is an agreement which does not seem to be acceptable. The rules on the establishment of filiation cannot be avoided by the agreement of the parties unless there is an express provision authorizing such an

agreement. As provided in Art.123 of the RFC, there is no provision that permits an agreement in derogation to the provisions on the establishment of maternal filiation as there are in cases of paternal filiation whereby the presumed fathers are allowed to settle by agreement the possible conflicts of paternity or a father is allowed to assign his paternity to a person declaring to be the father. (Read Arts.146 and 149 of RFC).

This is a case in point where there is no congruence between science and the law. Despite the fact that science has come up with new innovations that provide solutions for fertility problems, the solution of this problem in the legal field requires a clear act of the law maker. In this regard, the Ethiopian Family Laws, past and present, have not addressed this problem. **Do you think that this is a problem worth considering in Ethiopia? If so, what solution (s) would you recommend**?

(B) Contestation of Maternal Filiation (Arts.163-166 of RFC)

Maternal filiation, the establishment of which requires the sole fact of birth, can be contested at any time by any interested person (Art.163 of RFC). The action of the contestation of status is intended to disprove a mere matter of fact. In order to obtain a judgment abolishing the already existing maternal filiation, the contestant must show to the court that it is not based on the fact of birth. The petitioner must show that either of the elements necessary for the establishment of maternal filiation is missing. Thus, he will have to show to the court either (1) that the woman was not confined at the time when the child was born and/or (2) even if the woman was confined at the time when the child was born, the child whom she delivered is not the one whose status is in question. In this connection, the plaintiff may bring any evidence as no restriction is put as to the evidence that may be advised in connection with the action to contest maternity.

With a view to protecting the already established status, the law restricts the conditions under which the contestation of status may be admitted. The permission of the court must be obtained before the petition could be instituted in court (Art.164(1) of RFC). The court can give such a permission if there are presumptions or indications resulting from concrete facts enabling the court to grant permission. **What do you think are such concrete facts?**

It is possible to infer from the above provision that the court has wide discretion for granting the action having regard to the facts presented by the petitioner. But the court can by no means give permission for the institution of the action if the child whose status is contested has a filiation resulting from the certificate of birth and is corroborated by a possession of status (Art.165 of RFC).

Coming to the real party in interest to contest material filiation the right to contest the maternal filiation is not reserved to any specified persons as is the case in contestation of paternal filiation. In this regard, Art.163 of the RFC provides that the maternal filiation of the child may be contested at any time by any interested person. However, what could the yardsticks be to determine whether a certain individual is a real party interest in an action brought contesting the maternal filiation?

Without prejudice to the above issue the only valid limitation for the action to contest status lies upon the conditions necessary for the admissibility of the action. All sorts of evidence are acceptable although the law is reluctant to accept any sort of evidence unless corroborated by presumptions or concrete facts. The rationales behind such limitations are explained by Planiol in the following words:

> *The interests at stake are important and the fear of bribery is felt. Purchased perjury is feared. Therefore, the petitioner could not be allowed to institute the action until his allegations had been made probable by a commencement of proof, that is, by something that supports his petition, but that is not of itself sufficient to efface all doubt and convince the court. The proof thus commenced may be completed by the hearing of witnesses.*

A contestation of maternal filiation was brought to the attention of Ethiopian courts in 1975 E.C.

The case was brought by the appellants in the Jimma High Court. The appellants pleaded that a child was born to them on Tir 2/1966 whose whereabouts they did not know since Hamle 1/1969. They added that this same child named Mestewat, was with the respondents. The appellants requested that the child be returned to them. The respondents, on the other hand, contended that the name of the child who the appellants were claiming to be theirs was Jorina and was born to them on Hidar 10/1965. Each side

produced three witnesses to prove their allegation. The witnesses called by the appellants testified that the child was born to the appellants while the witnesses of the respondents testified that the child was born to the respondents.

The High Court decided in favor of the respondents by saying that enough evidence was not adduced by the appellants that would enable the court to decide that the child under consideration was not born to the respondents. The case was appealed to the Supreme Court of Ethiopia.

The Supreme Court confirmed the decision of the High Court. This court held that the issue involved was a question of fact and not of law. The court added that it was for the appellants to prove that the child was born to them by such an evidence that could outweigh the evidence adduced by the respondents. (Civil appeal, file No /06/75, supreme court of Ethiopia).

7.4. Paternal Filiation

Establishing both maternal and paternal filiation is important, among other things, to protect the right of the child. As your previous discussions show, ascertaining the mother of the child is less difficult than ascertaining the father of the child. Despite such difficulty, the law should do whatever possible to ascertain both parents since the child, inter alia, has the right to know and be cared for his or her parents which is clearly provided in Art.36(1) of the FDRE Constitution.

Besides, Art.7 the convention on the Rights of Child (adopted in 1989) to which Ethiopia is a party provides that:

(1) The child shall,…as far as possible, have the right to know and be cared for by his or her parents.

(2) State parties shall ensure the implementation of these rights in accordance with their national laws.

Hence, the Ethiopian family laws should implement the principles enshrined under the convention and the constitution. Accordingly, the family laws have provided modes by

which paternal filation is established. Generally, the modes of ascertainment of paternity are divided into three. These are:

(a) presumption of paternity

(b) acknowledgement paternity

(c) judicial declaration

Let us discuss each mode as follows:

7.4.1. Presumption of Paternity

This is the first mode of ascertaining paternity which provided under the RFC (Arts.126-130) and the relevant articles of regional Family Laws.

Logically, paternity ought to result from the physical begetting of a child by a certain man. But there is a problem in the determination of biological paternity.

Because of this difficulty, the need to rely on legal presumption is felt for the establishment of paternity. Such a problem, in most legal systems is solved by an almost conclusive presumption of paternity. The presumption is attached to a person who may happen to be the husband of the mother of the child or the man in an irregular union at the time of conception or birth.

The first element of presumption of paternity is the existence of legally prescribed unions. Accordingly, paternal filiation is established if at the time of conception or birth of the child the mother had relations provided by law with a certain man. Only children born or conceived within such relationships could benefit from the presumption of paternity. According to Art.126 and Art.130 of the RFC, the relationships capable of creating the presumption for the purpose of establishing paternal filiation are marriage and irregular union. Thus, Ethiopia gives the presumption of paternity a wider scope. In Ethiopia, irregular union is seen on equal footing with marriage in respect to the presumption of paternity both under the 1960 Civil Code and the current Family Laws.

How can presumption of paternity be justified?

As far as children born in a wedlock is concerned, there are strong reasons to justify the presumption. Most of the time, it is possible to maintain that a child born in marriage is the child of the husband because of the duties of cohabitation and fidelity. But the presumption in Ethiopia equally applies to irregular union. This invites the question whether or not, the duties in the marriage bond also apply to irregular union.

As we tried to discuss under chapter six, irregular union is the state of fact, which is created when a man and a woman live together as husband and wife without having concluded a valid marriage. This requirement of living together as husband and wife seems to show that the persons engaged in irregular union are bound to observe duties which must be observed by spouses. Do you agree?

As far as cohabitation is concerned, it is difficult to maintain that there is irregular union without cohabitation since living together as husband and wife is the crux of irregular union. But, as regards the duty of fidelity, the law no where states that partners in an irregular union are duty bound to observe the duty of fidelity. That fidelity is one of personal effects of marriage is clearly provided by law. The provisions of the law regulating the relationship between partners in an irregular union, however, do not say anything as to this duty either expressly or by way of implication. Despite this, it may be argued that the duty of fidelity is imposed upon partners in an irregular union by analogy. According to Menbertsehay:

> *"Such analogy seems logical when seen in light of the rigor of the presumption of paternity. Presuming a man in an irregular union as a father of a child born or conceived therein seems indeed illogical if the mother could at the statutory period of conception freely and without fear of any legal sanction copulate with any one. It follows from this that, the law when extending the presumption of paternity in wedlock to irregular unions is carrying with it the duties of cohabitation and fidelity to the same."*

Do you agree with this position? Why/why not?

However, the analogy as regards the duty of fidelity becomes senseless when it is seen in light of the Criminal Code of Ethiopia. For instance, Art.652(1) of the Criminal Code of the FDRE provides that "a spouse bound by a union recognized under the civil law who

commits adultery is punishable, upon complaint, by the injured spouse, with simple improvement or fine". It is clear that the criminal law has sanctioned the duty of fidelity. But such duty exists between spouses. Hence, it is possible to conclude that according to the criminal law partners in an irregular union are not spouses since a spouse is one's husband or wife by lawful marriage. Therefore, the extension of the duty of fidelity to partners in an irregular union cannot be plausible. To which of the above arguments do you subscribe? Why/why not?

Therefore, even though the presumption of paternity for children born or conceived in wedlock could predominantly be justified on the grounds of the duty of fidelity, its application to irregular unions must be traced to other causes.

In this regard, George Krzeczunowicz once wrote that:

> *"In order to create irregular union, merely the behavior of the man and woman must be analogous to that of married people. Such fauxmenage creates in fact, in spite of the lack of fidelity duty, a probability of conception by the man perhaps not less than in marriage. Such probability is sanctioned by the legal presumption of paternity," Journal of Ethiopian Law, Vol.3, No (1966) p.513)*

The application of the presumption of paternity to irregular union is based on the probability that the child is born of the man in such a union.

In our previous discussions, we have said that the first element of presumption of paternity is the existence of legally provided union between the father and the mother.

The second element of presumption is birth or conception within the legally provided union. Art.126 of the RFC provides that "a child conceived or born in wedlock has the husband as father". By the same taken, "a child conceived or born during an irregular union has as father the man engaged in such union", according to Art.130 of the same code. From this, it is possible to say that Ethiopia adheres to the Roman Law principles adopted in many legal systems that says "pate rest quem nuptiae demonstrate" which in English means the father is whom the marriage indicates. But a child in order to be protected by this basic formula must meet either of two requirements. He/she must either be born or conceived in wedlock, but it is enough that he/she either be conceived or born

in wedlock. But the question that we you raise here is as to how we can know that a child is conceived in a marriage or regular union?

For a better understanding of this topic, read the following article taken from Ethiopian Law Review Vol.1 No1, 2002, which has been slightly adapted for the purpose of this course and certain articles of the Civil Code have been replaced by the relevant provisions of the RFC.

Duration of pregnancy is strictly limited under the Ethiopian family law and can be used as a test for paternity. A child shall be deemed to have been conceived in wedlock if it is born more than 180 days after the celebration of the marriage and less than 300 days after its dissolution and no proof shall be admitted against this presumption (Art.128 RFC).

A child is presumed to have been conceived in wedlock if it is born on or after the 181st date following celebration of the marriage or on or before the 299th date after dissolution of the marriage. (For instance, if the marriage is dissolved on Tikimt 1st, the child will have to be born at the maximum on Hamle 29th to avail itself of the presumption of conception in marriage.) This is because a child shall be deemed to have been conceived on the 300th day, which precedes its birth. In this, case on 30th of Meskerem. Or if the marriage is celebrated on Tikimt 1st, a child has to be born at least on Miazia 1st that is on the 181st day.

Having the above in mind, let us emphasize on Art.128 (2). It provides: "No proof to the contrary shall be admitted." What does this mean? It may mean that a child born within the legally fixed period shall enjoy the presumption of conception in marriage, and if it is born within this period, no contrary evidence shall be admitted to rebut the presumption. It is unquestionable that such child is conceived in marriage. But a close reading of Art.128 (2) may reveal another meaning. That is, there is no possibility for a child to be born within 180 days from the date of the first intercourse of its mother with a man and a child can never be born on 300th day or more from its mother's last intercourse with a man. Hence, nobody can introduce evidence which proves the birth of a child outside this legally determined period. This means, if a child is born outside this period, there is no chance of presumption of its conception in marriage.

Why does the law come up with such a strict duration of pregnancy? Seemingly the legislature has not chosen such period arbitrarily. If it is not an arbitrary period, it must have been based on observation of the period of gestation of human beings. According to the legislature's understanding, a child is carried in its mother's womb for a maximum period of 300 days and the minimum period of 180 days after conception.

Is this idea well supported by biological or medical science? Is there really no possibility of birth in less than 180 days after celebration of the marriage and more than 300 days after its dissolution?

The average duration of pregnancy calculated from the first day of the last menstrual period of a large number of healthy women has been identified to be very close to 280 days, or 40 weeks. A pregnancy more or less corresponding to this period is called term and the child of such pregnancy is said to have fully matured at birth.

Usually the expected date of delivery is estimated by adding 7 days to the date of the first day of the last menstrual period and counting back 3 months (Naegele's rule). For example, if the woman's last menstrual period began on September 10, we would add 7 days to September 10 to make it September 17. Then we count 3 months back and we find June 17 which is the expected date of delivery. This calculation may not sometimes exactly conform to the Ethiopian calendar because of the 13th month. It is apparent that pregnancy is erroneously considered to have begun about 2 weeks before ovulation if the duration of pregnancy is so calculated from the first day of the last menstrual period. Nonetheless, clinicians persist in using gestational age or menstrual period to identify duration of pregnancy; embryologists and other reproductive biologists more often employ ovulatory age, or fertilization age, both of which are typically 2 weeks shorter. The RFC's approach is closer to this latter method of calculation since it uses intercourse as a basis for determination of the duration of pregnancy. But this does not mean that the date of coitus and that of fertilization is one and the same.

There are two fundamental difficulties in determining the duration of pregnancy; one is its commencement is of profound obscurity. Another difficulty is that gestation period of pregnancy is not the same for all women; hence, there are pre-term, term and post term pregnancies. That is to mean duration of pregnancies varies considerably. Hence, how can we establish the duration of certain phenomenon unless we can establish the time of its beginning as well as its ending?

Pregnancy begins when a sperm cell unites with an egg cell in the fallopian tube (the place where fertilization of an egg takes place). Here, the difficulty of determining the date of fertilization is that although we can be reasonably sure that spermatozoa are in the genital tract, we never know when the egg cell will be there to meet them. There are no outward signs with which the occurrence of ovulation in a woman can be recognized. This difficulty, accompanied by the extremely elongated viability of spermatozoa in genital tract of the female has made the possible estimation of the date of fertilization more improbable. Living spermatozoa had been found in the uterus from seven to eight days after intercourse, although the generally accepted life span of sperm cells while active and effective is from 72 to 100hrs. Hence, an intercourse made almost a week ago may cause fertilization of egg today. Clinical observations suggest that ovulation occurs two weeks before the onset of the next menstruation. This means, it occurs midway between two menstrual cycles in women who regularly menstruate every 28 days. Even if this is the most likely period of ovulation, it may occur at any point in the cycle. From these facts, it has to be admitted that fertilization may occur as long as three weeks after the last menstruation. Such a phenomenon would make it appear that pregnancy has lasted three weeks longer than it is actually the case.

Other complications related to pregnancy are a small proportion of woman menstruate irregularly at prolonged intervals; in others menstruation may be suspended temporarily due to illness or nervous shock, or when they are suckling. Pregnancy may, nevertheless,

occur under any of these conditions, and it is obvious that calculation with reference to menstruation would be a serious fault. Occasionally, the converse difficulty is met with, for there are women who continue to menstruate for two to three months after conception has taken place. This occurrence is extremely rare; many alleged instances turned out on careful inquiry to be in reality bleeding attacks due to minor pathological conditions, and not because of menstruation. Such occurrence wrongly leads us to believe that pregnancy has lasted a shorter time than is actually the case. Our law has avoided such problems that may be caused by these complications by taking intercourse rather than menstruation for calculating duration of pregnancy.

From the above discussions, we can understand that it is very difficult to determine exactly when pregnancy begins and this in turn has an effect on the determination of possible period of its end. That is why we lack a general consensus among biologists and medical scientists on the exact period of commencement of pregnancy.

Another fundamental difficulty in the determination of duration of pregnancy is the existence of pre-term, term and post term pregnancies. It has been said that the average duration of pregnancy is 280 days or 40 weeks when counted from the first date of the last menstruation, that is, 266 days from the most likely date of ovulation. Children of such births show full development at birth and gynecologists and obstetricians are well aware of these characteristics of children of term deliveries. This means, they can know without much difficulty whether a child is a pre term, term or post term child at birth.

Short Period of Gestation

We may regard all births before 38 weeks as premature, and all those which occur after the 42nd week as protracted. A medical expert witness may have to determine whether the development of a child is proper to the alleged period of gestation. When birth is premature, this sort of corroborative evidence is important.

The fact that a child has survived for a certain period after its birth furnishes no significant evidence of maturity for it is well known that though infants born before the 7th month are less likely to survive, they do so. Cases of survival of children born in the 5th and 6th months of gestation are not rare. Children born at the 7th month of gestation are almost always capable of survival although they are more delicate and in general require greater care and attention than more mature children. The critical period of maturation appears to be somewhere between the 5th and 6th month. As a result, the survival of the infant born before this critical time is extremely rare. But some obstetricians have reported the survival of infants born even before this critical time. The most important characteristic of pre term children is having considerably small weight. But weight alone cannot be conclusive evidence of a premature birth. Because in few instances, the rate of growth of the fetus during its pregnancy may be very high and at the time of delivery it may have the normal average weight even if its birth is a premature one. The converse is also true, that is, due to some irregularities the rate of development of a fetus may be very slow in the uterus and its weight may fall far below the average at birth although the birth is a term one.

The Ethiopian law does not presume conception in marriage if birth occurs within the period of 180 days after celebration of the marriage. However, for two reasons we may accept this idea of lack of presumption of conception in marriage for such births, although it could happen in reality. The first reason is that, rearing children born before 180 days is extremely difficult since they require special treatment and consequently their morality rate is very high. Hence, those who do not enjoy the presumption are negligible. The second reason stems from the presumption under Art.126 of the RFC. According to this article, a child conceived or born in wedlock has the husband of its mother as father. Although a child born within 180 days after celebration of the marriage cannot avail itself of presumption of conception in marriage, it can avail itself of the presumption of paternity of its mother's husband because of its birth in marriage. Since the main purpose of including duration of pregnancy in the law is to establish paternity and since a child born within 180 days after celebration of the marriage has the husband of its mother as father, it would be pointless to discuss on births which occur less than 180 days father celebration of the marriage, as far as the legitimacy of the child is concerned.

To say a few points on Art.126, the law here seems to have envisaged a premarital sexual relation as a child born just the next day after celebration of the marriage is considered to have been born in wedlock. We could also think that the law simply presumes paternity of the husband irrespective of the existence of premarital sexual relation as long as the child is born in wedlock. So the legislature seems to have chosen presuming the fatherhood of the husband who may not be a father in fact. But the husband can disown such child if he succeeds to prove the non-existence of a premarital relation.

Prolongation of Gestation

Post term pregnancies are of great medico-legal significance than pre-term pregnancies. A post term pregnancy is one that persists for 42 weeks or more from the onset of a menstrual period that is followed by ovulation about 2 weeks later. Although such a definition would include perhaps 10% or even more pregnancies, some may not be actual post term pregnancies but the result of an error in the estimation of gestation age.

"The post term child may continue to gain weight in the uterus and thus be an unusually large infant at birth. At the other extreme, the intrauterine environment may be hostile to the fetus so that further growth in the uterus is arrested. It may appear at birth to have lost considerable weight especially from loss of subcutaneous fat and muscle mass. In the extreme case, limbs appear long and very thin… The nails and the amnion are commonly bile stained."

Another very important symptom of a post term child is it will have very long nails on both fingers and toes.

Post term pregnancies are more important than pre-term ones for medico-legal purposes because they comprise relatively greater proportion from the total births and the greater tendency of survival of post term children. There are a number of reports made by gynecologists and obstructions which show post term deliveries. Although some of these figures indicate highly elongated delays and appear to be unbelievable, one thing we must always remember is that post term deliveries are not uncommon.

Although well-recorded reports are difficult to find in Ethiopia on such births, foreign reports are available. In one study of 15659 births delivered in Birmingham within a year there were 247 births after the end of the 44th week, of which seven were born later than 48 weeks. The two longest periods were 356 days. It is, of course, very difficult to accept these estimates as reliable without consideration of certain sources of error. We have to consider two factors in relation to this particular point. The first is then, in certain occasions the menstrual cycle may become longer, sometimes even longer than two months. In these cases, if calculations are made with reference to the first day of the last menstrual cycle, the consequence will be an elongated duration of pregnancy. Similar problem may be observed in suckling mothers. Another important point which must be considered is misleading information from the mother as to the commencement of pregnancy. Sometimes the information obtained from mothers may not be precise and even confusing; some mothers even forget in which month they had their last menstruation. This second problem can be resolved by taking pregnancy tests at the earliest possible time and a regular follow-up till the termination of pregnancy.

