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HLR SUBMISSION GUIDELINES

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CONSUMER BANKRUPTCY LAW FOR ETHIOPIA: LESSONS FROM UNITED STATES AND GERMANY

Getahun Walelgn Dagnaw*

Abstract

After deregulation of consumer credit and resultant availability, over-indebtedness became a problem for many countries. As a response to this, many jurisdictions have departed from their "merchant-oriented" bankruptcy law to include consumers giving them discharge and fresh start. Germany, United States, United Kingdom and France are some of the countries that have adopted consumer bankruptcy laws after experiencing over-indebtedness problem. In Ethiopia, credit market is still highly regulated. Nevertheless, consumers have access to credit and are potentially exposed to risk of indebtedness and there is a move towards that. Adopting consumer bankruptcy law can also be an ex ante solution. More importantly, introducing such law to Ethiopia is more convincing based on the entrepreneurship, social insurance, development policy and rehabilitative function of discharge and fresh start. The author argues that Ethiopia should follow the global trend by adopting consumer bankruptcy law with adequate discharge and fresh start. This law should be based on German model, repayment plan and then discharge: repayment of certain portion of the debt and covering cost of proceeding by the debtor.

Keywords: bankruptcy, debt, discharge, exemption, fresh start, insolvency, merchant-oriented, over-indebtedness, rehabilitation, repayment

I. INTRODUCTION

Recent trends in bankruptcy show that many countries, industrialized or otherwise, have been introducing consumer bankruptcy law[1] to solve the problem of consumer over-indebtedness and concomitant social and economic

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[1] Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L.J. 81 (2002), at 81.

problems.[2]The previously "merchant-oriented" bankruptcy system is considered to be vital tool for consumers as well. Indebtedness ceased to be a problem of merchants and corporations only.[3]But with the deregulation of credit market and individuals' access to consumer credit, over-indebtedness is becoming a problem for consumers, the society and the economy.[4] Countries such as United Kingdom, United States, Germany and France adopted consumer bankruptcy laws as a reaction to availability of consumer credit and accompanying indebtedness. There are, however, countries like Ethiopia that still restricted their bankruptcy law to merchants only. Under Ethiopian law, only merchants are entitled to file for bankruptcy and non-traders are excluded from the scope of the law. That was based on the French approach[5]though France has departed from that philosophy and introduced bankruptcy for consumers in 1989.[6] The reasons for such departure are almost universal and there is only a difference in the approaches with the solutions. It is, therefore, interesting to see if Ethiopia has to abandon its restriction and allow consumers to knock the door of courts for relief when they do not have a means to pay their debt.

Accordingly, the article is organized as follows. Following this introduction part, Section II will deal with the historical development of consumer bankruptcy discharge and fresh start and its theoretical underpinnings. It mainly discusses the Anglo-American jurisprudence, the pioneer of bankruptcy discharge and fresh start, as a benchmark for the theoretical and philosophical underpinnings of consumer bankruptcy. History of discharge, justifications for it and associated costs to discharge and fresh start are discussed in this section. Section III is dedicated to deal with the comparative discussion of the United States and German consumer bankruptcy laws. The two leading countries with contrasting fresh start policy are chosen to see the strengths and weaknesses of each system with a view of finding a suitable fit for Ethiopia. Section IV is reserved to discuss the Ethiopian context and to examine the need to adopt consumer bankruptcy law to Ethiopia. The *pros* and *cons* of adopting consumer bankruptcy law and fresh start are

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[2] Adam Feibelman, *Consumer Bankruptcy as A Development Policy*, 39 SETON HALL L. REV. 63 (2009), at 96.

[3] JOHANNA NIEMI *ET AL*, CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES, Hart Publishing, (2009), at 225.

[4] G. Stanley Joslin, *The Philosophy In Bankruptcy: A Re-Examination*, 17 U. FLA. L. REV. 189 (1964-1965), at 189-191.

[5] Tadesse Lencho, *Ethiopian Bankruptcy Law Commentary Part I*, XXII: 2 J. ETH. L 57 (2008), at 69.

[6] Robert Anderson *et al, (ed.) Consumer Bankruptcy in Europe: Different Paths for Debtors and Creditors, 09 EUI Working Papers (2011)*, at 19.

discussed from the experience of the jurisdictions mentioned above. Finally, concluding remarks will be made under Section V.

II. GENERAL OVERVIEW OF CONSUMER BANKRUPTCY LAW

A. Historical Development of Consumer Bankruptcy Law

In earlier times, indebtedness was a matter only for business entities and non-traders were excluded from the ambit of bankruptcy law.[7] Consumer debtors were subjected to barbarous punishments when they fail to repay their debt.[8] These punishments include moral degradation of the debtor, physical punishment, relegation to the status of slavery, and even death penalty.[9] Part of the reason for such treatment was that failure to repay a debt was considered as contrary to the moral dictates of the society.[10] In many ancient jurisdictions, creditors were entitled to cruel and primitive self-help remedies against the defaulters' person and property.[11] Back in time, the today debtors' heaven United States was not even different in this regard.[12]

Bankruptcy law was dressed with criminal law type function and debtors were almost considered as criminals.[13] The protection it sought to provide was towards the creditor.[14] Creditors were allowed to individually, and not as a group, employ different self-help remedies, including "draconian punishments" against the person and property of the debtor.[15] However, this was not helping the creditor since there were no effective ways of discovering and seizing the assets of the bankrupt who

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[7] *See* G. Stanley Joslin, *supra* note *4*, at 189; *see also* Nathalie Martin, *Common Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367 (2003), at 372-373; CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW PRINCIPLES, POLICIES AND PRACTICE, Anderson Publishing Co. (2003), at 479.

[8] Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQ. L. 365 (2006), at 367-368 & 372

[9] *Id*., at 366;

[10] *Id., at* 367-368; See also John C. McCoid, *II, The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361 (1988), at 387; Ramsay, Iain D. C., *Comparative Consumer Bankruptcy*, U. ILL. L. REV., at 241 (2007), at 256, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958190 (last visited on 28 March 2014).

[11] See Rafael Efrat, *supra* note 8, at370-374.

[12] *Id*., at 374-385.

[13] *See* Nathalie Martin, *supra* note 7, at 370; see also G. Stanley Joslin, *supra* note 4, at 192-193.

[14] *See* G. Stanley Joslin, *supra* note 4, at 190

[15] *Id*.; *see also* Rafael Efrat, *supra note 8*, at 366-368, 372; Nathalie Martin, *supra note 7*, at 371; Charles J. Tabb, *The History of The Bankruptcy Laws in The United States*, 3 AM. BANKR. INST. L. REV 5 (1995), at 7.

may transfer or sell it and change his location to escape the consequences of his/her act.[16]

It was inevitable that the bankruptcy system had to be reformed. The severe treatments of the debtor had to be abandoned while giving creditors an effective debt collection and distribution tool.[17] Factors that led to the reform of bankruptcy law into a debt collection tool were the expansion of credit, trade and commerce.[18] Around the end of 17th century, individual debt collection mechanisms became inadequate to cope up with the development of commerce - distance traders have to travel - and the increase and diversity of creditors. In addition, the "race of diligence" among creditors over the assets of the debtor prompted this change. Race among creditors with the rule "first come first served" was inequitable and as a solution to the problem of race among creditors situated in the same footing[19], a common debt collection mechanism needed to be created.[20] This bankruptcy philosophy was not only protection of creditors against the debtors but also among creditors as well.[21] Accordingly, bankruptcy was recognized as a debt-collection tool while, incidentally, the debtor started to be treated humanely.[22]

In 1705, discharge as a legal doctrine was invented under English law[23] and "honest but unfortunate debtors" started to be released against surrendering all their non-exempt assets in satisfaction of the full amount they owed creditors.[24] For example, doctrine of discharge was incorporated in the law of England at the beginning of the eighteenth century.[25] This change in bankruptcy philosophy was the result of industrial revolution that has created positive environment towards credit.[26] This marked the shift of bankruptcy philosophy from treating failure to

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[16] *See* G. Stanley Joslin, *supra* note 4, at 190.

[17] *Id., at* 191

[18] *See* Charles J. Tabb, *supra* note 15.

[19] *See* Michelle J. White, *Why don't More Households File for Bankruptcy*, 14 J. L. ECON, &ORG 205 (1998), at 211.

[20] *See* Charles J. Tabb, *The Historical Evolution of Bankruptcy Discharge*, 65AM. BANKR. L. J 325 *(*1991*)*, at 328; *see also* Malhotra, Vibhooti, *Debtor's Discharge Under United States Bankruptcy Code: Mechanisms and Consequences (*March 21, *2010)*, at 9, *Available at SSRN: http://ssrn.com/abstract=1646608 or* http://dx.doi.org/10.2139/ssrn.1646608 *(*last visited 26 March 2014*).*

[21] *See* Charles J. Tabb, *supra* note 15; *see also* Charles J. Tabb, *supra* note 20.

[22] *See* Charles J. Tabb, supra note20, at 333; *see also* Malhotra, Vibhooti, *supra* note 20, at 7.

[23] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note7.

[24] *See* G. Stanley Joslin, *supra* note 4, at 191-192.

[25] *See* Charles J. Tabb, *supra* note15, at 10*; see also* Charles J. Tabb, *supra* note 20, at 333; *see* Malhotra Vibhooti, *supra* note 20, at 7.

[26] *See* Charles J. Tabb, *supra* note 15, at 12.

pay harshly towards a rehabilitation tool of the debtors.[27] Punishing debtors or subjecting them to barbarous treatment proved to serve no one and this change was one of the most important developments in the history of bankruptcy law. The other development in bankruptcy law was the discovery of exemptions and discharge that revolutionized bankruptcy philosophy in the world and particularly in United States into one that sympathizes with the debtor than the earlier creditor-oriented approach.[28] This changed the philosophy and practice of United States bankruptcy law into rehabilitating and reorganizing tool than a punishment and liquidation instrument.

Despite the negative attitude society had towards consumer bankruptcy, there is a trend towards adoption of consumer bankruptcy into laws of many countries.[29] The scope and protection afforded by these laws vary throughout history and across jurisdictions. It ranges from being totally creditor's collective remedy to a 'debtors' relief' in the form of discharge and fresh start.[30] So, it is conceivable to imagine rough variations from "no relief' to 'automatic debt relief' jurisdictions."[31] In some jurisdictions, either there is no access for individuals to opt for bankruptcy or no relief is going to be granted even if there is access.[32] In jurisdictions where individuals have access, it may simply be a debt collection tool for the creditors and not intended to benefit the debtors in the form of discharge and fresh start. In other jurisdictions, consumers are entitled to discharge and fresh start as part of the bankruptcy process. Notable example where debt forgiveness and discharge is available is United States.[33]

Hence, there is a trend towards convergence with regard to extending bankruptcy law to consumer though there still are significant differences in approaches.[34] These disparities in the treatment of consumer debtors are attributed

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[27] *See* G. Stanley Joslin, *supra* note *4*, at 193; *see also* Paolo Di Martino, *The Historical Evolution of Bankruptcy law in Italy, England and US*, Paper presented at workshop at the Södertörns Högskola (Stockholm, August 2005), at 264; *see also* Margaret Howard, *A Theory of discharge in consumer Bankruptcy,* 48 OHIO ST. L.J. 1047 (1987), at 1051-1052.

[28] *See* G. Stanley Joslin, *supra note 4*, at 194.

[29] *See* Rafael Efrat, *supra* note1.

[30] See John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History, 70* AM. BANKR. L.J. 163 (1996), at 164-165.

[31] *See* Rafael Efrat, *supra* note 1.

[32] *Id.*, at 84.

[33] *Id.*, at 87.

[34] For example United States and Germany both have consumer bankruptcy law. Debtors are entitled to file for bankruptcy. But the relief for bankrupt debtor is very different in the two countries. United States gives relaxed and automatic discharge while Germany the debtor has to wait and act in a particular way to earn the fresh start. For more explanation, see Section III below.

to several factors including but not limited to colonization,[35] deregulation of credit markets,[36]availability ofsocial welfare,[37] and differing policy emphasis for entrepreneurship.[38] Worth to note at this point, however, is that countries that traditionally restrict their bankruptcy law to merchants are shifting towards allowing non-traders to be part of the bankruptcy process and benefit from discharge and fresh start.[39]

B. History of Discharge and Fresh Start in Bankruptcy

Discharge and fresh start is at the heart of consumer bankruptcy.[40] It is a release of the debtor of his pre-petition debts against full surrender of all his non-exempt property to the creditors.[41] This doctrine was invented in England and developed into a comprehensive legal doctrine in United States.[42] The invention of discharge was one of the turning points in history of bankruptcy law that marked the shift from being only creditors' remedy to that of debtors' remedy. The first time discharge was invented in the Anglo-American jurisprudence was when it was first used under English law at the beginning of 18th century. It was the time where "honest but unfortunate debtors" started to be released against giving their remaining property in satisfaction to their whole pre-petition debt.[43] At first, it was not intended to benefit debtors and rather the impact was incidental.[44] It was a kind of incentive for the debtor's cooperation and hence it was purely a collection device.[45] This first English discharge law was problematic in two ways.[46] First, the scope was limited to that of merchant debtors and it was out of the reach of non-

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[35] *See* Rafael Efrat, *supra* note 1, at 91.

[36] *Id.*, at 92.

[37] *Id.*, at 96.

[38] *Id*,. at 98.

[39] *Id., at* 81 & 108; *see also* Lencho Tadesse, *supra* note 5, at 69-70.

[40] Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law, 98* HARV. L. REV., 1393(1985), at 1393.

[41] *See* Charles J. Tabb, *supra* note 20, at 351; *see also* Douglas R., *Bankruptcy Revision: Procedure and Process*, 53 N.C.L. REV. 1197 (1974-1975), at 1200*; see also* DAVID G. EPSTEIN ET AL, BANKRUPTCY, PRACTITIONER TREATISE SERIES, West Publishing Co., (1992), at 12-13.

[42] *See* John M. Czarnetzky, *The Individual and Failure: A Theory of Bankruptcy Discharge, 32* ARIZ. ST. L.J. 393 *(*2000*),* at 400.

[43] *See* Charles J. Tabb, *supra* note20, at 333.

[44] *Id*., *see* also Malhotra, Vibhooti, *supra* note 20, at7; Margaret Howard, *supra* note 27, at 1049.

[45] *See* Margaret Howard, supra note 27, at 1049; *see also* DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY, The Foundation Press, (2010), at 37.

[46] *See* Charles J. Tabb, *supra* note 20, at 334.

traders. Second, voluntary bankruptcy was not put in place and it hampered the possibility of getting discharge.[47]

The use of credit by individuals was a condemned act that remedy of forgiveness was not available.[48] Rather, the use of credit and accompanying risk was accepted by the society and the remedy for failure was available for merchants only.[49] Even for the merchants, the full utilization of the remedy was impacted by the fact that there existed only creditor-triggered bankruptcy, i.e., involuntary bankruptcy.[50] The consent of the creditor was also necessary for discharge.[51] This requirement was abolished later in 1883[52] and replaced by courts' discretion either to grant or deny discharge.[53]In addition, the application of discharge was not automatic and should be raised as a defense by the debtor when approached by the creditor seeking repayment.[54] All these reveal that the then English law of discharge was intended to help creditors' collection efforts and not to release the debtors as its objective. This, however, was an important development and shift from a barbarous treatment to a more humane view of the debtors. This move was followed by the recognition of consumer into the realm of bankruptcy in 1861 and voluntary bankruptcy for merchants.[55]

The United States first bankruptcy Act, the 1800 Act, was not different from its English parent. Consumers were not recognized in the bankruptcy system; bankruptcy was involuntary, and discharge was not automatic as in English law.[56] Bankruptcy with debtor protection as its objective came only after the 1841 Act.[57] Though with creditors' consent, voluntary bankruptcy was allowed for the first time and scope of bankruptcy was extended to non-traders.[58] This pro-debtor attitude later resulted in different reforms that favored the debtor to a certain extent. Invoking discharge, as an affirmative defense by the debtor, was abolished

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[47] *Id*., at 334-336.

[48] *Id*., at 335.

[49] *Id*., *See* G. Stanley Joslin, *supra* note *4*, at 189.

[50] *See* Charles J. Tabb, *supra* note 20, at 336.

[51] *Id*., at 337 & 339.

[52] *Id.*, at 354 & 357.

[53] *Id.*, at *363.*

[54] *Id*., at 340-343.

[55] *See* Charles J. Tabb, *supra* note 20, at 354.

[56] *Id.*, at 345-346. As it was in English law, in order to benefit from discharge the debtor has to pay substantial percentage of the debt, get confirmation from the commissioners and finally the consent of the creditor.

[57] *Id.*, at 349.

[58] *See* Charles J. Tabb, *supra* note 20, at 349-350, *see also* Charles J. Tabb, *supra* note 15, at 17.

and it became the duty of the creditor to file dissent.[59] Another change was, although creditors' consent for discharge remained in operation, the majority vote required in favor of consenting for discharge was reduced.[60] The debtor was also granted right of appeal against denial of discharge for the first time.[61] This right of appeal was the result of the availability of discharge to all persons - individuals and businesses and expanded grounds of denial of discharge.[62] Subsequent amendment to the 1841 Act, i.e. the 1867 Act, made discharge very difficult to obtain because there existed several grounds of denial.[63]

Creditors' consent for discharge in United States was removed later in the 1898 Bankruptcy Act.[64] Unlike its English counterpart, the United States law did not give judges the discretion and denial as grant of discharge was statutorily fixed.[65] This was an important departure from the long-existed bankruptcy jurisprudence, which had its prime focus of helping the creditor in his collection effort and incidentally benefiting the debtor by making discharge a relief for "honest but unfortunate debtors".[66] Here came 'fresh start' where "the debts of the debtor are wiped-out and he started life afresh as a productive member of the society."[67] The grounds of denial of discharge were reduced and only discharge was refused where the debtor committed crimes relating to bankruptcy.[68] That was done to make "moral distinction between fraudulent and 'honest but unfortunate' debtors."[69] This pro-debtor policy was criticized as lax attitude and it became tight again and certain exceptions to it were provided.[70] Part of the criticism was that

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[59] *See* Charles J. Tabb, *supra* note 20, at 351-352.

[60] *Id.*, at 352. In the 1800 ACT the requirement was that two-third vote in favor of discharge. But this was changed to simple majority, in number and value, in the 1841 Act.

[61] *Id.*

[62] *Id.*

[63] *Id*. at 356-358. No discharge will be granted or will not be valid if granted, when the debtor sworn falsely, concealing estate, cause/permit destruction of estate, destroyed, falsified or mutilated books and accounts, made fraudulent conveyance, payment or gift, etc.

[64] *Id.*, at 364.

[65] *Id.*, at 364.

[66] *Id.*, at 364-365.

[67] *Id.*, at 365.

[68] *Id.*, at 366.

[69] *See* John M. Czarnetzky, *supra* note *42*, at 425-426.

[70] *See* Charles J. Tabb, *supra* note *20*, at 368. The exceptions were debts based on taxes, fraud, or obtaining property by false pretenses, willful and, malicious injuries, unscheduled claims and fiduciary misconduct

debtors were using the bankruptcy law as an escaping mechanism of their obligation while they could have paid their obligation out of their future income.[71]

As it is discussed earlier under Section 1.1, the first use of proper bankruptcy law was a means of debt collection and equitable distribution among creditors.[72] Even discharge introduced at the earliest point of the invention of the concept was as a means of securing the cooperative hand of the debtor in the debt collection process[73] and discharge was just a kind of incentive for that. Later in the 20th century, however, the philosophy in bankruptcy discharge was changed to a relief to "honest but unfortunate debtors".[74] This doctrine of discharge of debts of "honest but unfortunate debtor" was articulated in *Local Loan Co. v. Hunt.*[75] Accordingly, the debtor started to be released from pre-petition debts he incurred. Any asset acquired or income earned after bankruptcy petition could not be attached to the claims of the creditor.

The choice of protection between creditor and debtor has passed through different historical developments of the Anglo-American bankruptcy law. From 16th to mid-19th century, the concept of bankruptcy was purely and simply a creditors' vengeance-type remedy against debtors. Later, the harsh treatment of the debtor by the legal system and creditors proved to be unnecessary in the debt collection process and bankruptcy was devised to serve as a debt collection tool. Incidentally, the debtor started to be treated humanely.

At the end of 19th century and beginning of 20th century, debtor protection and relief became the corner stone of the consumer bankruptcy system. Accordingly, discharge became and is one of the means to give such protection. Further reforms to bankruptcy discharge and fresh start were motivated by the need to protect consumers who are overwhelmed by the availability and complexity of the credit market in particular and trade in general.[76] This was justified on the idea of protecting the weaker party, which other social security systems failed to address adequately.[77] In most cases, it is consequential that discharge and fresh

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[71] *See generally* Irving A. Breitwoitz, *New developments in Consumer Bankruptcy: Chapter 7 Dismissal on the Basis of Substantial Abuse,* 59 AM. BANKR. L.J. 327 (1985*).*

[72] Douglas R., *The Bankruptcy Discharge: Towards A Fresher Start,* 58 N.C. L. REV. 723 (1979-1980), at 724 & 893; *see* also Douglas R, *supra note 41,* at 1200.

[73] Douglas R, *supra* note 72, at 724 & 893.

[74] *Id.*

[75] *See* Charles J. Tabb & Ralph Brubaker, *supra* note *7,* at 479-80.

[76] *See* Vibhooti, *supra* note20, at 4; *see also* Douglas R, *supra* note 41, at 1202.

[77] *See* Douglas R, *supra* note 41, at 1202-1203.

start is available to individuals and not businesses.[78] Discharge is not any more a debt collection mechanism. It is justified out of several reasons that are not necessarily protecting the creditor.

C. Justifications for Discharge and Fresh Start

The philosophy of bankruptcy law that admitted individual debtors to its scope has to be backed by strong justifications. It is against State collection law that requires debtors to fulfill their obligations. Discharge is an exception to the conventional norm of repaying one's debt. And as an exception, it needs overwhelming justifications.[79] Different scholars have tried to provide answer for this problem. To this effect, they came up with justifications such as bankruptcy discharge as a debt-collection device,[80] incentive of debtor cooperation in the debt collection process,[81] incentive towards entrepreneurship and risk taking,[82] social insurance,[83] development policy,[84] debtors' rehabilitation tool to keep him/her as a productive member of the society,[85] relief for honest but unfortunate debtors,[86] societal act of forgiveness,[87] correction of human weakness,[88] reducing moral hazard in connection with lending[89] and consumer protection,[90] etc. But comprehensive legal research on the normative justifications on why discharge is

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[78] *See* Vibhooti, *supra* note 20, at 7.

[79] *See* Margaret Howard, *supra* note 27, at 1047-1048.

[80] Douglas J Baird, *A world Without Bankruptcy*, 50 L. & CONTEMP. PROBS.173 (1987), at 183-184.

[81] *See* John M. Czarnetzky, *supra* note 42, *at* 395-96.

[82] *See generally*, Seung-Hyun Lee & Mike W. Peng, *Bankruptcy Law and entrepreneurship Development: A Real Option Perspective*, 32 ACADEMY OF MANAGEMENT REVIEW, 257(2007), 257-272; *see generally* Wei Fan & Michelle J. White, *Personal Bankruptcy and The Level of Entrepreneurial Activity*, 46 J. L. & ECON. 545 (2003), at 545-567.

[83] *See generally*, Adam Feibelman, *Defining the Social Insurance Function of Bankruptcy, 13 AM. BANKR. INST. L. REV. 129 (2005)*, at 129-186; *see also* Todd J Zywick, *An Economic Analysis of consumer Bankruptcy Crisis*, 99 NW. U. L. REV.1463 (2005), at 1473; *See* Douglas J Baird, *supra note 83, at* 175; *see also* Barry Adler *et al,Regulating Consumer Bankruptcy: Theoretical Inquiry*, 29 J. LEGAL STUD.585 (2000), at 587.

[84] *See generally*, Adam Feibelman, *supra* note 2.

[85] *See* Douglas J Baird, *supra* note *83*, at 176; *see also* John M. Czarnetzky, *supra note 42*, at 396; *see* Douglas R., *supra* note *72*.

[86] *See* Todd J Zywick, *supra* note *83*, at 1471.

[87] *See* John M. Czarnetzky, *supra* note *42*, at 395-396.

[88] *Id.*

[89] *See* Barry Adler *et al*, *supra* note 83, at 608.

[90] *See* Ramsay, Iain D. C, *supra* note 10, at 262-263.

becoming an important part of consumer bankruptcy law is lacking.[91] Most of the existing literatures reviewed in this article also confirm this fact. Despite the overwhelming effort scholars have dedicated, comprehensive normative justification is far from being achieved.[92] Different scholars rather try to justify it from the perspectives they see it better justified.

The above justifications are not features of consumer bankruptcy laws of every jurisdiction. In any legal system, one or a combination of some of them may be the justifications of the consumer bankruptcy system.[93] The decision to adopt consumer bankruptcy differs across jurisdictions based on the socio-economic and political structures of a given country. The bottom line, however, is that many jurisdictions that restricted their bankruptcy to traders only are shifting their philosophy to include consumer bankruptcy and fresh start.[94] This move has its backing from one or several of the above justifications.

The next discussion is dedicated to the review of these theoretical justifications forwarded to back the need for discharge and fresh start in consumer bankruptcy.

1. Entrepreneurial Analysis

Consumer bankruptcy with discharge and fresh start has something to do with an entrepreneurship. One's bankruptcy system shapes (is shaped) the (by) entrepreneurship culture of a given jurisdiction. Some scholars argue that discharge and fresh start increases the level of entrepreneurial activity.[95] According to them, access to credit coupled with availability of filing for discharge gives individuals an incentive to go for business.[96] Individuals will be encouraged to take risks. The level of entrepreneurial activity will be good in jurisdictions where there is room for individuals in bankruptcy legislations and where the same provides for higher personal exemption levels.[97] This is because, according to those scholars, consumer bankruptcy with discharge and fresh start gives entrepreneurs 'partial wealth insurance'.[98]

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[91] *See* Thomas H. Jackson, *supra* note 40, at 1394; *see also* John M. Czarnetzky, *supra* note 42, at 393.

[92] *Id.* Thomas H. Jackson, at 1394; John M. Czarnetzky, at 394.

[93] *See* Margaret Howard, *supra* note 27, at 1087-88.

[94] *See* Rafael Efrat, *supra* note 1, at 108-109.

[95] *See generally* Wei Fan & Michelle J. White, *supra* note 85.

[96] *Id., at* 547 & 552.

[97] *Id., at* 563.

[98] *Id., at* 547 & 552.

It is a blunt fact that entrepreneurship and investing in new venture involves risk-taking. Stated otherwise, if investors are punished for failure too heavily, they will be hesitant to take risk.[99] The risk may be exacerbated by the unlimited liability their unincorporated startup could bring if it is not successful.[100] The market place should be convenient for learning from mistakes and that environment will help us get the best entrepreneurs.[101] Individuals' incentive to take such risk and foster their entrepreneurial activity can be motivated by generous discharge and fresh start. Studies show that pro-entrepreneurship jurisdictions have generous debt forgiveness while jurisdictions where investment and entrepreneurial activities are limited have tight bankruptcy rules with less or no discharge and fresh start.[102] Fresh start has a direct positive impact on entrepreneurial activity.[103] The availability of discharge and the time it will take to obtain discharge are very important in this regard.[104] When generous discharge is available and it is automatic or can be obtained in a short time, it has good signal for entrepreneurs. The release of "honest but unfortunate debtors" will hurt creditors for sure, but the aggregate gains from entrepreneurship are higher than losses to the creditors.[105]

The assertion that consumer bankruptcy with meaningful discharge is pro-entrepreneurship is neither a well-recognized theory nor there is clear evidence of a bankruptcy system crafted based on the assertion.[106] But empirical studies of consumer bankruptcy show that the 'entrepreneurial analysis' is consistent with the assertion.[107] Of course, it is logical that when failure is not punished severely, there will be enthusiasms for entrepreneurship. There is, however, a legitimate concern that generous discharge may increase interest rates. Yet, studies show that fresh start encourages entrepreneurship.[108] It is, therefore, quite possible for countries to

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[99] John Armour & Douglas Cumming, *Bankruptcy Law and* Entrepreneurship, 10(2) AMERICAN LAW AND ECONOMICS REVIEW, 303-350 (2008), at 4*; see also* John M. Czarnetzky, *supra* note 42, at 398-399.

[100] *See* Rafael Efrat, *supra note 1,* at 98-99.

[101] John M. Czarnetzky, *Time, Uncertainty and The Law of Corporate Reorganizations,* 67 FORDHAM L.REV. 2939 (1999) *as cited in* John M. Czarnetzky, *supra* note 42, at 405.

[102] Rafael Efrat, *supra* note 1, at 98-99.

[103] John Armour and Douglas Cumming, *supra note 102,* at 6.

[104] *Id.,* at 7.

[105] *See* John M. Czarnetzky, *supra note 42,* at 414.

[106] *Id.,* at 448.

[107] *Id.,* at 414.

[108] Frank M. Fossen, Personal Bankruptcy Law Wealth and Entrepreneurship-Theory and Evidence from the Introduction of "Fresh Start", German Socio-Economic Panel Study (SOEP) (2011), at 28.

consider their bankruptcy law while dealing with their entrepreneurship policy. The more generous and predictable bankruptcy discharge is, the more entrepreneurship will be enhanced. Studies also show that bankruptcy discharge and fresh start stimulates self-employment.[109]

2. Social Insurance Function

Consumer bankruptcy is also justified out of the social insurance function it provides.[110] Proponents of this view see bankruptcy as a cure for capitalist state that has either abandoned or cut its welfare activities.[111] Indebtedness is not voluntary and different circumstances contribute for failure to pay one's debt.[112] Losses of job, illness of the individual or his/her family, divorce, and business failures are some of the circumstances that will force someone into financial distress.[113] The financial distress out of such changed circumstances is responsible for the increase in consumer bankruptcy cases in United States.[114] Conventionally, such problems are dealt with under unemployment insurance, health insurance or other social assistance provided by the government based on the need. But the above insurances are private ones and may be unavailable because of market failure. In a system where social insurance is unavailable or otherwise inadequate, bankruptcy discharge can be a substitute.[115] This, however, is not a complete substitute and is only applicable to certain cases such as for unsecured debt.[116] A bankruptcy system that provides discharge and fresh start for unsecured debt can

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[109] *See* John Armour and Douglas Cumming, *supra* note 102, at 18.

[110] TERESA A. SULLIVAN, ELIZABETH WARREN & JAY WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 3-5 (2000) as cited in Admam Feibelman, *supra note 86, at* 130; *see* Todd J Zywick, *supra* note 83, at 1473; *see also* BARRY E. ADLER ET AL, BANKRUPTCY CASES, PROBLEMS AND MATERIALS, Foundation Press (2007), at 560.

[111] *See* Ramsay, Iain D. C., *Individual Bankruptcy: Preliminary Findings on Socio-Legal Analysis*, 37 OSGOODE HALL L. J.15 (1999), at 17.

[112] *Id. at* 22; *see also* Todd J Zywick *supra* note 83, at 1473.

[113] *Id.* Ramsay, Iain D. C at 22; Todd J Zywick, 1473; *see also* Robert Anderson *et al (ed.) supra* note 6, at 7.

[114] *See* Todd J Zywick, *supra* note 83, at1473-1474: There are studies that show that medical costs are, partly, responsible for the rise in personal bankruptcy filings in United States. This is because United States has the weakest safety net programs for its citizens. In Europe where there are several safety net programs the bankruptcy filing rate is lower, significantly, to that of United States. For more information see generally, Sarah Emami, Consumer Over-indebtedness and Health care Costs: How to Approach the Question from a Global Perspective, (World Health Report 2010, A back Ground paper No-3), *Available at* http://www.who.int/healthsystems/topics/financing/healthreport/3BackgroundPaperMedBankruptcy.pdf?ua=1, (last visited on 12 March 2014).

[115] *See* Admam Feibelman, *supra* note 83, at 132.

