Chapter One: General Consideration

- ✓ Family is the basic unit of a society. It has social as well as economic importance in any society.
- ✓ Naturally, persons bound by consanguinity and affinity are united to form the community. 'With time, the growing family has a tendency to become a tribe.'
- ✓ The need to have a law governing the family relationship is somehow tied with the development of family through time.
- ✓ Family Law is the branch of law which sets the rules to govern the ongoing responsibilities of family members to each other; both at the time families are formed and after relationships dissolve.
- ✓ The application of the family law begins at the time of formation of family either through marriage or irregular union.
- ✓ Its application extends throughout the life time of the existence of the family relationship as well as at the time of its dissolution.

Rationale behind Protection and Regulation of the Family

- ✓ Planiol defines a family as a group of persons who are united by marriage, by filiation or even, but exceptionally, by adoption. According to Murdok, family is considered as ' a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one and more children, own or adopted, of the sexually cohabiting adults.'
- ✓ First and basic type of family organization is the nuclear family. *The nuclear family basically consists of a married man and woman with their offspring.*
- ✓ *An extended family, on the other hand, consists of two or more nuclear families affiliated through an extension of the parent-child relationship rather than of the husband-wife relationship, i.e., by joining the nuclear family of a married adult to that of his parents.*
- ✓ Due to the fact that the marital status as well as the family entails community rights and obligations far beyond those implicit in the ordinary civil contract, it is conceded that the states may prescribe the conditions on which the status may be assumed. As a result, marriage laws are subject to the control of the state government; and the interest of the state in the marriage of its citizens has long been recognized. 'The state, it is said, is a party to every marriage.

Sources of Family Relationships

- ✓ There are three sources of family relationships namely, marriage, filiation and adoption.

1. Relationship by consanguinity

- ✓ Results from the birth. Relationship by consanguinity is a natural fact which is derived from birth.
- ✓ It is 'the tie which exists between two persons, such as the son and the father, the grandson and the grandfather; or those who descend from a common ancestor, such as two brothers, or two cousins.'
- ✓ When we look into the Ethiopian Civil Code of 1960, it does not govern how the relationship in the direct line is to be computed. Article 551 tries to give some highlight on how the computation of relationship in the direct line is to be conducted.

2. Relationship by Affinity

- ✓ Is created as a result of marriage.
- ✓ 'Relatives through marriage are persons who are not relatives, but which join the family by means of a marriage.'
- ✓ When a marriage is concluded, the relationship is formed between one of the spouses with the blood relatives of the other spouse. The woman who marries becomes the daughter in law (by marriage) of the father and mother of the husband and the husband becomes the son in law of the mother and father of the wife.
- ✓ A relationship does not exist between the relatives of one spouse with the relatives of the other spouse.

3. Relationship by Adoption

- ✓ Is created as a result of a special contract between the adopter and the original families of the adopted child.
- ✓ It is a fictitious relationship which resulted from the agreement of the parties to the adoption contract.

Effect of Family Relationship

- ✓ Relationships give rights; they also create obligations, and also carry incapacities.

1. **Rights emanating from a relationship**: - relationship results in the right of the relatives to take the estate of the deceased relative. A right of succession is one of the effects of a family relationship. Secondly, there is also the right of destitute relatives to get maintenance from the other relatives. Parents will also have a right over the person and the estate of their children. Article 198 of the RFC provides that the obligation to supply maintenance exists between ascendants and descendants and also between persons who are related by affinity in the direct line.
2. **Obligations emanating from relationship**: The first obligation is that of alimony. Relatives have the obligation to provide alimony for the destitute relatives who cannot have their own means of income. There is also the duty on the parents to take custody and raise their children. Article 219 of the RFC puts an obligation on the father and mother of the minor child to be the joint guardian and tutors during the life time of their marriage. Articles 255 and the following articles of the RFC provide by way of obligation on the parents to take care of the health, residence, education as well as social contact of the minor child.

- ✓ Apart from the above mentioned duties and rights, relationships may also result in **incapacities** of the persons involved. The law prohibits marriage between close relatives.

Chapter Two: Marriage

Betrothal

- ✓ In earlier times, before two persons conclude marriage, they would go through the process of betrothal.
- ✓ Mainly the betrothal was concluded between the parents of the future spouses.
- ✓ Betrothal is defined under article 560 of the civil code as a contract between the members of two families that a marriage shall take place between two persons, the fiancé and the fiancée, belonging to these two families.
- ✓ in many circumstances the practice shows that betrothal was concluded when the future spouses are underage and sometimes not yet born. This means, the interest and choice of the future spouses was not considered at all. On the other hand, the Constitution of 1995 recognizes the right of individuals to form a family with their own free and full consent. As result, the provisions of the Civil Code dealing with betrothal were found to be contrary to this fundamental right of individuals. Hence, the RFC has excluded the concept of betrothal as a whole.
- ✓ All the regional laws which incorporated the concept of betrothal defined it as a pact between the fiancé and fiancée to conclude marriage sometime in the future.
- ✓ The Family Code of the Amhara region requires the contract of betrothal to be made in a written form signed by four family witnesses, two from each side.
- ✓ The family code of the Benishangul Gumuz region allows betrothal to be concluded pursuant to the custom of the area. This may be either in writing or orally, whichever is customarily practiced in the region.
- ✓ The family codes have also provided a time framework for the duration of the betrothal. Article 6 of the SNNP family code leaves it open for the parties to determine the duration of betrothal. However, if the parties fail to mention the time for the conclusion of marriage, it requires them to tie the pact within a year after the conclusion of the betrothal contract. The family code of the Benishangul Gumuz, on the other hand, gives only six months after the conclusion of the betrothal contract. The time framework given under article 6 of the Amhara regional family code is two years..

- ✓ The family codes have also envisaged a situation for the invalidation of the betrothal contract. If one of the parties to the betrothal contract communicate their intention to invalidate the betrothal, or refuse to conclude marriage within the intended period or engaged in any act to impede the conclusion of marriage, the betrothal contract will be invalidated.

Definition of Marriage

- ✓ In Ethiopia, marriage is regarded in both the Civil Code. The Revised Family Code and the regional family codes as an institution, rather than a contract.
- ✓ In the English legal system, marriage, as defined by Sir James Wilde in the land mark case of Hyde Vs Hyde, is the voluntary union for life of one man and one woman to the exclusion of all others. Three elements. First, the marriage has to be concluded between a man and a woman, there is no legal marriage between same sex persons. Secondly, the institution of marriage is to be entered into with the absolute consent of the parties i.e., voluntarily. In addition, the marriage is expected to last for a life time, death being the only cause for dissolution.
- ✓ The Philippines Family Code of 1987, on the other hand, defines marriage as a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life.

Modes of Conclusion of Marriage

- ✓ There are three modes of conclusion of marriage.
  1. ***Civil Marriage (Marriage Concluded before an Officer of Civil Status):***
- ✓ For a marriage to be considered as being concluded before an officer of civil status, a man and a woman need to appear before the officer for the purpose of concluding marriage and give their respective consent to enter into marriage. The phrase civil marriage basically refers to the fact that the marriage has been solemnized in front of an officer who is empowered to accept the consent of parties wishing to enter into marriage.
- ✓ In order to conclude civil marriage, there are certain formalities and requirements which are stipulated by the RFC. The first formality is that of a residence. Pursuant to article 22 of the code, civil marriage is concluded before the officer of civil status of the place where one of the future spouses or one of the ascendants or close relatives of one of them has established a residence by continuously living there for not less than six months before the conclusion of the marriage. The other formality is that of giving notice. The RFC requires the future spouses to inform the officer of Civil Status of their intention to conclude marriage not less than a month before the celebration of the marriage. The purpose of notifying the officer is to make sure that there are no impediments to the conclusion of marriage and to allow anyone who want to oppose to the marriage to do so in accordance with the law.
- ✓ Once these preliminary formalities are fulfilled and the work of publicizing the intention of the parties to marry has been made by the civil status officer, the next step is the celebration (solemnization) of marriage. Celebration of marriage is to be made publicly in the presence of the future spouses and two witnesses for each of the future spouses. One requirement stipulated under article 25 of the RFC is that the future spouses have to personally appear for the solemnization process. In connection to this requirement, the issue of proxy marriages can be raised.
- ✓ The question of whether marriage can be concluded by proxy is of little practical importance in modern times. However, there may be circumstances which would necessitate the use of representation for marriage. Marriage by representation is necessary when one of the parties cannot be present for the ceremony. 'While its most prominent use has been in wartime with one party on duty overseas, sometimes it is used by prisoners.' Considering the need to conclude marriage by representation, the Civil Code of 1960 as well as the RFC allowed by way of exception for the conclusion of marriage through representation. One should note here that in principle each of the future spouses are required to appear personally and give their consent to the marriage at the time and place of celebration
- ✓ The other formality incorporated under article 25 of the RFC is the obligation on the witnesses to declare, under oath, that the essential conditions for marriage are fulfilled
- ✓ The third formality requirement for celebration of civil marriages is that the future spouses need to declare openly that they have consented to enter into the marriage.

  2. ***Religious Marriage***
- ✓ Pursuant to article 3 of the RFC, a religious marriage takes place when a man and a woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them.
- ✓ The formal requirements for the conclusion of religious marriage are dictated by the religion itself. The essential conditions that are stipulated by the RFC need to be observed whatever the manner of celebration of marriage is.

  3. Customary Marriage
- ✓ Pursuant to Article 4 of the RFC marriage according to custom takes place when a man and a woman have performed such rites as deemed to constitute valid marriage by the custom of the community in which they live or by the custom of the community to which they belong or to which one of them belong.

  4. Marriage Celebrated Abroad
- ✓ Article 5 of RFC provides for the recognition of marriages which are celebrated abroad as valid in Ethiopia.
- ✓ The marriage whose recognition is sought in Ethiopia has to be concluded by fulfilling the legal requirements of the place of celebration. Article 5 of the RFC provides for the recognition of marriages celebrated abroad as far as doing so will not be contrary to public morality.