Senior obstetricians of Birmingham Maternity Hospital have conducted two deliveries which were under their close inspection since the beginning of the pregnancies, and they indicated in their reports that the pregnancies were of 339 and 359 days.

Another writer says that sufficient medical data have been accumulated to show that human pregnancy may be prolonged to a period of 336 calculated days, and that there is nothing in the meantime to show that even this figure is the maximum limit beyond which prolongation of pregnancy is impossible.

Unlike the case in Ethiopia, foreign courts accept post-term births if they are corroborated by expert witnesses. The following reports shall confirm this idea.

- *Pregnancies of 331 days and 346 days were ruled legitimate by English courts.*
- *The New York Supreme Court accepted a pregnancy of 335 days to be legitimate.*
- *In the famous Preston Jones V. Preston Jones case of England, 1949, the husband petitioned divorce on the grounds of adultery. Since the date of last coitus with the defendant required an extension of the total length of gestation to 360 days. The divorce commissioner dismissed the husband's petition. The husband appealed, the Court of Appeal directed the rehearing of the case.*

At this juncture, it is clear that duration of pregnancy can vary considerably and as a result it is very difficult to fix the minimum and the maximum period. In particular the establishment of an upper limit for the duration of pregnancy is more difficult. The establishment of an upper limit for the duration of pregnancy is as difficult as discovering the maximum intelligence of a human being. Therefore, from these observations, it can be seen duration of pregnancy is a poor test of paternity.

It is common knowledge that the great majority of duration of pregnancy fall under the period fixed by the Ethiopian law. But what the writer wants to clarify here is that, there are births outside this period fixed by the law. Especially those births after 300 days

should not be neglected, as they constitute a relatively larger proportion. What is the fate of children of such births? The answer is clear. They could be made illegitimate. For example, if the marriage is dissolved today and if a child is born just after the 300th day, this child is neither conceived nor born in wedlock. Hence it cannot have the ex-husband of its mother as its father.

7.4.2. Acknowledgment of Paternity

This is the second mode of establishment of paternal filiation recognized under both the 1960 Civil Code of Ethiopia and the current family laws of the country. Under this sub-section, we will discuss the scope of application of acknowledgement, formality requirements, the role of the mother and the child to be acknowledged and proof of acknowledgement by focusing on the relevant provisions of the law.

(A) Scope of Acknowledgement

We can say that this method of establishing paternity, has more practical importance for children born or conceived out of a legally provided union in Ethiopia, where access to the courts is not as such easy to establish paternity. Because of this, voluntary paternal acknowledgment is an important method by which the children conceived or born out of a legally provided union may gain status vis-à-vis their fathers. This voluntary declaration of paternity can be used to establish paternal filiation if paternity is not possible to establish using the presumptions of paternity. This is clearly provided under Art.131 of the RFC which stipulates that when the father of the child is not determined by applying the provisions of the preceding articles, the paternal filiation of a child may be established by acknowledgement of paternity. This seems to give acknowledgement a rather narrow scope. Literally, this refers to children conceived and born out of a legally provided union and excludes children that were conceived or born in wedlock or an irregular union. Apparently, disowned children seem to have been excluded from the voluntary declaration of paternity.

How about incestuous children?

Acknowledgement of adulterine and incestuous children is not possible in some legal systems. The rationale behind such prohibition is said to be the protection and stability of

the legitimate family relationship. The acknowledgement of adulterine and incestuous children is considered as an assault to the legitimate family. Its prohibition is based on moral reasons. The law is reluctant, it is said, to uncover the facts of adultery and incest so that scandal could be avoided. (See Planiol, p.813).

The modern trend is, however, towards the abolition of such discrimination. The fact that adultery and incest are acts which society does not condone is taken as an untenable argument to deny adulterine and incestuous children the right of being acknowledged. The social condemnation of certain sexual relationships should not be taken as pretext to discriminate against those who do not share any responsibility for such relationships (See Frank Bates, The Child and the Law, Vol.2,1976, p.505). The arguments raised by the above writer seems to have been incorporated under the Ethiopian legal system as of the adoption of the 1960 Civil Code since there is no clear provision of law which prevents children born of adulterous or incestuous relationships from being acknowledged. That, too, does not seem to be the policy of Ethiopia since Ethiopia is committed to insure the right of children to know their parents as provided by the FDRE Constitution and the Child Convention to which our country is a party.

We can conclude that Art.131 is only meant to avoid interference of acknowledgement if the child has an already established filiation by presumption of paternity and not to exclude disowned and incestuous children from the benefit of the voluntary acknowledgement of paternity.

Thus, any child who is merely conceived or born may be acknowledged in so far as such an acknowledgment does not interfere with an already established filiation as child cannot be acknowledged if he has a father by operation of law. Neither can acknowledgment validly establish paternal filiation if the child has already been acknowledged unless such an acknowledgment is invalidated (See Art.192 of the RFC).

How about a child who has an already established filiation by judicial declaration of paternity? Should judicial declaration be a bar to a subsequent acknowledgment?

(B) Form of Acknowledgment

This requirement of writing was introduced with the promulgation of the Civil Code. Before that, acknowledgment was effected without any requirement of writing. Under the pre-code customary practices, a man was considered to have acknowledged the child, if he orally said that the child was his. And if the man later on denies that the child is his, testimony of witnesses or the mother's statement under an oath that the child is an issue of sexual relationship with the man sufficed to prove it.

Civil Code adopted stricter and more stringent requirements for acknowledgment this is because Art.748 of the Ethiopian Civil Code states that an acknowledgment of paternity shall be of no effect unless it is made in writing. Sub article two of the same article provides that except in cases mentioned in Art.146 of this Code [the civil code] the acknowledgement may not be proved by witnesses. The reason for this could be the fact that certain mothers may give their children to a man who could not be the natural father. Under the old customary rule, mothers were tempted to allege that the father of a given child was the one with a higher social or property status. There were occasions where children were made to have juridical bond to person who could not be their father. Coming to the RFC and other regional family laws, it has been provided that an acknowledgement of paternity results from the declaration made by a man before an officer of civil status or by a will he made in writing or by a document attested by a competent authority that he is the father of the child. (Read Art.133 of the RFC, Art.144 of Amhara Family Code, Art.150 of Oromiya Family Code and Art.163 of Tigray Family Code, for instance.)

From the above provisions of the law, it is possible to understand that the new family laws have made a significant departure from the 1960 Civil Code of Ethiopia as regards form of acknowledgment. Unlike Art.748 of the Civil Code, which requires that acknowledgement must be made in writing, the RFC and the regional family laws have widened the modes by which acknowledgement is to be made. Accordingly, a man may make acknowledgement of paternity by:

(a) A declaration made before an officer of civil status; or

(b) A will made in writing; or

(c) A document attested by a competent authority.

What is meant by a declaration in this context? Can the declaration be made in writing? To have a clear understanding of the import of declaration have a look at the Amharic version of Art.133 of the RFC which reads:

“xND sW yKBR mZgB ðT bmQrB xÆT mçn#N bmGl{ b¸s-W ”L wYM b{/#F b¸ÃdRgW n#²z@ wYM bl@§ b¥ÂcWM |LÈN bts-W Æl|LÈN btrUg- snD x¥µYnT xÆT mçn#N bmGl{ LJnTN lmqbL YC§LÝÝ”

The close reading of the Amharic version of the provision under consideration seems to suggest that the declaration to be made before an officer of civil status is an oral declaration. But, one can say that the oral declaration made by the man may be reduced into writing by the officer of civil status, signed by the one who made the acknowledgement and documented by the office of civil status for evidentiary purposes. However, the question that must be raised is as to what would happen if the oral declaration is not reduced into a written form? Would it affect the validity of acknowledgment?

The second form of making acknowledgement is will made in writing. This method must be seen in the light of the relevant provisions of the Ethiopian law of succession. This means that the will which is made for the acknowledgement of a child is either a holograph will or public will since both kinds of will must be made in writing as provided under Arts.881 and 884 of the Civil Code respectively. In addition to the requirement of writing, stringent requirements provided by the law must be satisfied so that the will becomes acceptable and hence the acknowledgement produces fruit in the eyes of the law. (Read closely Arts.881-891 of the Civil Code).

Thirdly, acknowledgement is acceptable if it is made by a document attested by a competent authority. From this, you can infer that acknowledgement is made in writing although the written document shall not produce any legal effect unless attested by a competent authority. Which government organ is a competent authority? The answer to this question varies from region to region.

(C) Acknowledgement to be made by whom

Because acknowledgement is a juridical act greatly attached to the man who makes the acknowledgement, the law, as a matter of principle, provides that acknowledgement is to be made personally by the alleged father of the child. This must be done by the father even if the father has not attained the age of majority. However, acknowledgment may be made by an agent when such agent is specially appointed for this purpose by special power of attorney which must be approved by the court. As a matter of rule, judicially interdicted persons are incapable to perform juridical acts. However, for the purpose of acknowledgement, the law provides that they have the capacity to make acknowledgement personally. Despite this, acknowledgement by representation is possible provided that the representative has obtained permission from the court to this effect. (Read Art.134 of the RFC). The other situation whereby acknowledgement may be made by a person other than the alleged father is where the father of the child is dead or is not in a position of manifesting his will. In this case, the law permits that acknowledgment may be made in the name of the deceased by one of his parents. In this regard, the new family laws have departed from what is provided under Art.750(2) of the 1960 Civil Code because the latter has provided that where acknowledgement is not possible to be made by the parents of the deceased, it could be made by another paternal ascendant. From this it is possible to maintain that, the great grand parents of the child could make the acknowledgement of the child. Do you think that the departure made by the new family laws important?

(D) Acceptance of Acknowledgement to be made by whom?

Although acknowledgement, as defined under Art.132 of the RFC, is deemed to be made when a certain man makes a declaration that he considers himself the father of a certain child merely conceived or born, it is not a unilateral act of the father. This is because acknowledgement cannot produce effect and cannot establish paternity unless the consent of the mother or in certain exceptional circumstances the consent of the maternal grand parents or the child to be acknowledged is obtained.

According to Art.136 of the RFC, acknowledgement presupposes the admission by the mother of the child or by the maternal grandfather or grandmother of the child if the mother is dead or not in position to manifest her will. And in default of these, the

acknowledgement may be accepted by another maternal ascendant or by the guardian of the interdicted person. Acknowledgement cannot be effective unless it is accepted by the child to be acknowledged where such child is of age.

If the mother is alive and in position of manifesting her will an acknowledgment could be effective only if she accepts it as well-founded. Well founded means based on facts, having a foundation in fact. In effect the mother is required to attest that such a man could possibly be the father of a child.

If the mother is dead or not in a position to manifest her will, the persons allowed to act in her stead may accept the declaration. Accepting declarations is quite different from acknowledging the same as well-founded. The latter rules out the willingness of the mother as requisite element for the effectiveness of acknowledgment. Here, it is not the consent of the mother that is required. If she admits the declaration of the person as well founded she does not have any discretion of obstructing the establishment of the juridical bond between her child and the declaring person on the ground of her unwillingness.

On the other hand, if it is only acceptance that is required to effect acknowledgment, it is in effect the consent of the concerned persons that is required. It is they who will have the final say whether a child should have a father by acknowledgment or not. They can at their free will reject the declaration of a person with whom the mother had the only meaningful relationship. On the other hand, they can give their consent to the declaration of a man whom the mother had never seen. This gives the whole opportunity for establishing the paternal filiation of one’s child with anyone who may wish to acknowledge him irrespective of the question of biological descent between the child and the person. It is immaterial whether the declaration of the person is well-founded; what matters is the attitude of the person required to accept towards the declaring person.

The above problem may be attributable to the difference in wording between sub-article 1 and sub-article on one hand 2 and 3 of Art.136 of the RFC on the other. However, it is suggested that sub-2 and sub-3 must be seen in light of sub-article 1 of the same article. If an unfounded acceptance is required of these persons, the purpose of acknowledgment may be defeated since the above persons may accept acknowledgement which is not

well-founded being tempted by the wealth and the social status of the individual who has made the declaration of acknowledgement of paternity.

In any case, acknowledgment will be effective unless the person required accepting it raises a protest within a month after he has come to know of the declaration (Art.138 RFC). This is the time given for the concerned persons to protest the declaration. If they protest within such time, the acknowledgment will not be effective. The question one may raise at this point is whether acknowledgment will be effective a month after the concerned person comes to know of it even if the declaration was made long ago, say 10 years. No clear answer is provided to regulate such problem. It may be argued that the length of time that causes problem between the date of declaration and the date when the person required to admit it becomes aware of it should not be restricted.

The other person involved in acceptance of acknowledgment is the child to be acknowledged. As per Art.137 of the RFC, an acknowledgement of paternity shall be of no effect unless it has been accepted by the child himself when it is made after the latter has attained majority. However, the acknowledgement is deemed to have been accepted where such person (the child) has not raised any protest against such acknowledgement within one month after he come to know of it. (Art.138 RFC).

Although acknowledgement is effective when the mother of the child admitted as well-founded, acknowledgement of paternity may not be made after the death of the child. (Art.139 RFC). The prime purpose of acknowledgement is to insure the right of children to know their father and to be cared of such father. In other words, acknowledgement is an important instrument of avoiding fatherlessness. Hence, since the purpose of acknowledgment of paternity is not to benefit the man who declares to be the father, no purpose would be served if a man is allowed to acknowledge a child after the death of the child. This is because if acknowledgement after the death of the child is allowed, some individuals may make acknowledgement for the sole purpose of inheriting the deceased child without discharging their parental obligations during the life time of the child.

However, acknowledgement after the death of the child is possible where the deceased has left descendants.

F. Non-revocability of Acknowledgement (Art.140 of RFC)- Normally, an individual does not make acknowledgement unless he has justifiable grounds to do so. Hence, he makes acknowledgement when he is, as far as his understanding goes, sure that he is the true father of the child. Once he has made an acknowledgement of his own free (without any external influence or pressure), he is not allowed to revoke the acknowledgement of paternity for allowing revocation of acknowledgement will result in disturbing the status which has already been maintained. Here the principle **Pacta Sunt Servanda** (gentleman's word is his bond) works. However, revocation of acknowledgement may be allowed when the father who made the acknowledgment is a minor. Art.140(2) of the RFC provides that a minor who has acknowledged a child may revoke such acknowledgement for so long as he is incapable and within one year following the cessation of his incapacity, unless his guardian consented to the acknowledgement. Even in this case, revocation of acknowledgement is strictly personal to the minor since the law provides that revocation may not be made by his legal representatives nor by his heirs.

Can the minor revoke the acknowledgement unilaterally or by the order of the court?

G. Annulment of Acknowledgement

It is obvious that acknowledgment is a juridical act. As such, the consent of the person who makes acknowledgement must not be vitiated. If the consent of the acknowledger is vitiated by a vice of consent, acknowledgement may be annulled (invalidated). However, unlike the Ethiopian Law of contract wherein violence, mistake and fraud are vices of consent resulting in invalidation of a contract, the family law as a rule has confined the ground of annulment of acknowledgement only to violence as clearly stipulated under Art.141(1) of the RFC. Sub-2 of this article, in black and white, provides that acknowledgement may not be annulled on the ground of error or fraud unless it is decisively proved that the child could not have been conceived of the person who made the acknowledgement.

H. Several Acknowledgements Prohibited (Art.142 RFC)- Naturally, a child cannot be attributed to two or more persons for a child has only one biological father. It is because

of this that Art.142 of the RFC prohibits several acknowledgements. According to this article, where an acknowledgement of paternity has been made in regard to a child, no other acknowledgement of child by another man shall be permitted unless the first acknowledgement has been annulled. Therefore, where the first acknowledgement is annulled on account of grounds of annulment provided under Art.141 of the RFC, another acknowledgement may be validly made. But, cannot another acknowledgement be possible where the first acknowledgement is revoked as per Art.140 of the RFC? Is there any difference between revocation and annulment as used in this context?

7.4.3. Judicial Declaration of Paternity (Arts.143-145 of the RFC)

This is the third mode of establishing paternity both under the Civil Code of Ethiopia and the new family laws of the country although the new laws have made remarkable departures from the Civil Code by widening the grounds for making judicial declaration by the court (Read Art.758-761 of the Civil Code and Arts.143-145 of the RFC).

Under this mode of establishment of paternity, a child who does not have a father either through the operation of the presumption of paternity or by acknowledgement can have a father only if the court declares a certain man to be his father. The court makes such declaration where it is satisfied that one of the grounds which justify judicial declaration of paternity is found. According to Art.758 of the Civil Code the grounds which declaration of paternity by the court was abduction and rape. However, the RFC and regional family laws have added other grounds of judicial declaration. Art.143 of the RFC, for instance, provides that:

Where, after applying the preceding articles the father of the child is not ascertained, a judicial declaration of paternity may be obtained under the following conditions:

(a) In the case where the mother has been the victim of abduction or rape at the time of the conception of the child.

(b) In the case where at the time of the conception of the child, the mother has been the victim of seduction accompanied by abuse of authority, promise of marriage, or any other similar act of intentional deception.

(c) In the case where there exists letters or other documents written by the claimed father which unequivocally proves paternity.

(d) In the case where the claimed father and mother of the child have lived together in continuous sexual relation, without having a legally recognized union in the period regarded by law as the period of pregnancy.

(e) In the case where the person claimed to be the father of the child participated in the maintenance, care and education of the child in the capacity of a father.

Let us discuss the above grounds one by one briefly as follows.

(a) When some one rapes or abducts the mother of the child, the court shall declare the rapist or the abductor as the father of the child. The court shall pass this declaration, only if the child is born within the legally presumed period of pregnancy. The child should be born within 181st day to 299th days from the rape or abduction of the mother. However, the question to be raised here is whether or not the rapist or abductor should be convicted by a criminal bench in order to pass judicial declaration of paternity.

It may be validly argued that the mother should show to the satisfaction of the court that there exist facts which are by themselves sufficient to meet the definitional requirements of rape or abduction. But it must be born in mind that all she is required to prove is only the facts and not any more. If she proves the facts the court must declare the paternity unless the defendant can avail himself of the defense available to him. If the facts are proved it does not seem that, the plaintiff will be required to adduce more evidence to show that the defendant did the acts in such a situation as to be criminally convicted. Thus, the court must declare the paternity after proof of the facts even if the defendant was acquitted by a criminal court.

This line of argument may be justified by difference in purpose of the criminal and the civil proceedings. The paternity action has as its purpose the ascertainment of paternity. The very aim justifies the exclusion of the defenses or the responsibility requirements prescribed in the Criminal Code.

(b) A man by abuse of authority, or promise of marriage, or by other intentional deception seduces the mother of the child, such man may also be declared the father of the child. This sub-article of 143 of the RFC and the respective articles of the regional family laws are meant to alliviate a social problem faced by mothers and

children in Ethiopia. Some men, using the economic weakness of woman, have sex by promising marriage. However, when the woman conceives, the man declines to accept that they are fathers of the child. This creates problem on the mother and the child. The mother is compelled to shoulder the duty of upbringing the child alone. The child, in such circumstances, does not get the treatment that he can get from a father unless such man is judicially declared to be the father of the child. Mehari Redae has neatly explained the rationale behind the inclusion of this provision in his book.(Read Mehari Redae; ytššlWN yb@tsB HG lmgNzB y¸rÇ xNÄND n¸ïC¿ Q{ h#lT¿ 1999 ›.M, pp.45-46).

However, in order to attribute such child to such a father, a woman who is the victim of such seduction should prove at least two facts. In the first place, she is expected to show that she was victim of seduction. In the second place, she must show that her child was conceived within the legally presumed period of pregnancy from the time of the sexual intercourse with the man as a result of seduction.

(c) What is provided under Art.143(c) is also another innovative addition to the grounds for judicial declaration of paternity. According to this ground, where there are letters or other documents which are written by the claimed father which unequivocally prove paternity the man can be declared to be the father of the child. However, such documents alone may not suffice to declare paternity by the court. The court should make further enquiry and investigation as to the relationship of the alleged father and the mother of the child. Have a look at the following example.