[116] *Id., at* 141.

replace the social insurance function. This is the limitation of bankruptcy discharge unlike other social insurance tools.

Studies show that bankruptcy system with adequate pre-petition discharge of debts can be justified out of social insurance (welfare) functions against some financial difficulties that may arise from loss of job, divorce, sickness, etc.[117]There appears to exist a direct relationship between the design of social insurances and bankruptcy system.[118] The more generous the bankruptcy discharge is, the less social safety net programs are available and vice versa.[119] The United States bankruptcy law fits into this formulation.[120] The bankruptcy system is generous enough to allow troubled debtors to see their debt wiped-out against surrender of non-exempt assets; the social safety net programs are, however, less extensive.[121]

The conclusion that can be drawn from the discussion made so far is that where welfare activities of the government are limited, individuals will opt to credit.[122] This will expose individuals for financial troubles.[123] This vulnerability is dealt with in some jurisdictions under their bankruptcy law that provides generous relief.[124] Welfare states have less bankruptcy filings compared to states that do not have significant welfare programs.[125]Hence, the more welfare state a government is the less debt forgiveness available in the bankruptcy law and vice versa.

3. Deregulation of Consumer Credit

The availability of consumer credit is another reason for adopting consumer bankruptcy system[126] with generous discharge and fresh start. There are evidences that countries have liberalized their discharge rules after deregulation of consumer credit.[127] Access to consumer credit will make it possible for individuals to finance their own startups or pursue self-employment;[128]improve demand for products in

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[117] *Id*., at 185-186; *see also*, Douglas R, *supra* note 41, at1203 as cited in Douglas R, *supra* note 72, at 724.

[118] *See* Admam Feibelman, *supra* note 83, at 185-186.

[119] *See* Rafael Efrat, *supra* note 1, at *82*-91 (2002) as cited in Admam Feibelman, *supra* note 83, at 184.

[120] Admam Feibelman, *supra* note 83, at142.

[121] *See* Rafael Efrat, *supra* note 1, at *82*-91 (2002) as cited in Admam Feibelman, *supra* note 83, at 184.

[122] *Id*., at 102-104.

[123] *Id*., at 96-97.

[124] *Id*.

[125] *Id*., at 103-104.

[126] *See* G. Stanley Josling, *supra* note 4, at 189.

[127] *See* Rafael Efrat, *supra* note 1, at 92-93.

[128] *See* Adam Feibelman, *supra* note 2, at 66.

the market; smooth consumption across income gaps, reduces income shocks[129] and increases consumption of some "discretionary goods" (food, health care, education, transportation etc.), which can be considered as indicators of development.[130]But it will be a source for competition in consumer lending industry, which will expose individuals to huge risks and then to over-indebtedness.[131] These risks are dealt by those jurisdictions by adopting debt forgiveness provisions in their consumer bankruptcy rules.[132] In jurisdictions where there is strict regulation of consumer credit, there is less relief from bankruptcy discharge.[133] This is because individuals' access to credit is very restricted and consequently exposed to less risk than in countries where consumer credit is easily accessible.

4. Consumer Bankruptcy as a Development Policy

There are also arguments that adoption of consumer bankruptcy with automatic discharge contributes to public development policy. They argue that, consumer bankruptcy will potentially create efficient consumer finance market while solving the problem of over-indebtedness.[134] According to this line of argument, well-crafted consumer bankruptcy system benefits both creditor and debtor. The debtor will have an opportunity to finance businesses or ideas that are worth put into market. Creditors are also compensated for the consequences of discharge in the form of high interest rates.[135] It will also solve the collective action problem, as it does in corporate bankruptcy, among creditors.[136] Coordinated collective action among creditors will increase probability of getting paid.[137]On the contrary, race to the debtor's assets, under non-bankruptcy law, may hurt the debtor and incapacitate his ability to earn in the future.[138] So, consumer bankruptcy law, with adequate discharge and fresh start, may help promote consumer financial market.[139]

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[129] *Id.*, at 66 & 75-76.
[130] *Id.*, at 75.
[131] *Id.*, at 66.
[132] See Rafael Efrat, *supra* note 1, at 92-93.
[133] *Id.*, at 92-94.
[134] *See* Adam Feibelman, *supra* note 2, at 89-90, 104.
[135] *Id.*, at 92.
[136] *Id.*, at 92-93.
[137] *Id.*
[138] *Id.*
[139] *Id.*

5. Rehabilitating the Debtor

Another most important justification for consumer bankruptcy and discharge is to keep the bankrupt individual as a productive member of the society.[140] It is a rehabilitation and reintegration of an individual to the society. If the individual bankrupt is discharged from part or whole of his/her debt, he will have an incentive to earn income and own property in the future.[141] The income is shielded, in whole or in part, from the reach of creditors[142] and psychologically, the debtor will get relief from the distress out of the indebtedness.[143]That is a huge incentive to start life afresh as a productive member of the society.[144] Therefore, treating debtors harshly because they failed to pay their debt will make things more complicated. Otherwise, the bankrupt individual may engage in different undesirable activities such as dependence on someone or engage in crimes that lead to social problems.

6. Human Act of Forgiveness

Bankruptcy discharge is also seen as a human act of forgiveness and rehabilitation of the debtor.[145] This is what is called "*humanistic view*" of consumer bankruptcy.[146] According to this view bankruptcy is a real problem affecting real people as opposed to people the neo-classical economists talking about. It rejects the hypothetical people and assumptions that economists use in order to understand the market.[147] According to this view, real persons are not simply self-interested profit maximizers but they are also highly concerned about the wellbeing of others.[148] "*Humanistic view"* of 'fresh-start' justification values people more than the money.[149] This view takes 'humanity' as essential element in bankruptcy discharge policy and not simply an incidental element to be considered when pursuing another end.[150] Accordingly, this view has its backing from biblical reasons than economic justifications.

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[140] *Id., at* 92.

[141] *See* Margaret Howard, *supra* note 27, at 1062.

[142] *See* Adam Feibelman, *supra* note 2, at 92.

[143] *See* Rendleman, Douglas R, *supra* note 72, at 726.

[144] *See* John M. Czarnetzky, *supra* note 42, at 415.

[145] S*ee generally* Susan Block-Lieb, Book Review: *A Humanistic Vision of Bankruptcy Law*, 6 AM. BANKR. INST. L. REV. 471 (1998), at 471-493, reviewing "KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM" (Yale University Press 1997).

[146] *Id*.

[147] *Id.*, at 473 & 486-487.

[148] *Id.*, at 473.

[149] *Id.*, at 477.

[150] *Id.*, at 477.

Another economic justification for "*non-waivable"* right to fresh-start is based on the theory of risk allocation.[151] The idea is that one in a better position to avoid the risk should be able to bear it.[152] Accordingly, the law has to choose one victim out of two innocents and it has to be the creditor. But this justification does not escape from criticism because, according to some scholars, it is not possible to identify with certainty the superior risk bearer.[153]

The discussion made so far shows some of the socio-economic and political justifications forwarded to back why doctrine of discharge in consumer bankruptcy law is becoming an important policy tool. A consumer bankruptcy regime in any jurisdiction will have its theoretical underpinning in one or more of the justifications discussed above. These justifications are benefits of well-crafted consumer bankruptcy law. However, there are costs consumer bankruptcy will bring to different stakeholders such as the creditor, the state and the community. The following section is dedicated to point out those pitfalls the doctrine of discharge in consumer bankruptcy law.

D. Costs of Consumer Bankruptcy

There is no doubt that the debtor will be better off when his debt is wiped-out by discharge and started his/her life afresh. It is true that credit will help the debtor finance his/her affairs (such as buying house, pay for school, etc.) or overcome temporary economic troubles that will make the individual life miserable. When an individual lost job, incurred significant bill due to his/her sickness or that of a family member, divorced and has to rent new house, new tools, etc., getting credit will help a lot. The problem will come later when the debtor is unable to pay back what he owed to creditors.

Consumer bankruptcy provides a solution. It provides a mechanism by which all the non-exempted assets, such as expensive musical instruments unless the debtor is a musician, collections of stamps, coins, and other valuable items, family heirlooms, cash, bank accounts, stocks, bonds, a second car, second home, etc.,of the debtor will be liquidated and paid to the creditors and the debtor will be set free and starts life afresh. So it serves both the debtor and the creditor. The debtor will be freed of his pre-bankruptcy obligations and creditors will be treated equitably avoiding the problem of race among themselves.

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[151] *See* Thomas H. Jackson, *supra note 40,* at 1398-1401.
[152] *Id.*
[153] *Id.*

But there are certain costs the creditor, the society and the state have to bear. And this is the "*bitter-sweet paradox*" of consumer bankruptcy. The release of the debtor comes at a huge cost to those stakeholders. The first criticism of consumer bankruptcy is that creditors' return is exposed to the risk of discharge.[154] Generous consumer bankruptcy law that releases debtors from their obligation will hurt creditors. In consumer bankruptcy, creditors, more likely, will see the debtor *walk-off* without paying a penny. This will also affect the institution of contract and principle of freedom of contract. Bankruptcy as a 'debt collection tool' is not true, at least in most cases, because consumer debtors usually do not have assets left.[155]Studies show that most of the consumer bankruptcies in the United States are based on *Chapter 7*[156] and the same do not distribute any asset to unsecured creditors.[157] It is also true in Germany that most plans do not pay creditors and debtors are seen *walk-off* free.[158] Moreover, discharge policy is not intended to solve the creditors' collection problem.[159] It is intended for the debtor and debtor only. This will hurt creditors by reducing their return.

The availability of generous discharge in consumer bankruptcy also makes credit very expensive for debtors. The creditors will increase the premium charging high interest rates for the credit they provide.[160] There will be reaction from lenders in the form of increasing the rate of interest to *offset* the losses because there is less chance of repayment.[161] This will affect the credit market by making credit expensive or limiting its availability.[162] There will also be direct cost on the particular individual debtor whose access to credit will be limited or just come at

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[154] *See* Adam Feibelman, *supra* note 2, *at* 68.

[155] *See* Richard M. Hynes, *Why (Consumer) Bankruptcy?* 56 ALA. L. REV. 121 (2004/5),at 123.

[156] *See* Michelle J. *White, Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change,* 65 U. CHI. L. REV. 685 (1998*),* at 688.

[157] *See* Richard M. Hynes, *supra* note 155, at 123 & 129.

[158] Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States,* 24 NW. J. INT'L L. & BUS. 257 (2003/4), at 278-79; *see also* JOHANNA NIEMI *ET AL*, *supra* note 3,at 336.

[159] THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW, Beard Books (2001), at 225.

[160] Michelle J. White, Economic Analysis of Corporate and Personal Bankruptcy, (NBER Working Paper Series, at 64), available at http://www.nber.org/papers/w11536.pdf(last visited on 29 March 2014); *see* Adam Feibleman, *supra* note 2, at 92; Adam Feibelman, *supra* note 83, at 171.

[161] *See* Frank M. Fossen, *supra* note 112, at 28.

[162] *See* Michelle J. White, *supra* note 164; *see* Adam Feibelman, *supra* note 83, at171.

high cost.[163] But it can be argued against it in that the debtor who has no creditors anymore because of discharge can find it easy to get credit.[164] There are also other costs on the individual bankrupt debtor. In order to get discharge he has to give up all his non-exempt assets to the creditor. The creditor and the debtor may value such assets differently and when it means so much for the debtor than the creditor then that is the cost the debtor has to bear.[165]

The other concern is that the failure of debtors to repay their debt will hurt financial markets. There are studies, however, that show on comparison the benefits of discharge outweigh the costs of making entrepreneurial activity smooth.[166] Social Insurance benefits of consumer bankruptcy also outweigh the costs of increased interest rates.[167] Two other problems associated with the insurance analogy of consumer bankruptcy are moral hazard and adverse selection problems.[168] According to this view, knowing that s/he will file for bankruptcy discharge, individuals may be reckless in loan and spending decisions. And the customers of this insurance are those who are most likely to fail to repay; adverse selection problem.[169] But the reputation and stigma associated with being bankrupt will work against the moral hazard problem.[170] That means even with discharge and fresh start; individuals will lose so much when they go bankrupt.[171]Reputation, the inconvenience of getting registered as bankrupt and inability to get further loans, etc., will work as a counter-incentive against moral hazard.

There is also a criticism that consumer bankruptcy hurts the state and community. To the government, financing of the system is a huge burden. It wastes the taxpayers' money for the fault and financial mismanagement and or misfortunes of individuals. In addition, the administration of bankruptcy proceedings will cost the state when the individual is unable to cover the costs.

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[163] *See* Michelle J. White, *supra* note 19, at 211; *see* Michelle J. White, *supra* note 156, at 691; *see* Thomas H. Jackson, *supra note 40, at* 1426-1427; *see* BARRY E. ADLER *ET AL*, *supra* note 110, at560.

[164] *See* BARRY E. ADLER *ET AL*, *supra* note 110.

[165] *See* Thomas H. Jackson, *supra* note 40, *at* 1427.

[166] *See* Frank M. Fossen, *supra* note 112.

[167] *Id.*

[168] *See* BARRY E. ADLER *ET AL*, *supra* note 110.

[169] *Id.*

[170] *Id., at* 561.

[171] *Id.*

Stigma is another cost the bankrupt individual has to bear[172] while using consumer bankruptcy. Even in United States, failure to pay one's debt is still seen as immoral and stigmatized though the degree of stigma is less now than it used to be.[173]

III. CONSUMER BANKRUPTCY LAWS IN UNITED STATES AND GERMANY

In this section the laws and experiences of United States and Germany will be discussed. The comparative discussion of the two systems is justified out of the following reasons. Firstly, the two leading countries with contrasting fresh start policy are chosen to see the strengths and weaknesses of each system with a view of finding a suitable fit for Ethiopia. Secondly, these countries' laws have been also major legal exports to different countries in the world.

A. Consumer Bankruptcy Law in United States

In United States individual debtors have two options while considering filing for consumer bankruptcy: Chapter 7 or Chapter 13.[174] The most important benefit associated with consumer bankruptcy, under both chapters, is the benefit of discharge and thereby fresh start.[175] Unless the debtor committed any of criminal acts of bankruptcy (fraud, concealment etc.), the debtor, as a rule, will be released of his obligation to repay.[176] Under Chapter 7 the debtor has to surrender all assets in excess of the relevant exemption level; the trustee liquidates the assets, pay the creditors and debtor *walk-off*.[177] No creditor can ask for repayment from the debtor after bankruptcy. There will also be benefit of automatic stay soon after the debtor petitioned for bankruptcy. Consumer bankruptcy under Chapter 7 is counterpart to that of business liquidation, also known as straight bankruptcy.

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[172] *See* Michelle J. White, *supra* note 156, at 691.

[173] *See* BARRY E. ADLER *ET AL*, *supra* note 110.

[174] *See* Robert H. Scott, III, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the credit Card Industry's Preservance paid off*, 41 J.ECON. ISSUES, 943 (2007) at 944; *see* Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV.1908 (2007), at 1913.

[175] *See* THOMAS H. JACKSON, *supra* note 159; *see* Carl Felsenfeld, Denial of discharge for Substantial abuse: refining-Not Changing Bankruptcy law, 67 FORDHAM L. REV. 1369 (1999), at 1369-1370.

[176] THOMAS H. JACKSON, *supra* note 159.

[177] *See* Robert H. Scott, III, *supra* note 174.

Chapter 13 is about adjustment of debts of an individual with regular income.[178] The debtor will put a plan to the creditors based on what s/he earns and the amount s/he need for living. The debtor will pay creditors according to the plan out of the disposable income for a certain period of time (3-5 years); then, he will be discharged.[179] And this is counterpart to that of reorganization in business bankruptcy. Goal of chapter 13 is, hence, rehabilitation of the debtor. Chapter 7 has advantages over chapter 13 and vice versa. Under chapter 7 there is an immediate discharge and the procedure is somehow simple.[180] Chapter 13 requires the debtor to come up with a plan and the debtor has to perform his repayment obligation for a certain period of time.[181] Discharge will come after the plan is executed. Chapter 13 will allow the debtor to keep his/her assets while under Chapter 7 such options are not available. Despite this, however, most of the consumer bankruptcy cases are based on chapter 7.[182]

The philosophy of the United States consumer bankruptcy law is very clear: no one should be put in jail for failure to pay his/her debt unless involved in bankruptcy crimes. Debtors who are not using the system to escape repayment duties will be given fresh start. Accordingly "honest but unfortunate debtors" will be released from part or whole of their debt. The two chapters are designed accordingly and will be discussed in detail in the following section.

1. Chapter 7

Chapter 7 governs the process of liquidation of the debtors' assets, individual or business, under the United States Bankruptcy Code.[183] The debtor will give up all his non-exempt assets in exchange for discharge.[184] This is "*non-waiveable"* right for every individual. When filing under Chapter 7, there are two important concepts. The first is automatic stay, which stops any action of the creditor against

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[178] *See* Michelle J. White, *supra* note 19, at 210; *see* David G. Epstein et al, *supra* note 41, at 13; *see* Mi chelle J. White, *supra note* 691.

[179] *See* Robert H. Scott, III, *supra* note 174.

[180] *See* Elijah M. Alper,*supra n*ote 174, at 1914.

[181] *See* Richard H.W. Maloy, *"She'll Be Able to Keep Her Home Won't She?"- The Plight of a Homeowner in Bankruptcy,* MICH. ST. DCL L. Rev. 315 (2003), at 339-40, as cited in Elijah M. Alper, *supra* note 174, *at* 1914.

[182] *See* Richard M. Hynes, *Why (Consumer) Bankruptcy?,* 56 ALA. L. REV 121, 127 n.32 (2004), as cited in Elijah M. Alper, *supra* note 178, at 1914.

[183] 11 UNITED STATES CODE BANKRUPTCY, (*hereinafter, Bankruptcy Code),* available at, *http://www.law.cornell.edu/uscode/text/11/chapter-7/subchapter-II* (last visited on 16 March 2014).

[184] *See generally* Michelle J. White, *supra* note 19, at 205-231; *see* BARRY ADLER *ET AL*, *supra* note 83*; See* Michelle J. White, *supra note 156*, at 687.

the debtor, judicial or extra-judicial.[185] This is temporary order, pending the final decision of the court, which protects the debtor from harassment. The second important concept under Chapter 7 filing is discharge.[186] The exempt assets and future income of the debtor and human capital are shielded from the demand of the creditors.[187] Only debts incurred before the order of relief are subjected to discharge.[188] The individual is not required to give the exempt assets or pay debt out of his future income. Creditor is prohibited from pursuing collection efforts once discharge is granted to the debtor.[189] But that is restricted to the individual's pre-bankruptcy life and not future debts/obligations.

In order to be eligible for a Chapter 7 discharge there are certain conditions that should be fulfilled. The first condition is that only individual debtors are entitled for 'Chapter 7 discharge'.[190] Chapter 7 filing is available for both businesses and individuals but 'discharge' is available only for individuals. Second, the debtor should not commit fraudulent acts such as mutilate, conceal or transfer assets within one year of filing or property of the estate after filing.[191] To benefit from discharge, the debtor has to disclose the whereabouts of all his assets and turn them over to the creditors' consideration.[192] This will make sure that no property is hidden from the creditors[193] and this builds the integrity of the bankruptcy system. Third, unjustified failure by the debtor to keep accounts and record will bar the right to discharge.[194] These include conceal, falsify or destroy documents, engage in any fraudulent act on accounts etc[195]and commission of bankruptcy crimes.[196] Finally, debtor should not have received bankruptcy discharge under chapter 7 within eight years.[197] If the debtor was discharged under Chapter 12 or Chapter 13, he has to wait for six years to file for Chapter 7

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[185] *See* Richard M. Hynes, *supra* note 155, at 129.

[186] *Id*.

[187] *See* Michelle J. White, *supra note 19,* at 205; *See* BARRY ADLER *ET AL, supra* note 83,at 587; *see* Thomas H. Jackson, *supra note 40*, at 1396-97; BARRY E. ADLER ET AL, *supra* note 110, at 559.

[188] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 482.

[189] *See* DOUGLAS G. BAIRD, *supra note 45*, at 44.

[190] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 500.

[191] *Id.; see also* 11 U. S. C. -Bankruptcy, *supra* note 183, § 727.

[192] *See* DOUGLAS G. BAIRD, *supra* note 45, at 31.

[193] *Id.,* at 35.

[194] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 500; the Bankruptcy Code, § 727.

[195] *See* THE BANKRUPTCY CODE, § 727.

[196] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 500.

[197] *See* DOUGLAS G. BAIRD, *supra note 45*, p. 37; THE BANKRUPTCY CODE, § 727 (a) (8).

discharge.[198] But this condition does not apply if the debtor files the second case for discharge based on chapter 12 or 13.[199]

Moreover, not all debts are dischargeable.[200] There are certain debts that are 'non-dischargeable'[201] by their nature and the individual whose debt has been discharged is still obliged to pay non-dischargeable debts.[202] These 'non-dischargeable' debts include taxes and custom duties, those debts obtained by false representations or fraud, domestic support obligations, tort claims, etc. These exceptions fall into two categories[203] and the rational for 'excepting' them is justified out of public policy considerations.[204] Most often these debts are obtained by 'wrongful' act of the debtor or they are very 'essential' for the creditor.[205] In the first category, "there is either a 'moral turpitude' or intentional wrongdoing on the part of the debtor".[206] And no sensible legal system is willing to bless a debtor who acted with such moral and intent with discharge. Reprehensible and malicious conducts of the debtor need to be discouraged by the denial.[207] In the second category, the repayment of the debt, no matter how difficult it will be, is very essential for the creditor. Hence, it is in the interest of the general public that these debts are 'excepted' from discharge.[208] And creditors are allowed to ask repayment of these non-dischargeable debts, even, after bankruptcy.

Apart from these two exceptions, it is also possible that the debtor may not be given discharge of certain debts. It is a condition precedent that the debtor has to list out all creditors while filing for bankruptcy.[209] If s/he failed to do that a

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[198] *See the Bankruptcy Code, supra* note 183, § 727(a) (9)

[199] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 500.

[200] *See* DOUGLAS G. BAIRD, *supra* note 45, at 46.

[201] *See* THE BANKRUPTCY CODE, *supra* note 183, § 523.

[202] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 511.

[203] *Id.*; *see also* DOUGLAS G. BAIRD, *supra* note 45, at 47.

[204] National Bankruptcy Review Commission, Discharge, Exceptions To Discharge, And Objections To Discharge;http://govinfo.library.unt.edu/nbrc/report/07consum.html last visited on 8th March 14

[205] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 511.

[206] *See infra* note 208.

[207] *See* DOUGLAS G. BAIRD, *supra* note 45, at 48.

[208] These includes unscheduled debts, certain taxes, debts for spousal or child support, debts to government, student loans, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated etc.

[209] *See* DOUGLAS G. BAIRD, *supra* note 45, at 46.

creditor who is not notified of the proceeding and did not share in the assets will not see his claim discharged.[210]

Fresh start from Chapter 7 discharge in United States has two sources.[211] The first source is from section 727 of the Bankruptcy Code.[212] It states that the individual debtor who gives up his/her assets will be discharged and creditors cannot encroach into future income or assets of that debtor.[213] The second source for fresh start is section 522 plus state and federal non-bankruptcy laws.[214] These second sources allow the individual certain level of exempted property.[215]Hence, future income and exempted property constitute fresh start.[216] Care must be taken, however, that policy of consumer bankruptcy law is financial fresh start for the debt-troubled individual shielding the future income (fruits of labor) and not to protect his/her wealth.[217] Exemption is an exception to the creditors' right to the assets of the individual debtor. Issue of exemption is left for states and this also can show that it is not the core policy of United States bankruptcy law.[218]

The consumer bankruptcy under Chapter 7 gives financially troubled individuals a fresh start by shielding the exempt assets and future income of the individuals. It is insurance for the debtor who otherwise does not have viable options to pass through difficult times (loss of job, illness etc.). The debtor being required to be honest in disclosing and giving up his assets to the creditors' questioning, bankruptcy rules are designed to release the "honest but unfortunate debtor" from yoke of debt s/he incurred and cannot repay.

There are also problems associated with consumer bankruptcy. The discharge available will inevitably create ground for dishonest debtors to abuse the system. To tackle such abuse the United States bankruptcy law provides certain rules to make sure of the integrity of the system. The system starts by making some debts non-dischargeable.[219] When the debtor acted out of "moral turpitude" then discharge is denied. When the debtor acted fraudulently and transfers or conceals a

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[210] *Id.*
[211] *See* BARRY E. ADLER ET AL, *supra* note 110, at 565.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *See* THOMAS H. JACKSON, *supra* note 159, at 254-255.
[218] *Id.*
[219] *See* § 523 of THE BANKRUPTCY CODE, *supra* note 183.

property s/he cannot obtain discharge.[220] Additionally, there is a limitation of time within before the lapse of which the debtor cannot go for another petition under chapter 7. If s/he has to file for a chapter 7 case again, s/he has to wait for eight years period.[221] Of course, it works to the debtors' favor as well. It will be easy for the debtor to get credit but creditors can also chase the debtor for payment before he can file for bankruptcy.[222]

There are also rules that prevent the debtor from abusing the system as a tactic to delay creditor's collection efforts.[223] The debtor, once s/he files for bankruptcy, has to provide all the necessary information or risk dismissal of her/his case.[224] There is doubt on this rule that it may work in favor of the debtor who wanted to avoid bankruptcy against creditors will by failing to provide the information required.[225] But the writer thinks, in consumer bankruptcy case, especially Chapter 7, that where the creditor is not usually paid, there is no incentive for the debtor to go that way and does not have potential harm to the creditor.

The debtor education and credit counseling introduced under the 2005 Bankruptcy Abuse and Consumer Protection Act[226] is also another way to keep the integrity of the bankruptcy system. All individual debtors, no matter which chapter they use, have to take credit counseling and debtor education before and after filing bankruptcy respectively. It is compulsory requirement[227] to qualify as a debtor within the meaning of the Bankruptcy Code. The credit-counseling course should be taken 180 days before filing for bankruptcy.[228]The course will help the debtor in organizing a plan of payment even without filing for bankruptcy if the creditors agree.[229] Failure to take this counseling will result in the dismissal of the bankruptcy case. On the other hands, the debtor education course required after the filing of bankruptcy is to help the debtor manage his financial affairs in the future. It is to equip the debtor with personal financial management skills.

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[220] *See* DOUGLAS G. BAIRD, *supra* note 45, at37.

[221] *Id.*, see THE BANKRUPTCY CODE, *supra* note 183, § 727 (a) (8).

[222] *See* DOUGLAS G. BAIRD, *supra* note 45, at 37.

[223] *Id.*

[224] *Id., at* 37-38; see THE BANKRUPTCY CODE, *supra* note 183, § 521 (i).

[225] *See* DOUGLAS G. BAIRD, *supra* note 45, at 37.

[226] Joseph Satorius, *Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement,* 75 FORDHAM L.REV. 2231(2007),at 2233-2234.

[227] *See* THE BANKRUPTCY CODE, *supra note 183,* § 109 (h) (1). There are exceptions to these requirements as provided under 109 (h) (2); *see generally*, Joseph Satorius, *supra* note 226, at 2234.

[228] *See* Joseph Satorius, *supra* note 226, at 2234.

[229] *See* Robert H. Scott, III, *supra* note 174, at946.

The bankruptcy code has also designed a mechanism to tackle abuse of Chapter 7 filing. The problem with this chapter is that consumer debtors, in most cases, *walk-off* without paying even though they have a means to pay part of their debt.[230] Ronald claims that "There was a concern that consumer are using the bankruptcy system as a means of financial planning than as a relief when they honestly fail to repay their debt."[231] In response to this, section 707 (b) was added to the 1984 amendments of Code.[232] The court may, therefore, dismiss a petition by individual debtor whose debts are consumer debts when it is found that the filing is "substantial abuse" of chapter 7.[233] This was designed to limit the access to Chapter 7 and force debtors to chapter 13 filing.[234] There was no agreement on what constitutes "substantial abuse".[235] One view was that criterion was that the individuals' ability to pay their debt without undue hardships amounts abuse.[236] Another view advocates for the 'totality of circumstances' test such as unconscionable spending or fraud.[237]

The 2005 Bankruptcy Act responds to the problem and come up with grounds of dismissal of Chapter 7 claims when there is abuse.[238] The first ground to be used to filter what can be brought under Chapter 7 is 'means test'.[239] This test will make sure that the debtor's income is low enough to chapter 7 filing. If debtor's income is below the applicable median, then that is the end of the story. S/he can file a Chapter 7 bankruptcy. If the debtor's income, including his/her spouse if married, is more the applicable median for the family size considered, an application for Chapter 7 might be dismissed up on the application of trustee, interested parties, or court on its own motion.[240] If there is disposable income, necessary expenses (food, cloth, health care, etc.) deducted from average monthly income for the last six months, abuse is presumed and debtor will not qualify for Chapter 7.[241] By this filtering process, individuals with high income will be forced to go for chapter

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[230] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7,103.

[231] *See* Mann, Ronald J., *Bankruptcy Reform and The 'Sweat Box' of Credit Card Debt*, U. ILL. L. REV., 2006, at 377-378.

[232] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 104.

[233] *Id., at* 103-104; see also David G. Epstein et al, *supra* note 41, at 56-57.

[234] *See* Ronald J. Mann, *supra* note 231, at 377.

[235] *See* Carl Felsenfeld, *supra* note 175, at 1369.

[236] *Id. p. 1369; see also* DAVID G. EPSTEIN ET AL, *supra* note 41, at 57-58.

[237] *See* Carl Felsenfeld, *supra* note 175, at 1369.

[238] *See* BARRY E. ADLER *ET AL*, *supra* note 110, at 79-80.

[239] *Id.*; *see* section 707 (b); *see also* Robert H. Scott, III, *supra* note 174, at 947.

[240] *See* BARRY E. ADLER *ET AL*, *supra* note 110, at 79-80.

[241] *See* Ronald J. Mann, *supra* note 231, at 380.

13.[242]Means test solely rests on the ability to pay.[243] But means test has pitfall of its own. It does not distinguish between unforeseen financial trouble (sudden illness, loss of job, divorce) and reckless indebtedness (using credit for luxuries and recreations).[244] Accordingly, there still exists the possibility of abuse of the system by later categories of debtors.

Qualifying the 'means test', however, is not the end of the story. Still the court may find Chapter 7 applications abusive and dismiss or convert it to chapter 13 accordingly.[245] Abusive or bad faith petitioners will see their case dismissed under the "totality of circumstances test".[246] This test will catch debtors who escaped the filtration process under means test. It does not have a clear formula as in the case of means test, a supplementary case-by-case analysis.

The 2005 Bankruptcy Abuse Prevention and Consumer Protection is, therefore, trying to make Chapter 7 discharge less attractive and want to limit it to those who really need it. Accordingly, those individuals capable of earning and paying a certain portion of their debt should use the Chapter 13 procedure.

2. Chapter 13

Chapter 13 is a debt adjustment plan[247] for consumer bankruptcy, like reorganization of businesses. It is intended for the use of individuals with regular income[248] and those who want to keep some of their assets.[249] Its use has become more popular by debtors who own small businesses and debtors who failed in payment for debt secured by mortgage.[250] Unlike Chapter 7 bankruptcies, under Chapter 13 there is no liquidation and all the debtor has to do is to come up with a plan of repayment[251] that should be accepted by the bankruptcy judge.[252] Debtor is not required to give up his/her assets, exempt or otherwise, and only has to propose a plan for repayment to be executed in the future, usually lasts between 3 to 5

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[242] *Id.*

[243] *See* BARRY E. ADLER *ET AL*, *supra* note 110, at 80.

[244] *Id.*

[245] *Id.*, at 81.

[246] *Id.*

[247] *See* Michelle J. White, *supra* note 19, at 210; *see also* DAVID G. EPSTEIN *ET AL*, *supra* note 41, at 13.

[248] *See* Michelle J. White, *supra* note 156,at 691.

[249] *See* Elijah M. Alper, *supra* note 174, at 1914.

[250] *See* DOUGLAS G. BAIRD, *supra* note 45, at 50.