Essential Conditions of Marriage

1. Consent

- ✓ Marriage is an institution which is to be entered into by the parties with their free and full consent. The UN Convention on Consent to Marriage, Minimum age of Marriage and Registration of marriage as well as the Recommendation of the UN General Assembly which was adopted in 1965 provide consent as a prerequisite for the conclusion of marriage.
- ✓ Pursuant to article 1 of the UN Convention, no marriage shall be legally entered into without the full and free consent of both parties.
- ✓ In some parts of Ethiopia, the culture does not require the consent of the future spouses for conclusion of marriage; rather what really matters is the willingness of their parents to tie their children in bond of marriage.
- ✓ When the international as well as domestic legal instruments require existence of consent as a requirement for marriage, it implies that 'there must be no duress or force inducing the marriage or any misunderstanding as to the effect of the marriage ceremony.'
- ✓ The RFC recognizes some grounds which would vitiate the consent of the spouses.

- o **Fundamental Error:** What the law considers to be fundamental errors are illustrated under sub article 3 of article 13. These include:

1. Error on the identity of the spouse where it is not the person with whom a person intended to conclude marriage: - here the mistake has to be as to identity rather than as to attribute. Cases of impersonation can be considered as fundamental error falling under this category. However, if the error pertains to the attribute of the person like for instance if one party mistakenly thought that the other was rich, it cannot be considered as a fundamental error as per the requirement of the article and hence, will not be a ground to invalidate the marriage.
2. Error on the state of health of the spouse who is affected by a disease that does not heal or can be genetically transmitted to descendants:-
3. Error on the bodily confirmation of the spouse who does not have the requisite sexual organ for the consummation of the marriage
4. Error on the behavior of the spouse who has the habit of performing sexual acts with person of the same sex.

o Violence (Duress)

✓ If the consent to marry was extracted by violence, it cannot be said that the party has freely consented to the marriage. As a result, article 14 of the RFC considers a marriage concluded when consent is extorted by violence as an invalid marriage. If the consent was given to protect himself/herself or one of his/her ascendants or descendants or any other close relative from a serious and imminent danger or thereat of danger, it can be said that the consent was extorted by violence.

o Judicial Interdiction

✓ Judicial interdiction exists in the cases where a person is insane according to article 339 of the Civil Code and where he has been interdicted by the court. The court orders interdiction of the person because his health and his interest so requires or because his heirs' interest so require. As a result of the lessened capacity, an interdicted person may conclude marriage only with the authorization of the court.

2. Age

✓ As discussed above, under Ethiopian law, marriage is an institution to be entered into by the full and free consent of the parties. In order to freely consent to the marriage, the parties should understand the consequences of their acts, and hence need to attain a certain age.

✓ The Convention on Consent to Marriage, Minimum age of Marriage and Registration of Marriage under the preamble, by making cross reference to the Universal Declaration of Human Rights provides that it is only those men and women who attained full age who can enter into marriage. This being the requirement, the next question would be as to who could be considered as being of full age. Specifying the minimum age for marriage is left for the individual countries to govern through legislation. However, this power of the state is not without any limitations.

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

Relationship

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

✓ In many societies across the world there are laws which prohibit marriage between people who are related. The restrictions under the RFC are based on two groups of relations: those based on blood relationships i.e. consanguinity and those based on marriage, i.e. affinity. The prohibited consanguinity restrictions involve marriage between persons related in the direct line between ascendants and descendants. Hence, marriage between parent and child, grandparent and grandchild is prohibited. On the collateral line, article 8/2 prohibits marriage between a man and his sister or aunt and also a woman and her brother or uncle.

✓ There are different reasons given for prohibiting marriage between related persons. The first argument is the fear of genetic danger involved in permitting procreation between close blood relatives.

✓ Under the 1960 Civil Code, marriage between ascendants and descendants as well as collaterals up to the 7th degree was prohibited.

✓ Marriage between persons who are related by affinity in the direct line is also prohibited under the RFC article 9. On the collateral line, marriage between a man and the sister of his wife, and a woman and the brother of her husband is also prohibited.

Bigamy

✓ The other essential condition for the conclusion of a valid marriage is the absence of prior marriage. As stipulated under article 11 of the RFC, a person is not allowed to conclude marriage when he is bound by the bonds of a preceding marriage. Many countries have laws which prohibit bigamous marriages.

Period of Widowhood

✓ The concept introduced here by the legislature relates to the fact that a woman is under prohibition to remarry within the next one hundred and eighty days following the dissolution of her former marriage.

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

✓ The article also provides for some exceptional circumstances in which the 180 days restriction need not be observed. The first of such exceptions is if the woman gives birth after the dissolution of marriage and before the

lapse of the 180 days. In such a situation, it is presumed that the child is born from the previous marriage and hence there will not be any conflict on paternity. Hence, she may remarry even before the 180 days lapsed. Remarrying the former husband will also avoid the conflict on paternity and hence if the woman is marrying her previous husband, she may do so without waiting for the 180 days. In addition to this, if she can prove by medical evidence that she is not pregnant, she need not wait for the lapse of the specified time before concluding another marriage.

Opposition to Marriage

- Depending on the essential condition which is violated, the persons who may oppose to the conclusion of the marriage differ. When the condition violated is age, there are potentially three groups of persons who are given the right to oppose.

- The first one is the parents of the minor. If one of the future spouses have not attained the minimum marriageable age stipulated by the law i.e. 18 years, then the parents of that minor may oppose to the marriage. In many instances underage marriages are arranged by the parents of the minor themselves. In such situations obviously other persons should be given the right to oppose for the marriage.

- Apart from the fact the parents of the minor are involved in the planning of the marriage and hence not opposing to its conclusion; underage marriage is considered as a criminal act. Moreover, the state has also the obligation to see the respect for the essential conditions of marriage. The law gives the public prosecutor the right to oppose the underage marriage. Last but very importantly, the law gives 'any other interested person' a right to oppose the underage marriage.

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

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

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

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

- the opposition is required to be made in a written form. The opposition has to be made 15 days before the celebration of marriage. Article 23 of the RFC requires the future spouses to notify the officer of civil status of their intention to conclude marriage, a month before its celebration, and the latter has the obligation to publicize the same. The idea here is everyone will have access to the notification publicized by the officer of civil status and hence within two weeks those interested persons will make opposition. (there will be 2 weeks left prior to the conclusion of the marriage). However, when it comes to the other modes of conclusion of marriage, this kind of stipulation is not provided, making observance of article 19 somehow impractical. The law provided the maximum time within which the opposition has to be made. This limitation takes into account various societal values and the burden on the future spouses. Hence, the observance has to be strictly followed.

- The person to whom opposition is made has to make its decision within five days. If the celebrating officer rejects the opposition and decides to continue the celebration of the marriage, the decision will be final one. However, if the decision is to accept the opposition and suspended the celebration of the marriage, the future spouses or one of them may appeal to the court against the decision.

Effects of Violation of Essential Conditions of Marriage

- A marriage which has been concluded when one or more of the essential conditions are lacking will be invalidated. That is to say, from the date of invalidation, the marriage will cease to exist, and the consequences of dissolution of marriage will follow.

- The Civil code, apart from providing for the civil consequences of violating essential conditions, also makes reference to the Penal Code for criminal punishment.

- As far as the consequence of violation of essential conditions is concerned, we may classify the conditions into three categories. The first one is the impediment to the celebration of the marriage which does not affect its subsequent validity, its purpose being only prohibitory. The first condition which falls under this category is period of widowhood.

- Civil marriages are to be concluded before an officer of civil status, who is competent enough to celebrate marriages, and by fulfilling certain formalities. However, the fact that the officer does not have competence to celebrate marriage will not be a ground to dissolve the marriage.

- The other group of impediments relates to those which will prevent the marriage from taking place and make the marriage voidable if it takes place, but for reasons occurring after the marriage, the impediments cease to exist and the marriage becomes valid.

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

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

- Bigamous Marriages: - the bigamous marriage also falls into the category of marriages which are voidable but validatable. Either spouses of the bigamous marriage and the public prosecutor are given the right to apply for the dissolution of the bigamous marriage. The application for dissolution may be made only as long as the former spouse of the bigamous marriage is alive. If however, the former wife dies, it can be validated. A presumption of validity is attached to bigamous marriages until avoided by dissolution.

- Defective Consent: - consent constitutes the basic element for the conclusion of marriage. There are various grounds which may vitiate the consent of a person. Whatever ground causes the defective consent, the marriage concluded in such manner will be dissolved. However, there is a difference in the time limit within which the application for dissolution may be made to the court.

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

Chapter Three: Effects of Marriage

✓ All marriages produce the same legal effect, without considering the mode of their celebration. As far as the marriage is concluded in compliance with the essential conditions of marriage, which are valid for all modes of conclusion of marriage, the effects of all marriages are identical. In addition to considering all marriages as having the same legal effect, the law also avoided the requirement of consummation as a condition for the marriage to have legal effect. A marriage, once celebrated will have an effect without having regard to the fact of consummation of the marriage.

Personal effects of Marriage

✓ Marriage produces special obligations between the husband and the wife as a result of their status as spouses.

1. Respect, Support and Assistance

✓ It is the first of all duties and it acts as the foundation as the object of marriage is the establishment of family which requires the assistance and respect of each other.

2. Family Management

✓ The Constitution under article 34/1 recognizes the equal right of the spouses at the time of entering into, during marriage and at the time of divorce. Article 50 of the RFC reflects the equal right of both spouses in the management of the family. Moreover, the spouses are required to cooperate in protecting the security and interest of the family.

✓ Guiding children to be responsible citizens of the society is one of the obligations of the parents towards their children. In this respect, article 50/2 of the RFC requires both spouses to cooperate in the bringing up and ensuring the good behavior and education of the children. Since the parents are the joint custodians of their children, the responsibility in relation to the education, health and behavior of the children is to be shared jointly. If one of the spouses is under disability, absent or abandons the family, or is away, the responsibility to manage the family rests upon the other spouse.