X wrote a letter to his girl friend which reads:

> *"Are you fine, my darling? Is our little one doing fine? Life is difficult for me here for I am always longing for you and my son. I will come soon and visit you and our baby."*

Can the above letter, if adduced by the mother of the child as evidence, suffice to make judicial declaration of paternity?

(d) The fourth ground of judicial declaration of paternity is where the claimed father and mother lived together in continuous sexual relationship, without concluding marriage

or establishing an irregular union. It is clear that a man and a woman may have continuous sexual intercourse during the time of betrothal or during the time of friendship without establishing betrothal. In this case, the man can be declared to be the father of the child provided that the woman is able to prove two facts. The first is that she has to prove that there was continuous sexual intercourse between them and secondly that the child was born within the legally presumed time of pregnancy.

(e) The last ground of making judicial declaration of paternity has a lot to do with the acts of the claimed father towards the child. If the mother of the child is able to prove that the claimed father of the child has voluntarily and in the capacity of a father participated in the maintenance, care and education of the child, judicial declaration of paternity may be made.

Having discussed the ground which, if proved by the plaintiff to the satisfaction of the court serve for the making of judicial declaration, the next important question to be raised is who is the real party in interest to bring suit against the claimed father so that the court can make judicial declaration of paternity?

Despite the above grounds of establishing paternity by judicial declaration, an action brought for declaration of paternity shall be of no effect where the conditions enumerated under Art.145 of the RFC are proved to exist.

(a) In case where the mother of the child had sexual relationship with another man in the period regarded by law as the period of pregnancy unless it is proved by medical or other reliable evidence that such man is not the father of the child.

(b) In case where the claimed person could not be the father of the child because he was absent or has been a victim of accident during the period regarded by law as the period of pregnancy.

(c) In case where the person claimed to be the father of the child decisively proves by blood examination or other reliable evidence that he could not be the father of the child.

Art.759 of the Civil Code provides that the action for judicial declaration of paternity may be instituted only by the mother of the child, or if she is dead or not in a position to manifest her will by the guardian of the child. From the provision of the Civil Code, it is clear that the only person who has a vested interest to bring action for judicial declaration of paternity was the mother. When the mother is dead or unable to manifest her will the guardian of the child could institute suit for judicial declaration of paternity. Bear in mind that grand parents and other relatives of the child cannot institute such suit unless they are guardians of the child. Unlike the Civil Code of Ethiopia, the new family laws do not have incorporated a provision in this regard. Hence it is natural to put the question as to who can institute an action for judicial declaration of paternity.

The other issue that need to be raised is as to when the action for the declaration of paternity to be instituted? Again this question was clearly answered by Art.752(2) of the Civil Code which reads:

“The action for the judicial declaration of paternity may not be instituted two years after the birth of the child or after the sentence of a criminal court in regard to the abduction or rape.”

The new family laws are silent in this regard. Does this mean that an action for judicial declaration of paternity can be brought at any time? If we accept this, does this bring a just result?

7.4.4. Regulation of Conflict Paternity

The time framework and scope within which the presumption of paternity applies may result in attributing one child to two or more fathers. This is basically because it is operative if a child is either conceived or born in wedlock or irregular union as the case may be. Both these elements when seen separately or taken together can give rise to situations when the law can attribute the same child to two or more fathers. Before considering how this could happen, it is important to note that this problem of attributing the same child to different fathers can come about only in relation to one mode of establishment of paternity. The wording of Art.146 of the RFC is confusing since it provides that “when on applying the preceding articles a child must be attributed to

several fathers a regulation of paternity may be made by agreement between the person to whom the paternity of the child is thus attributed by the law.

This seems to indicate the possibility of conflict of paternity by application of one or more modes of establishment of paternity as, for example, a child having a father by presumption of paternity and by acknowledgment at the sometime. However, the regulation of paternity is applicable only when a child is attributed to two or more persons by the presumption of paternity. This could be understood from the nature of the modes of establishment of paternity.

The nature of the application of the modes of establishment of paternity itself excludes the possibility of one child having two fathers by different modes of establishing paternity. The three modes are mutually exclusive; one of the three modes excludes the other two. Thus, if a child has his mother's husband as a father, he cannot have another father either through acknowledgment or judicial declaration. Similarly, a child can have a father by judicial declaration, if he has no father either by the presumption of law or by acknowledgment. Therefore, there is no possibility where a child can have two fathers by operation of two modes of establishing paternity in different "hierarchies". Neither can a child have two fathers by acknowledgment nor judicial declaration of paternity. A child cannot be validly acknowledged by more than one person at the same time for stronger reason, the court cannot declare two persons to be the fathers of the child.

The conflict arises when the mother has a relation (marriage or irregular union) provided by law with two or more persons and the child could simultaneously be attributed to the person in each relation. The conflict of paternity arising because of the aforementioned reason has two possible solutions as provided under the RFC and the regional family laws.

The persons to whom paternity of the same child is attributed may contractually agree to forfeit his paternity. Such an agreement is to be attested by three witnesses and approved by the court and the mother must be heard in person except in cases of force majeure (Art.147 of the RFC). According to Art.152 of the RFC the regulation of paternity, if validly made, is irrevocable. This is done to keep the status of the child undisturbed.

Although revocation of such agreement either unilaterally or by court order is prohibited by Art.152 of the RFC with no exception, the agreement on the assignment of paternity may be annulled by the court on the ground of violence (Art.153(1) of the RFC).

This is the only vice of consent, the proof of which is by itself enough to annual the agreement. If the party who made the agreement and who moves to annual the agreement proves that he had concluded the agreement under violence, he is not required to further show that the child could not be conceived of him. The annulment of the contract would result in making both parties to the agreement father as they were before the conclusion of the agreement. The invalidation of the agreement has the effect of restoring the position that they had before the conclusion of the agreement.

Invalidation of the agreement for regulating paternity on the grounds of error or fraud is stricter than in the general contract. Either party can succeed in invalidating the agreement for regulation of paternity by invoking mistake or fraud if he can in addition decisively prove that the child was not conceived of him (Read AA.153(2) of RFC). Thus, fraud or error, unlike duress is not by itself sufficient to invalidate the agreement. In addition to either of these two vices, the person invoking the invalidation of the agreement must be in a position to show that the child was not born to the person who has by virtue of the agreement become the father of the child. Therefore, assume that Abebe and Kebede who are both the legally presumed fathers of Getnet decided by agreement that Kebede is the father. Abebe succeed in invalidating the agreement on the ground of mistake or fraud if he can decisively prove that Kebede cannot be the father of Getnet.

Once the agreement is annulled or if the presumed fathers failed to reach an agreement the conflict of paternity will be solved by application of the legal presumption as provided under Art.148 of the RFC which states that "failing regulation of paternity, the following two presumptions shall be applied successively where appropriate:

(a) The child shall be attributed to the husband of the mother in preference to the man who has an irregular union with the mother.

(b) The child shall be attributed to the husband or the man with whom the mother is living at the time of the birth, in preference to the husband or the man with whom she was living at the time of the conception.

So, the decisive proof that the child was not conceived of either party will have the effect of annulling the agreement and no more. It will not go beyond that and operate to rebut the presumption laid down by law. It seems illusory to hold some one as a father after it has been decisively proved that the child was not conceived of him. But this paradoxical solution is in line with the general protective mechanism of the first presumption incorporated under Art.148 of the RFC which purports to solve the conflict of paternity if the mother had a marriage and irregular union at the material time. It prefers the husband to the man in irregular union even if the mother was living with the latter at the time when the child was born.

The second presumption will apply only if the conflict cannot get a solution under the first presumption. This will not interfere with the domain of the first presumption i.e., when the conflict of paternity is between a person in an irregular union and the husband of the mother. The application of sub (b) of Art.148 is thus restricted to situations when the conflict is between two husbands or two persons engaged in irregular union with the mother.

Assignment of paternity by agreement by virtue of Art.149 of the RFC is possible where the requirements provided there in are satisfied Art.149 of the RFC provides that:

> *(1) Where the child is born within 210 days from the conclusion of marriage or the commencement of the irregular union, the husband or the man who is living with the woman may, by agreement, assign the paternity of the child to another person who declares that he is the father of the child.*
>
> *(2) Where the child is born more than 210 days after the dissolution of the marriage or the cessation of the irregular union, the husband or the man who lived with the mother shall have the right provided in the preceding sub-article.*

Though it is not clear why the law has required the duration to be 210 days, it seems to have the purpose of mitigating the force of the presumptions of paternity when the conception of the child could actually have taken place out of the legally provided union.

Likewise, the law allows the assignment of paternity for children born more than 210 days after the dissolution of marriage or cessation of irregular union taking the possibility that the child could have been conceived after the end of the union. The force of the presumption extends up to the 299th day after the end of the union. But a child born after

210 days from the end of the union could have possibly been conceived after the end of such union.

Therefore, the assignment of paternity by agreement is the possible way whereby the father short of the facts sufficient for disowning a child, he thinks is born of another man, assigns his paternal status to the person declaring to be the father, who is not in a position of effecting acknowledgement because the child has a valid paternal filiation by presumption of paternity.

Coming to formality, such an agreement must be attested by three witnesses and approved by court as provided under Art.150 of the RFC. Moreover, the mother must be heard in person except in cases of force majeuere.

The agreement in the first case has as its object the transfer of paternity to a person who claims to be the biological father. The hearing of the mother thus seems to be a means for ensuring, to the extent possible, the well foundedness of the person's declarations. It is there to see to it that the paternity which results from the agreement would possibly correspond with biological paternity of the same. So, though the mother is not required to accept the declaration of the person, it is very likely that, the court will be influenced by the statements of the mother in approving the agreement. It is unlikely that the court will approve the agreement which has assigned paternity if the mother of the child makes it clear to the court that she had no sexual intercourse with the man at the time of conception.

As a matter of principle, the agreement of assignment of paternity must be concluded by the interested parties themselves. This is so when the parties have attained the age of majority and are not judicially interdicted. Where the parties to such agreement have not attained majority or are judicially interdicted, the agreement may be concluded by specially appointed agents by a special power of attorney approved by the court (Art.151 of the RFC). However, one issue is worth raising in connection with making agreements by agent. Can contracting parties to an agreement which assigns paternity, be represented so long as the representatives of the parties are appointed by a special power of attorney and approved by the court? Or are only minors and judicially interdicted persons who are

allowed to appoint agents who would conclude agreements of assignment of paternity? Read Art.151 of the RFC critically and try to respond to this query.

7.4.5. Disowning

(A) Meaning of Disowning

The familiar rule concerning paternity, **'Pater est quem nuptiae demonstat,** which has passed into all modern system of jurisprudence raises a legal presumption that a child conceived during marriage has for his father the husband (Joseph Cullen Ayer,. "Legitimacy and Marriage", Harvard Law Review, Vol.16, p.23). Though this presumption has been accepted in all modern legal systems it is not conclusive. It can be rebutted by the husband of the mother, if he is not in fact the father of his wife's child, by instituting an action to have it judicially declared that he is not the father. This act is called disowning. In France and Louisiana, it is referred to as disavowal. Therefore, disowning, as Planiol defines it, is a "…term applied to the act the purpose of which is to wipe out the presumption of paternity established against the husband, when he cannot be the child's father (Planiol, p.780).

In the Ethiopian Civil Code and the new family laws, there is no provision expressly defining what disowning is. When we read together the relevant provisions pertaining to disowning, we can understand that it as an action by which the husband or the man in an irregular union tries to disclaim the presumption of paternity established against him, if he believes that he cannot be the father.

Disowning shows that the presumed father owns the status of paternity. Persons other than the presumptive father have nothing to disown. It is less accurate for the law to use the term "disowning", when after the presumed father death (or incapacitation), his heirs contest the presumption of paternity established against him. Yet, Art.177 of the RFC the uses the term "Action to disown" to designate the action brought by the presumed father's heirs. In common law literatures, for example, since persons other than the

presumptive father are entitled to contest the presumption of his paternity we don't find the word "disowning". Instead we find "rebutting the presumption of paternity". (Read Planiol, p.780).

(B) Disowning as Distinguished from Other Modes of Contesting Legitimacy

Disowning and other modes of contesting legitimacy are sometimes confused with one another. Therefore, it is important that the line of distinction be drawn, since different rules apply to each of them.

Legitimacy is a status of a child being born in a legally recognized union or within a competent time after its termination under circumstances that the presumptive father can be the father. And its contestation involves contesting that a certain child is not his, because its birth or conception did not take place during the subsistence of a relationship that is legally recognized, or because no existence of such a relationship at all (See Pascal RA; Reading in Louisiana Family Law, 5th ed.1963, Vol.2, p.182). Also one may contest that the child was born after the declaration of the absence of the presumptive father. Still, one may contest the delivery of the mother or the identity of the child. In other words, one can bring an action in contestation of maternity as per Art.163-166 of the RFC as we have seen under our previous discussions.

In suit of disowning, however, one is specially contesting that the presumption of paternity taken against him is contrary to the truth. Here, the person is contesting his paternity. As Art.167 of the RFC states, disowning is the only means by which the paternity of person may be contested. Therefore, action to disown is brought to disclaim the legitimacy of children who are under the protection of the legal presumption that they are the children of the person contesting.

From the above discussion, you can see that unlike the other modes of contesting legitimacy, disowning is contestation of paternity. Presumption of paternity is **a sin qua non for** disowning. In contestation of legitimacy, however, presumption of paternity is

not a necessary requirement and the contestation revolves around the issue as to whether the very presumption exists or not. Or the question in contestation of legitimacy lies on the very conditions bearing upon the presumption.

The strong presumption which the law lays down will not achieve just results if it is proved that it is not in harmony with biological facts Karl W. Cavanaugh, "Action knaveau-challenging the Presumption of paternity", (Louisianan Law Review, Vol.23 (1962) p.759).

Therefore, although the legal presumption of paternity, once established, is difficult to avoid the protection which the law gives to children is at logger hood with social realism and the child becomes fatherless if his mother's husband can decisively prove that he cannot be the father of the child.

In Ethiopia, the presumption of paternity of a person conceived or born in wedlock or an irregular union can be rebutted only by the person to whom the law attributes the paternity by proving decisively that he could not have sexual intercourse with the mother during the period between the 300th and 180th day before the birth of the child (Art.168 of the RFC). In this regard, the law presumes that the spouses shall be deemed to have had no sexual intercourse with one another during the time when they actually lived separately following a petition for divorce made by one of them or in consequence of an agreement concluded between them (Art.169(1). However, this is a rebutable presumption as provided under sub-article two of the same article. This is one aspect of the protection of the presumption of paternity.

Despite this, Art.177 of the RFC permits that where the person to whom the paternity of the child is attributed by law dies or becomes incapacitated within the time fixed by law (i.e., Art.176 of the same code) for instituting the action to disown, one of his descendants, in his stead, may institute an action to disown. Art.177 (2) provides that in default of descendants, the right to disown may be exercised by his father, mother or in their default, by one of his ascendants. In default of ascendants, it may be exercised by one of his brothers or sisters, to the exclusion of any other heir or representative.

This action brought to disown a child whose filiation is established by law is stringent both in the mode and time for making it. In our law rebutting of the presumption that the child was born by a married woman is that of the husband is divided into three steps. First, a contestant may prove decisively that the mother did not have intercourse with him at the time of the child's conception. Second, if the presumption of intercourse is not disproved the contestant may decisively prove that it is absolutely impossible for the child to have been produced by intercourse between the mother and him. Third, the presumed father could produce any facts to disprove his paternity if the maternal filiation is established by the action to claim status (Read Arts.168, 170 and 176(2) of the RFC).

The facts that must be proved to contest the presumption differ depending on which of these three points the contestant bases his claim.

In the first situation, the presumption could be removed if the contestant could show that he was not in such a situation as to have had any sexual intercourse with the mother at the time when the child must have been conceived. But the presumption cannot be rebutted by circumstances which only create doubt and suspicion. It must be proved decisively. In this regard, let us take the following actual case decided by Ethiopian courts.

In one case, the wife and the husband concluded marriage on the 22nd of Magabit 1980. When the wife became pregnant, the husband took her to Dazazmatch Belcha Hospital and she was diagnosed by a medical doctor on Sene 19,1980 E.C, and the medical examination revealed that there was a 16 weeks old fetus in her womb. Because of this, the lady deserted her husband. Later on she brought suit against the husband praying the court to declare that the husband was the father of the child. In her claim, she made it clear that the child was born on Tahisas 21,1981 E.C. However, the man /husband/ argued that, although the child was born within the period of time prescribed by the law as period of pregnancy, he strongly argued that the child could not be his as per the finding of the medical examination. The court which heard the case rejected the claim of the wife accepting the arguments of the husband since the husband was able to prove decisively that pregnancy took place before marriage was concluded since it was proved that by the 18th of Sene (three months after the conclusion of marriage) she was a four months pregnant.

Aggrieved by the decision of the court of rendition, she appealed to Supreme Court. The Supreme Court confirmed the decision of the High Court (Decision rendered by the Supreme Court on Hidar of 1985 E.C Sup.Ct.1985 E.C).

Do you think that the husband in our case decisively rebutted the legal presumption?

As per Art.171 of the RFC, if the person contesting the presumption bases his move on the absolute impossibility of his paternity, this needs a permission from the court. According to Art.171(2) of the RFC the court shall grant permission where there are presumptions or serious indications resulting from sufficient and reliable facts enabling the court to accept the action.

Art.172 of the RFC considers as sufficient grounds for granting the action to disown, scientifically recognized incompatible physical characteristics of the child and the father, or the concealment of the birth or pregnancy to the presumed father "under circumstances which are apt to create doubts as regards his paternity." The concealment of the birth or conception, as a ground for disowning can be justified on the ground that a mother has no reason to conceal the conception or the birth of a child from her husband if he is the father. Such a concealment is in the nature of an admission of her wrong. It is important to note here that the proof that the mother has hidden the conception or birth of the child does not in any way mean that the contestant will be required to disprove paternity by easier and simpler means. This is in fact the case in some jurisdictions. For instance, in French Law, if it is proved that the mother has hidden the birth or conception, the presumed father he is not required to prove the absolute impossibility of paternity (see Planiol, p.785).

In our law, these are only preliminary steps made to convince the court to grant permission to institute the action. It seems that proof of physical incompatibility is only a preliminary step and not an end by itself. The exclusionary blood typing mechanisms which are in some jurisdictions taken to be conclusive to disown a child may prove the incompatible physical characteristics of the child and the father. This may raise a question of whether or not blood typing, if at all it is possible, is conclusive or simply

falls within the category of presumptions and physical characteristics the proof of which is only relevant for the admissibility of the action.

In the modern world, many foreign courts have taken blood grouping tests indicating non paternity, as conclusive to rebut the presumption of paternity if it was properly conducted although they recognized the possibility of defect in testing process. (To have a better understanding, read, 10 American Jurisprudence p.869).

In Ethiopia its solution revolves around the meaning that may be given to evidence decisively proving the absolute impossibility of paternity. In foreign countries similar provisions have been interpreted as requiring:

> *Clear, distinct, satisfactory and conclusive evidence as to convince the court that the child is not the issue of the union. Such evidence must convince the court beyond any reasonable doubt, and is thus equivalent to the proof in criminal action i.e., a more stringent test applied than normally applicable to civil action where issues are decided on a mere balance of probability. (Read Menbere Tsehay Taddesse, p. 26)*

We maintain that Art.170 of the RFC and equivalent Regional Family Laws provisions should be interpreted on similar lines. Hence, it may be argued that exclusionary blood typing mechanisms if done properly should be conclusive to rebut the presumption paternity. And sterility may also be taken as such because it decisively proves that the husband could not be the father.