[251] *See* THE BANKRUPTCY CODE, *supra* note 183, § 1322.

[252] *See* Michelle J. White, *supra* note 19, at 210.

years.[253] Under Chapter 13 the debtor keeps his/her assets but has to give up his/her future income.[254] That means the debtor has to pay the creditors in installments out of his 'disposable income'.

A Chapter 13 discharge allows discharge of some of the debts that are 'excepted' under section 523(a).[255] With the exceptions of "alimony and child support, student loan, DUI (driving under influence) debts, and debts for restitution of criminal fine,"[256] all other debts that were 'excepted' under Chapter 7 case are dischargeable under Chapter 13. In this regard, a Chapter 13 discharge is much broader than Chapter 7 discharge. This is intended to incentivize filing under Chapter 13 where the debtor has to pay a portion of his debts allowing creditors' a repayment to a certain extent. The discharge under this chapter is, therefore, called "super discharge" making only very few debts non-dischargeable.[257] Hence, under Chapter 13 plan, it is possible for the debtor to keep all his assets while enjoying wider scope of dischargeable debts.[258]

Unlike in Chapter 7, there is a restriction on the use of chapter 13.[259] Debtor with a debt of more than 250,000 for unsecured and 750,000 for secured debts are not eligible for chapter 13 bankruptcy.[260] One can see from the above figures that "chapter 13 is designed for working with individual debtors or couples with limited financial affairs, typically consumers or proprietors of small businesses."[261]

Chapter 13 plan is subjected to important conditions. First, the plan shall provide for the full satisfaction, in differed payments, of all claims entitled to priority under section 507 unless the holder of the priority claims agrees to a different treatment of such claim.[262] The plan should not discriminate between claims of a particular class, if any.[263] Second, the debtor has to pay his/her

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[253] *See* Michelle J. White, *supra* note 19, at 210; *see also* Barry Adler *et al*, *supra* note 175, at 587; Michelle J. White, *supra* note 156, at 691.

[254] *See* BARRY E. ADLER ET AL, *supra* note 110, at 621.

[255] *See* CHARLES J. TABB & RALPH BRUBAKER, *supra* note 7, at 511; Michelle J. White, *supra* note 156, at 210; *see also* BARRY E. ADLER ET AL, *supra* note 110, at 621.

[256] See DOUGLAS G. BAIRD, *supra* note 45, at 49; *see also Charles* J. TABB & RALPH BRUBAKER, *supra* note 7, at 511.

[257] See DOUGLAS G. BAIRD, *supra* note 45, at 48.

[258] *Id., at* 49-50.

[259] *Id., at* 50; *see also* BARRY E. ADLER *ET AL*, *supra* note 110, at 621.

[260] Id.; *See also* THE BANKRUPTCY CODE, *supra* note 183, *§* 109. The amount is subject to change every 3 year by regulation to reflect inflation.

[261] *See* DOUGLAS G. BAIRD, *supra* note 45, at 49.

[262] *See* THE BANKRUPTCY CODE, *supra* note 183, § 1322 (2).

[263] *Id*.

disposable income for five years, if not the creditor should receive, as of the effective debt of the plan, an amount he/she would have received if the debtor opted for a Chapter 7 bankruptcy.[264] This will ensure that the creditor is not going to be treated less favorably than he would have been under chapter 7.

Generally, Chapter 13 has several advantages over Chapter 7 bankruptcy. First, creditors are more protected under Chapter 13 than Chapter 7. They are paid from a projected 'disposable income' in 3 and 5 years if income is less than the median and above the median respectively.[265] And Chapter 13 cases pay creditors more than Chapter 7 do. As it is discussed under section 1.4, most often, Chapter 7 cases leave no asset and chance of the creditors getting paid is very slim. The second benefit is the debtor can keep his/her assets and collaterals under Chapter 13. This will avoid the giving up of an asset to the creditor who may value the property less than the debtor values it. Finally, under Chapter 13, there are only few non-dischargeable debts than under Chapter 7.

Chapter 7 and Chapter 13 have, therefore, basic differences. Chapter 7 is designed for lower middle class working persons while Chapter 13 is intended to be used by wage earners and working individuals with limited financial affairs. In a Chapter 7 case, the debtor has to give up all his non-exempt assets to the creditors, but in Chapter 13, debtor keeps the assets and pay out of future income. So, in the former case, future income is protected, but in the latter, assets and existing property are protected. In addition, discharge under Chapter 7 is automatic and it bars any move by the creditor for the enforcement of his/her claim, but the discharge under Chapter 13 is after the completion of the plan.[266]

3. Chapter 12

Chapter 12 is a special chapter intended for the use of family farmers and fishermen with regular income.[267] Special treatment for farmers under bankruptcy dates back to 1898[268] but the protection was on temporary basis.[269] This was in response to the farm crises that affected many farmers and subjected them to bankruptcy proceedings that may culminate in foreclosure of their farm.[270] It

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[264] *See* DOUGLAS G. BAIRD, *supra* note 45, at 50-51.

[265] *See* DOUGLAS G. BAIRD, supra note 45, at 51.

[266] *See* THE BANKRUPTCY CODE, *supra* note 183, § 1328.

[267] *See* DAVID G. EPSTEIN ET AL, *supra* note 41, at 15; see also the Bankruptcy Code, *supra* note 183, § 109 (f).

[268] *See* Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729 (2005), at 730.

[269] *See* DOUGLAS G. BAIRD, *supra* note 45, at 57.

[270] *See* Katherine M. Porter, *supra* note 268, at 731.

became part of the Bankruptcy Code on permanent basis after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[271]

What is peculiar in Chapter 12 from Chapter 13 is that the former is restricted to farmers and fishermen use while the later can be used by individuals with regular income irrespective of the source of such income.[272] The two chapters are also different in the type of debtor entitled to relief under the respective chapters. In Chapter 12, partnerships and corporations can file for relief while Chapter 13 is restricted to individuals with regular income.[273] The debt ceiling is also higher in Chapter 12 than in Chapter 13 making debt adjustment opportunity wider.[274]

The Chapter tries to strike a balance between two conflicting interests.[275] On the one hand the law makes sure that the farmers still hold their farms and fishermen their boats even when they owe secured creditors more than the value of their assets (land or boat).[276] On the other hand, the law has to ensure the security interest and rights on the property creditors have.[277]

Despite its long history and ambition, the achievement of Chapter 12 is being criticized as insignificant.[278] There are very few Chapter 12 bankruptcy cases.[279] One reason is that farmers in United States are very few in number (the number is dropping) and Chapter 12 filings are few compared to other types of bankruptcies.[280] Another possible reason is that farmers opt for Chapter 7 or 13 bankruptcies because farmers face similar grounds for being in financial distress, such as illness or divorce, and not necessarily secured farm debt. There are also evidences that bankruptcy contribution to the decline in farms in United States is insignificant making the response by way of chapter 12 unviable.[281] These reasons might have a hand in the limited use of chapter 12 filing while the number is soaring in Chapter 7 or Chapter 13 bankruptcy.

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[271] *See* DOUGLAS G. BAIRD, *supra* note 45, at 57.
[272] *See* DAVID G. EPSTEIN ET AL, *supra* note 41, at 16.
[273] *See* Katherine M. Porter, *supra* note 268, at 732.
[274] *Id.*
[275] *See* DOUGLAS G. BAIRD, *supra* note 45, at 56.
[276] *Id.*
[277] *Id.*
[278] *See* Katherine M. Porter, *supra* note 268, at 741.
[279] *Id.*
[280] *Id.*
[281] *Id., at* 742.

B. Individual Insolvency Law in Germany

Before the enactment of the 1999 Insolvency Act, consumer debtors in Germany were not allowed to file for bankruptcy. Pre-1999 German insolvency laws were not favorable to consumer debtors.[282] Theoretically, it was possible to enter into settlement agreements between debtors and creditors that provide for less-than-full payment of the debt.[283] But there were hurdles from realizing the benefits of such arrangement. On the one hand, the creditors' consent is required for the settlement that may in most cases go against the interest of the debtor.[284] On the other hand, the debtor has to have a plan for payment of at least certain percentage of the claims, which was not affordable by most consumers.[285] Moreover, the debtor should have a certain level of minimum assets to defray costs of proceedings.[286] This made individuals' access to the then insolvency laws a theoretical possibility than practical reality. Even for those who passed the hurdle, there was no such a thing called discharge[287] and the law was meant to facilitate creditors' collection efforts.[288] Debtors were supposed to repay their debt no matter how difficult it might be. The core of this policy was protection of the principle of party autonomy, and intervention by way of discharge was seen as against this principle.[289] Accordingly, before the 1999 German Insolvency Act, individuals' access to bankruptcy was very limited and discharge was not possible.[290] For the first time, consumer bankruptcy and discharge was introduced in the 1999 Insolvency Act.[291] This was as a reaction to rising over-indebtedness problem that was exacerbated by the deregulation of consumer credit in Germany since 1970s.[292]

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[282] *See* Jason J. Kilborn, *supra* note 158, at 262.

[283] *Id.*

[284] *Id.*

[285] *Id.*, at 262-263.

[286] *Id.*, at 263.

[287] *See* Susanne Braun, *German Insolvency Act: Special Provisions of Consumer Insolvency Proceedings and the Discharge of Residual Debts*, 7 GERMAN L. J. 59 (2006), at 65-66, available at*http://www.germanlawjournal.com/index.php?pageID=11&artID=686*, (last visited on 29 March 2014).

[288] *See* Jason J. Kilborn, *supra* note 158, at 264-265 & 269.

[289] *See* Susanne Braun, *supra note 287, at* 66; *see also* Jason J. Kilborn, *supra* note 158, at 268.

[290] *See* Robert Anderson *et al, (ed.) supra* note 6, at 21.

[291] *Id.*, at 21 & 59; *see* JOHANNA NIEMI *ET AL*, *supra* note 3, at 274.

[292] *See* Susanne Braun, *supra* note 287, at 60; *see generally* Jason J. Kilborn, *supra* note 158, at 260-262; *see also* JOHANNA NIEMI *ET AL*, *supra* note 3, at 273.

Currently, honest debtors are entitled to relief by way of individual insolvency.[293] Individual can request the court for the discharge of his/her debt under Section 287 of the Insolvency Act of 1999.[294] Discharge and fresh-start under German law is intended to protect the individual from undue harassment and reintegrate him/her economically.[295] The requirement to file for individual insolvency is inability to pay debts, illiquidity, when they fallen due.[296] The insolvency should be permanent.[297] Over-indebtedness is not a requirement to institute consumer bankruptcy proceedings.[298] To institute individual insolvency proceeding, the debtor has to cover proceeding cost under the pain of dismissal[299] and should have assets to pay certain portion of his/her debt to the creditors.

The German model of discharge is known as "*an earned fresh start"* and the individual debtor has to pass through different stages and a long six-years of hard work, paying a portion of his/her debt and showing good behavior.[300] Individual insolvency proceeding in Germany involves four stages.[301] The first stage is out-of-court settlement phase.[302] It is a compulsory requirement for the debtor to try to reach an amicable settlement of the debt before opting for insolvency proceeding. To that effect, a certificate from attorney or credit counseling institution is necessary.[303] In the second phase, the same attempt, with the discretion of the court, may be repeated before courts.[304] This is because the out-of-court settlement could be easily defeated by the refusal of one of the creditors.[305] In this phase, the court may force dissenting creditors to accept the plan on condition that the plan

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[293] See GERMAN INSOLVENCY CODE OF 5 OCTOBER 1994 (BGBl. [FEDERAL LAW GAZETTE] I, at 2866), last amended under Art. 2 G dated 21 October 2011 (Federal Law Gazette I, at 2082, hereinafter, German Insolvency Code), Section 286 & ff.

[294] *See* Susanne Braun, *supra* note 287, at *66.*

[295] *Id.*

[296] *See* GERMAN INSOLVENCY CODE, *supra* note 293, section 17.

[297] *See* Susanne Braun, *supra* note 287, at 63.

[298] *See* GERMAN INSOLVENCY CODE, *supra* note 293, Section 19.

[299] *See generally* Susanne Braun, *supra* note 287*; see also* the German Insolvency Code, section 26 (1).

[300] *See* Robert Anderson *et al, (ed.) supra* note 6, at 21; *See* Susanne Braun, *supra* note 287, at 66.

[301] *See* JOHANNA NIEMI, *ET AL*, *supra* note 3, at 274-75; M. Gerhardt, Consumer Bankruptcy Regimes and Credit Default in the US and Europe: A Comparative Study, (CEPS Working Document No. 318, 27 July 2009, at 8), available at http://aei.pitt.edu/11336 / (last visited on 11 March 2014).

[302] *See* Jason J. Kilborn, *supra* note 158, a t272: JOHANNA NIEMI *ETAL*, *supra* note 3, at 274-275.

[303] *See* Robert Anderson *et al, (ed.) supra* note 6, at 21 & 60; *see* THE GERMAN INSOLVENCY CODE, *supra* note 293, sec. 305 (1).

[304] *See* Robert Anderson *et al, (ed.) supra* note 6, at 21.

[305] *See* Jason J. Kilborn, *supra* note 158, at 275-276.

does not discriminate those creditors unduly.[306] The importance of this phase is declining through time.[307] If all efforts of negotiated settlement, out of court or court supervised, fail simplified liquidation procedure will follow.[308] This is the third phase of consumer bankruptcy process.[309] The debtor is required to turn over all non-exempt assets, if any, to the trustee appointed by the court, assets will be sold and proceeds thereof will be paid to the creditors [310] in addition to covering the cost of proceedings. But like in the United States Chapter 7 cases, this phase has no practical use because consumer debtors, at least in most cases, do not have assets.[311]

The last phase is where the debtor will be put to a six-year-long "good behavior period", successful completion of which will bless the debtor with discharge.[312] This is followed by a kind of probation-type period, known as "good behavior", where the debtor has to show good character paying a certain portion of his/her income, engage in gainful employment, transfer to the trustee half of the value of the property from inheritance, inform his change of addresses etc for a period of six years.[313] After successful six-year payment period, discharge will be granted, save for exceptional cases where it may be denied.[314] The grounds of denial of discharge include criminal conviction, fraudulent or false written statements about his economic situation, grant or refusal of discharge in ten years time, impaired creditors interest by wasting assets or delaying insolvency proceeding etc.[315]

There are certain debts that are 'excepted' from discharge, hence non-dischargeable. These include tort claims, fines, administrative penalties and incidental consequences of administrative or criminal offence, liabilities from interest-free loans granted to the debtor to pay costs of insolvency proceedings.[316] If the court decides to give discharge and fresh start for the debtor, the trustee will be appointed and emoluments will be vested to the trustee by way of statement of

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[306] *Id*., at 276.

[307] *Id*., at 276-277.

[308] *Id*., at 278.

[309] *See* JOHANNA NIEMI *ET AL*, *supra* note 3, at 275.

[310] *See* Robert Anderson *et al (ed.)*, *supra* note 6, at 21.

[311] *See* Jason J. Kilborn, *supra* note 158, at 278-79; JOHANNA NIEMI *ET AL*, *supra* note 3, at 336.

[312] *See* M. Gerhardt, *supra* note 305, at 8; see *also* Jason J. Kilborn, *supra* note 158, at 272.

[313] *See* Robert Anderson *et al, (ed.) supra* note 6, at 21; *See* Susanne Braun, *supra* note 287, at 66; *see also* THE GERMAN INSOLVENCY CODE, *supra* note 293, section 295.

[314] The GERMAN INSOLVENCY CODE, *supra* note 293, Sections 300 & 296.

[315] *Id*., Section 296.

[316] *Id*., Section 302.

assignment.[317] The trustee is responsible for monitoring the distribution of assets during the debtor's "good behavior" period.

The scope and nature of discharge introduced is, however, different, by far, from that of United State's concept of discharge.[318] There is no full discharge as in United States and it is not European way to let the debtor walk-off without paying anything.[319] The European understanding of consumer bankruptcy is rather re-adjustment and rehabilitation where by the individual debtor has to earn the fresh start by his effort. This recognizes "human capital" as valuable economic interest both for debtor and creditor in credit transaction.[320] This is a departure from the conventional view that credits are provided against tangible assets.[321] The debtor will be released only of the residual debts and enjoy fresh start. Accordingly, all creditors, even those who did not file a claim, are barred from any collection efforts against the debtor.[322]

Under German individual insolvency proceedings, it is not true that the creditors will be paid during the "good behavior" period. As in the case of United States' Chapter 7 cases, in most cases, the plan may not pay at all.[323] This is due to high level of exemption on the future income of the debtor. There are scholars who question the need for such six-year-long financial probation period of "good behavior" if it is proved that it is not paying the creditors, at least in most cases.[324] According to them, the German model of discharge is rigid because it does not distinguish between those who really are able to make a certain percentage of payments (those who can cope with the "good behavior period") and those who cannot.[325] No matter how penniless the debtor is or in urgent need of immediate fresh start, the six-years-long process and accompanying obligations nevertheless

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[317] *Id*., Section 291 & 287.

[318] *See* Robert Anderson *et al, (ed.)* supra note 6, at 21; indeed, United States Chapter 13 discharge has similarity with the German model. In both laws, there is repayment plan for a certain period of time. But still they have differences in that the German model is applicable for all debtors irrespective of their income or ability to pay, but United States chapter 13 is available only for those with regular income.

[319] *See* Jason J. Kilborn, *supra note 158,* at 281; *see also Ramsay*, Iain D. C, *supra* note 10, at 250-251.

[320] *See* Jason J. Kilborn, *supra* note 158, at 281-282.

[321] *Id.*, at 282.

[322] The GERMAN INSOLVENCY CODE, *supra* note 293, Section 301.

[323] *See* Jason J. Kilborn, *supra* note158, at 285-86, as cited in JOHANNA NIEMI *ET AL*, *supra* note *3*, at 341.

[324] *See* JOHANNA NIEMI *ET AL*, *supra* note 3, at 288.

[325] *See* Robert Anderson *et al (ed.)*, *supra* note 6, at 21-22.

has to be followed.[326] There are two European approaches in this regard. Some jurisdictions such as France and Sweden have such distinction with the view of helping those penniless debtors get immediate discharge without going through the period of repayment plan.[327] This is what some scholars call it the "*mercy model*".[328] But the German approach, known as "*liability model*",[329] sticks on the repayment of the debt. This is the weakness of the German individual insolvency law because it is not tailored according to the need of different types of debtors.

Some other scholars see that rule in a positive way than letting the debtor walk-off right after the conclusion of the insolvency proceeding.[330] According to this later view, by doing so, the hidden policy of the German law is to teach the debtor's financial responsibility and reintegrate him to the society than paying creditors.[331] In fact such good behavior period is a kind of financial responsibility lesson for the debtor. So the six-year period have a rehabilitative function. However, it isstill questionable whether this lesson's value is worth for penniless debtors who will be doomed to lead poor living standard abandoning several social activities, cutting nutrition, engaging in illicit economic activities etc.[332]

Another shortcoming in the individual insolvency practice in Germany is the limited availability of debt counseling institutions.[333] This will put the viability of out-of-court settlement phase in question for the indigent debtor.[334] Debt counseling has become very crucial instrument of dealing with consumer bankruptcy problems and the access and quality of the service has significant impact in the individual insolvency legal regime. Despite these benefits there seem to be a limited access to the service in Germany.

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[326] *Id*.

[327] *See* JOHANNA NIEMI *ET AL*, *supra* note *3*, at 340.

[328] *See generally* Jan-Ocko Heuer, Social Inclusion and Exclusion in European Consumer Bankruptcy Systems, Paper for the conference Shifting to Post-Crisis Welfare States in Europe? Long Term and Short Term Perspectives, (Berlin, 4-5 June 2013) available at https://www.academia.edu/3992692/Social_Exclusion_in_European_Consumer_Bankruptcy_Systes (last visited on 29 March 2014).

[329] *Id*.

[330] *See generally* Jason J. Kilborn, *supra* note 158.

[331] *Id., at* 296.

[332] *See* JOHANNA NIEMI *ET AL*, *supra* note *3*, at 287-88.

[333] *Id., at* 288.

[334] *Id*.

IV. OVERVIEW OF ETHIOPIAN BANKRUPTCY LAW AND VIABILITY OF INTRODUCING CONSUMER BANKRUPTCY LAW TO ETHIOPIA

Bankruptcy issues under Ethiopian law are, in principle, governed under Book V of the Commercial Code of Ethiopia adopted in 1960.[335] The sources of this law are the 1955 French bankruptcy legislation and Italian Insolvency Act of 1942.[336]

Ethiopian bankruptcy law is one of the most unsuccessful legal transplants in terms of practical utility.[337] Several factors accounted for the disuse of the bankruptcy provisions of the Commercial Code in court of law. The first reason was socialist political economy that prevailed in the country from 1974 through 1991 where the government controlled almost all economic activities.[338] Entrance and exit in the market was not determined by economic factors. There was no competition in the market and the only player was the government. That had affected the use of bankruptcy procedure until 1991. The other reason is that bankruptcy has not been in the academic curriculum of Ethiopian law schools and legal professional have little knowledge and experience in the subject.[339] It is only recently that this subject is in the curriculum of law schools. Finally, different legislations such as foreclosure laws undermined the role bankruptcy could have played in the business.[340] So, the bankruptcy law of Ethiopia is least used and least developed subject.

The stance of Ethiopian bankruptcy law, as applied to businesses, is not even business friendly. A look at the structure of the Code reveals that Ethiopian bankruptcy law is pro-liquidation than reorganization of businesses.[341]

Ethiopian law limits the application of the bankruptcy law to traders and excludes non-trader individuals from its scope.[342] Hence, the subjects of bankruptcy law are only "traders" i.e., persons engaged in commercial activities

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[335] THE COMMERCIAL CODE OF THE EMPIRE OF ETHIOPIA, NEGARIT GAZZETTE 19TH YEAR NO 3, Birihanina Selam Printing Press, Proclamation No. 166 of 1960, (hereinafter, the COMMERCIAL CODE OF ETHIOPIA) Articles, 968-1168; there are some other legislations such as banks foreclosure law or legislations only applicable for public enterprises.

[336] *See* Taddesse Lencho, *supra note 5*, at 62.

[337] *Id., at* 57.

[338] *Id., at* 58.

[339] *Id., at* 58-59.

[340] *Id., at* 59. To-date, there are only two court cases. For a legislation with this age it is shows a kind of ineffectiveness of the legal transplant.

[341] *Id., at* 63.

[342] *Id., at 69-70; see* the COMMERCIAL CODE OF ETHIOPIA, *supra note 335*, Article 968 69-70; *See also* Booz/Allen/Hamilton, *infra* 343, at 54; *see also* Tilahun Teshome *et al, Position of the Business Community on the Revision of the Commercial Code of Ethiopia*, July 2008, at 82-83.

within the meaning of Article 5 of the Commercial Code. Individuals can only file for bankruptcy if they qualify as traders and the debt is commercial debt.[343] It is consistent with the old times classical bankruptcy law philosophy that restricted the procedure to merchants only.

Before and after Ethiopian bankruptcy law was adopted, the traditional function of bankruptcy law in most, if not all, jurisdictions was liquidating and reorganizing businesses. Ethiopian legislatures adopt the same philosophy the revised 1955 French bankruptcy legislation had towards bankruptcy. But the latter has departed from the philosophy that restricted bankruptcy law to merchants in 1989 and today individuals are entitled to relief in the form of discharge.[344]

The justifications for excluding individuals from the 1960 bankruptcy law are obvious; access to credit and indebtedness used to be issues for businesses and not consumers. And important moral and legal principle under Ethiopian contract law that "failure to keep a promise is worse than losing a descendant" an equivalent of *'Pacta sunt servanda'* demands debts to be paid than the law intervene to free individuals from their repayment obligations. In this regard Ethiopian bankruptcy law was perfect of its time.

There were several reasons that make the 1960 Commercial Code bankruptcy provisions adequate enough for the needs of the time, at least until 1991. In Ethiopian business activities were least developed and dominated by small and medium government owned (public) enterprises. There was no competition in the market and there was no risk of failure and exiting the market. Publicly financed companies or businesses will continue operating even at loss. It is only after 1991 that the Ethiopian economic policy was shifted to market economy giving the way for private businesses and entrepreneurial activities to emerge. Another reason accounted for the merchant oriented bankruptcy law is that in Ethiopia debt was not something good and access to consumer credit was very limited. Failure to repay one's debt is still highly stigmatized. With these factors,the bankruptcy law as incorporated under the Commercial Code was adequate enough to ensure creditors protection, the only concerns of bankruptcy law of the time. But the law failed to keep track of changed bankruptcy philosophies and developments[345] in response to the development of commerce, entrepreneurship, availability of consumer credit, consumer over-indebtedness, and absence of government social

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[343] Booz, Allen & Hamilton, Ethiopian Commercial Law And Institutional Reform And Trade Diagnostics, (USAID Jan 2007), at 54.

[344] *See* Robert Anderson *et al (ed.) supra* note 6, at 19.

[345] *See* Taddese Lencho, *supra* note 5, at 95.

safety net programs.

Currently, the Ethiopian Commercial Code is under revision and there are recommendations from some scholars and experts for the inclusion of consumer bankruptcy into the upcoming amendment.[346] Others simply call for the policy makers to reconsider the issue of consumer bankruptcy emphasizing on the benefits it has towards entrepreneurship.[347] Therefore, whether Ethiopia has to introduce consumer bankruptcy law, factors calling for change of paradigm, the model it has to follow, if at all consumer bankruptcy is demanding, will be discussed in the coming sections.

A. Consumer Bankruptcy Law for Ethiopia

As pointed out so far in this article[348] bankruptcy law used to be restricted to the use of merchants and to protect creditors and help them in debt collection process, mainly through liquidation. Accordingly, only businesses were concerns of most bankruptcy legislations worldwide. This is still true under Ethiopian law where only businesses, and not consumers, can apply for bankruptcy.

Today, in other jurisdictions the scope of bankruptcy law has been extended to individuals as well. In United Kingdom and United States, consumer bankruptcy was introduced as a reaction to liberalization of credit and the accompanying over-indebtedness.[349] In Germany, the consumer insolvency rules were introduced in the 1999 Insolvency Act with a view to giving relief to debtors after the consumer over-indebtedness that occurred since 1970s. In France, consumer bankruptcy and debt readjustment were introduced in 1989 because of consumer over-indebtedness. This is true for most European countries that liberalized their bankruptcy law to include consumer debtors.

As discussed in section II (C) several factors led to justify the adoption of consumer bankruptcy into the legislations of many jurisdictions. Some of the reasons include, but are not limited to, industrialization, expansion of trade and commerce, deregulation of credit, individuals' access to credit and indebtedness, entrepreneurial friendly policies, reduction in the welfare activities of governments, etc. The question worth asking at this point is whether there is a need to introduce consumer bankruptcy rules to the Ethiopian legal system. There are no

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[346] *See* Tilahun Teshome *et al*, supra *note 342, at* 82-83; In fact these experts suggest, as I agree, that consumer bankruptcy matters being non-commercial will fit into separate legislation or civil procedure code.

[347] *See* Booz, Allen & Hamilton, *supra* note 347, at 54.

[348] *See* Section II of this article.

[349] *Id*.

empirical studies on increasing consumer debt or over-indebtedness in Ethiopia. And nothing is written on the issue. But taking the experience of the different jurisdictions studied in this article, introducing consumer bankruptcy as well as discharge and fresh start to Ethiopia will have a paramount importance.

Generally, bankruptcy law provides an alternative to judicial procedures of enforcing claims. As such, it solves the following problems inherent in non-bankruptcy procedure of enforcement of claims. Non-bankruptcy law provides for a procedure where creditors, individually, using state's power, seize non-exempt assets of the debtor to satisfy their claims. But non-bankruptcy law only regulates relationship between debtor and creditor and not creditors *inter se*. This will lead to several wasteful litigations, in terms of courts' time and parties' costs, as there are multiple creditors. The debtor will also be harassed as many times as there are creditors. It may also happen that first comer will take everything and hence, inequitable for the other creditors. So, consumer bankruptcy will solve collective action problem in the same way business bankruptcy does.[350] The assets of the individual will be given to a person, trustee, who has to liquidate and distribute to the creditors according to their share in the claims. This justification of bankruptcy, though the pioneer reason, is becoming obsolete because the debtor has no assets in most straight bankruptcy cases. Nevertheless, this justification for consumer bankruptcy is still cited as one of the most important justification. Consumer bankruptcy and fresh start is also a good incentive for debtor's cooperation in the collection process. If the debtor knows that he will be forgiven he will not hide or transfer assets and disrupt the opportunity to start afresh. Generally, there is an incentive not to engage in any fraudulent activities and disrupt the debt collection procedure.

It is discussed that many countries have adopted consumer bankruptcy laws after they deregulated their credit markets. In Ethiopia, there is no such deregulation and rather the financial sector is highly regulated and dominated by state banks.[351] Nevertheless, individuals, especially from urban areas, are getting access to credits.[352] In addition to state banks, there are several private banks, micro-finance institutions and saving and credit associations operating in the

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[350] *See* Margaret Howard, *Supra note 27, at* 1049.

[351] Ethiopia; Financial Sector Profile, available at http://www.mfw4a.org/ethiopia/ethiopia-financial-sector-profile.html (last visited on 16 March 2014).

[352] Commercial Bank of Ethiopia; http://www.combanketh.et/DomesticBanking/CreditFacilities.aspx; Ethiopia: Providing poor people living in rural areas sustainable access to financial services, available at http://www.ifad.org/evaluation/public_html/eksyst/doc/profile/pf/rfip.htm (last visited on 16 March 2014).

country. Individuals are having access to unsecured consumer credit directly or indirectly and are, therefore, exposed to the risk of misguided indebtedness problems. This will make more sense when Ethiopia introduces credit card system in the future.

From the debtor's perspective, consumer bankruptcy will solve the dis-incentive of the debtor to acquire property or engage in gainful employment in the future if there is a judgment creditor who is waiting to enforce a claim against the debtor. Without discharge and fresh start, "honest but unfortunate debtor" will be alerted perpetually by the judgment creditor looking to satisfy his claims. Consumer bankruptcy will play a role in providing relief, rehabilitation and reintegration tool.

Like in other jurisdictions, the social-insurance function of bankruptcy can be a good reason to adopt consumer bankruptcy law to the Ethiopian legal system. Studies show that, in countries where there are extensive welfare and safety-net programs by the government, there are limited reliefs or no relief at all under their bankruptcy law.[353] Conversely, in countries where there are no social safety net programs, there is a generous relief under their consumer bankruptcy law. In Ethiopia, the governmental social security scheme and safety net programs are very limited and inadequate. This gap can be addressed by adopting well-crafted consumer bankruptcy law.

Entrepreneurial analysis of bankruptcy also suits the current entrepreneurial policy of Ethiopia. Entrepreneurship is an area where Ethiopia is trying hard as part of the poverty reduction strategy. The first debt, before starting a business, is usually a personal (consumer) debt. Not being traders, entrepreneurs will not be allowed to file for bankruptcy under Ethiopian law. When the entrepreneur failed to repay the amount he owed for his start-up, he will be treated under non-bankruptcy law and will be harassed by judgment creditor indefinitely. This is not good for entrepreneurship. When entrepreneurs are punished for their failure, they will have less incentive to take risks. In order to encourage entrepreneurship and risk taking, among other things, consumer bankruptcy law that will forgive genuine debtors, who failed in their startups, is important. This will complement the current entrepreneurial policy of Ethiopia.

Furthermore, in Ethiopia most of the businesses are carried out at the level of mid-scale, small and micro enterprises that include partnerships and sole proprietorships. In fact the persons engaged in any of those business vehicles have

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[353] *See* R Adam Feibelman, *supra note 83,* at 184-186.

the access to bankruptcy law because they are traders within the meaning of Article 5 of the commercial code.[354] But the fact that the liability of the owners is unlimited in these unincorporated businesses will make it very risky for individuals to engage in these businesses.[355] Individual owner will not benefit out of bankruptcy once the business is gone. Creditors still can have an action against the debtor because of unlimited liability, in most cases. This will have negative impact on entrepreneurship and self-employment. So adopting consumer bankruptcy law insures such risk taking by entrepreneurs.