✓ Article 52 RFC provides the exclusive right of each parent to make decision in matters concerning the upbringing of children whom that parent had before the marriage.

3. Cohabitation

✓ One of the purposes of formation of marriage is to establish life in common. If the duty of cohabitation is not fulfilled, the union of the spouses is destroyed. The obligation of living together includes the conjugal duty. 'The jurisprudence holds that the unjustifiable refusal to have sexual relations with the spouse constitutes a violation of the obligations of marriage.' The RFC also requires the spouses to have sexual relations normal in marriage unless these relations involve a risk of seriously prejudicing their health.

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

4. Duty of fidelity

✓ From the moral point of view, the principal duty created by marriage is the duty of fidelity.

✓ Article 56 of the RFC stipulates that both the husband and wife owe fidelity to each other. 'The duty of fidelity is not a duty of mere morality; rather it is sanctioned by positive law.'

✓ Article 652 of the Criminal Code makes adultery a crime punishable upon complaint.

Pecuniary Effects of Marriage

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

1. *If someone becomes bankrupt then all of their property falls into the hands of the trustee in bankruptcy. The property of the bankrupt's spouse or partner does not. It is therefore, necessary to know whether certain property belongs to the bankrupt person or their partner.*
2. *If a third party wishes to purchase property it may be important to know who the owner is. Particularly when a house is to be sold, it is necessary to know who the owner of the house is so that he or she can sign the appropriate paperwork. There have been cases where husbands have sold the family home behind their wives' backs. In such cases it is important to know whether the wife had an interest in the property and, if so, whether the purchase is bound by her interest.*
3. *On the death of a family member it is important to know who owns what. So, if a wife left all her books to her brother in her will, it would be important to know which books were hers and which books belonged to her husband.*
4. *Ownership of family property has important symbolic power. At one time the husband owned all of his wife's property. This reflected the fact that he was regarded as in control of all the family's affairs. It is arguable that if the law were to state that family property is jointly owned, this would reflect a principle of equality between spouses in marriage.*

1. Personal property

✓ Marriage results in the unification of the spouses and not their property. The law recognizes the existence of personal property in marriage.

- ✓ The property which the spouses possess on the day of their marriage, or which they acquire after marriage by succession of donation, will remain their personal property. In addition, if the spouses get property through either succession or donation, then that property will remain to be the personal property of the successor or donee.
- ✓ In principle properties acquired by onerous title after marriage through the exchange of personal property will remain to be personal property of the spouses. However, for this principle to work, the party claiming to retain the personal property has to apply for the declaration of the court of such facts. Failure to get the declaration has the effect of making the property common property.

2. Common Property of Spouses

- ✓ The first category of property which is considered as common property is the income of the spouses.
- ✓ The sources of the income can be three: personal efforts of the spouses, meaning the income acquired through employment, income derived from the common property, or thirdly, income derived from personal property.
- ✓ Irrespective of its source, income is the common property of both spouses. Income of the spouses is made common property because it is the means of living of the spouses themselves as well as the children.
- ✓ The second category of property which is considered as common property of the spouses is property acquired during marriage by an onerous title. Hence, all property which has been purchased by the spouses are either of them during their marriage will be considered as common property. This article should be read conjointly with article 58/2 of the RFC. As a result, it has to be fist checked whether that particular property has been declared as personal property of one of the spouses by the court. In addition to this category of property, property donated or bequeathed conjointly to the spouses will also be considered as common property.
- ✓ Article 63 of the RFC basically provides a presumption in favor of community property. Meaning, all property in the marriage will be considered as the common property, unless the other spouse proves otherwise. The legal presumption would still be applicable even if the property is registered in the name of only one spouse.

Management of Personal and Common Property of Spouses

- ✓ As the law clearly stipulates under article 59, each spouse is to administer his respective personal property. However, through the contract of marriage, administration of the property may be entrusted on the other spouse.
- ✓ There is also the possibility of assigning the other spouse through the contract of agency. The contract of agency entered in between the spouses for the administration of personal property of one of them will not require, unlike other contracts, the approval of the court.
- ✓ As far as the management of income of the spouses is concerned, each spouse is given the mandate to receive his earnings. This power of the spouses to receive their respective income can be transferred for the other spouse. However, in such situations the receiving spouse has the obligation to give account. The law also recognizes the possibility of having joint bank account in which the spouses may deposit the income.
- ✓ In respect of other common property, article 35/7 of the constitution recognizes the fact that women have equal rights with men with respect to the administration of property. This includes the right to administer the marital property.
- ✓ The RFC stipulates that the common property is to be administered jointly by the spouses. However, in cases where one of the spouses is declared incapable or for any of the other reasons stated under article 66/2, the other spouse alone will administer the common property. The spouse who administers the common property alone is duty bound to inform the other spouse about the administration.
- ✓ As to dispose of the common property by one of the spouse the RFC has tried to take into account two interests: the need to ensure that common property is transferred to third parties with the knowledge and decision of the spouses, on the one hand and the need to have security of transaction, on the other hand. Having this consideration in mind, the legislature has restricted the freedom of the spouses to transact with third parties, by requiring the existence of consent of both spouses for alienating any common property in any manner, be it by sale, donation, exchange or other.
- ✓ Article 69 of the RFC by way of exception, allows the spouse without whose consent the contract was entered to request for the revocation (invalidation) of the contract. Hence, it can be concluded that this provision of the RFC provides for an additional ground for invalidation of a contract. The application has to be made within six months in which the other spouse came to know the existence of the contract or in other cases within two years after the obligation has been entered..

Debts of Spouses

- ✓ Generally, debts of spouses may be classified either as personal debt or debt incurred in the interest of the household. If the debt is a personal debt incurred by one of the spouses, third parties will first proceed on the personal property of the indebted spouse. If the indebted spouse does not have personal property, the debt will be recovered from the common property of the spouses.
- ✓ Debts incurred in the interest of the household are considered as joint and several debts and will primarily be recovered from the common property of the spouses. If the common property is not enough to cover the debt, the creditor may proceed to the personal property of either of the spouses.

Chapter Four: Proof of Marriage

Registration of Marriage

- ✓ The Revised Family Code declares mandatorily that marriage shall be registered by a competent officer of civil status. Such registration is to be conducted irrespective of the form of celebration of marriage.
- ✓ The officer of civil status who has celebrated the marriage has also the obligation to issue a certificate of marriage to the spouses.
- ✓ Article 30 of the RFC requires the record to show the full names, dates and places of birth, of each of the spouses and their witnesses including their addresses. This indicates that some of the purposes of issuing the certificate are to control the fulfillment of essential conditions of marriage, to protect the family institution and for evidentiary purpose. The effect of marriage begins at the time of conclusion of marriage and not at the time of issuance of marriage certificate.
- ✓ Article 321 stipulates for the establishment of necessary institutions in areas where the code has application, within six months from the coming into force of the code. However, this institution is not yet established. Until the establishment of the Office of Civil Status, article 321/2 gives the mandate for appropriate authorities of the administration to issue certificate of marriage.

Proof of Marriage by Certificate of Marriage

- ✓ The law considers certificate of marriage as the primary means of proving marriage.
- ✓ The certificate of marriage can be relied upon by those persons who seek to get some benefit from the conclusion of marriage. This includes the spouses themselves as well as the children. The certificate of marriage proves the fact of celebration of marriage.

- ✓ Civil marriages will be registered at the time of celebration whereas the registration of religious and customary marriages is to be performed after their celebration either upon the application of the spouses or upon the officer's own motion.

Proof of Marriage by Possession of Status

- ✓ Planiol defines possession of status as the fact that a man and a woman who live together are deemed to be married by those who know them. According to Article 96 of the RFC 'A man and a woman are deemed to have the possession of status of spouses when they mutually consider themselves and live as spouses and when they are considered and treated as such by their family and the community.'

Chapter Five: Dissolution of Marriage

Grounds of Dissolution

1. Dissolution by Operation of the Law

- ✓ The first ground for the dissolution of marriage as provided under article 75/a of the RFC is the death of one of the spouses, which brings the marital conjugal to an end.
- ✓ Apart from actual death of one of the spouses, the law also recognizes declaration of absence as another ground for dissolution. 'Absence, as a legal institution, is justified by the necessity of dealing with situations where a person cannot be considered as being dead, but where it is likely that such is the case.'
- ✓ The other ground for dissolution of marriage is the non fulfillment of the essential conditions of marriage.

2. Divorce

- ✓ Divorce has been defined by Planiol as the rupture of a valid marriage during the life of the two spouses.
- ✓ **Divorce by Mutual Consent**
- ✓ The RFC allows parties to seek for divorce by mutual consent. Considering the freedom of the parties, the law allows the spouses to petition for divorce by agreement. However, it cannot be said that divorce even in cases of mutual consent is automatic.
- ✓ The divorce by mutual consent is not necessarily a divorce without a cause. The spouses may have, and in many situations, do have causes for separation.
- ✓ Divorce by mutual petition is not available for everyone. Those newlyweds, whose marriage has not lasted for six months may not seek divorce by mutual consent. It should be noted here that the fact that newlyweds are prohibited from seeking divorce by mutual consent does not mean that they will not divorce at all, rather, they may seek the other alternative which is divorce by petition.
- ✓ The power of the court in cases of divorce by mutual consents is limited to counseling the spouses either jointly or separately to renounce their wish to divorce. If they are not willing to renounce their intention, the court will give them a maximum period of three months as a cooling time to reconsider their decisions. If they still wish to proceed with the divorce after the end of the cooling period, they may reapply to the court to approve their agreement. The court, at the time of approving their request, has to make sure that the agreement to divorce is the true expression of the intention and free consent of the spouses as well as that the agreement is not contrary to law or morality

Divorce by Petition

- ✓ The other way of ending the conjugal union by divorce is when one of the parties requests the court to end the marriage.
- ✓ In divorce by petition, it may be only one of the spouses who requests for the ending of the union; or alternatively, both the spouses my request the divorce.
- ✓ In cases of divorce by petition, the court has an obligation to speak to the spouses either separately or jointly, with a view of convincing them to renounce their petition.
- ✓ The code also envisages a possibility of referring the case to family arbitrators.
- ✓ The RFC provides for optional arbitration of family disputes. The court is given the discretion to refer the case for arbitrators. However, if the spouses do not agree to settle their disputes through arbitration, the court will dismiss the case by giving them a cooling period of up to three months. Where the reconciliation process either through the arbitrators or the cooling period fails, the court is duty bound to pronounce divorce within a month from the receipt of the arbitration report or end of the cooling period.
- ✓ The other important thing which needs to be accomplished by the court prior to the pronouncement of divorce is to give a temporary order on maintenance of the spouses, custody and maintenance of children and also of the management of the common property.
- ✓ Marriage in its very nature is very personal. As a result, the law requires the personal appearance of the parties at the time of celebration of the marriage. This argument should also be extended to divorce cases.
- ✓ The law recognizes under article 84 of the RFC the power of the court to award compensation to either of the parties.