However, by virtue of Art.178 of the RFC the father cannot disown a child in spite of the absolute impossibility of his paternity the child was conceived by an artificial insemination to which he consented in writing. **What do you think is the rationale behind this Article?**

Finally, let us say few words in connection with plaintiff in suit, defendant in the suit and period of limitation. As we have said previously, in order to maintain the presumption of paternity strong, Art.174 (1) of the RFC stipulates that the presumed father is the only person who can institute an action for disowning so long as he is alive. No action to this effect can be brought by the mother or by a man who claim, the paternity of the child or by the public prosecutor (Art.174 (2) of the RFC). Even a judicially interdicted person

can bring such action when he gets permission from the court although he may be represented by his guardian when the guardian obtains permission from the court to do so in the name of the judicially interdicted person (Art.175 of the RFC). As regards the person against whom the action to disown is brought Art.179 (1) of the RFC provides that such action shall be brought against the child or where he/she is dead, against his/her heirs and sub-2 of the same article makes it mandatory that the mother of the child is joined in the suit. Where the child is a minor, obviously, he shall be represented by a tutor ad hoc appointed for this purpose by the court.

The action to disown the child must be brought within the time limit provided by the law. In this regard, Art.176(1) of the RFC makes it clear that an action to disown shall be instituted by the man to whom paternity of the child is attributed by law within 180 days following the day he knew or should have known the birth of the child. Art176(2) provides that where the maternal filiation is established by an action to claim status, the action to disown shall be instituted within 180 days from the judgment deciding on the action to claim a status having become final. Sub-article one of Art.176 of RFC has departed from Art.792(1) of the Civil Code because in the Civil Code the lapse of 180 days is reckoned from the date of birth of the child while in the RFC the lapse of 180 days is to be reckoned from time when the presumed father knew or should have known the birth of the child. The following court case is pertinent to understand the issue at hand (Civil Appeal No 906, Supreme Court, 1983 E.C).

The appeal was lodged to the Supreme Court from a decision made by the North Shewa High Court decided on the 16th of Hidar 1980 E.C under file No.180/81. The applicant named Girma Habtewold, applied to the Zonal Court to disown a child presumed to have been born of him. The child was born on Tikmit 7, 1979 and the action to disown was instituted on 23rd of Tahisas 1981 E.C. The Zonal Court dismissed his suit reasoning that the action was barred by period of limitation.

In his appeal to Supreme Court the appellant argued that the 180 days must be reckoned following the day he knew or should have known the birth of the child. The respondent on her part argued that since the appellant and the respondent were living in the same town, he should have known the birth of the child.

The appellate court confirmed the decision of the high court and reasoned that actions for disowning should be instituted within 180 days from the birth of the child.

As you can understand, the decision of the above courts would be otherwise if the case were brought to court after Art.792(1) of the Civil Code has been replaced by Art.176(2) of the RFC and the respective provisions of regional family laws since the new family codes have stipulated that the 180 days is to be counted from the time when the presumed father new or should have known the birth of the child.

7.5. Proof of Filiation

7.5.1. General

The previous discussions show that paternal filiation is established by three mutually exclusive modes. Proof of filiation is not establishment of filiation but it is rather proving the existence of such fact where such fact is contested by interested third parties. In this regard, proof of filiation pertains to proving that a child is the son or daughter of a certain man or woman.

In the modern world, the primary mode of proof of filiation is record of birth. Record of birth, as provided under Art.99 of the Civil Code of Ethiopia, contains the day, month and year of the birth, the sex of the child, the first names which are given to him or her, the names, first names, dates and places of birth of this father and mother and where appropriate the names, first names, date and place of birth of the person making the declaration.

In the developed countries, as record of birth is properly maintained, it is easy to avoid confusions as to the identity of the child and the identity of the parents. In developing countries such as ours, there are no organized institutions for maintaining record of birth properly. Of course, in Ethiopia it was provided under Art.101(1) of the Civil Code that the birth of a child may be declared to the officer of Civil Status by any person. But Art.100(2) of the same code declares that such birth must be declared by the father of the child, or in his default by the mother or guardian of the child, or in default, by the person who has taken care of the child. In addition, the officer of civil status was duty bound to draw up the record of birth of his own motion if he is aware of the birth. By the same

token, failure to get registered a child was a criminal act under the 1957 penal code as is under the new Criminal Code (Art.656(1) of the FDRE Criminal Code).

Despite the above legal provisions, record of birth has remained an exercise in futility since the office of civil status has not been established in Ethiopia.

Art.7 (1) of the Child Convention which has been ratified by Ethiopia and which is the integral part of the Ethiopian law provides that births must be recorded immediately following the birth of children. Because the convention is part and parcel of the Ethiopian law and because Ethiopia has an international commitment in this regard, the need to put in place the institutional framework goes without saying. In view of this requirement, the Revised Family Code under Art.321 (1) stipulates that the Federal Government shall, within six months from the coming into force of this Code, issue registration law applicable to the administration where this code is to be enforced and establish the necessary institutions. Yet the Government has not taken any steps in this regard up to now (February, 2008).

Despite this, however, it is very much important to examine the relevant provisions of the law as regards proof of filiation. When we examine the provisions of the code, we can understand that there are two modes of proof of filiation. These are (a) record of birth (b) possession of status. Under the 1960 Civil Code there was a third mode of proof called act of notoriety as provided under Art.772 of the Civil Code of Ethiopia. This mode of proof has been removed from the RFC and regional family laws. Hence, our discussion will focus on the two modes of proof.

7.5.2. Proof by Record of Birth and Possession of Status

As we said previously, the record of birth which appears as the primary means of proof of filiation was not put into practice in Ethiopia. Article 3361 of the Civil Code suspended the operation of the record of civil status in which birth was to be recorded. What was the position of the possession of status as a means of proving filiation, in light of the suspension of the record of birth? Possession of status was applied in default of the record of birth as was provided under Art.770 of the Civil Code. Even today, although Art.154 of the RFC and the relevant provisions of the Regional Family laws provide that

both maternal as well as paternal filiation of a person are to be proved by his record of birth and although the law has imposed the duty of coming up with the legal and institutional framework for the establishment of the office of civil status the government has not yet come up with appropriate laws and institutions. However, it has been provided by Art.332(2) of the RFC that until the Office of Civil Status is established, certificates of birth, marriage and other relevant certificates issued to issued by an appropriate authority of the administration where this code is applicable shall be deemed to have been issued by the office of Civil Status. The same is true with the regional family laws. For instance, Art.332(2) of the Amhara National Regional State Family Law provides that "until the office of civil status is established and commence its work in accordance with sub-article one (sub-article one declares that the office of civil status shall be established within two years from the coming into force of the Code), certificates issued or to be issued by an appropriate authority of the region shall be deemed to have been issued by the office of civil status and considered valid (See also Art.338 of the Oromiya Family Code).

It must be clear to you that record of birth both under the Civil Code and the current family laws is the primary means of proof though not the only means. Despite this when it is not possible to prove filiaiton by record of birth, it is not possible to switch to proof by possession of status. In this regard, Art.155 of the RFC provides in default of certificate of birth, filiation is proved by the possession of status of child.

The question to be raised, therefore, is when can a person resort to proof by possession of status? Can an individual be allowed to prove filiation by possession of status by the mere fact that he/she does not produce the record of birth? No, this cannot be the case. Before one resorts to prove his case by possession of status, one should convince the court that birth certificate was not issued from the very out set or birth certificate was lost, destroyed or stolen. Therefore, the court must not admit proof by possession of status without convincing reasons that establish that proof by certificate of birth is impossible. Hence, proof by possession of status is allowed and it replaces proof by birth certificate when the primary mode of proof is of no avail for one of the reasons mentioned above.

What fact(s) should be proved by the witnesses? Art.156 of the RFC provides that a person has the possession of status of child when the child is treated by the community as being the child of such man or woman. What does “as has been treated by the community as being the child of such a man or woman” mean? Of course, if certain members of a community appear in court and testify that they have reasonable belief that the child belongs to a certain man or woman, that may be taken as sufficient proof. However, such kind of testimony may not be sufficient because if the witnesses do not have enough knowledge as to their relation, they may believe that the relationship between a relative and a child may be a relationship of parent and child. However, in order to arrive at a just result the witness should testify the identity of the mother and the father and the fact that a certain child was born to those individual when the parents were in a conjugal life or in or irregular union or the child was born to these individuals even out of such unions.

In one case (Nigisti Equbay V. Aster Yosef, Supreme Court Civil Appeal file No.1716/1075, 1975), the appellant filed an application to the High Court so that the court would declare that Ato Yosef was the father of Aster. To prove the paternal filiation, she produced witnesses and the witnesses testified that Aster’s mother and Ato Yosef were living like husband and wife when Aster was born. Based on the testimony of the witnesses the High Court decided that Ato Yoseph was the father of Aster. The Supreme Court to which the appeal was lodged also confirmed the decision of the high Court. Art.157(1) of the RFC provides that where the possession of status of child is proved in accordance with the preceding article, the court shall take the presumption that the child is born of such man or woman. This presumption is provided by the law for the best interest of the child since the standard of proof is light. However, this presumption is a rebuttable presumption as clearly provided under sub-article 2 of the same article. This means that the man or the woman who is presumed to be a father a mother can rebut the presumption by adducing any relevant and admissible contrary proof.

Some people strongly argue that possession of status as a means of proof (particularly for paternal filiation) must be admitted as means of proof when first of all filiation is established by presumption of law, acknowledgement or judicial declaration although there are contrary arguments.

Coming to the position taken by our courts, opinions are divided. In one case (cited by Mehari Redae Vol.2 pp.73-74) the Federal Supreme court arrived at the following conclusion. The case pertained to proof of filiation of a certain child named Maria born in an irregular union. Accepting proof of filiation by possession of status the court stated as follows:

We have had a look at the testimony of witness attached with the file. As we have understood from the testimony of witnesses that there was a long standing relationship between the mother of Maria and George (the claimed father of Maria) that George occasionally used to pass the night with Maria's mother, that during this relation Maria was born, that George declared that Maria was his daughter and he used to embrace her in a fatherly mood, that the name Maria was given to her by George and that he was doing everything to Maria that could be done by any father up to the time of his death. Therefore, from the testimony of the witnesses we have understood not only that there was along standing relationship between the mother of Maria and George but also the relationship was a cause for the birth of Maria. From the testimony of witnesses and the actions taken by George, it is possible to presume that Maria was the daughter of George. If the testimony of witnesses enable us to presume like this, it is possible to maintain that the appellant can prove filiation by possession of status. Accordingly, we have taken presumption that Maria is the daughter of George as provided under Art.157(1) of the Revised Family Code.

Although the issue was similar to the above case, the Federal Supreme Court took a different stance. The decision of the court was made on the basis of the provisions of the 1960 Civil Code. However, since the RFC has not made any meaningful departure with regard to the issue under consideration, the case and the conclusion made by the court is relevant to the issue at hand.

The applicant, (mother) the mother of Fikrete kassahun filed an application to the court stating that Fikrete was born to Ato Kassahun Wube while they (the applicant and Ato Kassahun) were living together in a non-marital relationship. She stated that Ato Kassahun was supporting her financially before the birth of the daughter and after the birth of the daughter. He (Ato Kassahun) gave her grains which would serve for the

preparation of “Kenfo” and ‘teff’ and barely that would be used for the preparation of food and drinks that would be served when the daughter was baptized. She also added that Ato kassahun was giving money for maintenance, clothing and education. Because Ato Kassahun died on the 30th Sene 1982 E.C, she prayed to the court so that the court would declare that Fikrete was the daughter of Ato Kassahun and a certificate be given to her to that effect.

The legal wife of Ato Kassahun objected to the petition saying that Fikrete was not acknowledged by Ato Kassahun during his life time. She added that filiation is to be established by possession of status only when a child is born in an irregular union.

The court to which the application was filed called the witnesses named by the applicant and the witnesses confirmed the allegations made by the applicant. The court, however, rejected the petition of the applicant by citing the pertinent provisions of the 1960 Civil Code. The case was taken by appeal to the Federal Supreme Court and the appellate court confirmed the decision of the lower court. The court stated that:

“The appellant (Fikrete’s mother) did not allege that Fikrete was born to Ato kassahun in a marriage or irregular union, nor did she produce a document which shows that Ato Kassahun acknowledged Fikrete; didn’t prove that Ato Kassahun was judicially declared to be the father of Fikrete because of rape or abduction of the mother by Ato Kasshun. The argument of the appellant is based on the fact that she produced witnesses who testified that Ato Kassahun was the father of Fikrete Art.748(1) of (the civil code) provides that an acknowledgement of paternity shall be of no effect unless it is made in writing. Likewise sub-article 2 of this article clearly provides that acknowledgement cannot be proved by witnesses. Therefore, since the appellant in her claim that Fikrete is the daughter of Ato kassahun did not produce any evidence supported by law.

We have confirmed the decision of the lower court (see civil appeal No1768/88 Federal Supreme Court or Read Mehari Redae vol.2 pp.75-77). From the forging discussions and samples of court decision you can realize that there is no consensus among our judges as regards the nature of proof of filiation by possession of status.

7.6. Summary

Filiation is an important aspect of family law. It is important because it is through the rules pertaining fililiation that both material filiation and paternal filiation can be established. The establishment of filiation is particularly important to protect the interest of children.

That is why past and present Ethiopian family laws, have incorporated relevant provisions which are instrumental for the establishment of filiation. The establishment of material filiation is not as difficult as the establishment of paternal filiation. This is because maternal filiation is established by the mere fact of birth although birth is not defined in Ethiopian law and it will remain a source of confusion particularly in view of artificial insemination.

As regards paternal filiation, there are three modes of establishment of paternity. These are legal presumption, judicial declaration and acknowledgment. In the case of legal presumption, once the existence of marriage or irregular union is proved, the law presumes that the husband of the woman or the man in a irregular union is presumed to be the father of the child who is born or conceived in marriage or during the irregular union. However, it must in mind be borne that such presumption is a reputable presumption. Coming to judicial declaration, (when it is possible to prove that what are provided under Art. 143 of the RFC and the corresponding regional family laws), the court is duty bound to declare that a man is the father of the child under consideration. The third mode of establishment of filiation is acknowledgment. Acknowledgment is dependent upon the free will of the man. In other words, the man freely declares that he is the father of a certain child so long as the stringent requirements of the law are fully satisfied.

As far as proof of filiation is concerned, the law has provided to modalities of proof. These are proof by record of birth and proof by possession of status.

7.7. Review Questions

1. Why is it said that maternal filiation is the basis for consanguinal relationship?

2. A and B are a husband and a wife B has remained to be a good wife except that she has problem of pregnancy since her womb is not able to carry fetus. Because of this, A and B agreed to transfer a fertilized egg from B's womb to another lady called Tihitina, who had the desire to remain virgin throughout her life. Despite her virginity, the fertilized egg was transferred to the womb of Tihitina as per her agreement to carry the same. Then she became pregnant and a boy called Tariku was born. In this case, who is considered to be the mother of the child as per Art.124 of the RFC?

3. Art.128 of the RFC provides that a child shall be deemed to have been conceived in wedlock if he is born more than 180 days after the celebration of the marriage and within 300 days after its dissolution. What would be the fate of a child born 300 days after the dissolution of marriage when it is proved without any doubt that the women had no sexual relation with another man?

4. Assume that Ato Begashaw and W/ro Debritu married on the 1st of Meskerem, 2000 E.C. A child was born on the 10th of Megabit, 2000 E.C. Can Ato Begashaw be presumed to be the father of the child? Why/why not?

5. Ato Thomas saw W/rt Endelibish when she was returning from school. Attracted by her physical appearance, Thomas approached her and invited her to sexual intercourse. She accepted the offer and commenced recreating together. Then, they transformed their relationship to sexual intercourse. Having had sexual intercourse for certain days, a dispute arose between them and they put an end to their relationship. Few months after the termination of such relationship, W/rt Endelibish went to Ato Thomas and told him that she had become pregnant. However, Thomas frankly told her that he could not be the father of the conceived child since their relation was only intermittent with no continuous sexual intercourse.

Three years after the birth of the child, she brought suit against Thomas so that the court would declare that Thomas was the father of the child. She named three witnesses who testified they saw W/rt Endelibish and Thomas several times when Thomas came to Endelibish's house to take her to restaurants and certain recreational areas.

5.1. If the case were brought to your bench, what would your decision be?

5.2. If you are an advocate of Thomas, what defence(s) would you raise in his favor?

6. Ato Awugichew appeared before an officer of Civil Status and declared that he was the father of a child who (the child) could not benefit from the presumption of paternity. The declaration of acknowledgement was reduced into writing and was kept as a public document. Four years after the making of the acknowledgement, Ato Awugichew died intestate. When the succession of the deceased was opened, the acknowledged child appeared and claimed his share on equal footing with other heirs-at- law. However, the other heirs of the deceased argued that the child who alleged to have been acknowledged was not the son of the deceased. Because of this, the acknowledged child was ordered to produce evidence that would be a proof that he was acknowledged by the deceased. When he asked the officer of Civil Status to give him evidence to that effect, the officer of civil status alleged that the declaration of acknowledgement which was reduced into writing was lost. Rather the officer told him that he (the officer) was more than happy to appear in court and testify that there was a valid acknowledgement.

Would his testimony be admissible in evidence?

7. The RFC makes it clear that acknowledgement of a dead child is not acceptable. Why does the law prohibit such acknowledgement? Why does the law permit acknowledgement of a dead child where such child is survived by descendants? Discuss the policy considerations of the law-maker in this regard.

8. In order to declare that a certain individual, who has allegedly raped or abducted is the father of a child, should the rapist or the abductor be convicted by the criminal court?

9. When he was walking from Menelik II Hospital to the Lion's Zoo (Anbessa Gibi), Ato Agenehu found a newly born baby without any care and treatment. His heart broke and he soon took the baby to his home and extended every humane treatment. He named the foundling Tegegne. When the child was a four years old, a certain lady appeared and claimed that she wanted to acknowledge that she was the actual mother of the child. However, Ato Agegnehu was not voluntary to give the child to the lady. Because of this, she has sued Ato Agegnehu in court. If you were a judge to whose bench this case was brought, what would your decision be?

10. Ato Erana and W/t Bilise lived together in a continuous sexual relationship although they did not establish an irregular union. Later on, she became pregnant. When such was communicated to him, Ato Erana told her that he could not be the father of the child since he had serious suspicion that she had sexual relationship with other individuals. W/t Bilise died immediately following the birth of the baby. However, the baby was taken care of by its grand parents. Now the child is a six-years old boy and he has started to inquire as to who is his father. Because of this, the grandfather of the child wants to file an application to court in order to obtain judicial declaration of paternity since the deceased told her parents that the child belongs to Erana.

    10.1. Is the grandfather of the child a real party in interest?

    10.2. What kind of proof should the plaintiff produce to convince the court and obtain judicial declaration of paternity?

    10.3. What defence(s) can be raised in favor of Ato Erana?

11. What is the rationale behind Art.148 of the RFC?

12. Ato Jandereba was a eunuch. Despite this, he concluded marriage with a certain lady called W/ro Endelibe. He married her not because he had sexual desire but because he had an interest to live together with the lady. The lady accepted this offer since Ato Jandereba was a very rich man in her locality. Despite the marriage, she was having

sex with other individuals. Because of this relationship, a baby was born. Although Ato Janderaba knew that the baby was not his issue, he used to treat the baby as though he were a father.

Before the child reached majority age, Ato Jandereba died without making any will. Because of this, the child claimed that he was the legal successor of the deceased. However, Ato Jandereba's sisters and brothers objected to the claim of the child alleging that the child was not the issue of Ato Jandereba. They adduced medical evidence as well as witnesses and proved to the satisfaction of the court that, Ato Jandereba could not produce sperm and hence a child could not be begotten to him.

Assuming that the case were brought to your bench, how would you go about the case?

14. The following case was decided by the supreme court of Ethiopia in 1982 E.C under Civil appeal file No.1109/82.

Although he was bound by a lawful marriage with his wife named W/ro Zenebetch Legesse, Ato Belayneh Abebe established an irregular union with Bahirework Tilahun. It was in such union that Bahirework became pregnant. Because of this, Ato Belayneh concluded marriage, although a bigamous one, with W/ro Bahirework on the 26th of Hamle, 1978 E.C. However, Ato Belayneh Abebe died on the 27th of Nehasie 1978 E.C, a month after the celebration of the marriage. Then, after three months following the death of Ato Belayneh, W/ro Bahirework gave birth to female child named Messay.

When the baby was born, the birth was told to Ato Belayneh's mother, W/ro Adanech Fanta, and the latter acknowledged the child before the Head of Acts and documents Department, Ministry of Justice. The acknowledgement was also attested by three witnesses.