Moreover, today indebtedness is not a matter for businesses only. That phenomenon has gone long ago when credit was only available for businesses. Today credit is available for consumers as well and indebtedness also affects real people. To this effect, consumer bankruptcy with adequate discharge is proved to be a good solution. There should be the chance for those who defaulted in their obligation to start life as productive members of the society. They should be forgiven and rehabilitated.

In conclusion, indebtedness is a universal problem. All countries, whether industrialized or not, face the problem of indebtedness. If it is a real problem for developed countries with high per-capita, high employment rate and developed insurance schemes, it should, for a stronger reason, be a problem in Ethiopia, which is at the opposite tail of those indicators. Different jurisdictions adopt consumer bankruptcy and give relief for those debtors in the form of discharge and fresh start. The primary goal of consumer bankruptcy and fresh start is tied with the problem of indebtedness but it is also justified out of the reasons discussed above and other parts of the thesis. It is, therefore, my argument that Ethiopia should adopt consumer bankruptcy law.[356]

B. Which Model for Ethiopia?

The question worth to be asked at this juncture is the kind of debt relief system that can be adopted to suit the special situation of the country. The models of relief and scope of fresh start differs from jurisdiction to jurisdiction and depends on several factors such as the socio-economic and political situations of each country. Some jurisdiction, like United States, give generous relief and automatic discharge while others, such as Germany, gives the relief in a different

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[354] *See* The COMMERCIAL CODE OF ETHIOPIA, *supra note 335,* Article 5 & 968.

[355] *See* Ramsay, *supra* note 115, at 79.

[356] This suggestion is, however, based on theoretical findings than empirical studies for the later is lacking in the current context of the country's research and legal/business and economics scholarship.

way from the former. In United States the consumer bankruptcy has three categories namely chapter 7 (for all individuals), chapter 12 (farmers and fishermen) and 13 (wage earners and working couples).[357] The United States model is tailored to fit the special needs of different segments of the society. Chapter 7 is designed for those debtors who have not the ability to pay their debts. Chapter 12 is designed for the special need of farmers and fishermen who need to keep their land and farm instruments even when those assets are given as a security for debts. Chapter 13 is a repayment plan for those who are able to pay out of their future income. Chapter 13 is, therefore, similar to the German repayment plan procedure. In Germany, there is only one procedure for all individuals and they have to go through series of procedures such as negotiated settlement, both out-of-court and in-court, and culminated in the repayment plan the successful completion of which will earn the debtor fresh start.[358]

For Ethiopia, I will suggest that *German-type* consumer bankruptcy that would fit to the realities of the country. Ethiopia is one of the world's poorest countries.[359] Yet, it is one of the fastest growing economies.[360] There is a need for consumer bankruptcy as the economy is growing and credits are becoming available. But also, a generous discharge of debts will not be a viable option for a very infant economy Ethiopia has. So, the consumer bankruptcy I am advocating should take into consideration these factors.

To have a United States type generous discharge and tailored to the different segments of the society will not be viable solution for the country for reasons that are socio-economic. One the one hand a generous discharge as in the United States will hurt the financial sector. More importantly, it will be unbearable burden for Ethiopia if a financial crisis, such as the global financial crisis in 2008, occurs in Ethiopia. The other reason against United States-type consumer bankruptcy is that credit is not available for everyone in Ethiopia. Credits are, mostly, available for people living in urban areas. Most of the entrepreneurial activities and start-ups are also concentrated in major cities and urban areas making the risk of indebtedness more acute for this segment of the society. In rural areas, for farmers, access to

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[357] See *supra* Section 2.1 of this article.

[358] See Section 2.2.

[359] Global Finance, The Poorest Countries in the World, available at http://www.gfmag.com/component/content/article/119-economic-data/12537-the-poorest-countries-in-the-world.html#axzz2w9Xb7SEc (last visited on 17 March 2014).

[360] Ethiopia Economic Update – Laying the Foundation for Achieving Middle Income Status, available at http://www.worldbank.org/en/news/press-release/2013/06/18/ethiopia-economic-update-laying-the-foundation-forachieving-middle-income-status; also at http://time.com/22779/forget-the-brics-meet-the-pines/ (last visited on 18 March 2014).

credit is very limited and they are not exposed to the risk of over-indebtedness. Indeed, farmers have access to credit through micro finance and rural saving and credit associations. One could also state that in Ethiopia farmers do take credits in the form of fertilizers and improved seed varieties and are thus exposed to the risk of indebtedness. But all these credits are highly regulated and monitored by government and saving and credit associations on a day-to-day basis. Hence, the risk on farmers is not a serious one. Moreover, ownership of land belongs to the government and individuals are not exposed to the risk of losing their land because of debt.[361]This is true for small-scale individual farmers and the assertion may not apply to mechanized farming owned by investors. Therefore, farmers do not need special protection like their United States' counterpart. The other reason for not adopting United States-type consumer bankruptcy is the societies' attitude towards failure to pay one's debt. In Ethiopia, failure to pay one's debt is highly stigmatized. As the saying goes, "failure to keep a promise is worse than losing a descendant." This is the equivalent of '*pacta sunt servanda',* which is a grand norm in contract law. Devising a rule for Ethiopia like the United States bankruptcy law, where the debtor just walks-off without paying a penny, will be against the belief of the business community. Also consumer bankruptcy law to be adopted shall be just a single type of procedure, as in Germany, to everyone.

Another issue that comes with adopting consumer bankruptcy procedure is the issue of who will finance the system. It will be huge burden for a country like Ethiopia, especially in case of financial crises, to cover costs of proceeding in consumer bankruptcy cases where the debtor may not have sufficient assets for that purpose. In order to solve this problem, the conditions of discharge should be devised in such a way that the individual debtor has to cover the costs of proceedings and come up with a plan of repayment for a certain period of time. That should be the price individual has to pay to get a fresh start. This will make sure that the financial/ credit market is not going to be hurt and the individual after successful completion of the plan will get fresh start. Introducing consumer bankruptcy law does not require a separate institution or bankruptcy courts in Ethiopia. It will be brought to the same court and judges that handle business bankruptcy cases. The trustee system is also already in place. Therefore, there is no additional cost to set up institutions in this regard.

In conclusion, designing consumer bankruptcy regime needs careful considerations of socio-economic situations of the country. The effect of consumer

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[361] THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995, Art. 40 (3).

bankruptcy system is that honest and deserving debtors will get fresh start. In doing so consumers are protected from bad lending practices. With fresh start worth entrepreneurship ideas are encouraged and failed individuals are rehabilitated and reintegrated back to the society. In Ethiopia introducing consumer bankruptcy with discharge and fresh start for "worthy debtors" will have paramount importance in several aspects of life. For one thing, individuals may be in serious need of credit due to changed circumstances such as illness, loss of job, divorce, as do people from other jurisdictions. Without consumer bankruptcy and discharge, the creditor, who has got a court judgment for the enforcement of his claims, will make the debtors life miserable by continuous harassment. This may continue forever making the debtor, restless, hopeless and unproductive. Individuals may also have entrepreneurship ideas that are worth putting in the market and credit is important tool for such startups. With credit, however, there is a risk. The new entrepreneurial idea may not work and may bring with it indebtedness, which the individual may not be able to repay even after working for the whole of his life.

On the other side of the spectrum, consumer bankruptcy and fresh-start carry with it some costs. A system where most debtors walk-off without paying something significant will be a huge burden for growing economy like ours. The issue of financing the system is another worry. Abuse of the system can be added to the problems. It is, therefore, very crucial to have a consumer bankruptcy law where a benefits will outweigh the costs by far. Repayment plan with discharge and fresh start for successful debtors who will pay cost of proceeding and a certain portion of debt will be a good option.

V. CONCLUSIONS

Bankruptcy law used to be a tool for businesses for most part of its history. Yet it has been long ago since the same is extended to cover individuals as well. Several reasons accounted for this shift. At the forefront of the reasons for such departure includes the availability of credit and resultant over-indebtedness that many countries have experienced prior to the adoption of their consumer bankruptcy laws. Indebtedness is becoming a universal problem. Different jurisdictions are reacting to the problem by adopting a consumer bankruptcy law where by the debts of the debtor are wiped-out and the debtor starts life afresh.

The scope of fresh discharge and fresh start varies across jurisdictions and some are pro-debtor with generous relief, exemptions and fresh start while others have provided restrictive conditions in their consumer bankruptcy laws. The United States and Germany can be contrasted in this regard. The former has a generous debt relief and discharge while the later has a series of procedures and

efforts that are required of the debtor to earn a fresh start. There are several reasons for the difference between the two countries' laws. Availability of safety net programs, attitude towards entrepreneurship, economic policy, stigma towards debt and consumer credit are just some of the reasons.

Currently, several countries are moving towards the adoption of consumer bankruptcy law. It is being justified out of several reasons and is considered as multi-faceted tool that serves several socio-economic functions. The issue of introducing the same law is under discussion in Ethiopia. A group of experts have made it clear that introducing such law is good for Ethiopia.[362] I also agree that consumer bankruptcy law designed after the German Model will benefit Ethiopia. It will solve the problem of debt collection and help individuals start life anew and join the society as a productive member. Consumer bankruptcy will help in entrepreneurial development reducing the risk of investing in new ideas. It will also be a substitute for the lack of safety net and inadequate social security schemes for individuals, who cannot otherwise survive the changed circumstances they will face such as illness, loss of job, divorce, etc.

[362] *See* Tilahun Teshome *et al*, *supra* note 342, at 82-84.

THE CRIMINAL SANCTIONS OF COMMERCIAL DECEPTIONS IN ETHIOPIA: COULD IT CONTRIBUTE TO THE REDUCTION OF COMMERCIAL DISPUTES?

Jetu Edosa Chewaka[*]

Abstract

It has been contended that criminalization of commercial wrongs would chill economic activities due to the over-deterrence effect of criminal sanctions. However, a growing amount of legal literature has emerged in this area and it has indicated that deceptive commercial behaviors deserve criminal sanctions since they involve the type of wrong that characterizes criminal blameworthiness under the conventional criminal law. Particularly, criminal sanction in the form of imprisonment is viewed as a more coercive threat to deceptive commercial practice. Relying on the deterrence/rational choice theory and the empirical evidences that support it, this article contends that reliance on criminal sanction can effectively deter commercial deceptions compared to civil sanction provided under the private law. Finally, it is concluded that the severity of criminal sanctions designed to deter crimes of commercial deceptions under the Ethiopian Criminal Law could potentially contribute to the reduction of commercial disputes.

***Keywords**:* businessperson, commercial, crimes, deception, deterrence, disputes, Ethiopia, regulatory, sanction

I. INTRODUCTION

Legal scholars and economists have debated why certain wrongs deserve criminal sanctions in the form of incarceration while others only receive civil sanctions in the form of compensatory relief.[1] If Garry Becker and Ronald Posner were correct, civil sanctions in the form of monetary compensation are not always

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[1] Frances K Zemans, *Coercion To Restitution: Criminal Processing Of Civil Disputes*, 2 LAW & POL'Y Q. 81 (1980).

enough to discourage crimes unless a more efficient deterrence is opted.[2] As such, it is contended that commercial wrongs should be criminalized only when civil sanctions do not deter it. However, it is argued that compared to remedies under the private law, the threat of criminal sanctions under the criminal law provides a disincentive for traders to act against good business practice. For this reason, criminal law is increasingly viewed as a powerful weapon for protecting the instrumentalities that are necessary to maintain honest commercial practice. In this context, most countries increasingly use criminal law as a means to regulate commercial activities as a standard aspect of the exercise of prosecutorial authority. Particularly, the rapid expansion of government regulations imbued with criminal sanctions to pursue a wide range of social and economic goals has spurred the trend to use criminal law beyond its traditional boundaries.

On the other hand, the criminalization of commercial misconduct is viewed as the unnecessary regulation of market that operates through the indivisible hands.[3] It is argued that the fundamental use of criminal sanctions in the business context has shifted from protecting commerce to regulating it which more threatens than protect the economy because it may kill the entrepreneurial risk-taking that is essential for economic growth.[4] The classical argument provided in support of these contentions emanates from the philosophical underpinnings that criminal law is designed to punish and deter violations of public morality and hence it represents the legal system's most severe and explicit means to express moral disapproval of conduct.[5] In this context, the traditional boundary of criminal law as a distinctive legal scheme will be crossed due to its over-expansion into business matters that sometimes involve risks in business decisions.[6] Particularly, with the accelerating trend of criminal sanction for the infringement of often imprecise and uncertain regulatory standards, it is feared that the intrusion of criminal law into the business arena would affect entrepreneurship.[7]

Against this background, the paper normatively investigates how criminal sanctions of commercial deceptions under the Criminal Law of Ethiopia could

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[2] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1215 (1985); *see also* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[3] George Terwilliger, *Under-Breaded Shrimp and other High Crimes: Addressing the Over Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417-1418 (2007).

[4] *Id*. at 1418.

[5] Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW& CONTEMP. PROBS. 401, 417 (1958). For more specific discussions *see* also Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct* [Part 1], 60 LAW& CONTEMP. PROBS. 23-65, at 27 n. 3 (1997).

[6] TERWILLIGER, *supra note* 3.

[7] *Id*. at 1417.

contribute to the reduction of commercial disputes. Relying on deterrence/rational choice theory, the paper tries to show how punishment of crimes of commercial deceptions under the criminal law ensures honest commercial practice by reducing deceptive acts capable of engendering commercial disputes. This scholarly paper is hoped to provide an insight into areas where applying criminal law in the commercial arena is justified in order to ensure the integrity of a market. Accordingly, the following research questions will be addressed in the meantime. The first question is what criterion could be contemplated to identify crimes of commercial deception from other crimes under the Criminal Law of Ethiopia? Second, what contending arguments could be advanced to justify the intrusion of criminal law into the business realm? Finally, could criminal sanctions of commercial deceptions provided under the Criminal Law of Ethiopia contribute to the reduction of commercial disputes?

In order to succinctly address these questions, the paper in part II deals with the conceptualizations of commercial crimes in general. It particularly sheds light on the type and nature of commercial crimes as compared to the various forms of crimes including regulatory crimes. Part III describes the desirability of applying criminal law in commercial practice and the accompanying debates of criminalization issues. Part IV provides analytical insights into how criminal sanctions of commercial deceptions contribute to the reduction of commercial disputes. Particularly, by establishing the interface between commercial crimes and commercial disputes, this part shows how the deterrence effects of criminal sanctions of crimes of commercial deceptions contribute to the reduction of commercial disputes. Part V attempts to identify and analyze the types and nature of deceptive commercial crimes within the context of Ethiopian Criminal Law. Particularly, it draws attention on how the severity of criminal sanctions under the Ethiopian Criminal Law could be consolidated as an optimal legal scheme in deterring deceptive commercial behaviors that in turn contribute to the reduction of commercial disputes. Part VI recaps major points of the paper by way of conclusion.

II. CONCEPTUALIZATIONS OF COMMERCIAL CRIMES

Under the criminal law of different countries, dividing crimes into different categories is practiced according to their nature and degree of harmfulness.[8] However, it is contended that the categorization of crimes in most criminal laws

[8] Stuart P. Green, *Deceit and the Classifications of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi,* 90 J. CRIM. L. & CRIMINOLOGY 1087 (1999-2000).

provides little useful information due to lack of systematic definition and subsequent conceptual overlap.[9] Thus, within the purview of the criminal law, commercial crimes could be taken as one area where such deficiencies are reflected. The following subsections highlight the distinguishing features of commercial crimes from other similar typologies of crimes. It also examines the commercial crimes within the context of regulatory crimes for more conceptual clarity.

A. Defining and Distinguishing Commercial Crimes

Black's Law Dictionary generally defines commercial crime as "a crime that affects commerce".[10] In consonance with this legal dictionary, the term commercial crime is also used to refer to "business crime" though it is criticized for it leaves unstated whether the act is crimes against business, crimes by business or simply crimes using business structures.[11] It is no surprise that the offences catalogued under such umbrella terms are similarly confusing. For instance, crimes such as embezzlement, counterfeiting, forgery and extortion are specified as examples of commercial crimes.[12] Therefore, the conception of commercial crimes in the preceding context is inclusive of crimes committed by businesspersons and crimes committed against commerce involving either deceptions or threat of force capable of affecting commerce.

Another ambiguous but specific umbrella terms often used to refer to commercial crime is "economic crime" and "white-collar crime," both used interchangeably to refer to the former.[13] The term economic crime refers to "a nonphysical crime committed to obtain a financial gain or professional advantage".[14] According to Kitch, economic crimes consist of crimes committed by businesspersons as an adjunct to their regular business activities.[15] He argued that businesspersons' responsibilities give them the opportunity, for instance to commit fraud, to violate regulations directed at their areas of business activity, or to evade tax payments.[16] Likewise, white-collar crime, as defined by the Chamber

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[9] *Id.*

[10] BLACK'S LAW DICTIONARY 425 (9th ed. 2004).

[11] R. Tom Naylor, *Towards a General Theory of Profit-Driven Crimes*, 43 BRIT. J. CRIMINOLOGY 82 (2003).

[12] BLACK'S LAW DICTIONARY, *supra* note 10.

[13] NAYLOR, *supra* note 11.

[14] BLACK'S LAW DICTIONARY, *supra* note 10.

[15] Edmund W. Kitch, *Economic Crime*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 670-71 (Sanford H. Kadish ed., 1983).

[16] *Id.*

of Commerce of the United States of America refers to "illegal acts characterized by guile, deceit, and concealment and are not dependent upon the application of physical force or violence or threats thereof".[17] Therefore, despite terminological usages, the latter terms are somewhat specific as it limits the ambit of commercial crimes to those non-violent crimes committed by businesspersons.

Furthermore, some legal scholars try to provide typologies of profit-driven crimes within which commercial crimes could be contextualized in terms that are more specific. Accordingly, commercial crimes can be compared and contrasted with other typologies of profit-driven crimes such as predatory crimes and market-based crimes.[18] Commercial crimes within such category is conceived as crimes that are committed by legitimate entrepreneurs, investors or corporations in the process of preparing or making market exchanges in the context consisting a normal business setting.[19] Accordingly, commercial crimes employ illegal methods for the production and distribution of legal goods and services through superficially voluntary exchanges with hidden yet involuntary aspect of victims by virtue of the existence of fraud and other methods of deceptions that would otherwise be produced and distributed by someone else using legal methods.[20] The type of commercial crimes that could be enlisted as an example involves fraudulent bankruptcy, fraud against suppliers of inputs, and telemarketing scams involving deception against customers of output.[21]

The second profit-driven crime involves predatory crimes that are committed by the businesspersons against individuals and against the economic interest of government through the involuntary transfers of goods and services by the use of elements of threat, stealth and deception.[22] Hence, be it through deception or the use of force, someone makes monetary gains at the expense of another with a pretence to an exchange of value. Some of the examples of predatory crimes involve payment card fraud, bank fraud and currency counterfeiting crimes.[23]

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[17] *See* Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. (1) 1, 111 (2004). The term "white-collar crime" was first coined by Edwin Sutherland. According to this writer, the prevalence of administrative remedies for sanctioning white-collar crimes served the business classes to protect themselves from the full force of the criminal sanctions utilized against others. Some argue that Sutherland implicitly prescribed for increased criminal prosecution of the commercial offenses regardless of their legal status. *See* LYNCH, *supra* note 5.

[18] NAYLOR, *supra* note 11, at 84.

[19] *Id.* at 88.

[20] *Id*. at 91.

[21] *Id.*

[22] *Id*. at 84.

[23] *Id.*

The third profit-driven crime includes market-based crimes that involve production and distribution of new goods and services that are inherently illegal through voluntary transfers.[24] In other words, it deals with illegal commodities occurring in the context of an underground network, even if that network is embedded within legal business structure.[25] Accordingly, market-based crimes involve regulation evasion, such as violation of the regulation on pricing, tax evasion and prohibition evasion such as prohibitions of certain drugs or goods that endangers public health.[26]

As indicated above, there are areas of overlap and point of distinctions between the three profit-driven crime typologies. For instance, both commercial and predatory crimes can involve elements of stealth and deception.[27] However, unlike commercial crimes, predatory crimes may involve the threat of force resulting in the involuntary transfer of goods and services. Similarly, like commercial crimes, market based crimes involve voluntary transfer. However, unlike commercial crimes, market based crimes involve the production and distribution of illegal goods and services that for instance endangers public health.

Generally, it is understandable how it could be difficult to find precise and water tight conceptual distinctions between commercial crimes and other profit driven crimes. However, it is evident from the definitions and conceptions that commercial crimes and the terms associated with it largely signify their typical nature as non-violent crimes characterized by deceptive commercial practices motivated by illegitimate economic gain. It is also pivotal to note how a consensus is lacking among legal scholars as to what types of crimes should precisely be collected under the umbrella of commercial crimes.[28]

Therefore, for the purpose of this article, it is very crucial to provide a working definition of commercial crimes before proceeding to the next section. Thus, in this paper, the term commercial crime will be used to refer to non-violent crimes mainly characterized by deceptive commercial practices committed by businesspersons against other persons in order to get illegitimate economic gain. The following section further sheds light on the debate that involves the "regulatory nature" of commercial crimes and identify whether commercial crimes are somewhat different from crimes under the conventional criminal law.

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 89.
[28] KITCH, *supra note* 15, at 82.

B. Commercial Crimes As Regulatory Crimes

The term regulatory crime is often used to refer to offences lacking criminal essence as opposed to crimes such as homicide and rape that are characterized by violence under the conventional criminal law.[29] Though the conceptions of commercial deception is as old as the concept of commerce itself, its recent revival is associated with the growth of regulatory states and the increasing use of criminal offences in circumstances outside the traditional boundaries of criminal law.[30] As indicated before, commercial crimes are non-violent crimes committed in business setting in pursuit of economic advantage for oneself or somebody, which affects free market exchange. For this reason, some scholars argue that violations of regulatory crimes should not be dealt with by the criminal law, as they do not possess "criminal essence" such as the requirement of mens rea element.[31] For instance, Ramsay characterizes regulatory crimes as possessing "strict criminal liability" character.[32] In strict liability crime, the public prosecutor need only show that the accused engaged in a voluntary act or an omission to perform an act or duty that the accused was capable of performing.[33] In other words, strict criminal liability encompasses both offenses for which no mental state is required generally and offenses for which no mental state are required as to a particular element of the crime.[34] The most important issue is whether crimes involving commercial deception should generally be characterized as regulatory crimes. However, the generic characterization of regulatory crimes as devoid of moral content has been criticized for several reasons.

The first criticism emanates from conceptual ambiguities regarding the distinction between regulatory crimes and real crimes based on the criteria of moral blameworthiness of the crime involved. Coffee observed how the line between regulatory and real crimes has been crossed many times since it is hard to construct the dichotomy based on the conceptions of blameworthiness.[35] The most

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[29] P. J. Fitzgerald, *Real Crimes and Quasi Crimes*, 10 NAT. L. F. 21 (1965).

[30] Andrew Ashworth, *Is the Criminal Law a Lost Cause?* 116 L. Q. REV. 225 -229 (2000)

[31] *Id.*

[32] IAIN RAMSAY, CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS, 356 (2nd ed, Hart: Oxford, 2007). *See also* Genevra Richardson, *Strict Liability for Regulatory Crime: The Empirical Research*, 110 CRIM. L. REV. 295 (1987).

[33] Will Thomas, *Note On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an intent – Free Moral World,"* 110 MICH. L. REV. 650 (2012).

[34] *Id.*

[35] John C Coffee, *Does "Unlawful" mean "Criminal"?: Reflections on the Disappearing Tort Crime Distinction in American Law*, 71 B. U. L. REV. 193, 193-198 (1991). *See also* Harry V. Ball

compelling contention against the claim that regulatory crimes are devoid of moral content arises from the jurisprudential thought of the morality to obey the law.[36] One of the earliest arguments for a moral obligation to obey the law was advanced by Socrates in the *Crito* (Socrate's defense of obedience to the laws of state). Condemned to death, Socrates refused to escape and live in exile in another country because he believes that he has an obligation to obey the laws of the state.[37] Lately, Ronald Dworkin has further advanced this thought by distinguishing between two grounds on which violation of law might be morally wrong.[38] Dworkin noted that it might be wrong to break a law because the act the law condemns is wrong in itself, and it might be wrong, even though the act condemned is not wrong in itself, just because the law forbids it.[39] The observation of Dworkin implicates that once law is passed everyone has a moral obligation to obey it. Based on such conception, Jerome Hall argues that the better usage of the term regulatory crimes is to refer to "acts that are said to be immoral because the actor knows they are legally forbidden".[40] It is based on such latter conception that Hall views mens rea as an intentional disregard of legal obligation.

The second criticism relates to the contention as to what constitutes the definition of regulatory crime since it is not easily discernible.[41] For instance, the term "regulatory" is defined as "the act or process of controlling by rule or restriction".[42] In strict sense of the term, if we apply this definition, all crimes could be seen as regulatory as the prohibition of homicide is as much "controlling by rule or restriction" as the prohibition on drawing a check without insufficient fund. Thus, by subjecting particular actions to criminal prohibition, governments seek to direct behavior and hence all criminal prohibitions are regulatory.[43] Accordingly, it is argued that any subtle downgrading of regulatory offences to quasi or non-criminal status is at odds with the clear indication of the criminality of

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and Lawrence M Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 233 (1965).

[36] George C. Christie, *On the Moral Obligation to Obey the Law*, DUKE L. J.1311, 1326 (1990).

[37] *See* Richard Wasserstrom, *The Obligation to Obey the Law. in* ESSAYS IN LEGAL PHILOSOPHY 274 (Robert S. Summers ed., 1968).

[38] *See* GREEN, *supra* note 17, at 1573-1574.

[39] *Id.*

[40] *Id.*

[41] Richard Hyde, *You Know It When You See It: A Socio-Legal Investigation into the Concept of Regulatory Crime* (2008), *available at*: http://ssrn.com/abstract=1295336 (last visited Jan.20, 2014).

[42] *Id.*

[43] PATRICK DEVLIN, THE ENFORCEMENT OF MORALS, at 16 (1968).

regulatory crimes provided by the use of the "crime" signifier.[44] This latter argument aptly signals the criminal status of regulatory offences as a subset of larger set of 'criminal' offences.[45] Consequently, it is understandable that the conception of regulatory crime would help to explain how criminal legislations are enacted to regulate commercial behaviors without necessarily implicating the nature of the commercial crimes as devoid of moral blameworthiness. Particularly, this line of argument is more tenable given the deceptive nature of commercial crimes that characterize commercial offenders based on the intentional disregard of regulatory provisions for undue economic advantage.

III. THE DESIDERATA OF CRIMINAL LAW IN REGULATING COMMERCE

Conventionally, while Criminal Law is viewed as a mechanism of social control to prevent and punish wrongdoing by the state, the private law that includes commercial law is designed to provide a forum for negotiating and setting private disputes through private settlements.[46] Particularly, the difference in severity and degree of coerciveness reflects the traditional role of criminal law in stating and enforcing public morality.[47] Put simply, in contrast to the role of private law system, it is agreed that criminal law is a reflection of moral outrage in which perpetrators are to be punished and stigmatized because they wronged society in general. However, with the emergence of complexities in business activities and regulatory states, criminal law becomes a powerful weapon for ensuring sound and healthy commercial practice — expanding the ambit of criminal sanctions.

Generally, arguments for and against the intrusion of criminal law in business arena has been occupied by two competing but equally succinct propositions. The choruses of scholars that support the intrusion of criminal law to control business conduct argue that criminal law seeks to optimize integrity of commercial transaction by devising reasonable and appropriate criminal sanctions of a magnitude sufficient to deter individuals from committing commercial crimes.[48] Accordingly, it is contended that criminal law plays a critical role in

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[44] HYDE, *supra* note 41.

[45] A. P. SIMESTER, APPRAISING STRICT LIABILITY, ix (2005).

[46] Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY, n.4 693 (1993).

[47] ZEMANS, *supra* note 1, at 83.

[48] Richard A. Booth, *What is a Business Crime?* 3 J. BUS. & TEC. 127, 127 (2008).

"policing" the market place by enforcing standards capable of promoting public confidence in commercial transactions that involve fiduciary duties.[49]

Proponents for the increased role of criminal law in business realm support their arguments based on two premises. On the one hand, the intervention of criminal law emanates from the jurisprudential thought that acts of deception and dishonest commercial practice shares the moral condemnation comparable to the moral outrage under the conventional criminal law.[50] Second, given the threat of criminal sanctions such as incarceration, scholars push that criminal law can truly deter offenders of commercial crimes — the function which would be futile if civil remedies are utilized.[51]

On the other hand, the intrusion of the criminal law into commercial realm is vehemently opposed by the legion of commentators advancing the idea that it subjects economic activity to strict state control that would be unqualified to manage industrial and business activities.[52] Scholars on this score propound that misconducts in commerce are viewed as "violations of private obligations arising from the assent of parties rather than as violations of duties owed to the public."[53] This view is heralded by Holmes, who in his famous work, *The Path of Law* inferred that the use of morality in contract *"*stinks in the nostrils of those who think it is advantageous to get as much ethics into the law as they can".[54] Robinson also argues that breaking a contract may be a conduct that we seek to discourage and may justify compensation of an injured party, but such conduct does not necessarily carry the moral blameworthiness implicit in a criminal conviction.[55] Thus, applying criminal law to the cases of business deviants is not warrantable since criminal law represents the legal system's most severe means to express moral disapproval of conduct.[56]

Consequently, it is relevant to address how these two competing interests on the role of criminal law could be balanced in a more productive and meaningful way. Firstly, despite the degree of criminalization, it is not difficult to appreciate

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[49] KITCH, *supra* note 15, at 82.

[50] TERWILLIGER, *supra* note 3, at 1419.

[51] *See* LYNCH, *supra* note 5, at 31.

[52] DeLong James V, *The New "criminal" Classes: Legal Sanctions and Business Managers*, 10 NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 24 (1997)

[53] GREEN, *supra* note 17, at 1600.

[54] OLIVER W. HOLMES, THE PATH OF THE LAW, 12 (2009).

[55] Paul H. Robinson, *Moral Credibility and Crime*, ATLANTA MONTHLY, 72 (1995).

[56] *Id. See also* Kenneth Mann, *Punitive Civil Sanctions: The Middle ground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1863 (1992).

that there are acts of deceptive commercial practice that would have the effect of crippling the commercial system. Hence, it would be tenable to argue that criminal law serves as the essential tool for preserving the integrity of the market.[57] Particularly, acts such as fraud, deceit and several other commercial crimes appear to mimic the contours of criminal act[58] due to their deceptive nature reflecting the need for the instrumental role of criminal law. Deceptive commercial acts are deliberately committed to create harm of economic nature that a society might want to prevent. In as much as promises made in commercial negotiations reflect the moral obligation that a commercial community wants not to be disregarded, the expression that act of contract breach resulting from deceptions are much like crimes that carry the baggage of moral blameworthiness. Consequently, it is on this basis that business misconduct deserves criminal sanctions.

Secondly, despite the perceptible role of criminal law in business realm, the line between criminal activities and acceptable business judgments sometimes can be fuzzy.[59] It is argued that society wants its economic actors to proceed with intelligent discretion, balancing costs, and benefits.[60] Hence, unless strict cares are taken, criminalization may tend to destroy this balance by declaring that all mistakes are intolerable and removing all discretions to act reasonably under unforeseen circumstances.

Thus, the effectiveness of criminal law in business realm could relate to certainty of criminal sanctions in order to obtain optimal deterrence without compromising the rule of law. In criminal law literature, however, the need for certainty of criminal standards in relation to commercial crimes is debatable. On the one hand, it is argued that uncertainty of the nature and extent of criminal sanctions in criminal law is important in ensuring compliance with the legal norms since it is difficult to calculate the cost and benefits of compliance or non-

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[57] TERWILLIGER, *supra* note 3, at 1419.

[58] Immanuel Kant's famous categorical imperative appeals to promise-making as a paradigmatic example of following the moral law. *See* Immanuel Kant, *Foundations of the Metaphysics of Morals*, in Lewis Beck Trans. 39-40 (1959).