Effects of Dissolution of Marriage

1. Child Custody

- ✓ When a marriage is dissolved through divorce, one of the questions which need to be answered by the court is as to *who should have custody of those minor children.*
- ✓ Custody of a minor child encompasses various set of rights and obligations under it, like the right to live with the child in a shared residence, authority over the discipline of the child and education as well as medical treatment.
- ✓ The Civil Code under article 681 requires the court to determine issues of child custody having regard solely to the interest of the children. The courts have to investigate what would be best for the child at the time of deciding as to where the child will be placed after the dissolution of the marriage. Children under five years of age will be placed with their mother unless there is a reason for not doing so. It seems that the law gives priority for the mother because children under five years require the care and protection of their mother than their father. Causes for such disqualification of the mother could be, if the mother suffers from a disease as a result of she cannot take care of the child.
- ✓ Article 113 of the RFC deals with the role of the court in determining custody of children after the pronouncement of divorce. By virtue of this article, there are three questions to be addressed by the court at the time of determining custody case. The first is who should have custody of the child? The second question is in relation to the maintenance of the child, how much should the non custodial parent give for the maintenance of the child? The third important question is the right of the non custodial parent to visit the child. How often should this visitation be? For how long can the non custodial parent stay with the child and other related questions are to be given a response by the court.
- ✓ If the divorce is made by mutual consent, the parties are also expected to determine the consequences of their divorce, including custody of their children, by their agreement. However, in the case of any other divorce, article 221/2 gives the mandate to the court to determine as to who should be the guardian or tutor of the child. In doing so, the court is expected to observe the guidelines enumerated under article 113/2. These guidelines include consideration of income, age, health and condition of living of spouses on the one hand and the age and interest of the child on the other hand. However, care should be made not to assume that the financially well to do parent is always in a position to provide the necessities of the child. Bringing up a child involves nurturing the behavior of the child as a result of with the living condition and also of the behaviors of the parent need to be considered. On top of this, interpretation of the

best interest of the child requires one to consider the view of the child. If the child is in a position to manifest his wishes, the court should seek to find out. However, care needs to be made at this time. '*The court should ascertain that the child's choice was not a result of undue influence from the chosen parent, as there is a strong possibility of the parent with interim custody to counsel the child to his or her choice.*

- ✓ When seeking the opinion of the child, two factors need to be considered. The first one is age of the child. The court has to be sure that the child has reached the age group in which he can make a reasonable preference. On the other hand, other statutes instead of limiting the age, provide for the child's preference to be considered and given weight if it reflects a level of mature judgment, the court is required to make its own assessment of the preference of the child.
- ✓ The preference of the child is also to some degree influenced by the circumstances in which he is interviewed. The second essential thing which needs to be considered is the environment in which the child's preference is to be obtained. The presence of the parents may intimidate the child, and hence it is better if the court interviews the child without the presence of the parents.

2. Liquidation of Pecuniary Relations

- ✓ Law has given discretion for the spouses to agree upon the management of their property. This discretion is also extended in respect of the partition of property. If the parties have addressed the issue of property in their contract of marriage as per article 83/3, then the contract will be effected by the court. However, if there is no contract of marriage or if the contract of marriage concluded is not valid, then the court has to decide on the right of the parties in respect of the properties.

3. Partition of Common Property

- ✓ Once what constitutes common property has been ascertained, the next thing to do is to decide on the manner of partitioning this common property between the spouses. The rule in partition, as is reflected under article 90 RFC is that common property shall be divided equally between spouses. This is a reflection of the Constitutional provision which gives both spouses equal right in respect of property at the time of entering, during and at the end of marriage.
- ✓ The rule is that partition will be made in kind in such a way that each spouse receives some property from the common property; any inequality will be set off by the payment of sums of money. If the property is difficult or impossible to divide, or alternatively if the spouses do not agree as to who should have the property, it will be sold and the proceeds will be divided between them.

CHAPTER SIX: IRREGULAR UNION

- ✓ Although the living together of a man and woman in marriage has been considered the most socially desirable relationship, different kinds of close relationships between men and women have existed in different societies.
- ✓ Those relationships perform partly the function of marriage producing similar effects as marriage.
- ✓ The existence of irregular union and its significance throughout the world is not debatable and various terms have been used to denote this relationship depending upon the prevailing religious, cultural and political situations.
- ✓ In Ethiopia, irregular union has been recognized by the 1960 Civil Code although such union is not a recent phenomenon.
- ✓ In Ethiopia, the 1960 Civil the Code the Revised Family Code of the Federal Government and the new regional family laws use the term irregular union.
- ✓ In legal theory, the term is defined as the union of a man and woman established solely by the consent of both parties. Like the institution of marriage, it is intended to be potentially indefinite in duration and the parties cohabit in the same household as a man and wife. Actual domestic cohabitation is essential.
- ✓ Black's Law Dictionary defines the term as: *"To live together as husband and wife; the mutual assumption of those marital rights, durations and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations".* (H.C. Black, Black's Law Dictionary .From the definition, it is possible to gather that the parties (necessarily a man and a woman in Ethiopia) to an irregular union live as husband and wife, assume mutually and voluntarily those rights, duties and obligations which are also assumed in the institution of marriage.
- ✓ In Ethiopia, the first legal instrument which tried to define irregular union is Art.708 of the Civil Code which provides that an irregular union is the state of fact which is created when a man and a woman live together as husband and wife without having contracted marriage. Art.709 of the code gives further explanation by stating that:

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

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

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

- ✓ What has been provided under Art.709 of the Civil Code has been reiterated by Art.99 of the Revised Family Code and the regional family laws.
- ✓ Irregular union is analogous to marriage. Generally, according to a certain author, two important elements may be drawn as regards the similarity between marriage and irregular union: *"The first element is composed of intimate life as between husband and wife and is founded on the relationship of affection and love, devotion and loyalty, that is indicative of their having pledged themselves to common fate. This actual domestic cohabitation is essential. The second element is the running of a common household, not simply out of personal need, convenience, narrow financial considerations, or as a self- standing arrangement, but as a natural function of the joint family life, as is customary and usual between husband and wife attached to each other by the bond of common destiny.*
- ✓ Traditionally, the relationship of unmarried cohabitees was considered to be meretricious and usually criminal as well. People forming such union were thought to be scoundrels.
- ✓ There are actual and possible reasons that necessitate living in an irregular union in the world in general and in Ethiopia in particular. Generally, the reasons encompass roots in cultures of societies that have accepted or tolerated informal families, socio-economic changes and especially in Ethiopia absence of knowledge of the legal consequences of one's relationship with another. Although there is no an empirical research conducted on the area, it is generally believed that in Ethiopia there are a number of people living in an irregular union in which one or both parties believe that their relationship is marriage while it is not from the view point of the law.
- ✓ Motivations of economic nature are the first reasons which make couples enter into an irregular union. It may also happen that the parties decline to go through a marriage ceremony. As a result, they simply agree to live together without any ceremony or formality.

The Need for Legal Protection

- ✓ If the traditional legal regulation of marriage, an old legal institution as a union of man and women uniquely involving the procreation and rearing of children within a family, is to protect and preserve the family, some argue that there is no reason that irregular union is not protected by law since

the living situation in an irregular union is as much as familiars as marriage

- ✓ Generally, legal regulation of marriage serves four state interests: promoting public morality, ensuring family stability, assuring support obligations and assigning responsibility for the care of children.
- ✓ In relation to preserving public morality, religious authorities raise strong opposition to the entire phenomena of irregular union. Their attitude is that the religions monopoly in matters of men-women relationships should remain unimpaired. Despite this, it should be taken into account that, religious law cannot always give answers to many problems in the domain of personal laws as far as the secular public is concerned. Moreover, in areas where there are cultural and religious diversities and where there is separation of state and religion as is the case in Ethiopia today, it cannot be appropriate for the legislature of a secular government to take an overly restricted ideological attitude concerning people's private choices of life. Some writers have made it clear that irregular union was as old or even older than the institution of marriage (see for instance the discussions made by Tilahun Teshome, work cited previously, pp.65-71).
- ✓ The 1960 Civil Code as well as the current family laws of Ethiopia do not say anything as to the requirements for the formation of a valid irregular union. Although the laws are silent, it is not possible to maintain that anyone under any condition whatsoever can form irregular union, as he/she pleases, with another opposite sex. The conditions that need to be satisfied in marriage must be satisfied in irregular union too. This means that consent, capacity, prohibited degrees and other impediments should be fulfilled.

Legal Effects of Irregular Union

1. Absence of Bond of Affinity

- ✓ Valid marriage creates a bond of affinity between the man and the relatives of the woman and vice versa. Consequently, marriage between person related by affinity in the direct line and marriage between a woman and the brother of her husband or marriage between a man and the sister of his wife is forbidden. In contradistinction to marriage, as provided in Art.100 of the RFC in irregular union, a bond of affinity is created neither between the man and the relatives of the woman nor between the woman and the relatives of the man. However, sub-article 2 of the above article provides that the legal impediments to a lawful marriage in the case of affinity are applicable to it. Accordingly, by virtue of Art.9 of the RFC marriage between persons related by irregular union in the direct line is prohibited. In the collateral line, marriage between a man and the sister of his partner in an irregular union and the brother of her partner is prohibited.