Then W/ro Bahirework filed an application to the then Addis Ababa High Court for declaratory judgment which would confirm that Messay was the daughter of Ato Belayneh. However her application was opposed by the former wife of Ato Belayneh, W/ro Zenebetch Legesse.

In order to prove her allegation, W/ro Bahirework produced the document of acknowledgement issued by the Ministry of Justice and the witnesses who attested the acknowledgement. In order to rebut the evidence produced by the applicant, W/ro Zenebetch named the mother of the deceased, W/ro Adanech Fanta, as a witness. Adanech Fanta testified that she did not acknowledge Messay as her grand daughter. She made it clear to the court that she signed the document induced and defrauded by the advocate of the applicant and the applicant herself. Because of this, the court called the officer before whom acknowledgement was made and the officer gave his testimony that W/ro Adanech Fanta acknowledged without any external influence. Then the High Court decided that the acknowledgement was duly made and it could not be revoked on the ground of inducement or fraud.

Aggrieved by the decision of the High Court, W/ro Zenebetch appealed to the Supreme Court. However, the Supreme Court confirmed the decision of the High Court by citing the relevant provisions of the Civil Code.

14.1. How could you evaluate the decision of the courts in the light of the relevant provisions of the 1960 Civil Code?

14.2. Would your evaluation be different if the case was decided on the basis of the current family laws?

14.3. Would W/ro Bahirework be successful if she invoked presumption of paternity?

14.4. Would judicial declaration of paternity be of any help if W/ro Bahirework resorted to such mode of establishment of paternity assuming that the case arose after the new family laws of the country had entered into force?

15. In a case decided by the Supreme Court (civil appeal No. 9360 decided on the 13th of Yekatit, 1981 E.C) the respondent named Gizesh Hailu filed an application in the High Court petitioning the court to give a declaratory judgment that Ato Haile W/Hanan was her father. Her application was supported by a holograph will in which the deceased acknowledged Gizesh Hailu as his daughter. The appellant,

W/ro Mulunesh Beyene, the wife of the deceased objected to the application alleging that the will was not valid. W/ro Mulenesh made the opposition although she did not have any child born from the deceased.

The High Court decided in favor of the applicant and the Supreme Court confirmed the decision of the High Court?

15.1. Evaluate the decision.

15.2. If you were an attorney retained by Gizesh Hailu, what preliminary objection would you raise in favor of your client?

CHAPTER EIGHT

ADOPTION

8.1. Introduction

In the normal course of circumstances, it is natural filiation which creates parent-child relationships. However, exceptionally an artificial filiation is established by agreement between an adaptor and an adoptee for several reasons. Although adoption seems to be a private agreement between the adoptive parents and the adoptee, the involvement of the law is very much crucial in defining the manner of establishment of such artificial familial bond, the respective rights and obligations of the adopter and the adoptee, the essential effects of adoption and revocation of adoption when the need to do so arises.

This chapter introduces students to the relevant provisions of the law regulating both in-country and inter-country adoption in Ethiopia. Hence, the chapter discusses, the meaning of adoption, the essential conditions of adoption, effects of adoptions and inter-country adoption. N.B. As usual, since it is the model for all regional family laws, reference will be made to the provisions of the Revised Family Code (The RFC here in after) in order to avoid unnecessary reproduction of legal provisions.

8.2. Objectives

After completing this chapter, students will be able to:

- define adoption;
- discuss the essential conditions of adoption;
- analyze effects of adoption i.e. both in-country and inter-country;
- analyze the grounds which lead to revocation of adoption.

8.3. Adoption Defined

Adoption is so widely recognized that it can be characterized as an almost world-wide institution with historical roots traceable into antiquity. The concept of adoption is understood differently in various culture. Despite that it is good to have a look at few

definitions with a view to shedding light on the concept. For instance, Black's Law Dictionary defines adoption as: The creation of parent-child relationship by judicial order between two parties who usually are unrelated. (Black's Law Dictionary, 8th ed, 2004, p. 52).

Planiol defines the concept as: A solemn contract which creates relation between two persons analogous and those flowing from legitimate filiation (Planiol, p. 872).

The Ethiopian Civil Code of 1960 defines adoption as a bond of filiation created artificially by a contract of adoption between the adopter and the adopted child (Art. 796(1) of the Civil). The RFC provides the same thing as the Civil Code.

Under Ethiopian law, filiation is a grouping of persons based on blood relationship. Adoption is, therefore, acceptance of the rules of filiation in which such relationship is created artificially.

In general, adoption is a way of home finding to children who have lost their natural parents by death, desertion, or their misconduct, and in a secondary degree for children whose parents are unable or unwilling to maintain them. And it is the practice of absorbing a child into a family that a child is not born into and giving it the legal rights and duties of a child that is naturally born to the adoptive parents.

8.4. Essential Conditions and Effects of Adoption

Adoption in Ethiopia both in country and inter country is governed by international laws and conventions to which Ethiopia is a signatory and by its national laws particularly the RFC and regional family laws. Having based ourselves on these laws, we will discuss in this chapter some of the legal requirements and effects of adoption. (Read Arts.796-806 of the 1960 Civil Code of 1960, the African charter on the Rights and welfare of the child, OAU Doc. CAB/LEG/ 24.9/49/1990/ entered into force Nov. 29, 1999 and the 1989 child convention.

8.4.1. Essential Conditions

In the past, Art 797(1) of the Civil Code provides that any persons of age may adopt a child." When it says "any person of age" it is referring back to Art 198 of the Civil Code which sets 18 years as age when a person is no more considered as a minor. In case of adoption also a person beyond the age of 18 years is capable of adopting a child unless such person is declared incapable by the law. Unlike the Civil Code, Art. 184 of the RFC provides that "any person whose age is not less than twenty five years may adopt. Where an adoption is made by two spouses, it is sufficient that one of them be of full age of twenty five years. As regards the age of the adoptee, the RFC provides that any person who is less than 18 years of age and under guardianship may be adopted. This means that once a person has attained majority age, no purpose would be served by adopting that person since is he/she able to maintain himself/herself. This is a clear departure the RFC has made from the 1960 Civil Code since the latter did not say any thing concerning the age of the adoptee. The Code has no upper age limit because the purpose of adoption traditionally is to have some one as heir. But one can argue that in case of adoption, it is the best interest of the child which is given paramount importance. So if the adopter is too old it can't provide the necessary care required for the child and this isn't in the best interest of the child.

As to marital status of the adoptive parents, there is no provision which prohibits adoption by a single person. However, if the adopter is married the child is adopted by spouses jointly as per Art.180 of the RFC. But this doesn't apply where a person adopts the child of his spouse and one of the spouses is not in a position to manifest his/her will. Generally, however, adoption by two spouses is the best solution for the child, as he acquires the status of being each adopter's own child and both are equally obligated to care for him. It also avoids misunderstanding between the spouses on the future upbringing of the child. Moreover, adoption by a couple is preferred, simply by reason of the likelihood that couples will provide a more "normal" family environment that could be provided by a single adopter.

If the above requirements are satisfied, the fact that the prospective adoptive parents may have biological or adopted children of their own doesn't affect adopting a child. Accordingly, Art 188 of the RFC states that, "the existence of children of the adopter shall not constitute an obstacle for adoption." However, by way of exception sub-article two of this article states that although having children is not an obstacle to adoption the court must take into consideration the effects of existence of children of the adopter on the well-being and interest of the adopted child.

When you closely read the Ethiopian family laws, it is possible to understand that adoption is possible even if the natural parents are capable of rearing the child. On the other hand, the 1989 Convention on the Rights of the Child permits adoption if the child can't be reared by his families or other alternative methods. The former can't take into account the capacity of natural parents to rear the child. While the latter takes into account the capacity of natural parents to rear the child. Therefore, there is discrepancy between both laws.

How can you reconcile the contradictions? The convention on the Rights of the child is an integral part of the Ethiopian law by virtue of Art.9 (4) of the FDRE Constitution since Ethiopia has ratified it and the RFC was approved by the HPR. Hence, by taking into consideration the principle of hierarchy of laws, should you give effect to the provisions of the child convention or the provisions of the Ethiopian Family Laws?

It may be argued that granting adoption for every child reduces the chance of other children who have no other means to their care than adoption. This can be justified pursuant to Art. 802(2) of the Ethiopia Civil Code for it says "If the child is under 15 years of age the contract of adoption shall be between the adopter and the guardian of the adopted child." Therefore, in this case consent is given by the guardian. And when an institution of assistance or an individual seeks to act as guardian of the child, the civil code requires a court appointment. When an institution is to act as guardian, the management has to delegate one of it members to exercise such functions, courts are

directed to appoint relatives as guardians, when possible and to appoint institutions only "where necessary".

For the establishment of valid adoption, the consent of parents of the adopted child is mandatory. Accordingly, Art.190(1) of the RFC provides that both the father and the mother of the adopted child must give their consent to the adoption agreement where they are alive and known. Sub-article two of this article provides that where one of them is dead, absent, unknown or incapable to manifest his/her will, the other parent shall give his consent. Despite the fact that the consent of both parents is necessary, one of the parents may not be willing to give his/her consent to the adoption. In this case, the court may approve the adoption upon hearing the opinion of the other parent and of the child where the child is ten and above years of age. Sometimes, there may not be ascendants who may give their consent to the adoption agreement. In this case, the court is empowered to approve such agreement by taking into account the interest of the child (Art.191).

In some circumstances, government or private orphanages may give any child under their custody to adopters. When this is the case, such orphanages are required to provide sufficient information to the government organ having authority to follow up the well-being of children, as to the identity of the child, how the orphanage received him and about the personal, social and economic position of the adopter. All the information must be given to the government organ before the agreement of adoption is concluded. (Read Art.192 of the RFC)

Where the adopter is a foreigner, the court may approve the adoption unless an authority empowered to follow the well-being of children, after collecting and analyzing relevant information on personal, social, and economic position of the adopter gives its opinion that the adoption is beneficial to the child. (Art.193(1).

However, how can such authority in Ethiopia collect and analyze relevant information with regard to the personal, social and economic position of a foreign adopter?

Despite what is provided under Art.193(1) of the RFC, the court may disregard the opinion of the authority and reject the agreement of adoption where the court thinks that the agreement is not beneficial to the child. In other circumstances, where the court finds that the information provided by the concerned authority is insufficient, it may order the authority to conduct further investigation and submit additional information. The power of the court is also extended to ordering other individuals or organizations to provide any relevant information in their possession or to give testimony (Read Art.193(3).

The power of the court does not stop here because an agreement of adoption does not produce any legal effect unless it is approved by the court. In the case, the court is duty-bound to verity that the adoption is to the best interest of the child before approving the agreement. In addition, before approving the agreement, the court is required to take into consideration:

- the opinion of the child about the adoption where the child is capable of giving opinion;
- the opinion of the guardian or the tutor of the child if he/she has not previously given his consent;
- the capability of the adopter to raise and take care of the child;
- where the adopter is a foreigner, the absence of access to raise the child in Ethiopia;
- the availability of information which will enable the court to know that the adopter will handle the adopted child as his own child and will not abuse him. (Read Art.194 of the RFC).

8.4.2 Effects of Adoption

When it is duly established, adoption produces certain legal effects. The conspicuous effects of adoption are marriage, succession, maintenance and the like. Let us see these effects briefly as follows.

A. Marriage

There are certain conditions to be fulfilled before marriage is concluded. The Civil Code provides that marriage between persons related by consanguinity and affinity is prohibited. In case of adoption bonds of consanguinity and affinity are created pursuant to Art. 556 of the Civil Code. Art. 8 of the Oromiya Family Code provides that adoption is one source of familial relationship. By the same taken, Art. 7 of the Tigray family code provides that both consanguinal and affinal relationship can be established by adoption. Art. 181 of the RFC also provides that an adopted child shall, for all purposes, be deemed to be the child of the adopter.

Therefore, relationship established by adoption may be an impediment to marriage in accordance with the degrees that are provided by the family laws of the respective regional family laws and the RFC.

B. Succession

Because adoption establishes an artificial filiation, the provisions of the Civil Code dealing with succession both intestate and testate do apply to the adopted child. However, there is no provision under our law which permits or prohibits an adopted child from inheriting his natural parents. But we can raise here two arguments. First the child is considered as a child naturally born into the family of the adoptive parents, he forfeits the right of inheriting his natural parents, for Art.836 says “adopted children shall be assimilated to the other children in case of succession.” The other argument is, as the adopted child shall retain his bonds with his family of origin, if so his right to inherit is not in jeopardy as his relation isn’t dissolved. However, there is no a provision in the Civil Code which prohibits the adopted child from inheriting his natural parents.

With regard to the inheritance of the property of the adopted child, it is the family of adoption that is the ascendants, descendants and collaterals of the adoptive parents who have the right to inherit. Since Art. 183(3) of the RFC states that, ‘wherever a choice has to be made between the family of adoption and the family of origin, the family of adoption shall prevail.”

C. Rights and Obligations as to Support and Care

Adoptive parents are duty-bound to support and care for the adopted child. Since the adopted child has an equal right as a naturally born child, it is also incorporated in both the FDRE Constitution and UN Convention on the Rights of the Child that the child is entitled to acquire care of his/her guardian. Hence, the mother and father are during their marriage jointly guardians and tutors of their minor children. The guardians or tutors of a child are duty bound to exercise different functions related to different needs as to residence, health, education, social contacts and correspondence, and income, etc. of the child. And the parents are responsible to maintain the child and give all the necessary material support within their capacity.

In return for support and care, a child who is capable, has reciprocal duty to give maintenance to his adoptive parents. As expressly put under Art. 198 of the RFC an obligation to supply and maintenance exists between relatives by consanguinity or affinity in the direct line and between brothers and sisters. However, the adopted child, his spouse and his descendants may not claim maintenance from the family of origin of the adopted child unless the adoptive family isn't in a position to supply such maintenance. They aren't also bound to supply maintenance to ascendants of the family of origin unless the latter can't claim maintenance from another member of their family. With regard to obligation to supply maintenance to natural parents, there is no provision which obliges or prohibits. So it is at the discretion of the parties to supply maintenance or not.

8.5 Inter-country Adoptions and Safeguards to Children

8.5.1 Inter-country Adoption in General

The shortage of adoptable children in developed countries, the unfortunate circumstances in which some children and parents in developing countries find themselves, along with greatly increased international mobility, have given rise to the new phenomenon of inter-country (international) adoptions. The first scheme of inter-country adoption was arranged in the 1940s by the family welfare association in England in conjunction with the American Branch of the International Social Service Organization. (See Hery D.

Krause, Family Law in a Nutshell, West Publishing Company 1995, pp. 208-209) and Mary Ellision, The Deprived Child and Adoption, Pan Books Ltd, London, 1963, p. 105).

In Ethiopia, the main cause for the start of inter-country adoption as an alternative care for orphaned and abandoned children was the 1974/75 draught and famine that resulted in orphaned and abandoned children. Because of this, the then Prime Minister's office gave directives to the Ministry of Labour and Social Affairs (MOLSA) to consider and work on inter-country adoption for orphaned and abandoned children in late 1970s. The directive established a committee for facilitation of adoption, as well as it provides the prerequisites for selection of adoptive parents and documents required at that stage (Dinkalem Betru, The Concept of Adoption and Procedures Followed in Ethiopia, workshop at Nazareth, July 1997, p. 5.)

The term inter-country adoption refers to an adoption in which adopters and child don't have the same nationality, as well as one in which the habitual residence of adopters and child is in different countries. Nowadays in Ethiopia, there are two kinds of inter-country cases. The first one is the biological mother voluntarily relinquishes her children for personal reasons. It may also by both parents and guardians for reasons such as lack of means to support. We call these private inter-country adoptions. They are arranged directly between the biological parents and adoptive parents or their representatives or through an intermediary. The other is adoption of orphaned or abandoned children or children whose parents are ill and hence have no one else to act on their behalf. These are called agency inter-country adoptions for the reason that it is the agency which acts on behalf of the child in case of adoption.

Moreover, in the field of private international law, two aspects must be distinguished. One concerns the choice of law; the other the exercise of jurisdiction. The same two aspects present themselves, once again, when the recognition of inter-country adoption is in issue. In civil law, adoption is regarded as a contract, albeit subject to approval by the public authorities; the constitutive act of an adoption under this theory is the exercise by the parties involves certain private rights. If one adds it the contract theory of adoption a person's private rights regarding any point of his personal situation should be governed

by a personal law, such as the law of his nationality. Then, it should follow that the right to adopt a child, or to be adopted, must be determined according to the national law of the person in question. In other words, the contract theory tends to bring with it choice of law that is for the validity of an adoption in which compliance with the national laws of at least one of the parties is necessary. (K. Kipstien, "Adoption in Private International Law," 12 International and Comparative Law Quarterly, (1963) p. 836).

In general, adoptions shall be granted only if it will be in the best interests of the child. And that the authority approving the adoption is to carry out a thorough inquiry relating to the parties through the agency or the appropriate authorities, and as for as possible with the help of experienced social workers and agencies qualified in the field of inter-country adoptions. The making of the appropriate investigations preliminary to an adoption, is therefore, left to the initiative of the forum state rather than to an internationally uniform procedure, and this is each country's courts are to apply forum law to all procedural matters. Hence, it is with this in view that we will discuss some of the procedural matters such as selection of prospective adoptive parents, court proceeding etc., in relation to the two types of inter-country adoptions.

8.5.2 Placement of the Child

UN Convention on the Rights of the Child recognized that "Inter-country adoption may be considered as an alternative means of child care, if the child can't in any suitable manner be cared for in the child's country of origin" (Convention on the Rights of the child, (1989), Art. 21(c))). This principle also finds expression in a directive issued by the Ministry of Labour and Social Affairs in 1996. Art. 3 of the directive provides that: A child can be adopted and expatriated only when it has been proven that it cannot get proper care in Ethiopia because foster parents or persons willing to adopt it could not be found and that there is no other way it can be brought up properly here."

Nonetheless, in certain circumstances inter-country adoption "may offer the advantage of a permanent family to a child for whom a suitable family can't be found in his/her state

of origin." This suggests that there are circumstances in which inter-country adoption may be regarded as preferable for a child over institutional care in the country of origin.

It is also obvious that the successful operation of this principle requires that the placing agency in Ethiopia should have the capacity to explore the alternatives to inter-country adoption. This implies a placement system which in some way is integrated into or at least has ready access to information about the child-care services in Ethiopia. However, in inter-country private adoption, i.e., in the sense of not being arranged through an approved agency, insufficient attention may be given to the possible alternatives to inter-country adoption. That is why Art. 21(e) of the Convention in the Rights of the Child states that the placement of a child in another country should be carried out by competent authorities and must not result in financial gain for the parties involved.

8.5.3 Selection of Adoptive Parents

In the total evaluation of the interest of the child, the examination of the personal qualities of the adopter is of special significance. Each country has its own laws and procedures regarding the selection and approval of prospective adoptive parents. In the United States, in order to be approved for adoption families go through a process called home study. This entails contracting a licensed social worker to carry out the study by means of visits and phone calls. In Ethiopia, Art.193 of the RFC states that where the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the well-being of children, after collecting and analyzing relevant information about the personal, social and economic position of the adopter, gives its opinion that adoption is beneficial to the child. However, the court may reject the opinion of the authority and decline to approve the adoption where it (the court) thinks that adoption is not beneficial to the child. According to the afore-mentioned directive children are adopted and expatriated where it is verified that:

a. The would be adopter's income will enable him to raise a child.
b. The adopter is healthy, that his social life is not tainted, that he is of a sound mind and is not at all addicted to any dangerous drugs.

c. The adopter has never been convicted of a crime or of being engaged in an illegal activity; and
d. The written consent of his lawful spouse has been obtained with regard to the adoption.

In general, it is necessary to arrive at a firm conclusion that the future adoptive parents will be able to bring up the child properly and maintain him financially. Beyond that parents have responsibility to teach their children, respect and to provide with a conducive environment in which he may develop sound character. This responsibility imposes on a parent an obligation to train his child in differentiating "right" from "wrong" and develop his child's conscience. It also requires a parent to teach by example, that is, to conduct himself in a manner that his child may imitate.