[59] *See* Ellen Podgor, *Laws have Over criminalized Business Behavior*, N. Y. TIMES, Nov.10, 2013, available at http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior (lat visited Oct. 20, 2014).

[60] For instance, it is claimed that criminal responsibility for breach of the duty of care in commercial transaction adversely affects business judgments made in good faith and honest belief, often termed as "the business judgment rule." *See generally* Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1-96, 20 (2010).

compliance under conditions of uncertainty.[61] On the other hand, some argue that lack of precise information about the size and extent of criminal sanction affects discretions in business due to its over-criminalization effect.[62] It is contended that criminal sanctions are not well suited to situations in which there exists real doubt about whether the offense committed were being motivated by a legitimate business purpose or perpetrated against the economic interests of another person for gain.[63] Therefore, it is a matter of legislative choices to weigh the effects of attaching criminal sanctions to violations of highly technical or vague and unintelligible regulatory standards to serve the purpose of compliance to legal norms while at the same time ensuring due respect for the rule of law.

The last but not least point relates to whether allocation of public resources is justified to prosecute and punish commercial offences that private litigants can handle. In order to address this matter one need to look into the dichotomy of civil and criminal law. As noted before, the traditional boundaries of criminal law that justifies the use of public resources is confined to the prosecution of those crimes that affect the interests of the society.[64] However, the proper role of criminal law with regard to the enforcement of norms governing business have been largely driven by the rise of regulatory state that imposed new substantive legal norms on economic activities necessitating effective remedies to adequately enforce them.[65] One can argue that business crimes could be an economic outrage that may affect the economic interests of a society. On top of this, by labeling commercial crimes in the criminal legislations, societal harm of such crimes is a *prima facie* evidence

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[61] Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 ALA. L. REV. 1143, 1160 (1988-1989). *See also* Craswell & Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279 (1986).

[62] It is noted that precision and specificity is a virtue of criminal law that is designed to deter future crime. Particularly, it is argued that vagueness in the dentition of conduct rules reduces the possibility of compliance, i.e., potential offenders may not understand what conduct is prohibited and may engage in conduct that they otherwise would avoid if the prohibition is clear. *See* Robinson, Paul, *Why Does The Criminal Law Care What The Lay Persons Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VIRG. L. REV. 1839, 1851 (2000).

[63] Tom Baker *et al*, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 468 (2004).

[64] On this matter, see generally JOHN STUART MILL, ON LIBERTY 13 (1863) (stating "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."); *see also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 213 (2d ed. 1960) (1947) ("Harm, in sum, is the fulcrum between criminal conduct and the punitive sanction"; Paul H. Robinson, *A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 266–68 (1975).

[65] LYNCH, *supra* note 5, at 26.

that implicates the need for criminal prosecution of commercial crimes through the proper allocation of public resources.

Briefly, the need for careful regulation of business practices on the one hand and the need for alternative optimal remedies to deal with deceptive commercial practices on the other poses a big challenge to law enforcement that require them to prudently weigh the rebounding effects of criminal sanctions. The bottom line is that criminal law is designed to encourage individuals to act in certain way that also logically and technically relates to the regulation of business practice.

IV. THE ROLE OF CRIMINAL SANCTIONS IN REDUCING COMMERCIAL DISPUTES

Market activities function best where genuine and reliable information is freely available. Commercial transactions between apparently legal equals will not be enforced if they were vitiated by deliberate misrepresentation about the fundamental nature of the deal.[66] This section highlights the interface between commercial crimes and commercial disputes. It then provides analytical insights into how criminal sanctions of commercial deceptions contribute to the reduction of commercial disputes.

A. The Interface of Commercial Crimes and Commercial Disputes

In order to have a clear picture of how commercial disputes and commercial crimes relates to each other, it would be appropriate to set out somehow descriptive definitions of what constitutes commercial deception. The term deception is synonymous with terms like deceit or fraud that generally refers to a "dishonest behavior that is intended to make some body believe something that is not true".[67] Accordingly, it could be possible to provide descriptive definition by outlining the main elements of commercial deception.[68] First, there is an element of deceit or of providing inaccurate, incomplete or misleading information. Second, reliance on the deceit or the information provided or omitted induces the target of the deception to part with some valuable thing that belongs to the target. Thirdly, the act of deception uses or misuses or distorts commercial systems and their legitimate instruments potentially creating a serious economic impact. The elements of the definition are indicative of the fact that a person who performs

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[66] TERWILLIGER, *supra* note 3.

[67] OXFORD ADVANCED LEARNERS DICTIONARY (New 8th ed. 2011).

[68] *See* UNCITRAL (United Nations Commission on International Trade Law), RECOGNIZING AND PREVENTING COMMERCIAL FRAUD: INDICATORS OF COMMERCIAL FRAUD 5 (United Nations, New York, 2013).

commercial deception is communicating information that intends to cause another person to believe something that is misleading as a result of which the latter is voluntarily subjected to surrender his monetary interests. Thus, the majority of dishonest commercial practices that subvert reliable information may fall under the ambit of commercial deception.

It is noted that commercial crimes are characterized by non-violence, deceptions and concealment of facts committed by businesspersons to advance economic gain. Hence, it is understandable how the definitional elements of commercial deceptions become the common denominator of both commercial crimes and commercial disputes. In other words, commercial deceptions that ignite criminal sanctions under the criminal law would also trigger commercial disputes under private law. Therefore, the relevant point is whether it is appropriate to resort to the sanctions provided under criminal law or private law in order to reduce commercial deception as a common feature of both commercial crimes and commercial disputes. As we shall see in what follows, the answer depends on how one views the effectiveness of either criminal or civil sanctions under the two legal schemes.

B. The Deterrence Role of Criminal Sanctions

Criminal law theories could generally be used to explain commercial crimes "within the deterrence/rational choice framework".[69] These theories are profoundly useful in examining the context of commercial crimes since commercial offenders as rational and self-interested utility-maximizers could be amenable to the threat of criminal sanction.[70] Therefore, a wealth of legal literature in this regard tried to treat the efficiency of criminal sanctions in deterring white-collar crimes.[71] However, little attempt has been made to link the relationship between the deterrence effect of criminal sanctions for commercial deceptions and the reduction of commercial disputes. Other studies such as the one conducted by Zemans, for instance, reveals that "the threat of coercion underlying the execution of remedies facilitates efficient processing of commercial disputes in the criminal justice system,"[72] but not in the context of deterring the dispute *per se*.

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[69] Raymond Paternoster and Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime,* 30 L. & SOC. REV. 550 (1996).

[70] *Id*.

[71] *See* generally EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1983); Edwin H. Sutherland, *White Collar Criminality,* 5 AM. SOC. REV. 1 (1940); Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J. L. ETH. & PUB. POL. 507 (2004); and Donald J. Newman, *White-Collar Crime,* 23 L. & CONT. PROBS. 738-39 (1958).

[72] ZEMANS, *supra* note 1.

It is noted that commercial crimes that involves acts of fraud, misrepresentation, false pretense and falsification would also be capable of triggering commercial disputes.[73] Therefore, it can be premised that deterring commercial deceptions through criminal sanctions would contribute in the reduction of commercial disputes that would otherwise remain rampant if compensatory civil sanctions are applied. It is in this context that the following discussion aims to attract the attention of the readers.

Generally, the deterrence of commercial crimes involving commercial deceptions could contribute to the reduction of commercial disputes in two ways. First, as the name indicates certain kinds of behaviors in commercial transactions are prohibited and hence a trader may comply with the normative rules governing such business conduct simply because criminal sanctions has a potential deterrence effect due to its severity compared to compensatory civil sanctions. The second point relates to the "pricing of crime" as economists subscribe. It is argued that a trader decides to commit commercial crime after a calculation of the likely costs and benefits of the economic gain – the so-called the rational choice theory of law-abiding behavior. Thus, it is vital to explain these two theoretical foundations moderately to address the issue at hand.

According to the first theoretical underpinnings, criminal sanctions of commercial deceptions send a general warning to the business community that a particular behavior is unacceptable and hence punished harshly.[74] In this context, the use of criminal sanctions to deter commercial deceptions that has been previously reserved to the ambits of civil sanctions may help traders and corporations to adjust their behaviors up to the standards of criminal law. Specifically, the stigma of conviction may potentially reduce commercial deception since traders, corporate managers, and directors would be sensitive to criminal sanction.[75] Hence, these individuals would not commit crimes of commercial deception under the pain of losing occupational position, social censure from friends and family as potential negative costs.[76] Likewise, crimes of commercial deception would be deterred since they are "calculated, deliberative

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[73] Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U. L. REV. 590 (2012).

[74] J. Scott Dutcher, *From the Boardroom to the cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L. J. 1304 (2006).

[75] William J, Chambliss, Types *of Deviance and the Effectiveness of Legal Sanctions*, WIS. L. REV. 703 (1967).

[76] PATERNOSTER & SIMPSON, *supra* note 69.

and directed to economic gain"[77] which "would increase the salience of any perceived costs and benefits".[78]

Furthermore, traders have greater stake in conventional business life style and therefore, have more to lose should their deceptive commercial behaviors be discovered. In this situation one of the traders most prized possessions placed at risk by engaging in illegal commercial practice is their good will and reputation.[79] However, it should be noted that given the complex nature of commercial deception and the likelihood of businesspersons to get away with their crimes, the optimal level of deterrence could be achieved by increasing enforcement efforts to increase the likelihood of detection.[80]

The second role of criminal sanction is that punishment of commercial deception provides disincentive to act contrary to the legal norms designed to ensure good business practice.[81]According to Becker, a party to the commercial transaction is a rational person who weighs the economic gain against the possibility of being caught and the price of the punishment.[82] Therefore, if we subscribe to Becker's economic model, the rational trader is presumed to be profit maximizer who weighs the costs and the benefits of committing a crime and does not undertake illegal commercial practice unless the expected benefits of such illegal act exceed the expected costs. Hence, an individual trader may act quite contrary to good commercial practice if the expected net gain from such contravention equates the expected economic gain minus the expected costs (being the product of the amount of punishment and its probability).[83] In the same vein, another earlier and more famous economic model can also be found in Richard Posner's writings of "*Economic Analysis of Criminal Law".* Posner argues that the

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[77] Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Regulations*, *in* WHITE-COLLAR CRIME: OFFENSES IN BUSINESS, POLITICS AND THE PROFESSIONS 304 (G. Geis & R. F. Meier (eds.), 1977).

[78] PATERNOSTER & SIMPSON, *supra* note 69, at 550-551.

[79] In response to jail sentence for white collar crimes in USA context, Chambliss document the following: "Everybody gets panicky at the thought of a jail sentence." "A jail sentence is dishonorable; it jeopardizes the reputation.' . . . These expressions are in marked contrast to the attitudes of the same men toward the imposition of fines and other monetary penalties: 'They don't hurt anybody "**. . .**" People are making enough money nowadays to pay a fine easily". *See* CHAMBLISS, *supra* note 75, at 709-710.

[80] *Id.*

[81] *Id*. 709. *See also* John M. Ivancevich *et al*., *Deterring White-Collar Crime*, 17 T ACAD. MGMT EXEC. 121 (2003).

[82] BECKER, *supra* note 2, at 169. His basic argument is that a breach is classified as a crime because it is harder to catch criminals and not all criminals will be caught; so, the penalty imposed will have to exceed actual damages (i.e., compensatory damages). *Id*. at 191-192.

[83] *Id.*

major function of criminal punishment is to prevent individuals from bypassing the system of voluntary, compensated exchange for the less efficient involuntary exchange exemplified by the criminal act.[84] Posner's economic model may help to understand how commercial crimes "generally consist of inefficient, involuntary transfers intended to bypass the voluntary market of exchange".[85] It is in this context that Posner propels the need to deter commercial deceits since they represents "inefficient allocation of resources".[86]

Regarding the optimal form of criminal sanction, two forms of sanctions are at the disposal of the state law enforcement. Becker for instance prefers monetary compensation as an appropriate form of criminal sanction as opposed to incarceration.[87] It is argued that incarceration for crimes of commercial deception such as fraudulent inducement may deter too much and hence opt for civil sanctions in the form of monetary compensation.[88] In other words, it means that criminal prosecution in the form of incarceration may chill commercial activities since individuals may fear to enter into commercial transactions that might be susceptible to fraudulent inducement should they fail to satisfy their obligation under the agreement.[89] Thus, Becker advices that confinement is a sanction of last resort to be used only when the offender either will not or cannot pay an adequate fine.[90] Posner also noted how criminal sanctions in the form of monetary compensation might deter affluent members of society while non-affluent members of society will not be sufficiently deterred since they will not have the money to pay. Therefore, Posner advices that incarceration would be the optimal type of sanction in case where non-affluent members of the society are involved.[91] Yet Posner also pointed his reservation on how monetary sanctions under the traditional tort or contract law are not enough to discourage inefficient commercial

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[84] POSNER, *supra* note 2, at 1193.

[85] Posner noted that fraud (false pretenses) and several others as clear example of forced exchanges. *Id*. at 1196.

[86] *Id.*

[87] John Collins Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 421 (1980).

[88] Geraldine S. Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLOR. L. REV. 937 (2003).

[89] Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBS 31-33 (1997). The author argues that punitive civil sanctions are the most appropriate sanctions for business crimes. *Id*.

[90] *Id.*

[91] Posner concedes that this notion suggests "criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law." *Id*, at 1204.

behaviors due to the ineffectiveness of pricing crimes.[92] According to Becker and Posner, the optimality of criminal sanction in the form of incarceration is limited to the cases where offenders are unable to pay monetary compensation as an alternative sanction. Nevertheless, the problem of their theorization is that it fails to explain the optimality of criminal monetary sanctions in crimes involving commercial deception. Particularly, commercial deceptions committed by white-collar criminals may not be deterred unless criminal sanction in the form of incarceration is opted.[93] It can be alternatively argued that the deterrence role of such monetary sanction is futile given the economic capacity of businesspersons to set-off the price of the crime. Hence, the monetary criminal sanction becomes suboptimal thereby failing to deter crimes of commercial deception unless incarceration is opted.

Another vital issue relates to whether criminal sanction of corporate commercial deception contributes to the reduction of commercial disputes. In this regard, the standard economic approach to corporate criminal liability supports the view that imposing strict vicarious criminal liability on corporations invariably reduces corporate crime, with higher sanctions leading to less crime.[94] Accordingly, crimes of commercial deception is deterred efficiently if the corporation is held strictly liable for all its crimes, subject to a fine equal to the social cost of crime divided by the probability of detection.[95] This forces the corporation to internalize the social cost of its criminal activity.

Crimes of corporate commercial deception are committed by member of directors, managers, shareholders, and agents of the corporation to benefit themselves in pursuit of their interest as rational utility-maximizers.[96] Since directors and mangers of corporation undertake commercial activities on behalf of the corporation, these individuals have the opportunity to commit commercial deceptions that breeds commercial disputes. In this context, directors, mangers, officers and agents of the corporation who commits crimes of commercial deception risks direct individual criminal liability.[97] The pertinent question is if

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[92] Posner, *supra* note 2, at 1201.

[93] *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236 (1985).

[94] Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL. STUD. 833-834 (1994).

[95] *Id.*

[96] Mark Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 71 B. U. L. REV. 247 (1991).

[97] *Id.*

corporate commercial crime substitutes for direct criminal liability of the directors, managers and officers of the corporation, what is the necessity of referring to corporate crime *per se*? Some scholars argue that corporate commercial crime has the nature of agency cost. [98] In this context, crimes of commercial deceptions that would be attributable to corporations could be deterred since corporations are forced to take measures that sanction its own directors, managers, and officers in the form of indemnification or by reducing their wages. Therefore, such schemes of corporate criminal sanction in the criminal law would force corporations to sanction their directors, managers, and officers for acts of commercial deception that may in turn contribute to the reduction of potential commercial disputes.[99]

The last but not least point is whether there exist empirical evidences in support of the deterrence effects of criminal sanction. Empirical evidence support that if sanctions provided for commercial deception are set sufficiently high, only persons who prefer risk can be expected to commit such crimes.[100] However, this research finding indicates that since crimes of commercial deceptions are difficult to detect it should have to be punished more severely.[101] Thus, since expected punishment is smaller when the risk of detection is small, potential offenders will tend to commit crimes that are relatively more difficult to detect or prosecute. Particularly, empirical evidences support how crimes of commercial fraud, which is unlikely susceptible to detection, could be deterred if the total expected penalty equals the social costs of the fraud.[102]

V. CRIMES OF COMMERCIAL DECEPTION UNDER THE CRIMINAL LAW OF ETHIOPIA

This section examines the nature and typologies of crimes of commercial deceptions under Ethiopian Criminal Law. Firstly, attempt is made to set the context within which crimes of commercial deceptions are distinguished from street crimes and regulatory crimes. Secondly, crimes of commercial deceptions that are stipulated under the Criminal Code of Ethiopia and Trade Practice and Consumers' Protection Proclamation will be examined. Thirdly, a normative

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[98] ARLEN, *supra* note 94, at 835.

[99] Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment,* 4 J. LEGAL. STUD. 479 (1975).

[100] Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk,* 24 J. LEGAL STUD**.** 123 (1995).

[101] *Id.*

[102]Jonathan M. Karpoff & John R. Lott, Jr, *The Reputational Penalty Firms Bear From Committing Criminal Fraud,* 36 J.L. & ECON. 797 (1993).

analysis will be made on the role of criminal sanctions provided by the Ethiopian Criminal Law in relation to crimes of commercial deceptions and its role in the reduction of commercial disputes.

A. Setting the Context: Commercial Crimes in Ethiopia

Commercial crimes in Ethiopia are mainly regulated under the Criminal Code and Trade Practice and Consumers' Protection Proclamation. In the Criminal Code, Book VI deals with crimes against property under which "Economic and Commercial Crime" is labeled. There are various crimes in the Criminal Code, which directly or indirectly affect commercial practice yet listed outside the umbrella title of "Economic and Commercial Crimes." Accordingly, one would be tempted to disregard criminal conducts perpetrated against commercial instruments that are dispersed in the Criminal Code. Hence, in order to provide general picture of crimes of commercial deceptions in Ethiopia, the discussion of this paper to some extent relates to the examination of these crimes.

In addition to the Criminal Code, there are various crimes of commercial deceptions stipulated under the Trade Practice and Consumers' Protection Proclamation. While this proclamation could be used to justify the criminalization of unfair trade practice, it would be insignificant to characterize commercial crimes as devoid of *mens rea*. The reason is that the general principles of Ethiopian Criminal Law require either criminal intention or negligence for a punishable offence even for petty offences.[103] However, this does not implicate that crimes of commercial deceptions equate the moral blameworthiness of crimes of violence such as murder, arson, and rape that do not involve the practice of dishonesty or false statement.

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[103] THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 414/2004, FED. NEGARIT GAZZETE, Year No, 9 May 2005 (hereinafter, CRIMINAL CODE OF ETHIOPIA). According to this Criminal Code, criminal intention refers to performance of an unlawful and punishable act with full knowledge and intent in order to achieve a given result; or being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow. A person is not convicted for what he neither knew of or intended nor for what goes beyond what he intended either directly or as a possibility. *Id.* art. 58. Criminal negligence refers to imprudence or disregard of the possible consequences of an act while aware that the act may cause illegal and punishable consequences; or it is a criminal lack of foresight or without consideration while one should or could have been aware that the act may cause illegal and punishable consequences. *Id.* art. 59. It seems that criminal code provisions of petty offence correlates to regulatory crime as such offence is punishable "when the mandatory or prohibitive provisions of a law or regulation issued by a competent authority is infringed or when a person commits a minor offence which is not punishable under the Criminal Law…" though still criminal intention and negligence is "a condition for liability to punishment". *Id.* art. 735 and art. 741(2).

The last but not least point worth mentioning is the issue that relates to the vicarious criminal liability of business organizations under the Criminal Code of Ethiopia. Business organizations in Ethiopia could be criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold business organization for crimes of commercial deception, the criminal act should be committed in connection with the activity of the business organization. However, the prosecution in Ethiopia must establish that the actions of directors, managers, officers and agents of the business organization had been perpetrated with the intent of promoting the interests of these individuals by unlawful means or by violating their legal duty or by unduly using the business organization as a means.[104]

In general, crimes of commercial deception under the Criminal Law of Ethiopia could be characterized by deceptive practice and violation of trust that are not dependent upon the threat of physical force. In addition, these types of crimes are committed in pursuit of economic gain, benefit or advantages contrary to good business practice. The following sections subsequently examine commercial crimes that take the form of commercial deception under both the Criminal Code and Trade Practice and Consumers' Protection Proclamation.

B. Crimes of Commercial Deceptions Under the Criminal Code

Legal scholars generally agree that commercial transactions will be hindered where deceitful commercial activities are rampant.[105] Hence, the role of criminal law is justified in deterring deceitful commercial practices. Generally, crimes of commercial deceptions in the Criminal Code of Ethiopia comprise range of offences that involve falsification and fraudulent trade practices. While the distinctions between commercial falsification and commercial fraud in the Criminal Code seems arbitrary, the deceptive and harmful nature of these crimes is their distinguishing feature compared to other forms of crimes that affect the proprietary interest of a certain person. While crimes of commercial fraud may involve deceptive commercial practice but it does not necessarily involve commercial falsifications.

1. Crimes of Commercial Falsification

The crimes of deceptions under the Criminal Code of Ethiopia that relates to commercial falsifications ranges from falsifications and forgery of public or

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[104] CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 34(1).

[105] Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609 (A)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1093 (1999-2000).

private documents and measurement instruments intended for use in commercial activity. The Criminal Code prohibits the deception of another person through the falsification of official marks, weight, balances, measures or other instruments intended for use in commerce.[106] Businesspersons are prohibited from unlawfully or through forgery affixing a mark or imprint denoting official certification or warranty or making use of such falsified instruments. In particular, exporting, importing, purchasing, acquiring or procuring, or accepting in trust, selling or offering for sale or donating, stamps, stamped paper, marks, official weights or measures that are known to be forged or falsified is prohibited.[107] In addition to the above list of crimes, the Criminal Code prohibits crimes of commercial forgery and falsification capable of affecting security of commercial instruments designed to effect payments as fulfillments to commercial obligations. Accordingly, it is prohibited to use forged bill of exchange, check, promissory note, bank deposit book or other certificate of deposit in a bank, credit card or document in an institution of deposit or loan or share certificate with the intent to injure the rights or interests of another or to obtain any undue right or advantage for himself.[108] The Criminal Code clearly prohibits falsification, adulteration, alteration or counterfeiting of goods capable of affecting another person.[109] Finally, utterance of falsified, counterfeited, adulterated goods as genuine, unadulterated, or intact is punishable.[110] In case of negligence and failure to exercise particular circumspection or care a businessperson may be punishable with fine not exceeding ten thousand birr in the gravest cases.[111] Generally, it is clear to appreciate how the Criminal Code of Ethiopia normatively prohibits commercial deceptions involving false representation as to the nature, quality, quantity or value of goods or services to be delivered through falsified or forged documents that are not normally used in the type of commercial transactions to which they are intended to relate.

2. Crimes of Commercial Fraud

Commercial fraud is another genre of deception in which a person is "induced to act against his own detriment due to the misrepresentation of the truth or

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[106] CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 367.
[107] *Id*. art. 368.
[108] *Id*. arts. 375 & 382(1).
[109] *Id*. art.391.
[110] *Id*. art. 392(1).
[111] *Id*. art. 392(2)

concealment of a material fact" by the other party.[112] In common law jurisdiction, the term fraud refers to a "dishonest and false statement" often used as meaning "un-conscientious dealing".[113] The meaning attributed to fraudulent misrepresentation under the Criminal Code of Ethiopia also conveys similar message.[114] Accordingly, it refers to the commission or omission of an act that cause another person to act in a manner prejudicial to his rights in property, or those of a third person in order to obtain unlawful enrichment by using either of the following means: (a) misleading statements (b) misrepresenting status or situation (c) concealing facts despite the duty to reveal or (d) taking advantage of the person's erroneous beliefs. Thus, ranges of crimes such as drawing of check without cover; fraudulent manipulation of stock exchange transactions,[115]gaming in stock or merchandise,[116] and fraudulent acts relating to insurance[117] are labeled as crime involving fraud that could be categorized as crimes of commercial deceptions. Specifically, there are crimes of fraud committed against the rights in property branded under "economic and commercial crime" in the Criminal Code.

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[112] BLACK'S LAW DICTIONARY, *supra* note 10.

[113] William R. Anson, *Principles of the Law of Contract*, 263(Arthur L. Corbin (ed), 3rd ed.1919).

[114] CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art 692(1).

[115] *Id*. art. 694: 'Whoever, through the facility of a stock exchange market or other market, with intent to create a false or misleading appearance of active public trading in a security or with respect to the market price of a security: a) effects a transaction in the security that involves no change in the beneficial ownership thereof; or b) enters an order for the purchase of the security, knowing that the security has been purchased by the same or different persons at substantially the same size, at substantially the same time, at substantially the same price, or an order for such purchase of the security has been or will be entered by or for the same or different persons; or c) enters an order for the sale of the security, knowing that the security has been sold by the same or different persons at substantially the same size, at substantially the same time, at substantially the same price or an order for such sale of the security has been or will be entered by or for the same or different persons is punishable, with simple imprisonment, or, in serious cases, with rigorous imprisonment not exceeding five years.'

[116] *Id*. art. 695: 'Whoever, with intent to make gain or profit by the rise or fall in price of the stock goods or merchandise of a registered or unregistered company or other undertaking, whether in or outside the country, makes or signs any contract, oral or written, purporting to be for the sale or purchase of shares of stocks, goods or merchandise, without the bona fide intention of acquiring or selling such things is punishable with simple imprisonment, or, in serious cases, with rigorous imprisonment not exceeding five years.'

[117] *Id*. art. 698: 'Whoever, with intent to obtain for himself or to procure for a third person an unlawful enrichment, deceives an insurance company: a) by creating the risk insured; or b) by concealing, misrepresenting, affirming or falsely declaring a fact relating 'to the amount, duration or beneficiaries of the insurance, in a manner affecting the interest stated in the contract, or c) in any' other way commits a fraudulent act in connection with insurance activity is punishable..'

For instance, attack on another's credit,[118] unfair competition,[119] infringement of marks, declarations of origin, designs or models,[120] and infringement of rights relating to literary, artistic or creative works[121] are deceptive commercial practices perpetrated against fair trade practice.

In addition, commercial deceptions may also occur during proceedings of bankruptcy. Needless to mention it, bankruptcy proceedings serve as an important commercial and policy needs for businesses experiencing financial difficulties in which it enables traders and business organizations to restructure debt through reorganization or liquidation proceedings. However, the bankruptcy proceedings can be used as deceptive schemes that help in facilitating the improper transfer of assets through fictitious claims and misrepresentation of facts. The ranges of crimes that fall under this category include fraudulent insolvency,[122] fraudulent bankruptcy,[123] fraud in execution and fraudulent composition.[124] Among other

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[118] *Id.* art. 717: 'Whoever, maliciously or with intent to cause damage, seriously injures, or compromises the credit of another by statements or imputations he knows to be false, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.'

[119] *Id.* art. 719: 'Whoever intentionally commits against another, an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular: (a) by discrediting another, his goods or dealings, his activities of business or by 'making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit there from against his competitors; or b) by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or c) by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or d) by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or e) by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.'

[120] *Id*. art. 720: 'Whoever intentionally: a) infringes, imitates or passes off, in such manner as to deceive the public, another's mark or distinctive signs or declarations of origin on any produce or goods or their packing, whether commercial, industrial or agricultural; or b) sells or offers for sale, imports or exports, distributes or places on the market produce or goods under a mark which he knows to be infringed, imitated, passed off or improperly affixed; or c) refuses to declare the origin of produce or goods in his possession under such marks, shall be punishable with rigorous imprisonment not exceeding ten years.'

[121] *Id*. art. 721: "Whoever apart from cases 'punishable more severely by another provision of the this Code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years. (2) where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years."

[122] *Id.* art. 725.

[123] *Id*. art. 727. Such fraudulent bankruptcy occurs when the debtor; a) 'either materially, whether by assigning or by destroying, damaging, depreciating or rendering useless certain property forming a

things, fraudulent insolvency involves entering into contract by intentionally concealing the fact of insolvency to third parties with the knowledge of financial incapacity to execute it. This scenario also implicates that in the absence of full awareness by one party as to the other party's true intention in the contract, the making of contractual obligation is less likely to allocate resources without making the other party worse off. Hence, though the formation of contract should be encouraged on economic grounds, the underlying intentional concealment of facts that affects the economic interest of the other party in good faith is an outrageous conduct that should justify criminal sanction to deter similar commercial malpractice in the future. Furthermore, a debtor who is adjudged bankrupt by the court of law is prohibited from intentionally disposing of his assets to the prejudice of his creditors. Similarly, a debtor who after the delivery of declaration of default is subject to proceedings by way of execution is prohibited to intentionally prejudice his creditors by reducing assets.[125] It is also important to note that a third party is prohibited from acting to the prejudice of the creditors by making fictitious claims in such cases.[126]

Generally, one can observe that the scrutiny of the Criminal Code of Ethiopia unfolds the fact that commercial crimes are perpetrated either intentional or negligently by creating untrue or false statements, confusions, inaccurate information and deceitful practices for the purpose of procuring economic advantage "contrary to the rules of good faith in business." Hence, the acts committed by businesspersons and the criminal related terms carry the stamp of moral condemnation that justifies the use of criminal sanctions.

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part of such assets; or b) fictitiously, whether by removing or concealing property, by relying on or recognizing non-existent debts or claims or by inciting a third party to make fictitious claims, or in any other manner pretending that his estate is less than it is in fact, in particular by means of incorrect accounting, falsified correspondence or a false balance sheet…'

[124] *Id.* art. 733(1): "Any debtor who, in order to obtain a scheme of arrangement or the ratification of a composition by the Court, misleads his creditors, the commissioner in bankruptcy or the competent authority, as to his financial position, in particular by means of incorrect or falsified accounts, correspondence or a balance sheet is punishable with simple imprisonment.' 'Purchase of Votes" is also prohibited: "Any debtor who, in order to obtain a favorable vote of one .of his creditors or a composition by the Court, grants or promise particular advantages: a) to that creditor or to his representative in a general meeting; or b) to a member of the administration or winding-up in a bankruptcy, is punishable with simple imprisonment not exceeding three years. (2) A third person who so acts in favor of the debtor, or any person who with the same intent causes such an advantage to be granted or promised to him, is liable to the same punishments."

[125] *Id*. art.728.

[126] *Id*. arts. 727(3) & 728(2).

C. Regulatory Crimes Involving Commercial Deceptions

In addition to crimes of deceptions stipulated in the Criminal Code, there are commercial crimes in regulatory legislations designed to ensure good business practices. One of such specific legislation relates to "Trade Practice and Consumers' Protection proclamation."[127] The proclamation, among other things, is enacted to ensure competitive and fair market practice among the business community; to protect consumers from misleading market conducts; and to prevent the proliferation of goods and services that endanger the health and wellbeing of consumers.[128] In this specific legislation, one can identify crimes of commercial deception that could be committed by businesspersons against consumers or other businesspersons. The type of commercial crimes committed by businesspersons largely involve crimes of unfair trade practices, agreements and concerted practices[129] with the object or effect of preventing, restricting or distorting competition, merger and unfair competition and crimes committed against consumers.[130] Crime of unfair trade practice involves the act of carrying on commercial activity by a businessperson or acting together with others who openly or dubiously abuse his dominant position in the market.[131] Such form of commercial crime is committed when a businessperson has the actual capacity to control prices or other conditions of commercial negations, or eliminate or utterly restrain competition in the relevant market.[132]

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[127] *Trade Practice and Consumers' Protection Proclamation,* Proclamation No. 685/2010, FED. NEGARIT GAZETA 16th Year, No. 49, Addis Ababa, 16 August 2010. This Proclamation is designed to regulate all persons carrying on commercial activities and to any transaction in goods and services within the Federal Democratic Republic of Ethiopia and to the outcome of a commercial activity conducted outside Ethiopia which have the effect in Ethiopia. *See also id*. art. 4.