2. Duty to Contribute to the Common Expenses

- ✓ The man and the woman in irregular union are obliged to contribute to the common expenses they may incur during their union in proportion to their respective means (Art.101 of RFC). If both the man and the woman have similar means, the common expense is shouldered equally by both parties. If, however, one of the parties is unemployed and without means, he/she is not required to contribute anything.

3. Community Property

- ✓ Because the 1960 Civil Code did not create community property in irregular union, partners irregular of union did not historically enjoy the same property rights as spouses of lawful marriage. The law, by its refusal to recognize the creation of community property in such union, seriously handicapped judges in their ability to relieve the inequity and hardships to one of the parties and prevent unjust enrichment of either of the parties.
- ✓ It was upon termination of the union that the man might be ordered to pay to the woman an indemnity corresponding to not more than three months allowance by virtue of Arts.716 cum 717 of the Civil Code. This was done if and only if the judge felt that equity requires so. If the judge felt otherwise, the woman was not entitled to any indemnity and had to leave her house surrendering the common popery to the man.
- ✓ Under the current family laws, irregular union has been made to give rise to community property between the cohabitees provided the relationship lasts for three years or more. All properties that the man and the woman have acquired during their union are considered to have been acquired within the union and, therefore, are presumed to be common property of the man and woman although the presumption is a reputable one.
- ✓ Community property is created when the union of the man and the woman lasts for not less than three years. A union lasting less than three yeas, therefore, does not create common property and the parties can terminate the union without any dispute relating to common property. If, however, the one who terminated the union commits a fault, he/she is liable to pay damages.
- ✓ the RFC, under Article 103, has stipulated that matters relating to the administration and liquidation as well as payment of debts in case of irregular union are to be governed in accordance with the provisions of the code that deal with community property and liquidation of pecuniary relations of spouses in marriage. (Hence it is important to relate this discussion with the discussions previously made under the foregoing chapter).
- ✓ As matter of principle, the common property of the man and the woman in an irregular union is administered jointly with a view to ensuring equality of sex which is unequivocally guaranteed under the FDRE Constitution.
- ✓ All actions for sale, exchange, rent out, pledge, mortgage or alienation in any other way of the common property need the consent of both the man and the woman in the union.
- ✓ Before establishing the share of the man and the woman in the common property, there are certain procedures that have to be complied with. In the first place, the cohabitees take back their personal property by proving that it belongs to them (Art.103 can 86(1) of RFC). Secondly, where the personal property of a cohabitee has been alienated and its price has fallen into the common property, he/she is entitled to recover it from the common property (Art.103 can Art.86(2)). A cohabitee is also entitled to indemnify if it is found out that the personal property of the other or the common property has been enriched to the prejudice of his property (Art.103 can Art.86). Damages may also be demanded before the physical division of the common property takes place by either of the cohabitants where the other partner, having been empowered to administer the jointly owned property, performs acts which adversely affect his/her partner or such acts are done without mandate, or constitute acts of bad administration or have been performed in fraud of the right of the partner making the claim (Id, Art.103 cum Art.87). In such cases, the aggrieved partner cannot request the court to grant him damage if the above acts occur five years before the termination of the union. Debts of the cohabitants have to be also paid before the partition of the common property (Id, Art.103 cum Art.89) which is meant to protect creditors who may be in a disadvantageous position if partition is made before their claims are settled.

4. Debts of the Man and the Woman in Irregular Union

- ✓ During the union, the man and the woman may transact with third parties and incur debts. Such debts may be incurred either for the interest of both parties or for personal purposes.
- ✓ If a debt is incurred either by the man or the woman for their maintenance and their children, it becomes a common debt and creditors will have recourse against one or both (Art.102 (3) of the RFC). In other words, such debts may be recovered from the personal property of each cohabitee and/or from the common property. If a common debt of the man and the woman is due after the termination of the union and the division of the common

property, each of them is liable to pay the debt in proportion to his or her share (RFC, AA.103 cum Art.93).

- ✓ Debts due by one of the partners for personal purposes to a third party are recovered on his personal property and when the personal property is not sufficient to cover the debt, the creditor will have recourse against the common property (RFC, Art.103 cum Art.70(1).

5. Filiation

Proof of Irregular Union

- ✓ a party desiring to benefit from the legal consequences of an irregular union is also required to prove the existence of irregular union, when such union is provide in accordance with the requirements of the law, the legal effects of such union become operative.
- ✓ The primary and frequent mode of poof is possession of status as opposed to documentary evidence. This type of mode of proof is preferred because of its practical significance. Most frequently, a man and woman engage in an irregular union without a written agreement that evidences the fact of their union. It is a simple union in which it is hard to find a reliable documentary evidence to prove the fact of the union.
- ✓ Possession of status is said to have comprised some three facts known as *"nomen", "tractus",* and *"fama". "Nomen"* is the fact of having the name which indicates the status; *"tractus"* is the fact of being generally reputed as having the status by all persons with whom family or business relations took place; and *"fama"* is the fact of being generally recognized and treated by the public as having the status.
- ✓ The RFC and the regional family laws have adopted a single mode of proof by which an irregular union may be proved. They have singled out possession of status as a mode of proof of irregular union by ignoring proof by an act of notoriety.
- ✓ The RFC under article 106, provides that irregular union is to be proved by way of possession of status and defined possession of status of persons living in an irregular union as the state of affairs in which the man and the woman, though not married, behave as married people and as a result of this, they are recognized as such by their families and the community as well.

Termination of Union

- ✓ In Ethiopia, the man and the woman are at liberty to end their union at any time they wish. Accordingly, an irregular may be terminated unilaterally or by mutual consent in addition to the clear instance of termination of the union by death. Though not clearly provided, an irregular union may also be dissolved by a court order when a man and woman previously engaged in an irregular union begin to live in an irregular union with the sister or brother of one another upon the application of any interested person or the public prosecutor (Art.32 cum Art.100(2) of the RFC). A man or woman who were previously engaged in an irregular union cannot marry or live in an irregular union with the brother or sister of the other as it is prohibited under Art.100(2) of the RFC.
- ✓ , according to Art.105 (2), of the RFC unless the party that ended the union commits a fault, no obligation to pay damages is imposed by the law.
- ✓ The other effect of termination of irregular union is that of the division of the common property if there is any.
- ✓ If the death of a party ends an irregular union, the surviving partner is not entitled to inherit the property of the deceased unless the deceased provided for this right by way of a will in accordance with the rules of testate succession. All what the survivor gets is what is provided for him or her in the will of the deceased partner if there is any. It is to be noted that no right of succession exists even between spouses in a lawful marriage. Hence, termination of union by death results in partition of the common property between the surviving partner and a person considered as the deceased's heir by law.

CHAPTER SEVEN: FILIATION

Maternal Filiation

- ✓ Maternal filiation is the basis for the whole consanguinal relationship since the relationship of kinship by blood emanates from this very relationship. The family relationship consists of three distinct statuses.
- ✓ The status of being brother and sister, father and child is established only after the establishment of maternal filiation. Without it, a child can't have the status of being a son or a daughter within a family for he/she will neither have a father nor a mother.
- ✓ According to Art 740(1) of the 1960 Civil Code of Ethiopia and Art.125 (1) of the RFC, the presumption of paternity flows from maternity. A person will be a father of a child because of the presumption if such a man had relationship provided by law with the mother.
- ✓ The establishment of maternal filiation is crucial in cases of establishment of paternity through judicial declarations. The court declares a defendant to be a father of a child if the court is satisfied that the requirements provided under Art.143 of the RFC are fulfilled.
- ✓ According to Art.124 of the RFC maternal filiation results from the sole fact that the woman has given birth to a child.
- ✓ Hence, the maternal filiation is established from the sole fact of birth irrespective of the type of relationship that resulted in the conception of the child. Firstly, it is not a requirement that a definite relationship provided by law should exist between the mother and someone at the time of conception or birth of the child. The fact that the child was born in an illicit relationship cannot in any way affect the establishment of maternal filiation.
- ✓ The establishment of maternity is the creation of the legal bond as a result of birth. Whereas proof of maternal filiation, as the name indicates is a means by which a person purports to prove an already established filiation. It is a means by which a claimant proves the fact of birth by mere existence of which the maternal filiation is already established.
- ✓ Art.740 (1) of the Civil Code and Art.125 of the RFC, the mother of the child is the one who gave birth to the child. Hence, in the case of artificial insemination, which of the two women has given birth to a child, the woman from whom the ovum is taken or the one who actually delivered the child?

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

- ✓ Maternal filiation, the establishment of which requires the sole fact of birth, can be contested at any time by any interested person (Art.163 of RFC). The action of the contestation of status is intended to disprove a mere matter of fact. In order to obtain a judgment abolishing the already existing maternal filiation, the contestant must show to the court that it is not based on the fact of birth. The petitioner must show that either of the elements necessary for the establishment of maternal filiation is missing. Thus, she will have to show to the court either (1) that the woman was not confined at the time when the child was born and/or (2) even if the woman was confined at the time when the child was born, the child whom she delivered is not the one whose status is in question.

Paternal Filiation

- ✓ Establishing both maternal and paternal filiation is important, among other things, to protect the right of the child. Art.7 the convention on the Rights of Child (adopted in 1989) to which Ethiopia is a party provides that:
  1. The child shall, as far as possible, have the right to know and be cared for by his or her parents.
  2. State parties shall ensure the implementation of these rights in accordance with their national laws.

- The Ethiopian family laws should implement the principles enshrined under the convention and the constitution. Accordingly, the family laws have provided modes by which paternal filiation is established. Generally, the modes of ascertainment of paternity are divided into three.