8.6 Safeguards for Children in Inter-country Adoption

8.6.1 Follow-up Work

As regards inter-country adoptions, the Convention on the Rights of the Child calls for the guarantee of being informed of the child's condition after authorization of adoption and his departure abroad. This enables the concerned authorities to ensure that the child's rights are respected and that the child is faring well. To this end, the competent authorities should follow-up the adopted and expatriated children. This can be done by requesting concerned governmental as well as non governmental organizations found in the child's country of residence. Follow-up, among other things, is done by periodical visits by experts from the competent authority and assess the situation of adopted children in the child's country of residence. When it has been found out that the rights of the adopted and expatriated child have been violated or that its welfare is not ensured, the competent authority shall take the necessary measures to remedy the situation. **What do you think are such measures?**

8.6.2 The Child's Right to Identity and Secrecy

In the adoption process three interests are involved i.e. the interest of the child, the parents i.e. both adoptive and natural, and public interest. The child has an interest to

know his identity. On the contrary, security is a guarantee based in part of a desire to protect the parent from public embarrassment. The adoptive parents are guaranteed the same anonymity as the biological parents. The adoptive family needs to be protected from intrusion in order that a healthy and stable relationship may be allowed to develop. Beyond this, the adoptive parent may feel his/her parenthood be threatened by disclosure and by the unknown results of any possible reunion. They can't easily put distance between themselves as parents and their child's personal need for identity. Furthermore, the primary interest of the public is to preserve the integrity of the adoptive process. That is, the continued existence of adoption as a humane solution to the serious social problem of children who are or may become unwanted, abused or neglected. Hence, the public has a strong interest in preserving the confidential and non public nature of the process.

Because of the difference in interest there is controversy. Nowadays, there are strong movements in many countries to recognize the interest of the adopted child to discover his true identity. Art. 8 of the Convention on the Rights of the Child seems to be a result of this it though identity is no defined in Art.8 or elsewhere in the convention. Instead instances of identity are listed "nationality, name and family relations as recognized by law," and, under Art. 8(1) the right of a child to preserve his/her identity "without unlawful interference" can be interpreted as placing a duty on states parties to allow adopted children the right to have access to records revealing the identify of their natural parents. Moreover, in the interest of children adopted, it must be revealed to them that they have both biological and adoptive families. However, anonymous adoptions will usually prevent the adopted child from knowing when or whether an inheritance is due.

On the contrary, some say that adoption records must be kept secret to protect parents and the public at large. If adoption is made public, potential adopters may decline to adopt children which may have a negative effect on vulnerable children. Moreover, open adoption will encourage natural parents to become over dependent on adoptive parents, aggravate adoptive parents' sense of insecurity and confuse adopted children. **To which of these arguments do you subscribe?**

Generally, however, any right to information must be balanced against the public interest in the adoption process which confidentiality is intended to protect. To this end, Art. 7 of the Convention on the Rights of the Child states that the child's right to know its natural parents will have to be restricted by operative legal solutions, aimed at keeping the adoption secret. The afore-mentioned directive also recognizes that adoption to be treated as a strictly confidential matter, unless it has a negative effect on the welfare of the child. And also recognizes the child's right to information about his/her country, natural parents and family member or in order to set free him/herself from any difficult condition that faces. Here we understand that the law demands that the secret of adoption be kept in cases where an adoption is revealed, damage to the parties involved can be great and lead to a severe family crises. At the same time, the child's right to his identity is recognized particularly with respect to granting access to information at some point in an adoptee's life whether at majority or earlier.

Adopted children unlike natural children don't share ancestry, genetic heritage, or family resemblance with their adoptive parents. They struggle with questions like 'why was I placed for adoption?"; "To whom do I belong?", "who am I?", "who are my natural parents?" As they mature, they need acceptance, reassurance, and positive but realistic, responses to their questions from their families and communities. They also need to understand that the decision made by their natural parents was based on their own personal circumstances and not on the child's being bad or damaged. This can be seen from these two cases.

In the first one, a young man of 23 years old came to Ethiopia, where he was abandoned as a little child, to prepare his graduation thesis on the topic 'Adoptions in Ethiopia.' He wanted to learn about his natural parents. He was taken to Kechene Child Care Institution in Addis Ababa where he lived before he was adopted. He was told that his mother wouldn't pay a visit to him as she abandoned him. Finally, he realized that he would not be able to meet his natural parents.

The other was a girl from Sweden who was abandoned as a little child in Ethiopia and came back to learn about her natural parents along with her adoptive parents. She was

taken to Kechene Child Care Institution where she lived before she was adopted. She left for Jimma which was traced to be the place where she was abandoned. In Jimma, she saw the exact spot where she was found abandoned and realized the whereabouts of her natural parents is unknown. And she was quite relieved thereafter for she learnt the truth.

Hence, the longer an adoptive parent kept secret the fact of adoption from a child, the more serious the consequences be when the fact is finally revealed. Similarly, the less information is revealed about the adoptee's origins, the greater the problems for the adoptee. Thus, generally parental motivation and commitment, the adoptive parent's openness in discussing adoption issues with their child, the age of the child at the time of placement, and the child's individual temperament have an influence on adoption adjustment.

8.6.3 Prevention of Unlawful Acts in Inter-country Adoption

The parent, guardian or foster parent may claim or accept money or other material goods, for himself or somebody else, in exchange for a child's adoption. A person may also obtain improper financial gain through acting as an intermediary or facilitator in a child adoption. But, in most states it is a crime to offer or receive money or any valuable consideration for relinquishing or accepting a child for adoption since adoption is based on the child's need to have a family and not on the economic profit of intermediaries. Similarly, the afore-mentioned directive states those acts which are unlawful with regard to adoption of children. These are, accepting bribes to willfully give away of one's child for adoption, making adoption a business and profiting by it, and adopting a child against his will or without the written consent of his parents.

Moreover, under the guise of adoption, certain people engage in child abuse such as exploitation of children through pornography, prostitution, cheap labor, the removal and sale of organs used in transplants and other forms of abuse, some beyond even the wildest stretch of the imagination. To avoid this, Art.11 of the Convention on the Rights of the Child states that parties shall take measures to combat the illicit transfer and non-return of children from abroad. And Art.35 of same convention calls for the counteraction of abduction, sale, or trafficking in children for any purpose or in any form. In addition, the

Hague Conference on Inter-country Adoptions calls for adoptions to be organized by authorized adoption agencies. Therefore, although biological parents are often willing to make private arrangements for adoptions, the government has to deter this by regulating and supervising adoptions to eliminate illegal trafficking in children. And hence strong administrative screening and legal supervision to avoid intermediaries from making profit in inter-country adoption is needed.

Do you think that Ethiopia has put in place the institutional and legal framework to combat abuse of the right of the child using adoption as a cover?

8.7. Revocation of Adoption

Although adoptive filiation is established by the agreement of the adopter and the adoptee, it cannot produce any legal effect unless it is approved by the court. The court, before giving the decision of approval, conducts serious investigations and inquires to make sure that the agreement of adoption is in the best interest of the child in all respects. If an adoption is approved by the court, as a matter of rule, if is not revocable as clearly provided in Art. 195(1) of the RFC. However, unlike Art. 806 of the Civil Code which provided for the irrevocability of adoption for whatever reason, Art. 195(2) of the RFC states that adoption may be revoked for the reasons mentioned there under. According to this sub article, adoption may be revoked by the court where the adopter, instead of looking after the adopted child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his future.

The petition for revocation of adoption may be made by the child, a government organ authorized to follow up the well-being of children or any other interested person (Art. 196(1)).When petition is submitted to the court the court shall determine whether the grounds for petition are real and sufficient to warrant revocation. If the court is satisfied that the petition is well founded, then it revokes the adoption.

8.8. Summary

Normally, it is natural filiation which creates parent child relationship. However, artificial filiation is established by agreement to be entered between the parties concerned. Such mode of establishment of familial relationship is called adoption which is entirely dependant upon the agreement of the adoptee (the child) and the adopter.

In order to establish a valid adoption, essential conditions of adoption provided by law must be satisfied. Once a valid adoption is established, it is only on few grounds that adoption is revoked. Even then, adoption is only to be revoked by the order of the court when it is satisfied that the continuance of adoption does not advance the best interest of the child.

A validly formed adoption produces certain legal effects. The first is, adoption becomes an impediment to marriage; secondly, it creates the obligation to supply maintenance and rights and duties of support and care between the adopter and the adoptee.

Adoption could be in country or inter country. In the case of inter- country adoption, we have to take care that the rights of children are respected and protected in accordance with the requirements of Ethiopian laws and international human right instrument to which Ethiopia is a party.

8.9. Review Questions

1. “Because adoption is an agreement between the adoptee and the adopter, the consent of both parties must freely be obtained. If the consent of either of them is vitiated by vices of consent such as fraud, mistake or coercion/violence/, the contract of adoption may be invalidated.” Do you agree with the above quotation? Why/why not?
2. Identify the departures that have been made by the RFC and regional family laws from the 1960 Civil Code as regards adoption and critically analyzes the rationale behind such departures.

3. Although the law provides that a physical person can adopt a child upon the attainment of 25 years, it has never provided the maximum age-limit. Because of this, there are people who argue that the law maker should have put an upper limit to the age of the adopter. Would be of any help to safeguard the best interest of the child if an upper limit to the age of the adopter is provided by law?
4. What is the significance of inter country adoption to developing countries such as Ethiopia? Do you see any negative consequences of inter country adoption? Discuss critically?
5. Art. 185 of the RFC states that any person who is less than 18 years of age and under guardianship may be adopted. What do you understand by the phrase "under guardianship"? Does this mean that children who are not under guardianship cannot be adopted? Discuss critically particularly by taking into consideration street children in Ethiopia and foundling.
6. Mr. X is a Swedish National. He concluded an agreement of adoption with the parents of child Y. because the court was satisfied that the adoption was in the best interest of the child, it approved the agreement and Mr. X took Y to Sweden. Though the life of the adoptee was decent, the adoptee was very much discontented since his adoptive parent prevented him from making any correspondence with his natural parents.
    6.1 Would the act of the adopter be a sufficient cause for revocation of adoption seen in light of Ethiopian laws and international human right conventions?
    6.2 Who could be the real party in interest to petition the court for revocation of the adoption?
7. Ato Gemechu adopted a child called Desta in 1970 E.C upon the approval of the court. Because Ato Gemach was not voluntary to send the adoptee to school, the latter deserted Ato Gemechu and went to the Aity of Addis Ababa where he could get better opportunity to education and job. Although Ato Gemechu exerted effort to trace the whereabouts of the child, he was not successful. Ato Gemechu died in 2000 E.C. When the succession of Ato Gemechu was opened last December 2000 E.C, the adoptee (Desta a 35 years old man) appeared and claimed that he is an heir at law and deserves a share from the estate of the deceased since Ato Gemechu died intestate. However, the other heirs of the deceased objected to his claim alleging that since

Desta disappeared the home from of the adopter, the agreement of adoption was terminated ipso facto. Desta, on the other hand, argues that, the fact he disappeared from the adopter does not affect the effects of the adoption that was duly established.

Assuming that the case were brought to you, how would you decide it?

8. Art. 180 of the RFC provides that adoptive filiation may be created by an agreement between a person and a child. On the other hand, Art. 187(1) of the same code states that a child merely conceived may be adopted. Do you think that there is compatibility between these legal provisions? If your response is in the negative, how would you redraft Art. 180 of the RFC?
9. Assuming that you are approached by a would be adopter and a would be adoptee to draft them an agreement of adoption, what elements would you incorporate in the agreement beyond and above the legal provisions and without prejudice to the substantive policies of your clients?
10. You know that every agreement is not a contract while every contract is an agreement. How do you characterize the agreement creating an adoptee-adopter relationship?
11. Because adoption is established by the agreement of the parties concerned, such parties can put end such relationship by mutual consent or one of the parties is at liberty to terminate it whenever he demands so. Evaluate the validity of this statement in light of the relevant provisions of the Ethiopia Family Laws.
12. Ato Haymanot concluded an agreement of adoption with the parents of a child called Guddinna. Although Ato Haymanot's intention was to foster the child, educate him and make him human, the child, now 19 years of age, is not voluntary to go to school engaging himself in gambiling, chewing chat and smoking. Because of this, Ato Haymanot wants get revoked the agreement of adoption can he succeed?

CHAPTER NINE

OBLIGATION TO SUPPLY MAINTENANCE

9.1. Introduction

In our preceding, discussions you have learnt that family relationship may be established by consanguinity, affinity or adoption and one of the salient effects of familial relationship is that an obligation to supply maintenance among and between such persons is created within the bounds of the law. One may be obliged to supply maintenance only to those persons the law has identified (to one's ascendants, descendants, spouse or adoptee or adopter). The debtor in a maintenance obligation is obliged to supply to the creditor those things necessary for the survival of the creditor provided that the creditor is a needy one. Demanding maintenance allowance is not an absolute right. Rather there are certain limitations. Even the one who is entitled to such an allowance may lose his right under certain circumstances defined by law.

This chapter is, therefore, aimed at introducing students to the law dealing with the obligation to supply maintenance. To this end, the chapter will concentrate on the rationale behind maintenance allowance, persons entitled to such allowance and persons obligated to supply, the subject matter of the allowance and termination of such debtor-creditor relationship.

9.2. Objectives

Having completed this chapter, students should be able to:

- define the subject matter of obligation to supply maintenance;
- identify persons entitled to maintenance and persons obliged to supply maintenance;
- discuss the rationale behind such obligation;
- state the reasons leading to extinction of the obligation;

9.3. Rationale behind the Obligation

As you can understand, obligation is a legal relation, which consists in the duty of one person (called the debtor) to perform or not to perform something towards another person (named the creditor). Obligation emanates from two sources-contractual obligations and legal obligations. The former is an obligation created by the agreement of the creditor and the debtor while legal obligations, however, emanate from the law itself. The obligation to supply maintenance is a typical example of legal obligation. Therefore, those persons identified by law to discharge such an obligation are bound to meet their obligations even if they have not given their consent to do so.

However, what is the rationale behind such obligation? They rationale behind such obligation is a moral duty that exists among family members. When a member of a family becomes needy, no one is nearer than the family members to maintain such member.

9.4. Subject Matter of the Obligation

According to Art.197 of the RFC, the person who is obliged to supply maintenance is bound to supply to his creditor things that are necessary for the livelihood of the creditor. This means that the debtor is not bound to supply to the creditor things that would facilitate luxurious life. The things that are necessary for the well-being of the creditor must be given to him based on the social conditions and local custom of the area in which the creditor lives. That is, the creditor who lives in the countryside may not claim to be given expensive clothes that are worn by fashion-conscious young people of big cities. Generally, things that are necessary for the livelihood of the creditor are; the means to feed, lodge, and clothe, to care for his health and education, depending on conditions of the creditor. Therefore, maintenance comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation depending upon the financial capacity of the debtor. The education of the person entitled to be supported may include his schooling or training for some profession, trade or vocation.

9.5. Persons between Whom the Obligation Exists

As provided in Art. 198 of the RFC, a person may be obliged to supply maintenance to his spouse, ascendants, and descendants, his brothers and sisters. Although it is not expressly provided in this article, a person is obliged to supply maintenance to his/her adoptee or adopter as the case may be. This is because Art.181 of the RFC clearly provides that (without prejudice to Art.182 of the same code) an adopted child for all purposes, be deemed to be the child of the adopter. If an adopted child is for all purposes considered as the child of the adopter, it means that the adopter will be obliged to supply maintenance to the adoptee and the adoptee will be obliged to discharge such obligation since such obligation exists between a child and his ascendants and between a parent and his descendants. These are the only persons that demand payment of maintenance from someone. The converse is also true. That is, someone can demand payment of maintenance only from the above persons. Therefore, no person may be obliged to supply maintenance to his uncles, aunts, nephews, nieces and other relatives.

According to Art.201 of the RFC, the obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work. But the question is as to who is a person in need of maintenance and not in a state of earning his livelihood by his work?

Generally, minors are in need of maintenance. Their parents are obliged to supply maintenance to them. Moreover, persons who have no sufficient means to take care of themselves as a result of poverty may be considered to be needy if they are unable to work and earn an income. Aged persons and those who are seriously sick are considered to be not in a state of earning their livelihood by their work. If your brother, who has completed a secondary school, claims maintenance from you, you may reject his claim on the ground that he is able to work, although he has no income.

The obligation to supply maintenance shall, as a rule, be fulfilled by means of a maintenance allowance paid by the debtor to the creditor for maintenance. The payment could be in kind or in cash. The amount to be paid shall be determined by taking into

consideration the needs of the person claiming it and the means of the person liable to pay maintenance (Art. 202 of the RFC). The ideal amount to be paid is the one that corresponds to the need of the creditor and the paying capacity of the debtor. The amount fixed at one time may be revised at another by the application of the debtor or of the creditor (Art. 203). This means, maintenance may be reduced or increased proportionally, according to the reduction or increase of the necessities of the creditor and the resources or means of the debtor to furnish the same.

As the maintenance allowance is believed to be extremely necessary for the survival of the creditor, it cannot be attached nor can it be assigned. For example, such person may be a debtor of another person. His creditor cannot attach the maintenance allowance. Also the creditor of this person cannot ask the maintenance allowance be assigned to him. In this regard there is a similarity between maintenance allowance and pension allowance. Assume that “A”, a son pays maintenance allowance to his father “B”. “B” takes some money in loan from his friend “C” to drink alcohol. “C” cannot ask “A” to assign the maintenance allowance that is to be paid to “B”. Also “C” cannot attach the maintenance allowance of “B”.

This rule has an exception. In the above example, assume that “C” supplied to “B” things that are necessary for the livelihood of “Y”. (For instance he supplied “B” with food, or gave him medicine or gave money to pay house rent, etc.) In this case, “C” has the right to require the assignment or the attachment of the maintenance allowance that is going to be paid to “B” for this is allowed as per Art . 205 of the RFC.

All arrears, which have not been received or claimed within three months from their falling due, shall cease to be due unless the creditor proves that such arrears were necessary for his subsistence (Art 206 of the RFC).

As per Art 207 of the RFC, in fulfilling his obligation of maintenance allowance, the debtor may offer to discharge his obligation by taking the creditor for maintenance into his/her house. Where there is a disagreement, the disagreement may be settled by the court. The court is expected to render appropriate decision taking into consideration all

the circumstances of the case. However, by virtue of Art.207 (3) of the RFC, the debtor may not be compelled to take into his house the person entitled to claim maintenance. This was also incorporated in the 1960 civil Code (see Art 818(3). What do you think is the rationale behind Art.207(3) of the RFC?

Where several persons are liable to supply maintenance, the creditor may claim maintenance from any one of such persons. Particularly, when all of the debtors have similar relationship with the creditor, the creditor may claim the payment of maintenance from anyone of such debtors (Art. 208) However, the debtor who has paid the allowance shall have recourse against those who have not paid their shares (Art. 209). That is when the obligation to supply maintenance falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each. However, in case of urgent need and special circumstances, only one of them may furnish the support provisionally, without prejudice to his right to claim from the other obligors the share due from them.

You may have understood from Art 198 that between which persons the obligation to supply maintenance exists. Although there is a reciprocal obligation to supply maintenance between these persons, there is an order of precedence between them. For instance, you are obliged to supply maintenance, first of all to your spouse. In the second place, you are obliged to supply maintenance to your descendants according to their degree. Then your ascendants, according to their degree shall follow. (See Art. 210). That is when two or more recipients at the same time claim maintenance from one and the same person is legally obliged to give it, should the latter not have sufficient means to satisfy all claims, the order established in Art 210 of the RFC shall apply.

The debtors for maintenance may validly agree, as regards their reciprocal relations, that maintenance shall be supplied to their common creditor by one of them. This agreement is beneficial to the creditor, because he can pursue only against one debtor instead of many debtors to get his maintenance allowance paid. In such conditions, the creditor may not make a claim against the other debtors to obtain maintenance unless he has a serious reason for not respecting such agreement (Art 211).

The adopted child, his spouse and his descendants may claim maintenance from the family of origin of the adopted child when the adoptive family is not in a position to supply such maintenance. It is said that adopted child has two families. The family that has to take the prior obligation to supply maintenance is the adoptive family. It is only when the adoptive family is unable to supply maintenance that the family of origin is obliged to do so. Likewise, the adopted child shall not be bound to supply maintenance to the ascendants of the family of origin unless the latter cannot claim maintenance from another member of their family (Art. 212 of the RFC).