[128] *Id*. *See also id.* art. 3.

[129]Anticompetitive agreement includes mutual understanding, written or oral contract and operational procedures, whether or not legally enforceable. Likewise, concerted practice means a unified or cooperative conduct of businesspersons depicted in a way that does not look like an agreement and done to substitute individual activity. *Id*. art. 12.

[130] *Id*. art. 11 cum.13 (1, a).

[131] Some of the acts that involve abuse of dominant position in the market involve limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade; doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels with the view to restrain or eliminate competition; directly or indirectly imposing unfair selling price or unfair purchase price; contrary to the clearly prevalent trade practice refuse to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him; without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person. *Id*. arts. 5 & 8.

[132] *Id.* art. 6.

One can easily understand the potential effect of these types of commercial crimes in planting the seed of commercial disputes between and among businesspersons. Some of the examples of anticompetitive agreements and concerted practices involve horizontal relationships that have the object or effect of directly or indirectly fixing prices; collusive tendering; allocating customers, or marketing territories, production, or sale by quota; and agreement between businesspersons in a vertical relationship that has an object or effect of setting minimum retail price.[133] Unfair competition involves an act or practice carried out in the course of trade, which is dishonest, misleading, or deceptive, and harms or is likely to harm the business interest of a competitor.[134] Crimes of unfair competition also relates to any act that causes or is likely to cause confusion with respect to another businessperson or commercial activities offered by such businessperson. Furthermore, acts of disclosure, possession or use of information without the consent of the rightful owner of that information in a manner contrary to honest commercial practice, and any false or unjustifiable allegation that discredits another businessperson or its commercial activities including the act of comparing goods and services falsely or equivocally in the process of commercial advertisement is prohibited.[135] Similar to the Criminal Code, the proclamation lists deceptive commercial acts committed by businesspersons against consumers. Crimes such as false advertisements,[136] provision of defective goods and services,[137] and unfair and misleading acts[138] are few examples.

In general, the above discussion highlights range of deceptive commercial practices regulated outside the rubric of the Ethiopian Criminal Code. Unlike the

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[133] *Id*. art. 13.

[134] *Id*. art. 21(1).

[135] *Id*. art. 21(2).

[136] *Id.* arts. 21(2, d) & 27.

[137] *Id*. art. 28.

[138] Acts such as issuing misleading information on quality or quantity or volume or acceptance or source or nature or component or use of goods and service may have; failing to disclose correctly the newness or model or the decrease in service or the change in or re-fabrication or the recall by the manufacturer or the second hand condition of goods; describing the goods and services of another business person in a misleading way; failing to sell goods and services as advertised or advertising goods or services with intent not to supply in quantity consumers demand, unless the advertisement discloses a limitation of quantity; making false or misleading statements of price reduction; failing to meet warranty obligation entered in connection with the sale of goods and services; misrepresenting the need for repair or replacements of parts to be made to goods as though not needed; doing any act of cheating or confusing in any transaction of goods and services; preparing or making available for sale or selling goods or services that are dangerous to human health and safety or those source of which is not known or whose quality is below standards set in advance or are poisoned or have expired or are adulterated are few unfair and misleading acts. *Id*. art. 30.

Criminal Code, the sanctions provided under this proclamation also relates to measures of administrative and compensatory nature. Compared to the Criminal Code, the proclamation provides sever criminal sanction in the form of imprisonment ranging from two years to twenty years and fine penalty ranging from thirty thousand to two million Ethiopian Birr depending on the type and nature of the crime involved.[139] Unfortunately, the tribunal of Trade Practice and Consumers' Protection Authority is permitted only to deliver administrative and civil sanctions in order to correct commercial wrongs,[140] while regular courts of both the federal and regional governments shall decide on the criminal matters so indicated under the proclamation.[141] Having had the catalogues of commercial crimes and the accompanying criminal sanctions provided for by the criminal law, the following section moderately analyses how criminal sanctions provided for deterring commercial deceptions contributes in the reduction of commercial disputes.

D. The Contribution of Criminal Sanctions in Reducing Commercial Disputes

It is noted that the severity and certainty of criminal sanctions potentially contributes to the deterrence of commercial offenders. Particularly, given the common characteristics of commercial deceptions in triggering prosecution and private litigation, resorting to criminal sanctions can provide optimal sanctions in the reduction of commercial disputes. However, the issue is whether the criminal sanctions provided under Ethiopian Criminal Law generally deter commercial deceptions at least in its normative context. On the one hand, the criminal sanctions of deceptive commercial practices that otherwise also receives civil sanctions under the private law would send a warning message to the businesspersons that deceptive practice is not tolerated by civil sanction alone. In this regard, the examination made on the nature and features of commercial crimes under the Ethiopian Criminal Law indicates how deceptive commercial practices deserve criminal sanctions despite the existence of civil remedies under the private laws. For instance, the issuance of check as commercial instrument is used to effect the obligation of payment in lieu of cash money. In contractual terms, drawing a check without cover or sufficient fund may amount to non-performance of the obligation to payment irrespective of the knowledge or intention of the non-

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[139] *Id*. art. 49. Compared to the Criminal Code, this proclamation provides a severe criminal imprisonment which as noted is twice the sanction provide in the former.

[140] *See* PROCLAMATION NO. 685/2010, *supra* note 127, art. 49.

[141] *Id*. arts. 35 & 49.

performing party.[142] However, in the Criminal Code, it is a punishable offence to issue a check without cover or full cover at the time of presentment for payment.[143] Arguably, the intentional or negligent drawing of bad check is indicia of dishonest and fraudulent behavior, which justify criminal sanctions on both economic and moral grounds. Therefore, the normative prohibition of drawing bad check under the Criminal Code could serve as a general deterrence that could contribute in the reduction of commercial disputes that emanates from such fictitious payments.

Another instance relates to the role of criminal sanction under the Ethiopian criminal law in deterring falsification, counterfeiting and utterance of defective goods and services that is prejudicial to the interests of businesspersons and consumers. It is noted that commerce involves transaction in goods and services that should be free from defects, adulteration and counterfeiting. While remedies for the contravention of such commercial obligations could be subject to the rules of sales contract under Ethiopian Civil Code,[144] it may also trigger prosecution resulting in severe criminal sanctions. Accordingly, criminal sanctions could serve as an alternative form of sanction capable of discouraging non-performance of contracts thereby reducing commercial disputes. However, a breach of contract could sometimes be economically justified in case the non-performing party can compensate the other party and be better off than non-performance of the contract. In such instance, applying criminal sanctions would chill economically valuable behavior by discouraging individuals from entering into contracts that are susceptible to "efficient contractual breach". Yet, it can be argued that commercial practices that are motivated by undue economic advantage through deceptive breach of contractual obligations should be discouraged.

On the other hand, the severity of punishments provided for commercial crimes under the Criminal Law of Ethiopia could also serve as powerful deterrence

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[142] Drawing a check without cover between traders is a common practice around "*Merkato*". This instance show how drawing check without sufficient fund is simply used as an evidence of latter payment to commercial obligations. In the Civil Code of Ethiopia, a party may default the performance of payment or even may refuse to carry out his obligations under the contract where the other party clearly shows that he will not perform his obligations or where the insolvency of the other party has been established by the court. This legal provision shows that default in payment may occur in the course of commercial practice, which could be solved by applying rules on effect of non-performance. See CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 165/1960, NEGARIT GAZZETE, Gazette Extraordinary, 19th Year No.2, Addis Ababa, 5th of May 1960 (hereafter referred as Civil Code of Ethiopia), art.1770 and 1771 including other related provisions.

[143] CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 693.

[144] For instance if a certain good does not possess the quality required for its normal use or commercial exploitation such product may be considered as a defective product. But, the commercial dispute that may arise from the defective nature of such product may be resolved through warranty rather than resorting to criminal sanctions. *See* CIVIL CODE OF ETHIOPIA, art. 2287- 2300.

particularly when the sanction involves incarceration. In this regard, the severe nature of criminal sanctions under the Ethiopian Criminal Law can be explained in two ways. The first severe form of criminal sanctions relates to the imposition of rigorous imprisonment on offenders of crimes of commercial deception that resembles criminal sanctions provided for violent crimes such as homicide and robbery. In this regard, while the criminal sanctions for commercial deceptions under the Criminal Code ranges from simple imprisonment of three months to rigorous imprisonment of ten years, the criminal sanctions provided under Trade Practice and Consumer Protection Proclamation ranges from the minimum of two years to the maximum of twenty years. The second criminal sanction relates a more severe penalty that combines inflated fine punishment and rigorous imprisonment. Even though Ethiopian Criminal Code provides the possibility of criminal sanctions in the form of fine penalty or imprisonment as alternative punishment, Trade Practice and Consumer Protection Proclamation provide fine penalty and imprisonment cumulatively. Hence, the writer contends that the severity of criminal sanctions provided for deterring commercial deceptions under the Ethiopian Criminal Law could serve as a potential alarm to the business community. It follows that commercial disputes that would potentially result from deceptive commercial practice could be reduced proportionately. Consequently, the preceding normative analysis provides a moderate insight into how the use of criminal sanctions primarily designed for deterring commercial deceptions under the Criminal law could also serve as a powerful weapon for the reduction of commercial disputes. In this way, the state may gear its efforts towards the criminal prosecution of commercial deceptions as an optimal form of sanction thereby reducing case backlogs in the civil courts emanating from commercial disputes.

VI. CONCLUSION

This paper generally attempted to show how the deterrence role of sanctions of commercial deceptions under the criminal law contributes in the reduction of commercial disputes emanating from deceptive commercial practices. In the preceding discussions, it is established that though acts of commercial deception could attract civil sanctions under private laws, the threat of severe criminal sanctions under the Ethiopian Criminal Law could serve as a more optimal sanction. In this regard, it is indicated that commercial deceptions carry the moral baggage that justify the intrusion of the criminal law in the business realm in which case labeling commercial crimes as lacking moral content becomes insignificant under the Ethiopian Criminal Law.

Another issue that captured the discussion of this paper is the task of showing the causal relationships between the deterrence of deceptive commercial practices under the criminal law and the reduction of commercial disputes. In this regard, number of legal literatures has treated the role of criminal sanctions in deterring commercial crimes such as white-collar crimes. Given the dearth of legal literature that relates to the same legal issue in Ethiopian context, this paper embarked on the normative analysis of the Criminal Law to show the role of criminal sanctions in deterring deceptive commercial practices that could engender commercial disputes. The paper in this regard labored to show how the severity of criminal sanctions provided under the Criminal Law of Ethiopia could normatively contribute to the reduction of commercial disputes within the broader context of deterrence/rational choice theory. It is contended that the price of criminal punishment provided for deterring deceptive commercial practice under the Criminal Code of Ethiopia inflict sanctions of fine and incarceration on businesspersons compared to the gains from the criminal act of delivering defective goods and services. Particularly, the severity of criminal sanctions that combines fine and rigorous imprisonment of twenty years under Trade Practice and Consumers Protection Law of Ethiopia would at least normatively serve as powerful weapon to deter deceptive commercial practices.

Admittedly, though it is difficult to conclude, the price of criminal sanctions provided under the Ethiopian Criminal Law, the normative analysis and empirical evidences on the deterrence effect of criminal sanctions elsewhere implicate that the severity of penalties provided for may serve to deter deceptive commercial practice. It is based on such normative dispositions that the criminal punishment provided for commercial crime under the Ethiopian Criminal Law is viewed as a more powerful and optimal sanction for deterring commercial disputes. Finally, while this paper is not definitive in addressing all issues involved, it could however help in triggering legal scholars to undertake further investigations into the practical impacts of Ethiopian criminal law in reducing deceptive commercial practices in more pragmatic approach.

A POST-DIVORCE COHABITATION NEVER EQUALS A REMARRIAGE IN ETHIOPIA: A CASE COMMENT

Sileshi Bedasie Hirko*

Abstract

The conclusion of a (re)marriage is required to be made in one of the three modes of celebration under the Revised Family Code. Despite the legal significance of the celebration of a (re)marriage as a decisive element in the conclusion and proof of the (re)marriage, the Cassation Division of the Federal Supreme Court decided a case in which the post-divorce non-marital cohabitation between ex-spouses was considered to constitute a remarriage. In the decision, the court essentially overlooked the need for proof of the celebration of the remarriage. The author argues that the decision contradicts with the relevant legal rules. Thus, this case comment attempts to make a critical analysis of the various legal issues involved in the case at different levels with particular emphasis on the decision of the Cassation Division. In the analysis, the author argues that a post-divorce non-marital cohabitation would not amount to a remarriage between the ex-spouses. The reason is that the conclusion of the alleged remarriage between the ex-spouses would be presumed only upon proof of its celebration in a certain form under the Revised Family Code.

Keywords*: cohabitation, celebration, divorce, irregular union, marriage, proof, remarriage*

I. INTRODUCTORY NOTE

The role of the Federal Supreme Court in contributing to a uniform application of the laws in Ethiopia is growing significantly following the recent legislative adoption of the doctrine of precedent with national scope of application.[1] As the

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[1] The doctrine of precedent has its origin in the Anglo-American legal system. As such, the doctrine is known for the binding nature of the precedent set by any superior court on subordinate or lower courts. This doctrine had formally found its way into Ethiopia in 1962 when it received a legislative backing for the first time. The doctrine was later limited in its scope since 1993 following a legislation which provided for the decision of the Central Supreme Court alone to be binding on the subordinate courts. As opposed to its predecessors, the current rule of precedent as embodied in the

court renders binding interpretations of laws enacted at federal and state levels, the rule of precedent commands a nationwide application by all judicial organs in the country. The various precedents set by the Cassation Division of the Federal Supreme Court would entail a far-reaching legal and practical consequence on the administration of fair justice.

Though the court's legal sphere of influence encompasses all legal matters in the entire domains of the laws in the country, the frequency and variety of cases that trigger legal interpretations by the Cassation Division vary from one area of the law to the other. In this regard, one may notice the frequency of cases on criminal matters, contracts, labor, property, family as well as procedural matters. Yet, family matters constitute a significant number of the cassation decisions of the court as published in a series of its volumes. In other words, family laws are among the various areas of the laws that are subject to the continuous and extensive practice of binding interpretations of the laws by the Cassation Division. Nonetheless, the practice that is meant to avoid basic errors in the interpretation of the laws as such is not immune to errors and misconstruction in its application. The instances of the possible flaws are evidenced by a case at hand calling for a critical case comment. Hence, this case comment attempts to bring into light some basic errors and misconstructions in the interpretation of the relevant legal provisions of the Revised Family Code with regard to conclusion and proof of a marriage.

Therefore, in this case comment, some pertinent legal issues will be critically analyzed in light of the issues involved in the case. To this end, the case comment begins with a brief exposition of the relevant basic legal principles to lay down a legal framework for the subsequent analysis of the case at various levels. Part II of this piece will present a succinct summary of facts of the case as it arose before the lower court. Treated in the Part III are rulings and reasoning of the courts as the subsequent critique will touch upon each of the decisions of all the courts on the case. There are a number of pertinent legal issues at each level that merit legal analysis. Part IV is devoted to an extensive critical analysis of the rulings and reasoning of the courts with emphasis on the cassation decision in light of the relevant legal provisions. Part V concludes the analysis and hint at the need to adhere to the true purpose and spirit of the law in the interpretation of the law where the latter calls for it.

Proc. No. 454/2005 is applicable only for the decision of the Federal Supreme Court in its cassation division. *See* A Proclamation to Re-amend the Federal Courts Proclamation No. 25/96, Proclamation No. 454/2005, FED. NEGARIT GAZETA, 11th Year, No.42, Addis Ababa, 14th June 2005; *see also* Hussien Ahmed Tura, *Uniform Application of Law in Ethiopia: Effects of Cassation Decisions of the Federal Supreme Court*, 7 AFR. J. LEGAL STUD. 203, 213-214(2014).

A. Conclusion of a Marriage

Marriage is a formal marital relation that comes into existence upon its conclusion. The conclusion of a marriage is marked by its celebration in accordance with the form prescribed by the Revised Family Code. To this end, the law provides three forms of celebrating marriage.[2] Based on the forms, marriage can be referred to as civil, religious or customary marriage. It should be noted that this distinction is solely based on the modes of celebration. In other words, there is only one kind of marriage.[3] Indeed, marriage is the only institution of its kind[4] despite the existence of varying forms for its celebration. As a result, the essential requirements for the conclusion of a valid marriage are all the same for all forms of marriage.[5] Nor does there exist any difference in their legal effects.[6] Thus, the difference lies only in form, not in substance.

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[2] Ethiopia, THE REVISED FAMILY CODE, Proclamation No.213/2000, FED. NEGARIT GAZETA, 6th Year, Extraordinary Issue No.1, Addis Ababa, 4th July 2000 [hereinafter, THE REVISED FAMILY CODE], Arts.1-4. For those who are not well familiar with the current legal system in Ethiopia, it is important to mention the fact that all the nine regional states in Ethiopia are constitutionally empowered to enact their own regional family laws. Most regional states have already enacted their respective family codes. The Revised Family Code is thus applicable only in the Federal city administrations, namely: Addis Ababa and Dire Dawa. *Nota Bene*: Unless indicated otherwise, references to legal provisions in this case comment are all made to the Revised Family Code.

[3] It is worth noting that the terms "kinds" and "forms," as used under relevant family laws, are quite distinct in their meaning. While the former tends to suggest the types of marriage, the latter refers to the modes of its celebration. Thus, the usage of the word "forms" under art.1 of the Revised Family Code signifies the different modes of celebration for the same "kind" of marriage. They are not meant to be used interchangeably. Indeed, distinction can be noted from the heading under art.1 of the Code that runs as "various forms of marriage" instead of using the corresponding phrase "various kinds of marriages" as was used under the Civil Code of Ethiopia. *See* CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROC. NO.165/1960, NEGARIT GAZETA, GAZETTE EXTRAORDINARY, 19th Year, No.2, Addis Ababa, 5th May,1960, art.557[hereinafter, CIVIL CODE]. In changing the terminology, it was felt that using the phrase with "kinds" deceptively appears to imply more than one types of marriage. In terms of their legal effects, all forms of marriage remain the same. Hence, there is only one kind of marriage that can be celebrated in one of the three forms. *See* Mehari Redai፣ **የተሻሻለዉን የቤተሰብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች ፣ ቅጽ አንድ ፣ ሁለተኛ እትም** ፣ 2000 **ዓ.ም**[Some Points for the Understanding of the REVISED FAMILY LAW], vol.1, at 13(2nd ed.2010).

[4] *See* GILLIAN DOUGLAS, *AN INTRODUCTION TO FAMILY LAW*, 38 (2nd ed. 2004).

[5] THE REVISED FAMILY CODE, art. 25(2), 26(2) &27(2). There is no exception for the essential conditions on the basis of the forms of marriage under the Revised Family Code and other regional family laws. That is, a certain religion cannot prescribe any substantive requirement that contradicts with or supersedes the essential conditions required by the law. *See also* Mehari Redai, *supra* note 3, at 15. To this date, only the family code of Harari regional state exceptionally permits the conclusion of a bigamous marriage on a religious ground. The Code contemplates a special permission to be granted by the concerned organ in the region. However, the organ that is competent to give the special permission is not clear. Nor is it clear whether or not the conclusion of the marriage shall be made in accordance with the religious mode of celebration. Indeed, the exception may not necessarily be limited to religious form of marriage as long as the exception is justified by the religious ground. *See* HARARI REGIONAL FAMILY CODE, PROC. NO. 80/2008, HARARI NEGARI GAZETA, EXTRA ORDINARY ISSUE No. 1/2008, Harar, 13th July, 2008, Art. 11(2).

[6] THE REVISED FAMILY CODE, Art. 40.

A marriage is concluded upon its celebration in one of the three forms. Accordingly, a civil marriage is concluded before an officer of civil status who would, after verifying the compliance with the essential conditions, pronounce the spouses to be united in a bond of marriage.[7] The declaration by the officer shall be made in the presence of four witnesses.[8] Thus, the celebration of a civil marriage is supposed to be made in accordance with the procedures prescribed by the law.[9] In contrast, a marriage is considered to be a religious marriage when it is concluded in accordance with the religion of the spouse(s).[10] The procedures for its conclusion would be prescribed by the concerned religion.[11] The conclusion of a religious marriage is thus signified by the observance of the procedures or religious rites dictated by the religion. The celebration of a religious marriage that does not conform to the essential procedures may fail to evidence the conclusion of the marriage.[12] For the marriage to be formally celebrated as such, its celebration shall not deviate from the procedures deemed essential by the religion. Conclusion of a marriage is pronounced by its celebration that is defined by the concerned form.

Marriage is a legal relation that differs from a factual romantic union. In some jurisdiction such as the UK, lack of ceremony for the alleged marriage would constitute non-marriage.[13] In Ethiopia, it remains unclear. It is argued that it would not make the marriage inexistent.[14] Yet, its practical effect is inextricably unavoidable. In some cases, the very conclusion may not possibly be traced to any form. It must be borne in mind that this is not an issue of validity. The defect in the form does not render a marriage void or voidable. Validity of a marriage is not determined by its form.[15] Rather, the issue at bar is the very conclusion of the marriage in the said form. It is a factual issue with immediate legal consequence. In reality, this creates a problem when its conclusion is contested and there is no indication of its celebration.

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[7] *Id.* Art. 25(6).
[8] *Id.* Art. 25(1).
[9] *Id*. Art. 2 & 25.
[10] *Id*. Art. 3 & 26(1).
[11] *Id*. Art. 26(1).
[12] In Ethiopia, the existing family laws including the Revised Family Code are mute on this issue. No precedent has been set in this regard to fill in the apparent vacuum. In UK, for instance, following a court decision in 2001, a marriage that is not celebrated in accordance with the forms prescribed by the Marriage Act of 1947 is considered non-existent rather than void. *See* Rebecca Robert, *CRETNEY'S FAMILY LAW* 33 (6th ed. 2006).
[13] *Id.*
[14] *See* Katherine O'Donovan, *Void and Voidable Marriages in Ethiopian Law*, 8 J. ETH. L. 2 (451), 452 (1972). It is important to note here that the issue of non-marriage was understood by O'Donovan to mean void despite the existence of different views on the distinction. *Id*. at 451-452.
[15] This can be drawn, by analogy, from the reading of arts.38-39 of THE REVISED FAMILY CODE. Moreover, the Revised Family Code does not provide for invalidation of customary or religious marriage for want of the required formalities. The relevant provisions of the Civil Code are quite clear on this point. *See* CIVIL CODE, *supra* note 3, Art. 623.

By the same token, celebration of a customary marriage would be made in accordance with the custom of the community to which the spouse(s) belong or wherein they reside.[16] The celebration would constitute the conclusion of the marriage when the required customary rites are so observed. In this regard, it is sufficient to constitute celebration of a marriage as long as the practice recognized by the concerned custom is complied with.

Therefore, a marriage is said to be concluded only when its mode of celebration conforms to one of the prescribed forms of a marriage. An alleged conclusion of a marriage that fails to fit one of the forms is deemed inexistent in the eyes of the law. Celebration is the distinctive feature of a marriage that it marks the beginning of the existence of the marriage. The public nature of a marriage requires a formal entry.[17] It is not a mere emotional intimacy created by and for the couple.[18]

One may wonder about the legal and practical significance of celebration of a marriage as such. Indeed, the legal significance of a form of a marriage is manifold. First, the celebration of a marriage in accordance with the form marks the beginning of its legal existence. It is the celebration that pronounces the conclusion of the marriage. Following its pronounced conclusion, the marriage begins to produce the legal effects of a marriage.[19] Second, the celebration of a marriage is an important element in distinguishing a marriage from an irregular union for all legal purposes. It has remained the distinguishing feature of a marriage throughout history.[20] As explained below, formation of an irregular union does not require any form of celebration.[21] Nor does its legal effect depend on a certain mode of celebration. Third, celebration of a marriage is quite important in the subsequent proof of a marriage. This is one of the most common instances that bring into picture the issue of conclusion of an alleged marriage.[22] Proof of a marriage may be necessitated for various reasons such as ascertainment of filiation,[23] claim of pecuniary interest,[24] pension benefit,[25] life insurance benefit,[26] employment compensation,[27]

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[16] THE REVISED FAMILY CODE, Art. 4 &27(1).

[17] Maggie Gallagher, *What is Marriage for? The Public Purposes of Marriage Law*, 62 LA. L. REV. 3(773), 778(2002).

[18] *Id*. at 775.

[19] THE REVISED FAMILY CODE, Art. 28(3).

[20] *The Formalities Essential to a Valid Marriage in Indiana*, 34 IND. L. J. 4 (644), 646 (1959).

[21] THE REVISED FAMILY CODE, Arts. 98 & 99(1).

[22] In principle, proof of the alleged marriage calls for proof of its conclusion or celebration in a certain form. *See Yeshareg Abatkun v. Mesert Admasu*, Federal Supreme Court, Cass. File No.33875/2008, 5 FED. SUP. CT. CASS. DECS. 262, 262-267(2009).

[23] *See* THE REVISED FAMILY CODE, art. 125(1) &126. Ascertainment of paternal filiation based on legal presumption of paternity depends on existence of a marriage between the presumed father and the woman that gave birth to the child.

[24] In order to claim the pecuniary effects of a certain marriage, the marriage shall be proved beforehand. This is so as effects of a marriage do not exist without the actual existence of the alleged marriage.

etc. In all cases, the conclusion or existence of a marriage may be at issue. Thus, proof of the marriage requires proving its conclusion in one of the three forms discussed above in this piece.[28] As is treated in depth below, proof of a marriage can be made either by marriage certificate or possession of status. It must be noted that a marriage certificate issued by the officer has to indicate the mode of the celebration of the marriage.[29] Fourth, celebration of a marriage as an integral part of proof of a marriage is also important to establish the commission of bigamy as a criminal act.[30]

B. Formation of an Irregular Union

An irregular union is a state of fact recognized by the law.[31] The state of fact is created upon the cohabitation of a man and a woman as husband and wife.[32] As such, its formation does not require any formal procedure. Though the law partly prescribes (explicitly or implicitly)[33] for applicability of the essential conditions of

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[25] Proof of marriage is required by the surviving spouse to claim 50% of the pension allowance following the death of the other spouse. *See* A Proclamation to Provide for Public Servants' Pension, Proc. No. 714/2011, FED. NEGARIT GAZETA, 17th Year, No.78, Addis Ababa, 24th June, 2011, art.41. *See also Social Security Agency v. Woletebirhan Kassaye*, Federal Supreme Court, Cass. File No.20036/2006, 5 FED. SUP. CT. CASS. DECS. 362, 362-363(2009). Proof of marriage may also be equally important to terminate payment of the allowance where the surviving spouse is alleged to have concluded a new marriage. *See also Muluworke Watche v. Social Security Agency*, Federal Supreme Court, Cass. File No.52569/2010, 11 FED. SUP. CT. CASS. DECS. 40, 40-41(2011).

[26] *See* COMMERCIAL CODE OF THE EMPIRE OF ETHIOPIA, PROC.NO.166/1960, NEGARIT GAZETA, *Gazette Extraordinary* , 19th Year No.3, Addis Ababa, 5th May,1960, Art.701(1)(a). The spouse of the deceased is deemed a beneficiary of the life insurance even when s/he is not specified by name in the insurance policy.

[27] The compensatory benefit is claimed by a spouse as a survivor upon the death of the spouse due to employment injury or due to other ground. The spouse is thus expected to establish her status to claim the compensation. *See* Federal Civil Servants Proc. No.515/2007, Arts. 55(4) & 86(2).

[28] *See also Beletu Ashami v. G/Tsadik Workineh*, Civ. App. File No.714/80(EC), SELECTED JUDGMENTS OF SUPREME COURT OF ETHIOPIA, Civil Cases, Vol.2, AAU Faculty of Law, March 2000. In the case, the then Supreme Court emphasized that proof of celebration of the marriage in one of the forms is required for proof of an alleged marriage. Otherwise, proof of other elements of possession of marital status excluding celebration would only amount to an irregular union.

[29] THE REVISED FAMILY CODE, Art. 30(c) .

[30] *Id.* Art.11. *See also* THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, PROC.NO.414/2004, FED. NEGARIT GAZETTE, Year No.9, May 2005[hereinafter, the Criminal Code], Art. 650(1). In order to establish the crime of bigamy under the Criminal Code, the existence of a preceding bond of marriage shall be proved for the subsequent marriage to constitute bigamy under the Revised Family Code.

[31] THE REVISED FAMILY CODE, Art. 98. *Compare* the Civil Code, *supra* note 3, Art. 708. An irregular union is an age-old practice in Ethiopia. Nonetheless, a better legal protection of its basic legal effects has been recognized in the Revised Family Code. *See* Tilahun Teshome, *Ethiopia*: *Reflections on the Revised Family Code of 2000*, 2002 INT'L SURV. FAM. L.1, 16(2002).

[32] *Id.*

[33] For instance, affinity is explicitly indicated under Art.100(2) of the Revised Family Code. It can also be inferred from the very nature of the relation as a juridical act that age and free and full consent are required to be satisfied for a valid irregular union. Moreover, prohibition of consanguinity could also be considered an essential condition as sexual relations between persons related by

marriage for an irregular union, it does not stipulate for any form to mark its commencement.[34] That is, no celebration in any mode is required to signify its formation. Thus, it is a *de facto* relationship that is given a legal recognition to produce some legal effects. As indicated in the preceding subsection, this is one of the distinguishing elements between the conclusion of a marriage and formation of an irregular union. Consequently, most relations that are alleged to be marriages are supposed to remain irregular unions in the absence of marriage celebration. As a matter of fact, a certain relationship between a man and a woman may be claimed a (re)marriage. Nevertheless, the relation may fail to satisfy the legal requirement of a (re)marriage. Determining the nature of the relation traces back to the beginning of the relation and its form of commencement. It must be borne in mind that characterizing the relation either as a marriage or an irregular union entails different legal consequences in some cases.[35] As a result, the law draws a clear line of distinction between a marriage and an irregular union upon their creation, during their continuance and upon their termination. Yet, the relationship created in an irregular union is analogous to that of a marriage.

Therefore, an irregular union is formed based on the commencement of a relation that is analogous to a marriage without any specific form. Traditionally, most irregular unions used to develop out of sexual relations accompanied by cohabitation over a period of time.[36]

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blood would amount to a crime of indecent sexual act under the criminal Code. *See* Criminal Code, *supra* note30, Art.655. The existence of a marriage may also be considered an impediment against irregular union as it undermines the duty of fidelity the breach of which amounts to a crime of adultery. Yet, bigamy cannot be an impediment for an irregular union under the Revised Family Code and the Criminal Code. However, it is provided as an impediment by the regional family code of the Southern Nations, Nationalities and Peoples regional state. *See* The Southern Nation, Nationalities and Peoples Regional State's Family Code Proc. No. 75/2004, DEBUB NEGARIT GAZETTA, 9th Year, Extraordinary Issue No. 1, Art.108[hereinafter, SNNPs Family Code], Art.21. Even then, it cannot be considered bigamy in the strict sense of the term. Hence, the relevant provisions providing for essential conditions of a valid marriage are *mutatis mutandis* applicable for an irregular union.

[34] THE REVISED FAMILY CODE, Art. 98. A formal conclusion that is signified by celebration is not required for an irregular union. This can be gathered from the reading of the phrase "…without having concluded a valid marriage" as enshrined in Art.98 of the Code. *See also The Explanatory Note on the Revised Family Code*, at 143.

[35] For example, pecuniary effects in particular legal presumption of common property begins to operate soon after the conclusion in a marriage (Art.28(3)) while the presumption becomes operation only after three years in an irregular union(Art.102(1)). Similarly, marriage is preferred to an irregular union for resolution of the conflict of paternity in the absence of an agreement between the presumed fathers as per Art. 148(a) of the Revised Family Code. Moreover, considering the relation as a marriage may also involve the issue of bigamy if a subsequent marriage is concluded prior to dissolution of the preceding marriage. In contrast, this is not an issue at all in an irregular union.