1. Presumption of Paternity

- The first element of presumption of paternity is the existence of legally prescribed unions. Accordingly, paternal filiation is established if at the time of conception or birth of the child the mother had relations provided by law with a certain man. Only children born or conceived within such relationships could benefit from the presumption of paternity.
- As far as children born in wedlock is concerned, there are strong reasons to justify the presumption. Most of the time, it is possible to maintain that a child born in marriage is the child of the husband because of the duties of cohabitation and fidelity. But the presumption in Ethiopia equally applies to irregular union.
- The second element of presumption is birth or conception within the legally provided union. Art.126 of the RFC provides that "a child conceived or born in wedlock has the husband as father". By the same taken, "a child conceived or born during an irregular union has as father the man engaged in such union", according to Art.130 of the same code.

2. Acknowledgment of Paternity

- Voluntary paternal acknowledgment is an important method by which the children conceived or born out of a legally provided union may gain status vis-à-vis their fathers. This voluntary declaration of paternity can be used to establish paternal filiation if paternity is not possible to establish using the presumptions of paternity. This is clearly provided under Art.131 of the RFC which stipulates that when the father of the child is not determined by applying the provisions of the preceding articles, the paternal filiation of a child may be established by acknowledgement of paternity. This seems to give acknowledgement a rather narrow scope

Form of Acknowledgment

- This requirement of writing was introduced with the promulgation of the Civil Code. Before that, acknowledgment was effected without any requirement of writing. Under the pre-code customary practices, a man was considered to have acknowledged the child, if he orally said that the child was his. And if the man later on denies that the child is his, testimony of witnesses or the mother's statement under an oath that the child is an issue of sexual relationship with the man sufficed to prove it.
- Art.748 of the Ethiopian Civil Code states that an acknowledgment of paternity shall be of no effect unless it is made in writing. Sub article two of the same article provides that except in cases mentioned in Art.146 of this Code [the civil code] the acknowledgement may not be proved by witnesses. The reason for this could be the fact that certain mothers may give their children to a man who could not be the natural father. Coming to the RFC and other regional family laws, it has been provided that an acknowledgement of paternity results from the declaration made by a man **before an officer of civil status** or by **a will he made in writing** or by a **document attested by a competent authority** that he is the father of the child.
- Because acknowledgement is a juridical act greatly attached to the man who makes the acknowledgement, the law, as a matter of principle, provides that acknowledgement is to be made personally by the alleged father of the child. This must be done by the father even if the father has not attained the age of majority. However, acknowledgment may be made by an agent when such agent is specially appointed for this purpose by special power of attorney which must be approved by the court. As a matter of rule, judicially interdicted persons are incapable to perform juridical acts. However, for the purpose of acknowledgement, the law provides that they have the capacity to make acknowledgement personally. Despite this, acknowledgement by representation is possible provided that the representative has obtained permission from the court to this effect.
- The other situation whereby acknowledgement may be made by a person other than the alleged father is where the father of the child is dead or is not in a position of manifesting his will. In this case, the law permits that acknowledgment may be made in the name of the deceased by one of his parents.
- Although acknowledgement, as defined under Art.132 of the RFC, is deemed to be made when a certain man makes a declaration that he considers himself the father of a certain child merely conceived or born, it is not a unilateral act of the father. This is because acknowledgement cannot produce effect and cannot establish paternity unless the consent of the mother or in certain exceptional circumstances the consent of the maternal grandparents or the child to be acknowledged is obtained.
- According to Art.136 of the RFC, acknowledgement presupposes the admission by the mother of the child or by the maternal grandfather or grandmother of the child if the mother is dead or not in position to manifest her will. And in default of these, the acknowledgement may be accepted by another maternal ascendant or by the guardian of the interdicted person. Acknowledgement cannot be effective unless it is accepted by the child to be acknowledged where such child is of age.
- If the mother is dead or not in a position to manifest her will, the persons allowed to act in her stead may accept the declaration. Accepting declarations is quite different from acknowledging the same as well-founded. The latter rules out the willingness of the mother as requisite element for the effectiveness of acknowledgment. Here, it is not the consent of the mother that is required. If she admits the declaration of the person as well founded she does not have any discretion of obstructing the establishment of the juridical bond between her child and the declaring person on the ground of her unwillingness.
- The other person involved in acceptance of acknowledgment is the child to be acknowledged. As per Art.137 of the RFC, an acknowledgement of paternity shall be of no effect unless it has been accepted by the child himself when it is made after the latter has attained majority. However, the acknowledgement is deemed to have been accepted where such person (the child) has not raised any protest against such acknowledgement within one month after he come to know of it. (Art.138 RFC).
- Although acknowledgement is effective when the mother of the child admitted as well-founded, acknowledgement of paternity may not be made after the death of the child. (Art.139 RFC). The prime purpose of acknowledgement is to insure the right of children to know their father and to be cared of such father. However, acknowledgement after the death of the child is possible where the deceased has left descendants.

Non-revocability of Acknowledgement (Art.140 of RFC)-

- Normally, an individual does not make acknowledgement unless he has justifiable grounds to do so. Hence, he makes acknowledgement when he is, as far as his understanding goes, sure that he is the true father of the child. Once he has made an acknowledgement of his own free (without any external influence or pressure), he is not allowed to revoke the acknowledgement of paternity for allowing revocation of acknowledgement will result in disturbing the status which has already been maintained. Here the principle **Pacta Sunt Servanda** (gentleman's word is his bond) works.
- However, revocation of acknowledgement may be allowed when the father who made the acknowledgment is a minor. Art.140 (2) of the RFC provides that a minor who has acknowledged a child may revoke such acknowledgement for so long as he is incapable and within one year following the cessation of his incapacity, unless his guardian

consented to the acknowledgement. Even in this case, revocation of acknowledgement is strictly personal to the minor since the law provides that revocation may not be made by his legal representatives or by his heirs.

Annulment of Acknowledgement

✓ The consent of the person who makes acknowledgement must not be vitiated. If the consent of the acknowledger is vitiated by a vice of consent, acknowledgement may be annulled (invalidated). However, unlike the Ethiopian Law of contract wherein violence, mistake and fraud are vices of consent resulting in invalidation of a contract, the family law as a rule has confined the ground of annulment of acknowledgement only to violence as clearly stipulated under Art.141(1) of the RFC. Sub-2 of this article, in black and white, provides that acknowledgement may not be annulled on the ground of error or fraud unless it is decisively proved that the child could not have been conceived of the person who made the acknowledgement.

Several Acknowledgements Prohibited (Art.142 RFC)-

✓ Naturally, a child cannot be attributed to two or more persons for a child has only one biological father. It is because of this that Art.142 of the RFC prohibits several acknowledgements. According to this article, where an acknowledgement of paternity has been made in regard to a child, no other acknowledgement of child by another man shall be permitted unless the first acknowledgement has been annulled. Therefore, where the first acknowledgement is annulled on account of grounds of annulment provided under Art.141 of the RFC, another acknowledgement may be validly made.

3. Judicial Declaration of Paternity (Arts.143-145 of the RFC)

✓ Under this mode of establishment of paternity, a child who does not have a father either through the operation of the presumption of paternity or by acknowledgement can have a father only if the court declares a certain man to be his father. The court makes such declaration where it is satisfied that one of the grounds which justify judicial declaration of paternity is found. According to Art.758 of the Civil Code the grounds which declaration of paternity by the court was abduction and rape. However, the RFC and regional family laws have added other grounds of judicial declaration. Art.143 of the RFC, for instance, provides that: *Where, after applying the preceding articles the father of the child is not ascertained, a judicial declaration of paternity may be obtained under the following conditions:*

a. In the case where the mother has been the victim of abduction or rape at the time of the conception of the child.

b. In the case where at the time of the conception of the child, the mother has been the victim of seduction accompanied by abuse of authority, promise of marriage, or any other similar act of intentional deception.

c. In the case where there exists letters or other documents written by the claimed father which unequivocally proves paternity.

d. In the case where the claimed father and mother of the child have lived together in continuous sexual relation, without having a legally recognized union in the period regarded by law as the period of pregnancy.

e. In the case where the person claimed to be the father of the child participated in the maintenance, care and education of the child in the capacity of a father.

✓ Despite the above grounds of establishing paternity by judicial declaration, an action brought for declaration of paternity shall be of no effect where the conditions enumerated under Art.145 of the RFC are proved to exist.

a. In case where the mother of the child had sexual relationship with another man in the period regarded by law as the period of pregnancy unless it is proved by medical or other reliable evidence that such man is not the father of the child.

b. In case where the claimed person could not be the father of the child because he was absent or has been a victim of accident during the period regarded by law as the period of pregnancy.

c. In case where the person claimed to be the father of the child decisively proves by blood examination or other reliable evidence that he could not be the father of the child.

✓ Art.759 of the Civil Code provides that the action for judicial declaration of paternity may be instituted only by the mother of the child, or if she is dead or not in a position to manifest her will by the guardian of the child.

✓ "The action for the judicial declaration of paternity may not be instituted two years after the birth of the child or after the sentence of a criminal court in regard to the abduction or rape."

Regulation of Conflict Paternity

✓ The time framework and scope within which the presumption of paternity applies may result in attributing one child to two or more fathers. This is basically because it is operative if a child is either conceived or born in wedlock or irregular union as the case may be. Both these elements when seen separately or taken together can give rise to situations when the law can attribute the same child to two or more fathers.

✓ The nature of the application of the modes of establishment of paternity itself excludes the possibility of one child having two fathers by different modes of establishing paternity. Thus, if a child has his mother's husband as a father, he cannot have another father either through acknowledgment or judicial declaration. Similarly, a child can have a father by judicial declaration, if he has no father either by the presumption of law or by acknowledgment. Therefore, there is no possibility where a child can have two fathers by operation of two modes of establishing paternity in different "hierarchies". Neither can a child have two fathers by acknowledgment nor judicial declaration of paternity. A child cannot be validly acknowledged by more than one person at the same time for stronger reason; the court cannot declare two persons to be the fathers of the child.