The obligation of supply maintenance shall include the funeral expense of the creditor of the maintenance. Therefore, the debtor of maintenance is obliged to cover the funeral expenses of the creditor. For instance, if the neighbor of the creditor covers the funeral expense of the creditor, the person who is obliged to supply maintenance for the deceased has to pay back the funeral expense to the neighbor of the creditor (Art. 213 of the RFC). This rule shall also apply when the person obliged to supply maintenance to another refuses or fails to give and when maintenance is urgently needed by the creditor, any third person may furnish maintenance to the needy individual, with right of reimbursement from the person obliged to supply maintenance.

9.6. Termination of the Obligation

In our previous discussions, we have said that the obligation to supply maintenance is a legal obligation. As such, it creates a debtor creditor relationship. The one who is obliged to supply maintenance is the debtor while the one who entitled to receive maintenance is a creditor. The source of such relationship is the law. Despite this legal bond, the debtor creditor relationship cannot exist in perpetuity. It terminates on certain grounds. What do you think could be the grounds of termination of such obligation?

Although the Ethiopian Family laws have not fully incorporated the grounds of termination, we can validly maintain that the following can be taken as the grounds of termination of the obligation:

A) Agreement of the parties:- The debtor and the creditor may agree to terminate such relationship without affecting the mandatory provisions of the law. This is because under Art. 1975 of the Ethiopian Civil Code a contract is defined as an agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of proprietary nature. Look at the following example: Ato A, a monk, was living in Addis Ababa. Because he was not able to maintain himself, his son, B, was ordered by the court to supply maintenance. After three years, the monk was resolved to pass the rest of his life in Debrelibanose Monastery and agreed with his son not to claim any maintenance allowance from him. They also agreed that in case the monk abandon monastic life and return to Addis Ababa, the obligation of B would revive. From the above illustration, it is clear that the agreement of the parties has the effect of termination of the obligation.

B) The ability of the creditor to earn his/her livelihood:- previously, we have said that one is entitled to claim maintenance allowance when one is not able to earn his/her livelihood by his her/own effort due to some reasons. But when it is possible to show that the creditor is in a position to earn his livelihood or has acquired enough means to sustain his/her life, there is no reason that makes the obligation continue.

For instance, W/ro X was very much poor. As a result, she was receiving 300.00 Birr maintenance allowance from her son-in-law as of 1990 E.C. Fortunately, she bought a ticket sold by the National Lottery Administration and won 1,500,000.00 Birr. In this case, because she became capable of maintaining herself, the debtor-creditor relationship existing between her and her son-in-law terminates.

C) Inability of the debtor to discharge the obligation:- the relationship that exists between the debtor and the creditor does not suffice to entitle the creditor for maintenance allowance. Rather the debtor must be able to provide maintenance. Hence, although debtor-creditor relationship has been established between the parties, such relationship terminates when the debtor is unable to discharge his obligation for various reasons.

For instance, Ato A, a farmer, was ordered by court to supply maintenance allowance to his mother amounting 3 quintals of teff per annum. However, because there was a serious

drought in his locality, Ato A has never collected any crop for the last three years. He sustains his life and the lives of his children thanks to the food relief program. In this case, the debtor creditor relationship between A and his father terminates since A is not able to supply maintenance.

D) Condemnation of creditor (Art. 200 RFC):- The creditor loses his right of maintenance where the commits or attempts to commit a criminal act against the debtor. The creditor may also lose his right of maintenance where he has committed or attempted to commit a criminal act on the life or property of the ascendants or descendants of the debtor. The same is true or such crimes are committed or attempted on the life or property of the spouse of the debtor.

9.7. Summary

One of the conspicuous effects of familial relationship is that an obligation to supply maintenance allowance among such persons is created within the bounds of the law. One is obliged to supply maintenance only to those persons whom the law has identified. The obligation to supply maintenance establishes a debtor creditor relationship provided that the debtor is not able to maintain himself and the creditor is able to provide such maintenance allowance.

Generally, such obligation exists between ascendants and descendants, adopter and adoptee, spouses, and sisters and brothers. Such obligation is a moral duty existing between such persons. As to the subject matter of maintenance allowance, the law provides that the debtor is duty bound to supply to the creditor things that are necessary for the livelihood of the creditor.

The obligation to supply maintenance allowance is not an everlasting obligation. It may be terminated on a number of grounds. The grounds of termination are generally waiver of the right by the creditor, the ability of the creditor to earn his livelihood, inability of the debtor to supply maintenance and condemnation of the creditor.

9.8. Review Questions

1. How can we say that the relationship between the person who supplies maintenance allowance and the one who receives maintenance allowance is a debtor-creditor relationship?
2. How do you justify the obligation to supply maintenance?
3. Discuss the requirements that must be fulfilled to make some one supply maintenance to another?
4. Does irregular union produce the effect of maintenance allowance as between the partners? Discuss.
5. Ato Abdulfatah was obliged to pay 400.00 Birr per a month to his mother, W/ro Kedija. After three years, W/ro Kedjja, a 92 years old lady, lost her eye-sight and living alone was difficult to her. Because of this, she was very much desirous of living in the house of her son. However, the wife of Ato Abdulfatah seriously objected to the demand of W/ro Kedija. The attorney of the old lady sued Ato Abdulfatah in court and requested the court to order Abdulfatah to take the old lady to his house since the lady was too old to live alone without any treatment. Can Ato Abdulfatah be compelled to take his mother to his house?
6. Ato Ujulu was ordered by court to supply maintenance allowance to his father called Ato Ubong. The court ordered that Ujulu should pay 300.00 Birr a month to the creditor. Later on, Ujulu asked his father to take him into his house so that maintenance would be convenient to them. The creditor agreed and was taken into the house of the debtor. However, Ato Ubong was not comfortable with his daughter-in-law Ujulu's wife since she was not happy about the coming of Ato Ubong into her house. Gradually, Ato Ubong developed a deep-routed hatred towards his daughter-in-law. Worst of all, the daughter-in-law started reducing food and drinks that would be served to Ato Ubong. Because of this, Ato Ubong decided to kill her. One day, he loaded his gun and discharged the gun at her. However, the old man missed his target and heaven spared the life of the lady. What would happen to the right to maintenance allowance of Ato Ubong after this event?
7. Discuss the grounds of termination of maintenance allowance.

8. The provision of the law dealing with maintenance allowance impose obligations on the debtor and confer right on the creditor; hence, the parties to such relationship cannot make any agreement derogating from such provision.” comment.
9. Art. 199 of the RFC provides “The obligation to supply maintenance shall not subsist between relatives by affinity unless the marriage which created the affinity is dissolved by death.” What do you think is the rationale behind this provision?
10. Discuss the relevance of the provisions of the Civil Code on plurality of debtors and creditors to Arts. 208-211 of the RFC.

CHAPTER TEN

SETTLEMENT OF DISPUTES

10.1. Introduction

It is obvious that misunderstandings and disputes arise between spouses or partners in an irregular union. The disputes may be attributable to a number of factors. However, the main thing is resolving such disputes using various dispute settlement mechanisms. These mechanisms are generally divided into two: settlement of disputes by courts and settlement of disputes by out-of-court mechanisms which are collectively called ADR (Alternative Dispute Resolution) mechanisms. The RFC and Regional Family Codes have incorporated these dispute resolution methods. Therefore, this unit is devoted to the study of dispute settlement mechanisms by concentrating on the relevant provision of the law. As usual, it is the provisions of the RFC that are to be cited under this chapter since there are not points of departure made by regional family laws from the provisions of the RFC.

10.2. Objectives

Having completed this chapter, students will be able to:

- identify dispute resolution mechanisms used to settle disputes arising in marriage and irregular union;
- appreciate the role of regular courts in resolving family disputes;
- define the status and significance of family arbitration;
- discuss the departures that have been made by the new family laws with regard to the power and functions of arbitrators from the 1960 Civil Code.
- identify and analyze matters that need to be settled after the separation of the spouses.

10.3. Settlement of Disputes Arising out of Marriage and Irregular Union

10.3.1. Preliminaries

As you can understand from the foregoing chapters of this course, marriage is the base for the existence of society. This may be the case only if there is a system which treats both of the spouses and partners in an irregular union equally in stabilizing their union at the time when there exists disagreement between them. It is impossible to avoid disputes from cropping up but it is possible to resolve them by utilizing different disputes settlement mechanisms.

There are a lot of causes for disputes that arise between a husband and a wife or between a man and a woman living together in an irregular union. In order to resolve these disputes between these persons effort is made by third parties. These third parties may include courts, arbitrators, conciliators, mediators etc. Although courts are the ideal institutions to adjudicate family disputes in almost all countries, using the alternative dispute settlement mechanisms such as arbitration, conciliation or mediation is a common practice all over the world.

In Ethiopian family laws, a solution is sought for disagreements between spouses or partners to an irregular union either by adjudication or by using arbitration. The law has put in place both the substantive and procedural provisions in order to help the disputants resolve their problems by regular courts or arbitration. These are clearly incorporated under the RFC and Regional Family Laws. It is these two important dispute settlement mechanisms that will be discussed under this chapter of the course material.

10.3.2. Settlement of Disputes by Court

In any society, courts of law have been the proper institutions for settlement of disputes of various nature. Despite this, various ADR methods are as old as society itself for settlement of disputes although such methods cannot absolutely oust the jurisdiction of courts in setting family disputes. Although Art. 118 of the RFC provides that any dispute

arising out of marriage or irregular union is to be decided except for deciding divorce, by arbitrators chosen by the spouses, if reconciliation becomes difficult to arbitrators or if one of the parties or both of them feel that the way the arbitrators handle the arbitration process is wrong then they may appeal to a court having jurisdiction. After the appeal is made to the court, the court will analyze the petition and may approve, amend or reverse the decision of arbitrators and the decision of the court shall be final.

This helps the parties to resolve their disputes amicably. In the case of marriage, even though the spouses petitioned for divorce, the court does not immediately give decision to divorce. As per Article 91 of RFC, when the spouses either conjointly or one of them petition for divorce, the court speaks to the spouses separately or jointly in order to make them renounce their intention to separate for good and Article 82(1) of the RFC can be referred for this. Where this effort is not successful, it will direct the parties to arbitrators to settle their disputes. A cooling period of up to three months is given to the disputants where they did not agree to settle their dispute through arbitration (Refer to article 82(3)). This time, after the court has exhausted all the means to bring the spouses into an agreement in order to renounce their petition for divorce, the court according to article 82(4) of the RFC shall pronounce divorce within one month from the receipt of the reports of arbitrators, or the end of the cooling period as the case may be (Arts. 81 and 82 of the RFC).
However, under the Civil Code, failing the agreement between the parties, the family arbitrators would pronounce the divorce within one year from the petition for divorce having been made to them (see article 678(1) of the Civil Code). The departure of the RFC and regional family codes is that they have reduced the period from one year to there months, if divorce related disputes are not decided by the courts within short time, they will cause unnecessary suffering both to the parties themselves and to their children.

The court is duty-bound to give an order regarding the matters to be settled after divorce, i.e., regarding maintenance of the spouses, the custody and maintenance of their children and the management of their property (Read Art. 81 and 82 of the RFC).

According to Art 82(6) of the RFC,

> *where circumstances absolutely require that one of the spouses leave their common abode, the court shall when giving an order under sub-article (5) of this article take into consideration the interest of children and the condition of the spouse who may be affected more by leaving their common abode.*

In order to advance the best interest of children, Art 113 of the RFC gives direction to the courts to treat the custody of children very carefully. Prior to the pronouncement of divorce, it may encounter personal matters of the spouses that could not be displayed to the public. Therefore, according to Article 110 of RFC, the court sits **in camera** while consulting with the spouses either jointly or separately about these personal issues.

By the same taken, according to Art.111 of the RFC, decision of the court should not incorporate the details of the case but only state the existence of sufficient causes for divorce which is meant to maintain reputation of the spouses.

Although courts are believed to be ideal institutions for settlement of disputes of families nature, they cannot be free from problems. Particularly in Ethiopia, a number of practical problems are encountered by parties to a family dispute who take their cases to a court. As you may understand family cases are tough and they need well trained judges and lawyers in courts who give sound judicial decisions based on their professional opinions. One of the main duties of courts to is to consider cases relating to the custody of children. (Read for instance, Robert Coulson, Family Mediation, 2nd ed, 1996, p. 44).

If the parties are unable to come to agreement, the judges render the decision. A court trial is full of controversies whereby lawyers do all the talking while the clients are watching their private life on show. During litigation, the parties are to be cross-examined by lawyers who ask them impolite and unpleasant personal questions. This is humiliating for the parties because their marital privacy is being intruded in front of the public (Ibid).

Because of the fact that courts do not have time to listen to parties, they will not be well suited to decide cases of child custody, visitation and financial support. Furthermore, the parties' opinion has to be taken into account for insuring the children's interest. Thus, the enforcement of an order, which does not reflect the wishes of the parties have bad

consequence on the upbringing of the children (Refer to David Foskett, The Law and Practice of Compromise, 1980, p. 150).

Moreover, there is a large amount of cost incurred by the parties when they choose their case to be treated in courts because they have to hire a lawyer and reimburse various costs incurred by witnesses.

The above limitations of courts would force the parties to resort to alternative dispute settlement mechanisms. These alternative dispute resolution techniques incorporate the fundamental mechanisms by which disputes are resolved (Jan Macneil, American Arbitration Law, 1992 p. 3).

Coming to Ethiopia, it was believed that the RFC would avoid practice related problems in courts which were faced throughout the period in which the 1960 Civil Code remained operative. In spite of this, there are still problems in relation to the practice of courts while they entertain dispute of spouse or when they deal with post-divorce matters. The situation may not be different in regional states since the family laws of the regional states have not made any departure in relation to settlement of disputes arising out of marriage or irregular union from the RFC.

As it is discussed above, if the spouses petition the court for divorce, the RFC requires the courts to discuss with the parties patiently and give the parties a cooling period in order to calm down their anger. The court directs the parties to arbitrators of their own choice so that they will end up their dispute in reconciliation. Here you have to note taking the dispute to arbitrators is not compulsory; rather it is voluntary. But according to some sources what practically observed in courts is that the parties are not asked whether they are willing to take their case to arbitrators or not rather the courts direct them to arbitrators without doing what the law prescribes which is clearly against the spirit of the law.

The 1960 Civil Code was amended in this regard with the idea that both pre divorce and post-divorce matters (maintenance, partition of property, custody of children) to be under

the control of courts. But there is a problem created practically, while courts transfer their responsibility to regulate the partition of property of spouses, to arbitrators.
The drafting committee believed that there would have to be a separate bench in order to complete the disputes so successfully by cooling the anger of the disputants and reconcile them. Without this separate bench, it will be difficult to implement the law. But in practice, there is no so called separate bench to regulate family disputes.

There are also additional problems that are reflected in the practice of courts. For instance, the problem, which was believed to be resolved by Article 82(5) of the RFC, is still without solution. According to this sub article, court shall give appropriate order regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property and it shall take into consideration the interest of children and the condition of the spouses who may be affected more by leaving their common abode. But after the file has been opened these matters take a considerable long period of time resulting in suffering of the parties particularly women.

Among the issues that are to be regulated by courts, after the dissolution of the marriage by divorce or termination of irregular union is child custody. Article 681 of the 1960 Civil Code states that children under the age of five years are to be entrusted to their mother unless there is a serious condition to do otherwise. However, according to Article 113(1) of RFC, the court is expected to give an order as to which spouse shall have custody of the children, care of their education, health, maintenance and the rights of the parents and the children to visit each other. Most of the time, it is observed that spouses pray the court so that the decision would be in favor of one of them. In such conditions, practically courts render decisions without giving reasons as to why the custody of a child is entrusted to the father or the mother. This is a problem, which is practically observed while the court is entraining child custody issues. In most of the decided cases it, is shown that courts do not take into account the requirements listed under article 113(2) of the RFC (income, age, health and condition of living of the children) when deciding on child custody. The other practical problem observed in courts when they are adjudicating child custody issues is that, courts give decision only on the interests of the children.

Even though the law demands the courts to consider the interests of the children, it does not suffice to give a decision only based on that, there must be additional conditions that are to be taken into account by the courts (Wondwossen, Demissie, ¾}hhK¨<" ¾u?}cw IÓ Á}Ñvu` ‹Óa‹" u}SKŸ} ¾k[u Ø"© êOõ& Ide 22, 1998 E.C).

The other issue is that of property liquidation decisions. Courts after pronouncing divorce close the file and there is another file to be opened for the partition of property of the spouses because the court considers this case anew. As a result of this, the parties will be in difficulty as they waste their time, energy and money (Ibid).

Even if the petition for partition of property is brought by the parties to the court after the very moment of divorce pronouncement, still the case take a prolonged time to be completed. The grant of undue power to arbitrators is also another additional problem. (Ibid).

10.3.3. Settlement by Arbitration

Historically, the idea or concept of private dispute settlement mechanisms existed long before the creation of formal and organized judicial systems and codes of law. Ancient societies had the tradition of resolving disputes by using means very much related with mediation and arbitration since those disagreements between persons existed many centuries ago.

In our case, in certain part of Ethiopia, the persons with special qualities of personality and experience are those who are traditionally called *shimagiles* in order to save a marriage from falling apart and preserve the integrity of the family. Spouses whose marriage is in difficulty and as a result of this who seek for a divorce pronouncement, first present their case to a local judge who is traditionally known as “atbia dagna”. But prior to the ending up of the marriage in divorce the parties as well, as the local judges should try their best to cool down the anger and the disagreements created between the spouses. This was done through the process of reconciliation. If the judges fail to bring the parties into an agreement they, will grant a divorce in cases of non-serious cause of

divorce. (Aklilu W/Amanual, The Fallacies of Family Arbitration under the 1960 Civil Code, JEL, Vol. 9(1973) p. 194).

This method of settlement of family disputes out of court was retained by the 1960 Civil Code of Ethiopia since the Civil Code incorporated provisions on arbitration. Although traditionally, no one could be compelled to go to by arbitration, the 1960 Civil Code introduced compulsory arbitration of spousal disputes. (See Arts.722-731 of the Civil Code).

Although family arbitration was criticized for not treating women in equal footing with men, the RFC and the regional family laws have retained this alternative dispute resolution method. The 1960 Civil Code had incorporated arbitration primarily for the purpose of protecting marital privacy, to minimize divorce and to decrease court congestion. But although the new family laws of Ethiopia have taken into consideration these purposes they have significantly reduced the powers of the family arbitrators. (Read Tilahun Teshome, Ethiopia: "Reflections on the Revised Family Code of 2000" The International Survey of Family Law, May 2002, p. 7.

Coming to the essence of arbitration, it is one of the traditional ways of avoiding disputes between conflicting parties irrespective of the causes of disputes. It is one of dispute settling mechanisms most people choose because of its simplicity and since it brings a solution to the conflict in the shortest possible time. It is preferable to ordinary court litigation since it is not as expensive as litigation (Judith Areen, Cases and Materials on Family Law, 3rd ed. 1992, p. 843).

Arbitration is an out-of-court mechanism of settlement of disputes in which the parties (disputants) take their cases before a tribunal of their own choice. Besides, the parties have the freedom to limit the power of arbitrators and regulate how the tribunal performs throughout the process. This is the main distinction between regular courts and arbitration tribunals. (Read Aschalew Ashagre, "Involvement of courts in Arbitration Proceedings under Ethiopian Law" Ethiopian Journal of Business and Development, Vol. 2 No 2, 2007 pp. 1-3). Zekarias keneaa, "Formation of Arbitral Tribunals and Disqualification

and Removal of Arbitrators under Ethiopian Law," Journal of Ethiopia Law, Vol. 21, August 2007 pp. 138-172.

In many countries including Ethiopia, arbitration has been widely used in both modern and traditional ways. And it is strongly believed that it plays great role in brining solution to disputes of all kinds, i.e. it could be disagreements created in commercial relations, between spouses, labor disputes, etc.

Although there are arguments against arbitration, it is preferred to litigation in court because of its cost effectiveness, flexibility expediency and adaptability.

What is arbitration? Although arbitration is one of the oldest mode of dispute settlement mechanisms, it has never been accorded a universally acceptable definition. Different individuals define it differently although the difference is slight.