[36] *See* Tilahun Teshome, **ከጋብቻ ውጭ በግብረ ሥጋ አብሮ መኖር፤ ችግሮችና የመፍትሔ ሀሳቦች፡ የቤተሰብ ህግን ከኤፌዲሪ ህገ-መንግስት ጋር ለማጣጣም ለሚደረገዉ ዓዉደ ጥናት የቀረበ የመወያያ ጽሑፍ፤ክሰኔ** 21-25፤1991 **ዓ.ም** (*Irregular Union: Problems and Recommendations*, A Discussion Paper presented on a workshop for the conformity between the Family Law and the FDRE Constitution, June 28-July 2, 1998), at 3-10.

C. Proof of Marriage and Irregular Union by Possession of Status

Proof of a marriage is as important as its conclusion for the purpose of determining its legal effects. Proof of its celebration in one of the forms is thus a prerequisite for claiming the legal effects produced by the marriage.[37] Such is not the case for an irregular union. For an irregular union, no specific form is needed for its commencement. Rather, its existence as of a certain time and the legal effects created thereof are so important. Yet, both marriage and irregular union require a proof. The issue of proof may arise either during or after the termination of the relations. In most cases, the issue of a proof arises upon dissolution of a marriage or upon termination of an irregular union. The issue is often triggered by a claim of pecuniary effects.

Proof of a marriage can be made primarily by marriage certificate.[38] This is the rule in proof of a marriage. The production of a valid marriage certificate is a conclusive proof of the conclusion of the alleged marriage. The marriage certificate would normally indicate, *inter alia*, the date and mode of celebration of the marriage.[39] Thus, adducing the certificate before the court would resolve the issue of the conclusion of a marriage on a certain date in one of the modes of celebration. In practice, the experience of obtaining a marriage certificate appears to be uncommon in Ethiopia. This might be attributed to lack of well-functioning institutions in the rural parts of the country. The community's lack of awareness about the need for and significance of marriage registration can be another major reason.

As a result, the most dominant mode of proof is that of possession of marital status. It must be noted that a proof by possession of marital status is a default avenue that operates as an exception to the primary mode. Thus, a resort to such an exception must be justified under Article 95 of Revised Family Code. When so justified, proof of the conclusion of a marriage would be made by possession of status.[40] In a proof by possession of marital status, the conclusion of a marriage is presumed upon proof of the elements indicated by the law.[41] The constitutive elements that must be proved are: cohabitation, the mutual treatment of the spouses as husband and wife, their treatment as such by their family and community. Unfortunately, the list of the constitutive elements does not explicitly include celebration of the marriage in a specific form.[42]

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[37] As per Art. 28(3) of the Revised Family Code, it is stipulated that any marriage shall have effect from the date of its conclusion.

[38] THE REVISED FAMILY CODE, Art. 94.

[39] *Id*. Art. 30(c).

[40] *Id*. Arts. 95-97.

[41] *Id*. Art. 97(1).

[42] The definition of possession of marital status regrettably excludes the element from its ambit. *See* THE REVISED FAMILY CODE, Art. 96.

In this regard, the Family Code of the Southern Nations, Nationalities and Peoples Regional State (SNNPRs) clearly stipulates the requirement of proving the conclusion of a marriage in one of the modes of celebration.[43] Under the regional family code, proof of a marriage by possession of status requires proving celebration of a marriage as opposed to that of an irregular union. Consequently, presumption of conclusion of a marriage would be drawn only when, *inter alia*, its celebration in a certain form is proved.[44] This element plays a key role in signifying the conclusion or otherwise of an alleged marriage.

In fact, all the constitutive elements of possession of marital status under the Revised Family Code require sufficient proof. Thus, upon proof of the elements, proof of the celebration of the alleged marriage is quite decisive even though it is not expressly required by the Revised Family Code. Proving celebration is of a paramount significance as it marks the conclusion of the marriage. This element can be read into the definition of possession of marital status. In so doing, the proof by possession of status can be complete and reliable. Based on proof of the status, the court may then infer the presumption of conclusion of the marriage.[45] In principle, the proof of the elements of possession of status can be made by any reliable evidence.[46] Nonetheless, under the Civil Code of Ethiopia, proof of possession of status was limited to testimonial evidence.[47] No such restriction is indicated in the Revised Family Code. In practice, it appears that proof by possession of marital status primarily depends on the oral testimony of witnesses.[48] The testimonial evidence must be relevant to establish the constitutive elements of possession of marital status.

For instance, under the SNNPs Family Code, the conclusion of a marriage in a certain form must be testified by the witnesses that witnessed the celebration of the

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[43] *See* SNNPs Family Code, *supra* note 33, Art. 108.

[44] Id. In UK, for instance, the absence of evidence of celebration of the marriage would bar drawing the presumption of its conclusion. *See also* NIGEL LOWE & GILLIAN DOUGLAS, *BROMLEY'S FAMILY LAW*, 65 (10th ed. 2007).

[45] THE REVISED FAMILY CODE, Art. 97(1). The reading of the provision appears to render the presumption optional. But, as long as sufficient evidence is adduced to prove possession of status, the court is left with no alternative, but to draw the presumption. Hence, despite the deceptive wording of the provision, in effect, the presumption is rather mandatory.

[46] For instance, the registration of the spouse in public document at *kebele* administration and biography form at public office can be considered as reliable evidence. *See Social Security Agency v. Woletebirhan Kassaye*, *supra* note 25.

[47] *See* CIVIL CODE, *supra* note 3, Art. 700.

[48] Despite the fact that the law does not specify the kind of evidence, the elements of possession of status are factual situations that are best proved by testimonial evidence. Moreover, the number of witnesses required is not fixed by the law. It appears that the credibility and sufficiency of the testimonial evidence would not necessarily depend on the number of the witnesses, but on the content of the evidence. In the Civil Code, proof and contestation of possession of status are made by the testimony of four witnesses. *See* CIVIL CODE, *supra* note 3, Art. 700. In contrast, proof of an irregular union by possession of status was based on any kind of reliable evidence. *Id.* Art. 719.

marriage.[49] The practical significance of this requirement might be limited due to the possible absence of witnesses with personal observation. It is not clear whether or not courts dealing with the issue under the Revised Family Code would attach a weight to the testimony of a witness that is based on indirect knowledge. As can be noted from some cases that involved celebration as an element in the proof, due weight has been given to the testimony of witnesses present at the celebration.[50]

In general, the proof of possession of status triggers a judicial presumption of the conclusion of the marriage. The presumption, once established by the plaintiff, would shift the burden of proof to the other party.[51] Indeed, the presumption would have a profound legal consequence.[52] The presumption so inferred can be rebutted by any reliable evidence.[53] Thus, the rebuttal evidence is also not limited to a specific type of evidence. The most appropriate kind of the evidence would rather be dictated by the fact in issue.

Compared to marriage, proof of an irregular union is made only by proving the existence of possession of status. As there is no registration for an irregular union, there does not exist a certificate or written record for proving the union. Possession of status as defined by the law[54] is used to establish the formation or existence of an irregular union. For an irregular union, the elements that require a proof are: the cohabitation of the cohabitants, their behavior that is analogous to a married couple, their treatment as a married couple by their family as well as their treatment as such by the community.[55] Following the proof of the cumulative elements, a rebuttable presumption of the existence of an irregular union will be drawn by the court.[56] The presumption is created only upon proof of the elements by the required evidence. Nonetheless, the kind of evidence required for proof is not specified under the Revised Family Code. Thus, like the case of a marriage, proof of an irregular union through possession of status can be made by adducing any reliable evidence. In most cases, the existence of the possession of status is primarily established based on the oral testimony of the witnesses. Furthermore, it is also not uncommon to find the production of social, financial and employment

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[49] SNNPS FAMILY CODE, *supra* note 33, Art. 129(2).

[50] See *Yeshareg Abatkun v.Mesert Admasu*, *supra* note 22. *See also Asres Mesfin v. Wubnesh Takele*, *infra* note 59, at 177(in which regional court emphasized on the need for proof of celebration by witnesses*); Alehegn Mekonnen* v. *Aster Arahaya*, FEDERAL SUPREME COURT CASS. FILE No.52569/2010, 11 FED. SUP. CT. CASS. DECS. 47, 47-49 (2011).

[51] Shifting the burden of proof to the other party is one of the basic legal effects of a presumption. *See* JOHN W. STRONG (ED.), MCCORMICK ON EVIDENCE, 520-529(5th ed. 1999).

[52] *See* Andrew Borkowski, *The Presumption of Marriage*, 14 CHILD & FAM. L. Q. 251, 251 (2002).

[53] THE REVISED FAMILY CODE, Art. 97(2).

[54] *Id*. Art. 106(2).

[55] *Id.*

[56] *Id.* Art. 106(3) & (4).

records designating the partner as a spouse.[57] In fact, these documents can be considered as corroborative evidence to supplement the testimonial evidence. Thus, the elements that need to be proved for an irregular union are substantially analogous to that of possession of status for marriage.[58]

Therefore, due to the substantial similarity in the elements, the modes of proof are likely to create confusion between marriage and an irregular union. Particularly, this is the case as proving celebration of a marriage in a certain form is not stipulated in the definition of possession of marital status. Furthermore, the ambivalent stance of the Federal Supreme Court on the point is another source of confusion.[59] As a result, there might be instances where an irregular union is mistaken for a marriage and vice versa. In this regard, adopting the experience of the SNNPs Family Code is commendable to avoid the ambiguity.

D. The Non-Liquidation of Pecuniary Effects of a Marriage after Divorce

A marriage once concluded gives rise to the creation of personal and pecuniary relations. The pecuniary relations such as acquisition and administration of personal and common properties constitute pecuniary effects of a marriage. Thus, pecuniary effects are important legal effects of a marriage.[60] The pecuniary effects created upon conclusion of the marriage come to an end upon its dissolution.[61] As one of the grounds of dissolution of a marriage,[62] divorce leads to the liquidation of the pecuniary effects. The pecuniary interests once engendered would then be subject to liquidation process.

In principle, the liquidation is intended to be made by the agreement of the spouses.[63] In default of the agreement, it shall be governed by the operation of the law.[64] In the process of liquidation, the spouses would be allowed, subject to a proof, to reclaim their respective personal property and share the common proper-

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[57] Documents such as *Idir*, insurance, joint bank account, employment record, etc may be produced to corroborate other evidence. *See also Alehegn Mekonnen* v. *Aster Arahaya*, *.supra* note 50. In the case, proof of irregular union was invoked in an alternative claim in the event proof of marriage might fail.

[58] In both cases, the possession of status is defined to consist of mutual treatment of the spouses/cohabitants as married couple, their treatment as such by their family and the community, and cohabitation. *See* THE REVISED FAMILY CODE, Arts. 96 and 106(2).

[59] In one case, the Federal Supreme Court Cassation Division criticized the decision of decision of Amhara regional courts that considered "proof of celebration" as a distinguishing element between proof of marriage and that of an irregular union. *See Asres Mesfin v. Wubnesh Takele*, Federal Supreme Court, Cass. File No. 21740/2007, 5 FED. SUP. CT. CASS. DECS 174, 174-179(2009). In another case, the same division of the court indicated the need for proof of celebration of a customary marriage in a proof of marriage. *See Yeshareg Abatkun v. Mesert Admasu*, *supra* note 22, at 266.

[60] *See* THE REVISED FAMILY CODE, Arts. 57-73.

[61] *Id*. Art. 85.

[62] *Id*. Art. 75(c).

[63] *Id*. Art. 85(1).

[64] *Id*. Art. 85(2).

ty.[65] The court pronouncing the divorce is expected to render its decision on the liquidation of marital property soon after the divorce.[66] In a divorce by petition, the court may not postpone the decision for more than six months after the divorce.[67] However, the issue that begs question is the duration within which spouses can claim the liquidation. The Revised Family Code is mute on this issue. The Federal Supreme Court has taken note of the silence and decided the issue based on the period of limitation under the law of obligations.[68] Thus, it is possible that the liquidation of pecuniary effects may be made any time within ten years since the dissolution of the marriage. This is quite common for cases of dissolution of a marriage by death. In case of divorce, though such a delay is not common, the spouses may still fail to follow up the liquidation process after divorce. In such a case, the pecuniary effects may remain non-liquidated.

Nonetheless, the non-liquidation of the marital property does not indicate the continuity of the marriage. Nor does it necessarily imply the existence of a remarriage that arises from the conclusion of a new marriage. Once a divorce is pronounced, the legal presumption of common property will cease to operate as the marital bond is unequivocally terminated by the divorce decision. That is, the operation of the presumption is limited to during the continuance of the marriage. Though the existing common property would remain as such until its partition, all future pecuniary interests of the spouses would be subject to the ordinary rules of property law.[69] Thus, the non-liquidation of the pecuniary effects does not necessarily presuppose the continued existence of the previous marriage or a remarriage.

II. SUMMARY OF FACTS OF THE CASE

The case originally arose before the Federal First Instance Court (FFIC) between W/ro Abebework Getaneh (hereinafter, the *petitioner*) and W/ro Wagaye Haile (hereinafter, *the respondent*).[70] In the case, the petitioner claimed the existence of a marriage between herself and her deceased ex-husband named Ato

[65] *See* THE REVISED FAMILY CODE, Arts. 85-93. *See generally* Sileshi Bedasie, *Determination of Personal and Common Property During Dissolution of Marriage under Ethiopian Law: An Overview of the Law and Practice*, 2 OROMIA L. J. 138, 138-186 (2012).

[66] This is usually the case for conditions of divorce by mutual consent. The agreement on conditions of divorce shall be approved along with the divorce agreement. *See* THE REVISED FAMILY CODE, Art. 80(2).

[67] THE REVISED FAMILY CODE, Art. 83(4).

[68] *See Dinke Tedla v Abate Chane*, Federal Supreme Court, Cass. File No.17937/2007, 4 FED. SUP. CT. CASS. DECS 82, 82-85(2009).

[69] Any property acquired after the date of divorce would become private property as per the relevant legal provisions of property law. The property may be subject to individual or co-ownership based on whether it is acquired personally by a spouse or jointly by both spouses. No legal presumption of common property would operate to govern the property jointly acquired after divorce.

[70] *Abebawork G. v. Wagaye H*, FEDERAL SUPREME COURT, CASS. FILE NO. 23021/99(E.C) [*hereinafter*, cited as "*Abebawork v Wagaye Case* "].

Amare Yilma. As can be gathered from the record of cassation decision, the marriage between the petitioner and the deceased was dissolved by divorce in 1976 (E.C). The marriage lasted only for a decade. The divorce judgment made by the then family arbitrators was approved by the court. Four months after the divorce, the ex-spouses were reconciled to live together without concluding a marriage. Following the death of her ex-husband, the petitioner filed an application before FFIC for declaration of existence of marriage in until 1995. The court ruled that there was a marriage between the petitioner and Ato Amare. The respondent as a guardian for the son of the deceased filed an objection before the FFIC against the declaratory judgment. Following the objection, a ruling was made in favor of the respondent quashing the declaratory judgment. In effect, the ruling set aside the previous decision of existence of marriage by the court. Eventually, the case was let run its course all the way up to the Cassation Division of the Federal Supreme Court.

III. RULINGS AND REASONING OF THE COURTS

This section is devoted to a brief summary of the salient statements of the case pertaining to the ruling and the reasoning of the courts throughout the proceedings. The critique on the ruling and the reasoning of each court would be made in the section to follow.

A. Ruling and Reasoning of the Federal First Instance Court

In the case at hand, the court was seized with the issue of whether there was a marriage or not. So, the issue was essentially about proof of the marriage. Nevertheless, since there was no marriage record, the proof was based on possession of status. Having heard the arguments and witnesses of both parties on possession of status, the court ruled that the existence of the alleged marriage was not sufficiently proved.[71] In its reasoning, it indicated that the presumed conclusion of the marriage was satisfactorily rebutted by the respondent. The rebuttal evidence that was given more weight was a letter from the *kebele* administration based on the testimony of three witnesses. The letter was the only written evidence submitted to rebut the presumption of conclusion of the alleged marriage. The letter purported to be an official declaration of the inexistence of cohabitation between the applicant/petitioner and the deceased after the dissolution of the initial marriage.[72] The letter was originally addressed to the Commercial Bank of Ethiopia (CBE).[73]

[71] *Id. at* para 5.
[72] *Id.*
[73] *Id.*

B. Ruling and Reasoning of the Federal High Court

In dealing with the appeal, the Federal High Court (FHC) noted the continued cohabitation between the petitioner and the deceased ex-husband soon after four months following the dissolution of the marriage by divorce.[74] It was proved in the lower court that they were reconciled to continue living together despite the divorce.[75] Undisputed was also the non-liquidation of pecuniary relations after the divorce.[76] Having noted these facts, the issue framed by the FHC was whether the spouses had to remarry or be reinstated via reconciliation to renew their former marriage.[77] The FHC indicated that the law is mute to address the issue.[78] Nonetheless, the Court ruled that the previous marriage continued to exist as remarriage would not be required to renew the marital union.[79] In effect, the appellate court reversed the decision of the lower court. In substantiating its ruling, the Court stated that it is uncommon in our custom for ex-spouses to conclude a new marriage between themselves after a divorce.[80] Rather, the reconciliation itself was indicative of their intention to live together as husband and wife.[81] Likewise, their reconciliation after divorce would be deemed to have the effect of cohabitation in a marriage.[82] Moreover, the non-liquidation of the pecuniary relations would evidence the continuity of the marriage even after the divorce.[83]

C. Ruling and Reasoning of the Federal Supreme Court

In response to the appeal lodged by the respondent, the appellate division of the Federal Supreme Court (FSC) reversed the decision of the FHC. In other words, the court ruled out the existence of a marriage between the petitioner and the deceased ex-husband after the divorce. In its reasoning, the court rejected the issues of reconciliation and continued cohabitation that underpinned the ruling of the FHC.[84] The FSC made its stand clear that none of the grounds would constitute or evidence conclusion of a remarriage.[85] The court also mentioned that the conclusion of a new marriage or proof of the same was not the contention of the petitioner.[86] Hence, neither reconciliation nor cohabitation would be regarded as an ev-

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[74] *Id. at* para 6.
[75] *Id.*
[76] *Id. at* para 4 & 6.
[77] *Id. at* para 6.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id. at* para 7.
[85] *Id.*
[86] *Id.*

idence of remarriage or conclusion of a new marriage after the dissolution of the previous marriage.[87]

D. Ruling and Reasoning of the Cassation Division

Following the petition of the current petitioner, the Cassation Division of the FSC was seized with the matter to give its binding interpretation of the law on the issue. In the beginning, the parties were summoned to clarify whether the marriage was in fact dissolved through divorce or the death of the ex-husband.[88] The dissolution of the marriage by divorce long before the death of the ex-husband was not disputed. As a result, the Cassation Division went further to verify whether or not the alleged marital union was created between the petitioner and the deceased after the divorce in 1976 E.C.[89] In addressing the issue, the court highlighted the silence of the law on the necessity of remarriage between ex-spouses following their reconciliation.[90] In so doing, it however admitted the existence of possible argument against the need for a specific legal stipulation for a remarriage.[91] This is so as a remarriage in effect would not be different from conclusion of a new marriage.[92] Yet, the Cassation Division ruled that the existence of the marriage could be established based on possession of status under Art. 96 of the Revised Family Code. In this regard, the court stated that the cohabitation of the ex-spouses as husband and wife after reconciliation and their treatment as such by the community would evidence the possession of status.[93] The Cassation Division also mentioned that the legal presumption so created under Art. 97(1) of the Revised Family Code[94] was not satisfactorily rebutted by the written evidence considered by the trial court.[95]

IV. CRITIQUE

This section endeavors to make a critical analysis of the decisions and reasoning of the courts that have been summarized in the preceding section. To this effect, the analysis would be made in the light of the legal framework highlighted in the beginning section.

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[87] *Id.*
[88] *Id. at* para 8.
[89] *Id. at* para 9.
[90] *Id. at* para 12.
[91] *Id.*
[92] *Id.* In the course of its reasoning, the FSC explicitly stated that remarriage after divorce is not different from conclusion of a new marriage. It further indicated that regulating it anew may likely raise an argument about the necessity of a legislative act to do so. This is due to the fact that conclusion of a new marriage, irrespective of the parties, is subject to the existing legal rules under THE REVISED FAMILY CODE.

[93] *Id.*
[94] *Id. at* para 13.
[95] *Id. at* para 14.

A. The Decision of the Federal First Instance Court

In this sub-section, three important legal issues will be analyzed in light of the Revised Family Code. The first legal issue would be about the establishment of presumption of conclusion of the alleged marriage. This would be followed by a critical analysis of the sufficiency of the evidence for the presumption. The last pertinent legal issue would be the effect of post-divorce cohabitation.

1. Presumption of Conclusion of a Remarriage

As can be noted from the facts of the case and the ruling of the FFIC, the judicial declaration of the petitioner's marital status was disputed by the respondent in the same court. The court subsequently reversed its previous decision stating that the testimony of the witnesses was not sufficient to establish possession of status. This begs the question as to what extent the first decision was well-founded on sufficient evidence. It is a rule of procedure that judicial presumption of conclusion of a (re)marriage shall follow an established proof of possession of status. In other words, whosoever alleges the conclusion of a marriage and seeks to prove same on the basis of possession of status is required to establish the constitutive elements of the status as defined under Art 96 of the Revised Family Code. As stated in the Code, the elements namely: mutual treatment as spouses, cohabitation, and treatment as spouses by the community and their family are all cumulative conditions that require sufficient proof. It is unfortunate that celebration of a marriage is missing from the elements.[96] Indeed, all the other elements emanate from the conclusion of a (re)marriage in one of the forms prescribed by the law.

Without celebration of the (re)marriage in accordance with a given form that marks the conclusion of a (re)marriage, the elements in themselves would remain hollow and rootless. In the case at hand, no celebration was proved to trigger the presumption of conclusion of the remarriage.[97] The court did not consider the issue of celebration at all. The judicial oversight of the issue might be attributed to the silence in the law. Unlike the SNNPs Family Code,[98] the Revised Family Code regrettably omits celebration of a (re)marriage from its definition of possession of status. The former requires proof of celebration as an integral component of possession of status to establish the judicial presumption of conclusion of a marriage. The omission of such a decisive element in the Revised Family Code has already created a confusion thereby blurring the basic distinction between a marriage and an irregular union. For the presumption of conclusion of the remarriage to be taken by the court, proof of its celebration should be considered as an inherent element

[96] There is no explicit mention of "celebration" in the definition of possession of status. *See* THE REVISED FAMILY CODE, Art. 96.

[97] Proof of celebration of the alleged post-divorce remarriage was not even raised as an issue.

[98] SNNPs FAMILY CODE, *supra* note 43.

of proof of possession of status. Without proof of such a decisive element, presumption of conclusion of the alleged remarriage would remain unwarranted. It is assumed that FFIC was not unaware of significance of a mode of celebration as an essential point of distinction between a (re)marriage and an irregular union. Moreover, the court was quite aware of the absence of a celebration for the post-divorce cohabitation. Nevertheless, the court took the presumption of conclusion of the marriage and ordered for its rebuttal. Hence, the court's presumption of conclusion of the alleged remarriage lacked a firm legal basis.

2. Sufficiency of Evidence for the Presumption

In the case at hand, it appears that even the elements that were stated by the law were not well-established. Indeed, the degree of proof required to create the presumption of conclusion of a marriage is not clear. Yet, the degree of preponderance common in other civil suits would seem to suffice as long as it is properly weighed.[99] The question worth asking is how sufficient was the evidence to establish the presumption of the alleged remarriage. This question is important as the issue of celebration and the relevant evidence thereto were altogether neglected. In effect, the decisive part of the evidence was missing.[100] Ignorance of the evidence would render the whole evidence below the threshold required for the presumption. It may be argued that the court's revocation of its previous decision might allude to its reluctance to adhere to the standard of proof required to create the presumption. Apparently, the presumption drawn was not well-founded to withstand a little refute. This can be inferred from the court's assessment of the rebuttal evidence. The letter was found to be quite sufficient to rebut the presumption.[101]

Further, it was held that the testimonial evidence adduced to set up the presumption was insufficient to prove the possession of status. However, the court went further to consider the rebuttal evidence. In so doing, it found the evidence sufficient to rebut the presumption of remarriage that led to its previous decision. If at all, the oral evidence was insufficient to prove the possession of status, one may wonder how the court took the presumption to deal with the rebuttal.[102] The reason

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[99] As long as a specific exception calling for a higher degree of proof is not stipulated by the law, the established rule of degree of proof (*i.e*, degree of preponderance/balance of probability) in civil suits would be the governing standard. *See* BETATEK TADESSE, BASIC CONCEPTS OF EVIDENCE LAW, 280-281 (1st ed. 2005).

[100] Each of the elements of possession of status would be proved by sufficient evidence to establish the presumption of conclusion of the alleged marriage. From among the facts to be proven, celebration of marriage, though not counted as *such* in the law, is the critical element seeking sufficient proof to warrant the inference of the presumption.

[101] *Abebawork v Wagaye Case* , *supra* note 70, at para 5.

[102] The reasoning of the court itself is self-contradictory on this point. On one hand, the court argued that the testimonial evidence submitted by the petitioner was insufficient to prove possession of status. On the other hand, the court took the presumption of the conclusion of the remarriage and or-

is that rebuttal presupposes the establishment of the presumption, which in turn depends on proof of possession of status.[103] Such a venture would cast a doubt on the credibility of the successive and contradictory rulings. In the absence of a presumption, it would amount to a procedural irregularity to deal with rebuttal evidence. This procedural flaw would be severe enough to affect the ruling. Where presumption is involved, the court cannot routinely call for production of evidence from both parties turn-by-turn. The evidence of the other party is required only after the presumption is set in operation.[104] If the presumption is not well-established, the case will be closed. Were the court to find the evidence insufficient, it could avoid taking the presumption. That would also entail setting aside its prior ruling.

In the event the evidence adduced is found sufficient to create the presumption, the rebuttal of the presumption can be duly ordered by the court. Despite the silence of the Revised Family Code on the kind of relevant evidence for proof of possession of status, it is indicated that rebuttal can be made based on any kind of reliable evidence.[105] Thus, either oral or written evidence or even both kinds as appropriate can be used in rebuttal. In contrast, the appropriate evidence for proof of the constitutive elements of the possession of status would primarily be oral evidence.[106] With regard to the rebuttal evidence, even though the presumption itself was not convincingly established, the court considered a letter from the *kebele* administration to the CBE as sufficient evidence. It is arguable if such a written declaration of non-cohabitation is worth the credence. Be that as it may, the decision was flawed as the issues of the presumption and the cohabitation were misconstrued.

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dered for rebuttal evidence. Rebuttal evidence is required only when the proof is sufficient to create the presumption.

[103] The law unambiguously states that the court may presume the conclusion of the alleged marriage when the possession of status under Art.96 of the Revised Family Code is proved. Proving possession of status is a condition precedent for the operation of the presumption and the subsequent rebuttal. *See* THE REVISED FAMILY CODE, Art.97.

[104] It is a rule that evidence is introduced by the other party only after the first party has made his case out by producing sufficient evidence, which, in his opinion, would justify the finding in his favor. In particular, this is more so where a rebuttable presumption governs the issue as the other party is required to produce evidence (usually rebuttal evidence) after the presumption is triggered by the first party. Yet, the first party bears the burden of setting up the presumption by proving the existence of the facts that lead to the presumption. *See* ROBERT A. SEDLER, ETHIOPIAN CIVIL PROCEDURE, 200(1968).

[105] T HE REVISED FAMILY CODE, Art. 97(2). Under the Civil Code, proof by possession of status and its contestation were exclusively based on the testimony of four witnesses. *See* CIVIL CODE, *supra* note 3, Art. 700

[106] The nature of factual elements would normally require oral evidence to establish their existence. Nevertheless, relevant written evidence such as registration of the spouses in public /community documents, family and private documents or letters of the spouses may still be used to corroborate the oral evidence.

3. Cohabitation Not a Proof of Remarriage

In the case, the prime issue before the court was about the post-divorce cohabitation. The ruling on the issue stood in a stark contradiction with the legal regime. Sticking to the factual relation, the court was misguided by the issue of cohabitation. Instead, the proper issue at hand would have been all about the (non-) conclusion of a remarriage in one of the forms after the divorce. This had to be the case as a continued cohabitation after a divorce *per se* would not suffice to constitute a remarriage between the ex-spouses.[107] Nowhere in the law does proof of non-marital cohabitation imply a remarriage. Once the former marriage was dissolved by a divorce, that previous bond would come to an end.[108] No marital bond would then persist after its dissolution as its existence was formally terminated. Even, the court's decision on divorce as such is not subject to further judicial review by appeal.[109] It is worth noting that a marital bond once terminated by divorce can never be repaired through cohabitation.

Strictly speaking, the cohabitation of the spouses would not have the effect of setting aside the divorce decision of the court that stood good for all legal purposes. Nonetheless, the ex-spouses could create a new marital union. In fact, they were at liberty to do so any time without a limitation. Hence, the existence of a post-divorce marital union between the ex-spouses depends on a remarriage. Remarriage is understood to mean a second marriage after the dissolution of a previous marriage. The remarriage can be concluded between ex-spouses or one of the ex-spouses and another person. Remarriage necessarily occurs through celebration or conclusion of a new marriage in one of the modes of celebration as prescribed by the law.[110]

In the case under consideration, the issue would be whether or not there existed a remarriage. As can be noted from the record, no remarriage was proved. In the absence of such a remarriage, there would be no legal basis for proof of a remarriage. Cohabitation would never suffice to warrant presumption of conclusion of a remarriage. Since celebration is a prerequisite for conclusion of a (re)marriage,

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[107] A post-divorce cohabitation along with other elements of possession of status can be regarded as an irregular union. For irregular union, no formal instance of commencement such as celebration is required.

[108] Divorce is one of the grounds for the complete dissolution of a valid marriage. A marriage so dissolved would cease to exist in the eyes of the law. *See* THE REVISED FAMILY CODE, Art. 75(c). In the same token, a marriage dissolved due to declaration of absence may not be restored upon the reappearance of the absentee. *See Wubit Hiruy v. Hawassa City Finance and Economic Development Office*, Federal Supreme Court Cass. File No.74791/2013, 14 FED. SUP. CT. CASS. DECS 167, 167-170(2013).

[109] No appeal can be lodged against the judgment of the court on divorce as such. *See* THE REVISED FAMILY CODE, Art. 112.

[110] Conclusion of a (re)marriage necessarily depends upon its celebration in one of the forms prescribed by the law. Indeed, that is the very reason for regulating the modes of celebration.

proof of cohabitation along the other elements, yet short of celebration, would not be sufficient to constitute proof of the alleged remarriage. Even though the ultimate decision of the lower court was not flawed as such, the procedure, the issue and the reasoning of the court were all tainted with errors and misconstructions.

B. The Decision of the Federal High Court

Treated in this sub-section is the critical analysis of reconciliation and the gap between the law and the practice. Besides, the effect of non-liquidation after divorce is worth analyzing. At first blush, dwelling on the issues may appear redundant. Yet, a closer scrutiny of each issue merits meticulous analysis.

1. Reconciliation Not A Substitute for Remarriage

The ruling of the FHC as reflected in its reasoning was based on three grounds that call for critical analysis. The first ground relied on by the court was the reconciliation of the ex-spouses after the divorce. In so doing, the court gave undue weight to the subsequent reconciliation that was proved in the lower court. In grappling with the effect of the reconciliation, the court mentioned the silence of the law with regard to renewing the former marital relationship. Indeed, the primary issue was whether reconciliation alone would restore the marital bond that was once terminated by the divorce. Reconciliation under the Revised Family Code is an important step in saving the dissolution of a marriage by divorce. To this end, attempts would be made both by the court and arbitrators chosen by the spouses to reconcile the latter during divorce proceedings. A successful judicial/court-supervised reconciliation could rescue a marriage from divorce.