✓ The conflict arises when the mother has a relation (marriage or irregular union) provided by law with two or more persons and the child could simultaneously be attributed to the person in each relation. The conflict of paternity arising because of the aforementioned reason has two possible solutions as provided under the RFC and the regional family laws.

✓ The persons to whom paternity of the same child is attributed may contractually agree to forfeit his paternity. Such an agreement is to be attested by three witnesses and approved by the court and the mother must be heard in person except in cases of force majeure (Art.147 of the RFC).

✓ *Once the agreement is annulled or if the presumed fathers failed to reach an agreement the conflict of paternity will be solved by application of the legal presumption as provided under Art.148 of the RFC which states that "failing regulation of paternity, the following two presumptions shall be applied successively where appropriate:*

a. The child shall be attributed to the husband of the mother in preference to the man who has an irregular union with the mother.

b. The child shall be attributed to the husband or the man with whom the mother is living at the time of the birth, in preference to the husband or the man with whom she was living at the time of the conception.

✓ *Assignment of paternity by agreement by virtue of Art.149 of the RFC is possible where the requirements provided there in are satisfied Art.149 of the RFC provides that:*

1. *Where the child is born within 210 days from the conclusion of marriage or the commencement of the irregular union, the husband or the man who is living with the woman may, by agreement, assign the paternity of the child to another person who declares that he is the father of the child.*
2. *Where the child is born more than 210 days after the dissolution of the marriage or the cessation of the irregular union, the husband or the man who lived with the mother shall have the right provided in the preceding sub-article.*

✓ As a matter of principle, the agreement of assignment of paternity must be concluded by the interested parties themselves. This is so when the parties have attained the age of majority and are not judicially interdicted. Where the parties to such agreement have not attained majority or are judicially interdicted, the agreement may be concluded by specially appointed agents by a special power of attorney approved by the court (Art.151 of the RFC).

Disowning

✓ In the Ethiopian Civil Code and the new family laws, there is no provision expressly defining what disowning is. When we read together the relevant provisions pertaining to disowning, we can understand that it as an action by which the husband or the man in an irregular union tries to disclaim the presumption of paternity established against him, if he believes that he cannot be the father.

✓ Disowning shows that the presumed father owns the status of paternity. Persons other than the presumptive father have nothing to disown. It is less accurate for the law to use the term "disowning", when after the presumed father death (or incapacitation), his heirs contest the presumption of paternity established against him.

Disowning as Distinguished from Other Modes of Contesting Legitimacy

✓ Legitimacy is a status of a child being born in a legally recognized union or within a competent time after its termination under circumstances that the presumptive father can be the father. And its contestation involves contesting that a certain child is not his, because its birth or conception did not take place during the subsistence of a relationship that is legally recognized, or because no existence of such a relationship at all.

✓ Art.167 of the RFC states, disowning is the only means by which the paternity of person may be contested. Therefore, action to disown is brought to disclaim the legitimacy of children who are under the protection of the legal presumption that they are the children of the person contesting.

✓ Unlike the other modes of contesting legitimacy, disowning is contestation of paternity.

✓ In Ethiopia, the presumption of paternity of a person conceived or born in wedlock or an irregular union can be rebutted only by the person to whom the law attributes the paternity by proving decisively that he could not have sexual intercourse with the mother during the period between the 300th and 180th day before the birth of the child (Art.168 of the RFC). In this regard, the law presumes that the spouses shall be deemed to have had no sexual intercourse with one another during the time when they actually lived separately following a petition for divorce made by one of them or in consequence of an agreement concluded between them (Art.169(1). However, this is a rebutable presumption as provided under sub-article two of the same article. This is one aspect of the protection of the presumption of paternity.

✓ Art.177 of the RFC permits that where the person to whom the paternity of the child is attributed by law dies or becomes incapacitated within the time fixed by law (i.e., Art.176 of the same code) for instituting the action to disown, one of his descendants, in his stead, may institute an action to disown. Art.177 (2) provides that in default of descendants, the right to disown may be exercised by his father, mother or in their default, by one of his ascendants. In default of ascendants, it may be exercised by one of his brothers or sisters, to the exclusion of any other heir or representative.

✓ This action brought to disown a child whose filiation is established by law is stringent both in the mode and time for making it. In our law rebutting of the presumption that the child was born by a married woman is that of the husband is divided into three steps. First, a contestant may prove decisively that the mother did not have intercourse with him at the time of the child's conception. Second, if the presumption of intercourse is not disproved the contestant may decisively prove that it is absolutely impossible for the child to have been produced by intercourse between the mother and him. Third, the presumed father could produce any facts to disprove his paternity if the maternal filiation is established by the action to claim status (Read Arts.168, 170 and 176(2) of the RFC).

✓ In order to maintain the presumption of paternity strong, Art.174 (1) of the RFC stipulates that the presumed father is the only person who can institute an action for disowning so long as he is alive. No action to this effect can be brought by the mother or by a man who claim the paternity of the child or by the public prosecutor (Art.174 (2) of the RFC. Even a judicially interdicted person can bring such action when he gets permission from the court although he may be represented by his guardian when the guardian obtains permission from the court to do so in the name of the judicially interdicted person (Art.175 of the RFC). As regards the person against whom the action to disown is brought Art.179 (1) of the RFC provides that such action shall be brought against the child or where he/she is dead, against his/her heirs and sub-2 of the same article makes it mandatory that the mother of the child is joined in the suit. Where the child is a minor, obviously, he shall be represented by a tutor ad hoc appointed for this purpose by the court.

✓ Art.176(1) of the RFC makes it clear that an action to disown shall be instituted by the man to whom paternity of the child is attributed by law within 180 days following the day he knew or should have known the birth of the child. Art176(2) provides that where the maternal filiation is established by an action to claim status, the action to disown shall be instituted within 180 days from the judgment deciding on the action to claim a status having become final. Sub-article one of Art.176 of RFC has departed from Art.792(1) of the Civil Code because in the Civil Code the lapse of 180 days is reckoned from the date of birth of the child while in the RFC the lapse of 180 days is to be reckoned from time when the presumed father knew or should have known the birth of the child.

Proof of Filiation

✓ In the modern world, the primary mode of proof of filiation is record of birth. Record of birth, as provided under Art.99 of the Civil Code of Ethiopia, contains the day, month and year of the birth, the sex of the child, the first names which are given to him or her, the names, first names, dates and places of birth of this father and mother and where appropriate the names, first names, date and place of birth of the person making the declaration.

I. Proof by Record of Birth and Possession of Status

✓ Record of birth both under the Civil Code and the current family laws is the primary means of proof though not the only means. Despite this when it is not possible to prove filiation by record of birth, it is not possible to switch to proof by possession of status. In this regard, Art.155 of the RFC provides in default of certificate of birth, filiation is proved by the possession of status of child.

✓ Before one resorts to prove his case by possession of status, one should convince the court that birth certificate was not issued from the very out set or birth certificate was lost, destroyed or stolen. Therefore, the court must not admit proof by possession of status without convincing reasons that establish that proof by certificate of birth is impossible.

✓ Art.156 of the RFC provides that a person has the possession of status of child when the child is treated by

the community as being the child of such man or woman. If certain members of a community appear in court and testify that they have reasonable belief that the child belongs to a certain man or woman, that may be taken as sufficient proof. However, such kind of testimony may not be sufficient because if the witnesses do not have enough knowledge as to their relation, they may believe that the relationship between a relative and a child may be a relationship of parent and child. However, in order to arrive at a just result the witness should testify the identity of the mother and the father and the fact that a certain child was born to those individual when the parents were in a conjugal life or in or irregular union or the child was born to these individuals even out of such unions.

CHAPTER EIGHT: ADOPTION

- Black's Law Dictionary defines adoption as: The creation of parent-child relationship by judicial order between two parties who usually are unrelated.
- Planiol defines the concept as: A solemn contract which creates relation between two persons analogous and those flowing from legitimate filiation
- The Ethiopian Civil Code of 1960 defines adoption as a bond of filiation created artificially by a contract of adoption between the adopter and the adopted child (Art. 796(1) of the Civil). The RFC provides the same thing as the Civil Code.
- In general, adoption is a way of home finding to children who have lost their natural parents by death, desertion, or their misconduct, and in a secondary degree for children whose parents are unable or unwilling to maintain them. And it is the practice of absorbing a child into a family that a child is not born into and giving it the legal rights and duties of a child that is naturally born to the adoptive parents.