Generally, to shed some light on the concept, let us take the following two definitions. Black's Law Dictionary defines the term arbitration as:

> *"A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.* (Bryan A. Gamer (editor-in-chief), *Black's Law dictionary, 8th ed., 2004, p. 112).*

From the above definitions, we can understand that the arbitral tribunal is constituted by the agreement of the parties (where arbitration is voluntary) to a dispute and the decision handed down by a neutral third party is binding upon the parties as though it were given by a court of law.

According to Rene David, arbitration is defined as:

> *"Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons-the arbitrator or arbitrators- who derive their powers from private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such agreement." (Rene David,* Arbitration in International Trade, Kluwer Law and Taxation Publishers, Deventor, Netherlands, 1985, p. 5)

This definition also tells us that arbitration is a dispute settlement mechanism and the power of the arbitrators does not emanate from the authorities of the state but from the agreement of the parties.

How do you evaluate the institution of family arbitration in Ethiopia in the light of the above definitions?

Even though, the institution of family arbitrators is retained in the RFC, as it has its powers are so much reduced. Except for reconciliation of the spouses, all other powers of arbitrators which were incorporated the under the Civil Code, are given to the court. Hence, the institution of arbitration retained in the family laws does not fulfill the distinguishing features of arbitration. Despite this, arbitrators play significant roles in resolving of disputes of spouses and especially in the countryside. This is because people living in countryside know each other very well and the arbitrators are selected among friends, village elders and religious leaders. And it is for them to find out the actual cause of the dispute of spouses and seek for a solution.

In the RFC, and other regional family laws, arbitration could only serve as an alternative mechanism of dispute settlement and the reason for this is that if arbitration outs regular courts for matters of family disputes then the rights of women would be at stake. This is because arbitrators, it is believed, in Ethiopia may not be qualified enough to resolve all family disputes including pronouncement of divorce.

There is an international concern about the pronouncement of divorce to be under the power of competent court. Many pressure groups, NGO's, etc strongly believe that the pronouncement of divorce by a competent court is worthwhile. Among the international instruments that requires only competent judicial authorities grant divorce is the UN Economic and Social Council, in its Resolution 1068 G (XXXIX) o 16th of July 1965.

This has influenced the law makers of many countries including Ethiopia Since it is

> *The basis for the argument here is that, such tribunals usurp court powers. When an organ other than the court makes decisions that would seriously*

affect the lives of people, there is a danger that justice could not be served well.

At this juncture, we have to ask question such as: How are arbitrators appointed. What are the responsibilities of arbitrators? What are the limitations of family arbitration and what problems are associated with family arbitration (Read Zekarias Kenea, Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Law, Journal of Ethiopia law Vol. XXI, 2007, pp. 138-176)

As regards appointment, Art. 119 of the RFC confers the power upon the disputants to appoint the arbitrators and the number of the arbitrators is not limited under this same article. What it simply puts is that their number can be one or more than that. Although the arbitrators are appointed by the parties, arbitrators are under the control of the court. The court makes an uninterrupted follow upon the arbitrators and gives direction as to how they entertain case. According to Article 119(1), the parties are expected to submit the names of the arbitrators they have selected within fifteen days from the date they were told to do so.

As it is clearly stated under Article 121(1) the same code, sole duty of the arbitrators is to make an exhaustive effort to reconcile the spouses. And article 119 orders the court to give the proper direction to the arbitrators as to how they help the spouses reach agreement. The result of the arbitration or attempt of reconciliation has to be submitted to the court within three moths.

According to the law, the process of arbitration has to be completed within three months but if there is any possibility or condition that reconciliation could not be completed within this period of time, one month additional time may be added (Art 120 of the RFC).

As to the responsibility of arbitrators, the role of the arbitrators is to settle the dispute of the spouses or partners in an irregular as the case may be through amicable means. Other than trying their best to reconcile the parties they can not pronounce divorce. If it becomes beyond their capacity, they have the duty to report this fact to the court without delay.

Article 82(2) of the RFC sets forth that when the parties petitioned divorce and the court is unable to persuade the parties to renounce their petition for divorce and solve their disputes amicably, then it will direct the case to the arbitrators of their choice so that the dispute will be resolved positively. According to Art. 82(2) of the Code, the role of the arbitrators is confined only to persuading the parties to resolve their problems amicably. In this regard, Art. 121 of the RFC provides that "the arbitrators shall make an effort to reconcile the spouses and to make them renounce their petition for divorce. Where the arbitrators have concluded that the dispute cannot be solved except by divorce, they shall report the result of their attempt to the court without delay.

What would the consequence be if the arbitrators fail to submit reports in accordance with Art. 119. Art. 121 of RFC provides that the court is required by law to close the case (Art. 122(1) of RFC. This does not mean that the case is closed for good but if the spouses (or one of them) present their reasons to the court and petition for the reopening of their case then the court after examining their reason will reopen the case and give appropriate decision. Sub article one of article 122, does not prohibit the spouses from petitioning anew and from asking the court for their case to be reconsidered as long as the husband or the wife or both of them can show to the court that the arbitrators have failed to appropriately discharge their responsibility Art. 122(3) of RFC.

10.4. Settlement of Other Family Disputes

10.4.1. Preliminary

There are two possible outcomes from the processes of dispute settlement be it by courts or by alternative dispute settlement mechanisms, i.e., either the spouses be brought to reconciliation or their contention end up in divorce. In cases where the spouses separate for good, it does not mean that they have absolute freedom to build up a new life of their own. This is because dispute settlement of the spouses goes further than this (even after divorce). Thus the divorced man and woman are expected to act according to the prescription of the law which is concerned with the post- divorce matters that need to be settled.

According to the law, the court has to give its decisions on three very important post-divorce issues; namely, child custody, maintenance allowance for the child and visitation rights of the child by the non-custodial parent. These matters will be discussed under the following sub-sections.

10.4.2 Child Custody

The choice of determining the custody of a child lies either on the parents themselves or on the court. In general terms, the word custody pertains to whom the child is to live with, and which parent has the responsibility to make major decisions about the life of the child. In some cases, parents may be given right of joint custody which is the case when the child lives with both parents at different times. Sometimes while one parent acquires custodial right, the other parent would be allowed by the law to exercise the visitation right. There are times when the law determines how often the non-custodial parent is allowed to visit his/her child (Kenneth Fox, Every Thing you Need to Know about your Legal Rights, 1995, p. 21).

Child custody may be understood as the right to retain a child at one's home which at the same time empowers the parent to control the child. Custody originated from the common law and the word custody used by this author is in relation to children which is defined as "…A state of fact; in this sense a child is in the custody of an adult if he happens to be under the adults' physical control or in the wider sense of a 'bundle of power' including not only the power of physical control but also powers relating to child's education, religion, property and the general management of his life which is almost the equivalent of guardianship (Fasil Taddesse, Arbitration and Resolution Urban and Rural perspective in Ethiopia, the practice of Family arbitration in selected four Woredas in Addis Ababa, December, 1998).

The law governing child custody has its own origin. Previously, where there was absolute male dominance in every aspect in the society, men were believed to be endowed with a right to acquire everything. Likewise, where traditional male authority over the family was of prevalence, the custody of children was given to fathers only. This absolute right of the father was extended even after his death. Without taking the mothers (who is alive)

right into consideration, he could appoint testamentary guardian for his children. But this paternal dominance which would affect right of mothers over their children has been gradually replaced by a concept which is much better than the previous one. Women's right to custody of their children was recognized because they were believed to be the best possible individuals for the proper upbringing and nurture of their children. As the result, primacy of paternal custody rights has been undermined (Ibid).

This evolution of the law regarding child custody is to some extent reflected in provisions of the 1960 Civil Code of Ethiopia. As per Article 618 of the Civil Code, the governing principle regarding custody of children above the age of five was the best interest of the child and this makes it "sex neutral". But this evolution of the law concerning child custody issues which has been upgraded from "the primacy of paternal custody" to the "**best interest**" standard enhanced judicial authority over child custody issues. This doctrine was criticized because it created implementation problems by the judges. The "best-interest" standard was very wide and an indeterminate as it embraces so many things to be taken into account by the judges in order to grant a decision on child custody issues. Thus, this resulted in unlimited judicial authority. The movement from paternal custody to the application of best interest of the child doctrine, is movement from *"paternal patriarchy to judicial patriarchy" which shifted child custody issues from the unlimited paternal authority to unlimited judicial authority"* (Fasil Taddesse p. 34).

U.S courts were also faced with the same kind of problem in connection with the "best interest" standard. The solution that was sought was known as 'tender years rule", which declared that infant children below puberty, and youngsters affected with serious ailments should be placed in a mother's care unless she was proven unworthy of the responsibility. As per the 1860 New Jersey Code, *"the mother is entitled to the custody of her children under the age of seven unless it affirmatively appears that, in her custody, they should be exposed to either neglect, cruelty or the acquisition of immoral habits and principles."* (Id, p. 41).

This kind of "maternal preference" rule was also reflected under article 681(2) of the 1960 Civil Code. Coming to the RFC, as it is incorporated under Article 113(1) of the

RFC, the court, after pronouncing the dissolution of the marriage, has to deal with three important matters: child custody, maintenance allowance for the child and visitation right of the child and the non custodian parent. As per Article 113(2) of the RFC, since the court has to take into consideration the income, age, health, and condition of living of the spouses as well as the age and interests of the children, it is felt unnecessary to retain the provision of the 1960 Civil Code (Art.681(2)), which entrusts children below the age of five to their mother.

The RFC tries to state elements that the court has to take into consideration rather than applying the 'best interest' standard or the outdated 'maternal preference' rule. The approach of the RFC in this regard is in line with the current trend followed by other jurisdictions for determining child custody issues. Thus, for this purpose, the RFC, illustrates guidelines based on which the court may pass its decision regarding child custody, maintenance allowance for the child and visitation rights of the child and the non-custodian parent. The court is required to take several factors such as, the income, age, health and condition of living of the spouses as well as the age and interests of the children into consideration.

The aim of Article 113(2) of the RFC, is to avoid material preference to child custody without a justified reason. Therefore, RFC regarding child custody is designed in such a way as to deal with such issues from different angles since it demands great care while the court is to decide on the fate of the children who are the future generations of the country.

However, there are some implementation problems. To begin with, the final judgment of the courts as to whom the child belongs to, does not contain satisfactory reasons. There are situations whereby the judgment of the court is made arbitrarily when it chooses the father or the mother to be better custodian of the child. Courts, most of the time, do not equally consider all the factors that are listed down under Article 113(2) of the RFC. The court grants judgment solely relying on the preference of the child. The court has to clearly identify whether the child's preference was some how influenced by parental pressure or not and whether there are other factors that have strong effect directly or

indirectly on the preference of the child. (¨”É¨c” ÅUc?& ¾}hhK¨< ¾u?}cw QÓ ¾›}Ñvu` ‹Óa‹” u}SKŸ} ¾k[u Ø“© êOõ& Ide 22 k” 1998 ¯.U Ñê 43).

The reliance of the courts on the child's preference has also created problem in destroying the best interest of the child standard that is enshrined under Article 113(2) of the RFC. Article 3 of the UN Convention on the Rights of the child gives a paramount concern for the best interest of the child when it states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Despite the problems reflected in the practice of the courts when they entertain child custody issues, Article 113 of the RFC is one step ahead that helps for the protection of children's right and which tries to incorporate the current trend concerning determination of child custody by the courts of other jurisdictions.

10.4.3 Maintenance Allowance

According to Black's Law Dictionary (6thed, 1993 p. 953)

> *…maintenance is sustenance support assistance and the furnishing by one person to another, for his or her support of the means of living, or food, clothing, shelter, etc, particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife, the supplying of the necessity of life. While the term similarly means food, clothing and shelter, it has also been held to include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, and household expenses…*

As has been clearly incorporated in Article 113 of RFC, maintenance of children is one among the issues that the court shall see after deciding the dissolution of marriage. Referring to Article 198 of the RFC, the person who is able to shoulder the responsibility of maintenance is obliged to supply maintenance only to his proximate relatives by consanguinity and affinity, and to his spouse. Thus, what we infer from this same provision is that there is a boundary beyond which the obligation of a person to supply maintenance may not be extended. The kind of bond that both the person who is obliged to supply maintenance and who is demanding it, is debtor-creditor relationship where the

one that pays maintenance is the debtor and the person who receives the payment of maintenance is the creditor. But at the same time, the RFC has laid down requirements for the existence of this kind of obligation, i.e., in order to be supplied with maintenance, the person who is demanding it (creditor) has to be in need of it and he has to be not in a state of earning his livelihood by his work (Read Mellese Damte, Cases and Materials on the Ethiopian Family Law, May 2004, p. 234).

With no doubt, minors are in need of maintenance because they are dependant on their parents to sustain their lives and at the same time they are not expected or are unable to earn their livelihood by their work. But there are circumstances whereby children may earn income by their labor since under the Ethiopian labor Proclamation, which is in line withinternational standards children of 14 years of age and above are allowed to be employed. Moreover, aged persons and those who are seriously sick are categorized to those kinds of persons who are unable to earn an income by working. These persons due to the condition they are in, they are unfit or incapable to earn their own income in order to fulfill their basic needs.

As per article 197 of the RFC, the obligation of the person who is ready to supply maintenance is limited only to things that are necessary for the livelihood of the creditor. Moreover, the same article stipulates that the supply of maintenance be in decent manner having regard to social conditions and local custom of the area in which the creditor lives. In some jurisdictions, such rights of the creditor would extend even after he/she has attained his/her majority age and he is able to work and earn his income although this kind of rule is absent in our Revised Family Code and the regional family laws.

Having regard to the provisions of RFC dealing with “obligation to supply maintenance” let us resort to Article 113 of the RFC which requires courts which decided the dissolution of marriage at the same time to render its decision on matters of custody of the children, care of their education, health, maintenance and the rights of the parents and the children to visit each other. It also provides that after the court decides upon to which spouse the custody of the children belongs, care of their education, health, maintenance and visitation right, the court should consider the income, age, health, and condition of

living of the spouse who is able to assume duties that are lied down under article 113(1) of the RFC.

As far as the maintenance of the children is concerned, once the marriage bond is dissolved by divorce of the spouses, the obligation to supply maintenance to the wife ceases and the execution proceedings taken after the divorce judgment would consequently have to be for maintenance of the children only. According to Article 202 of the RFC, the spouse (debtor) against whom the court passes its decision to maintain the children may fulfill the obligation to supply maintenance in kind or in cash. But this should fundamentally be based on both the needs of the person claiming it and the means of the person liable to pay maintenance.

A child whose parents are separated due to none of his fault should not be subjected to suffering. Even if there is nothing better than living with his both parents happily but if thing turn out to the contrary and conditions makes him live only with one of his parents, he has to at least be maintained properly by the non-custodial parent.

When the court is ready to decide on the payment of maintenance for the child it must take into account factors like for how long and how much does the non-custodial parent pays the maintenance to his child. Most of the time, the non-custodial parent is compelled to pay maintenance until his/her child attains majority age (18 years of age). But the parents may reach an agreement as to the additional time of payment of maintenance. As to the amount of the maintenance to be paid, the court will take into account the earning of both parents and the living condition of the family. But this does not help much because after knowing how much the non-custodial parent earns, deciding how much he/she has to pay is something difficult to deal with.

The other problem revolves around when the parties plan to effect the payment of maintenance by their own (out of court) agreement or by involving third party. Putting the money into bank account of the person who is to be paid maintenance is also another option that the parties willing to take. Making payment by coming to the court every month and telling the employer of the non-custodial parent to deduct from his salary the amount of maintenance money are also other ways of enforcing payment of maintenance.

10.4.4. Visitation Right

Visitation right is a right granted to non custodial parent. This means in other words that, the other parent to whom the custody right of a child is given must permit the other non-custodial parent to visit the child. Moreover, it is usually put in the decision of the court the manner and how often the non-custodian parent visits his child. However, the visitation right should not go against the best interests of the child. Thus, courts put several restrictions on this right like frequency, length and location of visitation and whether someone else or third party besides the non-custodial patent must be present. Therefore, generally speaking, physical custody of the parent who is awarded sole legal custody is shared through visitation right. There are certain conditions under which visitation right is denied or restricted. This is when visitation right would affect the child adversely (Harry D. Krause, Family Law, 1988, p. 196).

Some jurisdictions hold the position of denying the visitation right of the non custodial parent if it "endangers seriously the child's physical, mental, moral or emotional health." Other statutes give the court power to deny visitation rights simply if visitation is deemed not to be in the best interest of the child (Ibid).

The basic dilemma is that while the grant of meaningful visitation rights to the non-custodial parent softens the impact of a custody decision and helps preserve for child and parent a continuing social relationship, coerced visitation, when parents 'hate' each other may prolong the child's trauma. There are times when visitation right is so much abused by the non-custodial parent so that the latter would keep intouch with the former spouse of his/her and with the child (Ibid).

Due to this problem, some argue that forced visitation must be abolished. But, this point of view would go against the natural right of the child to know both of his parents. (Harry D.Krause, Family Law in a Nutsell, 3rd ed., 1995, p. 319). **How do you explain this problem in light of the Ethiopian situation?**

According to Art. 113(2) of RFC, when the court provides its decision as to who would be the custodial parent of the child and other related matters like maintenance payment,

and visitation right of the non- custodial parent, it has to take into account the income, age, health, and condition of living of the spouses as well as the age and interest of the children. But there are cases where by the court simply awards the child custody right and visitation right to either of the parents based on the mere joint agreement of the parents. This would go in contrary to what Article 113(2) puts as “the age and interests of the children.”

10.5. Summary

It is not arguable that disputes of various nature and magnitude arise between spouses or partners in an irregular union. But, such disputes must be resolved in one way or another in order to protect the family as a whole and to protect the interests of children in particular.

Family disputes arising in marriage or irregular union may be resolved by courts or ADR methods such as arbitration, conciliation, mediation and the like.

It is obvious that in any society, courts of law are the ideal institutions for settlement of disputes- be it family, commercial or labor disputes. However, various ADR methods are also as old as society itself for settlement of disputes although the latter cannot absolutely oust the jurisdiction of courts.

The Ethiopian family laws have also given recognition to settlement of family disputes by courts and ADR mechanisms although the roles to be played by courts are quite different from the roles to be played by ADR mechanisms.

10.6. Review Questions

1. Arbitration is basically characterized by involving one or more neutral third parties who are usually appointed by the parties to a dispute and whose decision is as binding as a court decision although such decision may be subject to judicial review on certain clearly defined grounds. Therefore, is the concept of arbitration and the roles and functions of arbitrators provided under the current Ethiopian Family laws in line with the basic features of arbitration?

2. Is the formula adopted by the RFC and regional family laws in resolving family disputes by arbitration better than that adopted by that of 1960 Civil Code? Why/Why not?
3. Why do you think the role of so-called arbitrators is significantly reduced under the RFC as compared to the 1960 Civil Code? Do you think that the reduction of the powers of family arbitrators plays roles in safeguarding the rights of women and children?
4. Should family arbitration proceedings be open to the public or closed? Why/why not?
5. Under what circumstances should the court sit in camera (in a closed session) when it entertains family disputes?
6. The Ethiopian family laws seem to confine themselves to settlement of disputes by arbitration and court. However, wouldn't it be appropriate to incorporate other ADR forums such mediation, conciliation and the like in the laws in view of the fact that court congestion/backlog of cases is an actuate problem in Ethiopia?
7. Particularly an ethnic-based federalism is established, among other things, to entertain diversities. However, major family law codes (Amhara, Tigray, Oromiya and SNNP) have adopted the same family dispute resolution mechanisms as that of the RFC. Do you think that is proper? In other words, wouldn't it be better if regions were to have embraced other dispute settlement mechanisms that would fit into their social, political and economic realities? Discuss.
8. What would the consequence(s) be if divorce were to be pronounced by arbitrators?
9. As you know, the requirements for the formation of irregular union are not so astringent as marriage. As regards, termination, either of the parties can put an end to such union for no apparent reason. If that is the case, why do we talk about settlement of disputes arising out of irregular union? Discuss.
10. Field Work

    Form a group consisting of 4 or 5 students, go to courts and collect decided cases in relation to settlement of disputes arising out of marriage and irregular union. Then, by critically studying the cases, evaluate:

10.1. whether the courts are settling disputes in line with the spirit of the law.

10.2. the efficacy of the new family laws in resolution of family disputes.