A post-divorce reconciliation does, however, bear no such effect for the marital bond was dissolved for good by the divorce. Should the ex-spouses desire to have similar marital union upon reconciliation, they should first establish a new one in accordance with the law. Reconciliation can never be equivalent to conclusion of a remarriage which signifies the creation of a marital bond. Legally speaking, post-divorce reconciliation cannot amount to a remarriage despite the existence of such a practice where the spouses assume to be in a marital union.[111] For a marital union to exist between the ex-spouses, there must be a remarriage which should flow from the celebration of a second marriage. At best, post-divorce rec-

[111] If such a practice needs to be recognized as a special procedure for ex-spouses to conclude a subsequent remarriage after the dissolution of a previous marriage, that should be revisited by the legislative organ. Of course, it can be argued that the law has already provided for the possible avenues to create a new marriage in one of the three forms. As a result, considering reconciliation as a conclusion of a remarriage is simply unnecessary if at all the law is to be implemented consistently. The law in providing for the modes of celebration is assumed to have taken into account all the prevailing situations/practices in the society. In the alternative, the law still gives recognition to the cohabitation upon reconciliation after divorce as an irregular union. This can accommodate the practice. Hence, the law as such must be enforced unless changed by the appropriate organ.

onciliation would only suggest mutual consent for cohabitation. The cohabitation together with other elements might develop into an irregular union. Thus, the effect of post-divorce reconciliation falls short of a remarriage.

2. Remarriage at Odds with the Practice

In this regard, the court's second issue was whether or not conclusion of a new marriage is required to renew the marriage. In addressing the issue, the court relied on the practical experience of the society as the second ground to justify its ruling. Consequently, the fact that conclusion of a new marriage is uncommon in practice was considered as another ground for its decision. It is true that conclusion of a new marriage by ex-spouses seems to be uncommon in Ethiopia.[112] This may be attributable to lack of awareness of the legal significance of a formal conclusion of a (re)marriage. Moreover, some spouses tend to believe that a previous marriage can be brought back to life once again through reconciliation and cohabitation. Hence, conclusion of a remarriage through one of the forms appears to them unnecessary.

In practice, the society may not expect ex-spouses to undergo celebration of a second marriage. Moreover, as divorce is condemned on religious ground, the spouses would be encouraged to reunite via reconciliation. In particular, this is likely to be the case with Christianity. Once divorced, the divorcees are not supposed to conclude a remarriage with other persons. Yet, there is no such a barrier to conclude a civil marriage as the marriage is freely celebrated before the concerned office in the cities such as Addis Ababa. In practice, civil marriage is apparently not common as such in the rural parts of Ethiopia as the office of civil status is not sufficiently accessible to the rural community.[113] As a result, ex-spouses outside urban areas may tend to consider reconciliation and cohabitation as restoration of the dissolved marital union.

Despite the foregoing factors, equating reconciliation to conclusion of a remarriage lacks a legal basis.[114] Nor does reconciliation serve as a legal means to restore a legitimate marital bond that was unequivocally terminated. Likewise, non-marital cohabitation is not equivalent to a remarriage. Let alone reconciliation or cohabitation, even a judicial declaration of any kind can never create or restore a

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[112] It is even not common among other divorcees in subsequent marriages. Some people informally start living together thereby treating the cohabitation as a marital union.

[113] *See* Mehari Redai, *supra* note 3, at 14.

[114] It is important to note that there is no need for interpretation in the case at hand. Even when interpretation is necessitated, the rule of interpretation appropriate for the issue at hand would be the contextual or positive rule of interpretation that makes the application of the relevant provisions effective. *See* George Krzeczwnowicz, *An Introductory Theory of Laws in the Context of the Ethiopian Legal System*, 5(1971) [unpublished manuscript at AAU Law Library].

legal marital bond once dissolved.[115] Thus, the court's sympathy for the *defacto* relation between the ex-spouses and its treatment akin to remarriage is a clear deviation from the law.[116] The sympathy may seem to justify the practice of equating a post-divorce reconciliation and cohabitation with a remarriage as a formal conclusion of a remarriage is not common in Ethiopia. Yet, it lacks a legal basis to buttress the deviation. It is submitted that a gap exists between an explicit legal rule and the practice. Nonetheless, leaning towards the practice in disregard of the law is legally unwarranted. The fluid practice must be guided by the proper application of the law. The application of a clear legal rule must not be misunderstood as a mere reflection of positivism devoid of a normative content. Marriage is a public legal act that shapes the conduct of individuals in the union. As such, its unequivocal legal creation is necessitated and regulated by the relevant law for public interest.

Celebration of a (re)marriage does not only evidence its very inception, but also distinguishes it from other informal unions. As such, celebration of a (re)marriage is not the making of the law. It is rather a product of the societal practice recognized by the law. Setting aside the explicit legal rule would thus nullify its legal significance. It would even create further unintended legal problems that would stem from the erosion of the distinction between a formal marriage and an irregular union.[117] It should be noted that a marital status does not ensue from a post-divorce cohabitation between ex-spouses and their treatment as 'spouses' by the community.

Misconstruction of a post-divorce relation that remains an irregular union or a mere cohabitation as a (re)marriage would entail serious legal repercussions. One of the possible undesirable legal consequences would be related to cases of biga-

[115] With regard to marriage and its legal effects, the power of the court under the Revised Family Code is exclusively so extensive. For instance, only the court is competent to decide on the conclusion and validity of a marriage. Nevertheless, the court's power is limited to deciding on whether or not the marriage has been concluded and is valid. It does not extend to creating or restoring a marital union that is ended by divorce. *See* THE REVISED FAMILY CODE, Art. 115.

[116] The law as it stands now does not support such a deviation. For all cases of a marriage, its conclusion in accordance with the prescribed forms is clearly provided by the law. The legislature was not unaware of the practice when it stipulated the requirement of conclusion in a certain form for all forms of a marriage. Should the change in the situations over a period of time necessitate amendment in the requirement, that task is constitutionally entrusted to that same legislature, not the court. Courts are duty bound to apply the law appropriately.

[117] Apart from defeating the very fundamental goals and public social objectives behind the regulation and protection of marriage as indicated in the preamble of the Revised Family Code, the specific instance of the undesired legal consequence would be related to the legal effects of a valid marriage. Though an irregular union is fairly treated in the RFC in terms of its legal effects, it is still not on equal footing with a marriage. In the extreme, when regarded as such, bigamy would entail punitive measure. *See also* Mehari Redai, *supra* note 3, at 112.

my.[118] The issue would be as to how the court would deal with cases where the ex-spouses conclude another marriage. It is arguable if they would be held responsible for a crime of bigamy as the preceding bond of marriage was legally dissolved despite the continued cohabitation between the ex-spouses upon reconciliation.[119] For crime of bigamy to exist, the existence of preceding bond of valid marriage shall be proved.[120] Despite this fact, the court might hold it otherwise in such a bizarre case. Similar legal issue would arise in relation to the pecuniary effects of the post-divorce relation.[121] If the relation is treated as a marriage, it means that properties acquired in a relation that does not last for three years would be subject to the legal presumption of common property.[122] Thus, such a decision would undermine the very purpose of distinguishing a (re)marriage from an irregular union. In effect, a formal (re)marriage and an irregular union will fade into a legal and practical insignificance.[123] This has been the case in the US where the significance of a marriage is in decline.[124]

In the same vein, treating a short-lived post-divorce non-marital cohabitation as a remarriage would also complicate legal issues pertaining to the paternity of a child born in the cohabitation. In particular, this is the case with regard to legal presumption of paternity that depends on the existence of a (re)marriage or an irregular union.

Therefore, in the absence of a formal conclusion of a remarriage between the ex-spouses, no bond of marital union would exist between them in a post-divorce cohabitation. The previous divorce decision unequivocally causes the legal dissolution of the marriage.[125] Thus, the post-divorce relation that fails to constitute a remarriage would remain an irregular union or a mere cohabitation, as the case may be.

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[118] As bigamy presupposes the existence of preceding bond of a valid marriage, considering a case of an irregular union as a marriage would involve a perplex issue of determining bigamy as an impediment for subsequent marriage and render it invalid. Thus, a marriage that would be valid in the eyes of the law would be considered bigamous where an irregular union is mistaken for a marriage.

[119] The commission of a crime of bigamy should be strictly considered in light of the existence of a preceding bond of valid marriage. Otherwise, factual situations that would not constitute a relation more than irregular union can, if mistaken for a marriage, result in severe penalties. The absence of remarriage after the dissolution shall govern the case. *See* CRIMINAL CODE, *supra* note 30.

[120] *Id*.

[121] *See supra* note 117.

[122] For a marriage, the presumption begins to operate from the date of the marriage as one of its legal effect. *See* THE REVISED FAMILY CODE, Art. 28(3). This is not the case for an irregular union. *See id*. Art. 102(1).

[123] *See* Walter Otto Weyrauch, *Metamorphoses of Marriage,* 13 FAM. L. Q. 4(415), 428(1980).

[124] *See generally* Walter, *infra* note 149.

[125] *See* Lloyd Cohen, *Marriage, Divorce and Quasi Rents; Or, "I gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 2(267), 274(1987).

3. Non-Liquidation of Marital Property Not a Proof of Marital Bond

The third ground underpinning the reasoning of the court was the non-liquidation of pecuniary effects after divorce. It is possible that liquidation of pecuniary effects can be effected soon after the divorce or be delayed for a period not exceeding six months.[126] This period refers to the duration to be complied with by the court dealing with a divorce petition. Yet, the maximum period of limitation for the claim of liquidation is the 10-year duration set by the Cassation Division of the FSC in a recent case.[127] Hence, the liquidation of pecuniary effects can be made any time within a decade since dissolution of a (re)marriage. However, the presumption of common property ceases to exist upon the dissolution of the marriage.[128] In other words, any property acquired after the date of divorce would remain the personal property of the concerned spouse. This implies that all the rules that are operative during a marriage would come to an end upon its dissolution. What remains behind is just the issue of liquidation, which is limited to retaking and partition of the properties acquired prior to or during the marriage. Worth mentioning is the fact that there may be an issue of common property in an irregular union arising from a post-divorce cohabitation. Nonetheless, that is applicable subject to the condition of three years after the union is created. In the case under consideration, the court was rather dealing with the issue of a marital union. Therefore, the non-liquidation of pecuniary effects does not imply the continuance of the previous marriage after divorce. Nor does it necessarily imply the existence of a remarriage. The overriding divorce decision irreversibly dissolves the marriage.

In sum, the grounds relied on by the FHC were all flawed and without legal basis to justify the existence of a continued marriage or remarriage between the ex-spouses. It suffices to recap that none of the grounds stated by the court would stand on any legal basis to justify the ruling. For a juridical consequence to flow from a (re)marriage, its creation upon celebration must be proved.[129] That is, compliance with one of the special forms is indispensable for the commencement of the remarriage. There is no dispensation of such a requirement for the mere fact that the parties were ex-spouses.

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[126] THE REVISED FAMILY CODE , Arts. 80(2) & 83(4).

[127] See *Dinke Tedla v Abate Chane, supra note 45*. *See also, Seyoum W/Meskel v Amsale Muluneh, et al.,* Federal Supreme Court Cassation Division, Cass. File No.59539/2011, 11 FED. SUP. CT. CASS. DECS 92, 92-93(2011).

[128] It must be borne in mind that legal presumption of common property and its operation as such is the legal consequence of the conclusion and continued existence of the marriage. The dissolution of the marriage is thus tantamount to cessation of the presumption.

[129] Marcel Planiol and George Ripert, *Treatise on the Civil Law*, Vol. 3, Part 1, at 497(11th ed. 1938).

C. The Decision of the Appellate Division of the Federal Supreme Court

This sub-section is limited to illuminating the standpoints of the Appellate Division of the FSC on the most important issues. As the author concurs with the stance of the court, no critical comments are made. The issues are thus highlighted to show the absence of basic errors of a law calling for further cassation review.

1. No Claim of Conclusion of Remarriage

In reversing the decision of the FHC, the court held that conclusion of a remarriage with the deceased was not directly alleged by the petitioner. Instead, the contention of the petitioner was about a post-divorce cohabitation following the reconciliation. Indeed, both the dissolution of the marriage and absence of subsequent conclusion of a remarriage were admitted by the petitioner.[130] As rightly pointed out by the court, there would be no issue of remarriage between the ex-spouses as its conclusion was not even alleged. In the absence of celebration of a remarriage, one cannot talk about its existence and the effects that would ensue thereof. Suffice to mention that celebration is a prerequisite for conclusion of a remarriage that in turn would give rise to its legal consequence. Thus, the significance of this core issue was overlooked by the FHC. This deliberate but serious judicial oversight led the FHC to make unnecessary venture into the issue of possession of status. The erroneous endeavor of the court in this regard was correctly dismissed by the appellate division of the FSC.

2. No Issue of Proof of Marital Status

As indicated above, the appellate division of the FSC also stated in its reasoning that proof of possession of marital status was not the issue at hand. According to its reasoning, the petitioner's claim was limited to the existence of cohabitation and reconciliation between her and the deceased husband. Hence, existence of possession of marital status was not alleged as such. One might argue about the existence of an implied allegation. This ought to be a basic claim to be asserted, though. Indeed, possession of marital status presupposes the conclusion of a (re)marriage. Conclusion of a remarriage after the divorce was not even claimed as indicated elsewhere. In the absence of conclusion of a remarriage, reconciliation and cohabitation *per se* would not suffice to trigger proof of possession of marital status. No possession of marital status exists without the existence of the remarriage. The existence of a remarriage depends on its conclusion. In this regard, the FSC took the correct approach.

[130] *Abebawork v Wagaye Case*, *supra* note 70, at para 4.

3. Reconciliation and Cohabitation Not Enough

In addition to the aforesaid issues, the court rejected the argument of the petitioner that hinged upon the post-divorce reconciliation and cohabitation. The existence of the alleged reconciliation of the ex-spouses and their consequent cohabitation were not dismissed by the court. However, the unwarranted conclusion of the FHC about the existence of the marriage was criticized. It can be noted that proof of the alleged grounds would not necessarily evidence the existence of a remarriage. Nor does it extend the dissolved marital union beyond the date of divorce.[131] Consequently, the court appropriately held that reconciliation and cohabitation were not tantamount to a remarriage. They can be indicative of a relation amounting to an irregular union. Nevertheless, they are not sufficient enough to evidence conclusion of a remarriage after the divorce.

D. The Decision of the Cassation Division of the Federal Supreme Court

In the previous sections, concise analysis of various key legal issues involved in the case has been made. It is believed that the analysis would indicate errors, clarify ambiguities and elucidate the legal issues pertaining to the rulings and reasoning of the courts. It is quite obvious that none of the legal interpretation(s) underpinning the rulings would be binding. In contrast, the legal interpretation of the Cassation Division of the FSC on the case at hand would carry a prospective binding effect on all judicial and quasi-judicial organs as well as parties. This would remain so unless the interpretation gets changed in future cases. Thus, this subsection gives more emphasis to the analysis of the key legal issues involved in the decision.

1. Deviation from the Issue Framed

Initially, the Cassation Division rightly framed a proper legal issue for its interpretation. The issue was whether or not a remarriage was made between the ex-spouses. In its analysis, the Division noted the indisputability of the dissolution of the previous marriage after a decade. It further pointed out the proof of post-divorce reconciliation and subsequent cohabitation few months later after the divorce. Though the issue was all about the existence or non-existence of a post-divorce remarriage, the court eventually went astray in its inquiry of the issue. It rather focused on the issue of reconciliation and cohabitation. The central issue in

[131] Worth noting is the legal consequence of a divorce that entails change in the legal status of the spouses for all legal purposes. *See* LOWE & DOUGLAS, *supra* note 44, at 174-176. Most legal effects (rights and obligations) that were once attached to the marital status of the spouses would be terminated. For instance, the duty to supply maintenance that is based on affinity relationship comes to an end upon divorce. *See* THE REVISED FAMILY CODE, Art.199. Moreover, the change is the legal status needs to be clear to third parties dealing with the spouses so as to avoid an erroneous belief of the status of the spouses. Thus, extending the effects to a post-divorce would complicate those legal issues.

the case would have been whether or not a remarriage had been concluded between the ex-spouses after the divorce. Framing such an issue would then call for proof of celebration of the alleged remarriage in one of the three modes of celebration under the Revised Family Code. The issues of reconciliation and cohabitation, as dealt with at length elsewhere in this piece, would rather be ancillary to the inquiry of the main issue. Taking the proof of the auxiliary facts, the court rushed to deal with the issue of proof of remarriage. Holding that possession of marital status could be the appropriate mode of proof for the case at hand, the court skipped the initial issue to address whether or not remarriage would be required by the law.

In so doing, the court essentially reverted to another issue. Both issues are quite distinct. The first issue of conclusion of a new marriage (remarriage) is an issue of fact that seeks a response based on the necessary evidence. As can be noted from the record, no evidence was adduced in this regard. Even the issue itself was overlooked by the FFIC. It is noteworthy that this should have been the issue before the lower court as the dissolution of the previous marriage was never contested. In contrast, the second issue of the legal necessity of a remarriage would be a question of law as the proper answer for this issue lies in the law itself. Should this issue be an issue calling for the legal interpretation, the first issue would be inappropriate. The issue would be irrelevant when the legal necessity of remarriage itself is rather in question. As indicated below, it is worth noting that the necessity of a remarriage would not be an issue calling for a legal interpretation. It can readily be gleaned from the law that a remarriage can be concluded between ex-spouses after the dissolution of a former marriage. Though framing the proper issue is a procedural matter, its disposition goes deeper to determine the outcome. As a critical reflection on the substance of the issue is in order in the next sub-section, it is sufficient to note how the court deviated from the issue it framed in its subsequent legal reasoning. This would render its legal analysis quite muddled.

2. No Room for Interpretation

The other question worth asking is whether there was a need for the legal interpretation of a remarriage. Both issues indicated in the preceding sub-section would never call for a legal interpretation. The main issue of the existence or non-existence of an alleged remarriage would not be regarded as a question of law seeking interpretation. It would rather remain a question of fact to be answered in the trial court. As such, it would call for the relevant evidence. In the event that the issue was not properly framed by the lower court, the role of the Cassation Division would then be limited to rectifying the error in framing the issue and remand-

ing the case back to the trial court. This has been the practice in some cases.[132] The Cassation Division would have done same in the case at hand as the issue so framed was never raised in the lower courts. Both the FFIC and the FHC were wandering along the margin. The issue before them was whether or not post-divorce reconciliation/and cohabitation would constitute remarriage. That is, the issue was not directly about the (non-)conclusion of a remarriage. Yet, the outcome was not far from the one that would result from the proper issue. Compared to the issue before the FHC, the issue before FFIC was however limited to proof of post-divorce cohabitation. It appears that cohabitation was indirectly taken to evidence the existence of remarriage.

The second misconceived issue that would not merit legal interpretation was the necessity of conclusion of a remarriage. Driven by its sympathy for the practice, Cassation Division endeavored oddly to inquire for a remarriage. This was indeed quite futile in view of the role and power of the court. The notion or possibility of remarriage was already contemplated by the Revised Family Code. In relation to the period of widowhood, the Revised Family Code makes clear the possible conclusion of a remarriage after the expiry of the period.[133] More importantly, the law even dispenses with the requirement when such a remarriage is to be made between ex-spouses.[134] As conclusion of a (re)marriage in accordance with one of the forms is the rule, it is assumed that the legislature did not find appropriate to stipulate a separate rule for a remarriage between ex-spouses.

A (re)marriage requires a solemn conclusion as prescribed by the law. The existence of a remarriage between ex-spouses essentially requires the conclusion of a new marriage.[135] Reconciliation of the spouses would not change or supersede the requirement that serves a legitimate legal purpose. There is no exception in the law for cases involving former spouses. Furthermore, it is not within the ambit of its judicial power for the Cassation Division to create a separate rule for a remarriage between ex-spouses.

Thus, it is against the well-established rule of interpretation to resort to a legal interpretation when the law is clear. There is no room for interpretation on the issue at hand. Under the guise of interpretation, the court essentially ruled out the requirement of celebration for the conclusion of a remarriage between the ex-spouses. In so doing, the Cassation Division of the FSC cast a doubt over its judi-

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[132] *See e.g, Negasi Ayele v Samuel Yohannes & Manasebesh Beyene,* Federal Supreme Court cassation Division, Cass. File No. 46726/2010, 11 FED. SUP. CT. CASS. DECS 42, 42-44(2011)(ruling on, *inter alia*, the need for farming the appropriate issue as to proof of a marriage and deciding the issue in light of the relevant evidence).

[133] THE REVISED FAMILY CODE, Art. 16(1).

[134] *Id*. Art. 16(2)(b).

[135] *Abebawork v Wagaye Case, supra* note 70, at para 12.

cial mandate in the interpretation of the law. Moreover, the legal ramification of such an interpretation would also entail the relegation of a marital status to the level of cohabitation.

In sum, it can be concluded that there existed no legitimate room for interpretation of the issues raised by the court. Nor was there a legal necessity for the interpretation of the issues raised in the FFIC and FHC. Rather, the basic errors that related to erroneous application and unnecessary legal interpretation were already rectified by the appellate division of the FSC.

3. Incomplete Possession of Marital Status

The other critical legal issue that was misconstrued is that of possession of marital status. This mode of proof is quite vital for determining several legal issues stemming from a (re)marriage. It has become a dominant mode of proof due to limited instance of the primary mode. It must be borne in mind that proof of a marriage presupposes the conclusion of the marriage. As clearly stated by the law conclusion of a marriage requires its celebration in one of the forms. In the issue at hand, the court overlooked the necessity of celebration that decisively marks the very creation of a remarriage.

The court focused only on treatment of the ex-spouses as married couple by themselves and their community during their cohabitation.[136] Based on proof of these facts alone, the court held that the proof would evidence existence of possession of marital status as defined under Art 96 of Revised Family Code.[137] The treatment of the ex-spouses as married couple by their family and the celebration of the remarriage were both ignored. This can be gleaned from a careful reading of the court's analysis. The proof of possession of marital status was thus incomplete as it excluded this decisive element. Indeed, the law itself fails to make an explicit mention of the component from among the constitutive elements comprising the definition.[138] As a result, it confuses with that of irregular union.[139] The loophole in the definition of possession of marital status calls for patching from within.[140]

Indeed, this could have been made complete by way of interpretation in light of relevant legal provisions. It is clearly spelt out by the law that conclusion of

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[136] *Id.* at para 12.

[137] *Id.*

[138] THE REVISED FAMILY CODE, Art. 96.

[139] Thus, proof of the similar elements of an irregular union claimed as a marriage may result in mistaking the irregular union for a marriage. This would be against the purpose of the law.

[140] Without any further legislative act, the requirement of celebration can be read into the definition of possession of status through purposive interpretation by the Cassation Division of the Federal Supreme Court. Such an interpretation is quite reasonable and within the ambit of the court's mandate of binding legal interpretation. It is not as outrageous as the interpretations of the court in some cases.

marriage shall be made in the form prescribed by the law, religion or custom concerned.[141] In all cases, the bottom line is the need for conclusion of the remarriage in a certain form. Thus, subsequent proof of a remarriage shall necessarily entail proof of its celebration in a certain form.[142] It is this fundamental element along with others that would lead to judicial presumption of conclusion of a remarriage.

4. Presumption of (Re)marriage Conclusion

Related to the issue of proof of possession of status is that of the presumption of conclusion of the alleged remarriage. The essence of proof of possession of marital status is the consequent presumption of conclusion of a (re)marriage. As indicated in its reasoning, the court pointed out that the presumption would be operative upon the establishment of the three facts identified above.[143] In principle, the court should take such a presumption upon convincing proof of possession of marital status.[144] For the presumption of conclusion to be taken, the proof shall be complete. The proof must be deemed complete up on the ascertainment of all the integral elements including celebration. This can be noted from the stand of the FSC in subsequent cases.[145]

Worth discussing is thus the nexus between celebration of the alleged remarriage and the presumption for the latter to be operative. For the obvious reason mentioned above, the court did not make even a mention of the link. This is arguably another important legal issue skipped by the court. As celebration is a prerequisite for conclusion of a (re)marriage, the presumption of the latter would eventually depend on proof of the former. That is, proof of celebration of a remarriage must be a necessary and decisive element in the proof of the status for the operation of the presumption. The presumption is not about the existence of circumstances of a remarriage, but its conclusion sometime in the past. As such, the celebration signifies its very creation. Hence, no presumption would operate if its celebration is not proved.[146] The celebration for the dissolved marriage can never be extended beyond that marriage to characterize the post-divorce cohabitation as a remarriage.

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[141] *See* THE REVISED FAMILY CODE, Arts. 1-4, 25, 26(1), 27(1).

[142] This can be noted from the subsequent decisions of the FSC in which the court endorsed the need for proof of celebration of the alleged marriage. *See Yeshareg Abatkun v.Mesert Admasu*, *supra* note 22. *See also Alehegn Mekonnen* v. *Aster Arahaya*, *supra* note 50. Despite lack of consistency in its jurisprudence, the FSC has noted the necessity of proof of marriage celebration. Thus, it is argued that the same stand should apply for cases of an alleged marriage between ex-spouses after divorce.

[143] *Abebawork v Wagaye Case*, *supra* note 70, at para 12.

[144] *See* THE REVISED FAMILY CODE, Art. 97(1). It is worth noting that the use of the word "…*may*…" must be construed to mean the court would take the presumption only if it is satisfied with the evidence for proof of possession of status. As indicated elsewhere, despite misleading wording, the presumption must remain operative once the required standard is met.

[145] *See Yeshareg Abatkun v.Mesert Admasu*, *supra* note 22. *See also Alehegn Mekonnen* v. *Aster Arahaya*, *supra* note 50.

[146] *See supra* footnote 142.

It should be noted that the presumed fact is conclusion of a (re)marriage, not its celebration.[147] As a rule of evidence dictates, proof of the first fact requires no evidence for the presumption would serve the same purpose. In contrast, proof of the celebration calls for evidence as it is not the presumed fact. In other words, conclusion of a marriage should not be confused with its celebration. Yet, there is a logical connection between celebration and conclusion of a (re)marriage. Thus, proof of the former fact, *inter alia*, entails presumption of the latter.[148] In the case at hand, such a distinction was overlooked. Instead, a non-marital cohabitation was accorded the status of a remarriage.[149]

In short, presumption of the conclusion of the remarriage was inferred from an incomplete proof of the ostensible possession of status. In effect, a quasi-marital union or, more appropriately, the so-called *defacto* remarriage was judicially created. In other jurisdictions, presumption of a (re)marriage may operate so as to give legal recognition to a non-marital cohabitation.[150] Such recognition is necessitated due to the absence of the regime of common-law marriage in their jurisdictions.[151] The situation in Ethiopia is quite different as an irregular union is maintained with equivalent function.

5. A Letter of Declaration Not Sufficient for Rebuttal

As judicial presumption of conclusion of a (re)marriage is rebuttable, the question is how sufficient should the rebuttal evidence be. This was another legal point with no analysis in the decision of the court. At issue was the sufficiency of the letter of declaration of non-cohabitation from the *kebele* administration. In contrast to the ruling of the lower court, the Cassation Division found the evidence insufficient to refute the presumption. As any kind of reliable evidence can be pro-

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[147] Though logically and necessarily connected, both facts are not the same. As such, providing the presumption of conclusion of a marriage shall not be overstretched to mean presumption of celebration of the marriage in a certain form.

[148] For a presumption based on proof of a certain basic fact such as the one in the case at hand, the presumption is created only after the basic fact is sufficiently proved. *See* Betatek Tadesse, *supra* note 99, at 85.

[149] Courts must be careful not to take cohabitation and repute of being married for inferring presumption of a marriage. That would result in eroding the strong values inherent in distinctive treatment of a formal marriage from an irregular union. Such a move would open up the door for the practice in other jurisdictions such the US where a formal marriage is merely reduced to the status of the prevailing practice of cohabitations. In those jurisdictions, the significance of a formal marriage itself is getting eroded. *See generally* Walter O. Weyrauch, *Informal and Formal Marriage: An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV.1 (88), 88-110(1960).

[150] *See generally* Frank Bates, *The Presumption of Marriage Arising from Cohabitation*, 13W. AUSTL. L. REV. 3(341), 341-353(1978). Yet, the presumption is applicable only as regards the civil aspects of the marriage. No such presumption applies where the proof the alleged marriage is required for determination of a criminal issue in criminal law. *Id*. at 350.

[151] *Id*. *See also* GILLIAN DOUGLAS, *supra* note 4, at 47-51.

duced in rebuttal, such written evidence could be deemed admissible.[152] At this juncture, one may question the relevance and sufficiency of the evidence for disproof of the alleged cohabitation. As a rule, written evidence is considered more reliable than oral evidence. Yet, the relevance and credibility of written evidence depend on the nature of the fact in issue. Though the reliability or otherwise of a certain evidence is ultimately determined by the court, not all facts are appropriately proved by written evidence. Thus, for the cohabitation, testimonial evidence from the community is much more credible than a letter from a *kebele* administration. As can be noted from the record, the declaration made by the letter was based on the testimony of three witnesses. Since the testimony at the *kebele* would not be subject to a cross-examination before the administrative officer, its credibility could be disputed. The letter, if credible, could still be used to corroborate the testimonial evidence before the court. However, the letter alone could not in itself suffice to rebut the presumption.

This appears to be the reason for the Cassation Division to reject the contention of the respondent on the issue of cohabitation. In this regard, the ruling of the Cassation Division on the issue is not amenable to criticism. Nevertheless, ruling on the issue without any legal reasoning as to the insufficiency of the evidence is susceptible to criticism.[153] It is important to note that every ruling along with the reasoning of the Cassation Division on a legal issue carries more weight than that of lower courts. The court would be expected to make a ruling on an issue with a legal reasoning.[154] A legal opinion of the court will be a vital *obiter dictum* to inform future decisions of lower courts.

V. CONCLUSION

The rulings and reasoning of the courts except that of the FSC were not based on a firm legal basis. The important issues were also overlooked. In particular, the issues of the (non-)conclusion of a remarriage after the divorce were sidelined. Moreover, unwarranted presumption of conclusion of remarriage was drawn on the basis of incomplete proof of possession of status. In this regard, the legal significance of proving celebration of a remarriage in a certain form was utterly neglected. In effect, a post-divorce non-marital cohabitation and reconciliation were erroneously regarded to imply the existence of the alleged remarriage. Eventually, an

[152] *See* THE REVISED FAMILY CODE, Art. 97(2).

[153] It is also arguable whether FSC Cassation Division can engage in evaluation of the sufficiency of evidence submitted at lower courts except as regards its admissibility or the required degree of proof that involves basic error of the relevant law. In one case, the FSC itself has indicated that weighing the sufficiency of the evidence submitted in a lower court lies outside the issue that is subject to cassation review. *See Muluworke Watche v. Social Security Agency*, *supra* note 25, at 41.

[154] *See Kaldis Link International v. Genet Wondimu*, Federal Supreme Court Cassation Division, Cass. File No.58540/2011, 12 FED. SUP. CT. CASS. DECS 326, 326-328(2011).

irregular union was rather mistaken for a remarriage. In so doing, several legal issues were misconstrued even in the cassation decision.

Therefore, it is quite compelling to revisit the precedent so tainted with serious legal flaws to guide future cases in light of the law. Celebration of a (re)marriage shall be considered essential in the proof of possession of marital status to draw a valid presumption of conclusion of the (re)marriage. Some recent decisions of the Cassation Division of the FSC confirm the need for proving the celebration of a marriage. This practice must be maintained consistently to govern proof of a (re)marriage. In particular, the subsequent precedent that is apparently set for proof of a former marriage must be applied to cases of alleged remarriage between ex-spouses. Another important point is the consequence of divorce that changes the legal status of the spouses. The change in the legal status must not be neglected. No post-divorce cohabitation short of celebration of a remarriage can be accorded the legal status of a remarriage. As such, the distinction between a (re)marriage and an irregular union shall be kept unclouded. Courts should be careful not to deviate from clear legal rules. If deviation is so desired, that can only be done by the legislator. A justified resort to the default mode of proof must be treated so narrowly. Otherwise, there remains no incentive to obtain (re)marriage certificate for the purpose.

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