Essential Conditions of adoption

- In the past, Art 797(1) of the Civil Code provides that any persons of age may adopt a child." When it says "any person of age" it is referring back to Art 198 of the Civil Code which sets 18 years as age when a person is no more considered as a minor. In case of adoption also a person beyond the age of 18 years is capable of adopting a child unless such person is declared incapable by the law. Unlike the Civil Code, Art. 184 of the RFC provide that "any person whose age is not less than twenty five years may adopt. Where an adoption is made by two spouses, it is sufficient that one of them be of full age of twenty five years.
- As regards the age of the adoptee, the RFC provides that any person who is less than 18 years of age and under guardianship may be adopted. This means that once a person has attained majority age, no purpose would be served by adopting that person since is he/she able to maintain himself/herself. This is a clear departure the RFC has made from the 1960 Civil Code since the latter did not say anything concerning the age of the adoptee. The Code has no upper age limit because the purpose of adoption traditionally is to have someone as heir.
- If the adopter is married the child is adopted by spouses jointly as per Art.180 of the RFC. But this doesn't apply where a person adopts the child of his spouse and one of the spouses is not in a position to manifest his/her will.
- Moreover, adoption by a couple is preferred, simply by reason of the likelihood that couples will provide a more "normal" family environment that could be provided by a single adopter.
- Art 188 of the RFC states that, "the existence of children of the adopter shall not constitute an obstacle for adoption." However, by way of exception sub-article two of this article states that although having children is not an obstacle to adoption the court must take into consideration the effects of existence of children of the adopter on the well-being and interest of the adopted child.
- pursuant to Art. 802(2) of the Ethiopia Civil Code for it says "If the child is under 15 years of age the contract of adoption shall be between the adopter and the guardian of the adopted child." Therefore, in this case consent is given by the guardian. And when an institution of assistance or an individual seeks to act as guardian of the child, the civil code requires a court appointment. When an institution is to act as guardian, the management has to delegate one of it members to exercise such functions, courts are directed to appoint relatives as guardians, when possible and to appoint institutions only "where necessary".
- For the establishment of valid adoption, the consent of parents of the adopted child is mandatory. Accordingly, Art.190 (1) of the RFC provides that both the father and the mother of the adopted child must give their consent to the adoption agreement where they are alive and known. Sub-article two of this article provides that where one of them is dead, absent, unknown or incapable to manifest his/her will, the other parent shall give his consent. Despite the fact that the consent of both parents is necessary, one of the parents may not be willing to give his/her consent to the adoption. In this case, the court may approve the adoption upon hearing the opinion of the other parent and of the child where the child is ten and above years of age. Sometimes, there may not be ascendants who may give their consent to the adoption agreement. In this case, the court is empowered to approve such agreement by taking into account the interest of the child (Art.191).
- In some circumstances, government or private orphanages may give any child under their custody to adopters. When this is the case, such orphanages are required to provide sufficient information to the government organ having authority to follow up the well-being of children, as to the identity of the child, how the orphanage received him and about the personal, social and economic position of the adopter. All the information must be given to the government organ before the agreement of adoption is concluded. (Art.192 of the RFC)
- Where the adopter is a foreigner, the court may approve the adoption unless an authority empowered to follow the well-being of children, after collecting and analyzing relevant information on personal, social, and economic position of the adopter gives its opinion that the adoption is beneficial to the child. (Art.193 (1)).
- Despite what is provided under Art.193(1) of the RFC, the court may disregard the opinion of the authority and reject the agreement of adoption where the court thinks that the agreement is not beneficial to the child. In other circumstances, where the court finds that the information provided by the concerned authority is insufficient, it may order the authority to conduct further investigation and submit additional information. The power of the court is also extended to ordering other individuals or organizations to provide any relevant information in their possession or to give testimony (Art.193 (3)).
- Before approving the agreement, the court is required to take into consideration:
  - the opinion of the child about the adoption where the child is capable of giving opinion;
  - the opinion of the guardian or the tutor of the child if he/she has not previously given his consent;
  - the capability of the adopter to raise and take care of the child;
  - where the adopter is a foreigner, the absence of access to raise the child in Ethiopia;
  - the availability of information which will enable the court to know that the adopter will handle the adopted child as his own child and will not abuse him. (Art.194 of the RFC).

Effects of Adoption

- The conspicuous effects of adoption are marriage, succession, maintenance and the like.

1. Marriage

- Art. 181 of the RFC provides that an adopted child shall, for all purposes, be deemed to be the child of the adopter. Therefore, relationship established by adoption may be an impediment to marriage in accordance with the degrees that are provided by the family laws of the respective regional family laws and the RFC.

2. Succession

- ✓ Because adoption establishes an artificial filiation, the provisions of the Civil Code dealing with succession both intestate and testate do apply to the adopted child. However, there is no provision under our law which permits or prohibits an adopted child from inheriting his natural parents. But we can raise here two arguments. First the child is considered as a child naturally born into the family of the adoptive parents, he forfeits the right of inheriting his natural parents, for Art.836 says "adopted children shall be assimilated to the other children in case of succession." The other argument is, as the adopted child shall retain his bonds with his family of origin, if so his right to inherit is not in jeopardy as his relation isn't dissolved. However, there is no a provision in the Civil Code which prohibits the adopted child from inheriting his natural parents.
- ✓ With regard to the inheritance of the property of the adopted child, it is the family of adoption that is the ascendants, descendants and collaterals of the adoptive parents who have the right to inherit. Since Art. 183(3) of the RFC states that, 'wherever a choice has to be made between the family of adoption and the family of origin, the family of adoption shall prevail."

3. Rights and Obligations as to Support and Care

- ✓ Adoptive parents are duty-bound to support and care for the adopted child. Since the adopted child has an equal right as a naturally born child, it is also incorporated in both the FDRE Constitution and UN Convention on the Rights of the Child that the child is entitled to acquire care of his/her guardian.
- ✓ In return for support and care, a child who is capable, has reciprocal duty to give maintenance to his adoptive parents. As expressly put under Art. 198 of the RFC an obligation to supply and maintenance exists between relatives by consanguinity or affinity in the direct line and between brothers and sisters. However, the adopted child, his spouse and his descendants may not claim maintenance from the family of origin of the adopted child unless the adoptive family isn't in a position to supply such maintenance. They aren't also bound to supply maintenance to ascendants of the family of origin unless the latter can't claim maintenance from another member of their family. With regard to obligation to supply maintenance to natural parents, there is no provision which obliges or prohibits. So it is at the discretion of the parties to supply maintenance or not.

Inter-country Adoptions and Safeguards to Children

- ✓ In Ethiopia, the main cause for the start of inter-country adoption as an alternative care for orphaned and abandoned children was the 1974/75 draught and famine that resulted in orphaned and abandoned children. Because of this, the then Prime Minister's office gave directives to the Ministry of Labor and Social Affairs (MOLSA) to consider and work on inter-country adoption for orphaned and abandoned children in late 1970s. The directive established a committee for facilitation of adoption, as well as it provides the prerequisites for selection of adoptive parents and documents required at that stage (
- ✓ The term inter-country adoption refers to an adoption in which adopters and child don't have the same nationality, as well as one in which the habitual residence of adopters and child is in different countries. Nowadays in Ethiopia, there are two kinds of inter-country cases. The first one is the biological mother voluntarily relinquishes her children for personal reasons. It may also by both parents and guardians for reasons such as lack of means to support. We call these private inter-country adoptions. They are arranged directly between the biological parents and adoptive parents or their representatives or through an intermediary. The other is adoption of orphaned or abandoned children or children whose parents are ill and hence have no one else to act on their behalf. These are called agency inter-country adoptions for the reason that it is the agency which acts on behalf of the child in case of adoption.
- ✓ Moreover, in the field of private international law, two aspects must be distinguished. One concerns the choice of law; the other the exercise of jurisdiction.
- ✓ In general, adoptions shall be granted only if it will be in the best interests of the child. And that the authority approving the adoption is to carry out a thorough inquiry relating to the parties through the agency or the appropriate authorities, and as for as possible with the help of experienced social workers and agencies qualified in the field of inter-country adoptions. The making of the appropriate investigations preliminary to an adoption, is therefore, left to the initiative of the forum state rather than to an internationally uniform procedure, and this is each country's courts are to apply forum law to all procedural matters.

Placement of the Child

- ✓ UN Convention on the Rights of the Child recognized that "Inter-country adoption may be considered as an alternative means of child care, if the child can't in any suitable manner be cared for in the child's country of origin" (Convention on the Rights of the child, (1989), Art. 21(c))). This principle also finds expression in a directive issued by the Ministry of Labor and Social Affairs in 1996. Art. 3 of the directive provides that: A child can be adopted and expatriated only when it has been proven that it cannot get proper care in Ethiopia because foster parents or persons willing to adopt it could not be found and that there is no other way it can be brought up properly here."
- ✓ Nonetheless, in certain circumstances inter-country adoption "may offer the advantage of a permanent family to a child for whom a suitable family can't be found in his/her state of origin." This suggests that there are circumstances in which inter-country adoption may be regarded as preferable for a child over institutional care in the country of origin.
- ✓ It is also obvious that the successful operation of this principle requires that the placing agency in Ethiopia should have the capacity to explore the alternatives to inter-country adoption. This implies a placement system which in some way is integrated into or at least has ready access to information about the child-care services in Ethiopia. However, in inter-country private adoption, i.e., in the sense of not being arranged through an approved agency, insufficient attention may be given to the possible alternatives to inter-country adoption. That is why Art. 21(e) of the Convention in the Rights of the Child states that the placement of a child in another country should be carried out by competent authorities and must not result in financial gain for the parties involved.

Selection of Adoptive Parents

- ✓ In the total evaluation of the interest of the child, the examination of the personal qualities of the adopter is of special significance. Each country has its own laws and procedures regarding the selection and approval of prospective adoptive parents. In Ethiopia, Art.193 of the RFC states that where the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the well-being of children, after collecting and analyzing relevant information about the personal, social and economic position of the adopter, gives its opinion that adoption is beneficial to the child. However, the court may reject the opinion of the authority and decline to approve the adoption where it (the court) thinks that adoption is not beneficial to the child. According to the afore-mentioned directive children are adopted and expatriated where it is verified that:
  a. The would be adopter's income will enable him to raise a child.
  b. The adopter is healthy, that his social life is not tainted, that he is of a sound mind and is not at all addicted to any dangerous drugs.
  c. The adopter has never been convicted of a crime or of being engaged in an illegal activity; and
  d. The written consent of his lawful spouse has been obtained with regard to the adoption.

Safeguards for Children in Inter-country Adoption

1. Follow-up Work

✓ As regards inter-country adoptions, the Convention on the Rights of the Child calls for the guarantee of being informed of the child's condition after authorization of adoption and his departure abroad. This enables the concerned authorities to ensure that the child's rights are respected and that the child is faring well. To this end, the competent authorities should follow-up the adopted and expatriated children. This can be done by requesting concerned governmental as well as nongovernmental organizations found in the child's country of residence. Follow-up, among other things, is done by periodical visits by experts from the competent authority and assess the situation of adopted children in the child's country of residence. When it has been found out that the rights of the adopted and expatriated child have been violated or that its welfare is not ensured, the competent authority shall take the necessary measures to remedy the situation.

2. The Child's Right to Identity and Secrecy

✓ In the adoption process three interests are involved i.e. the interest of the child, the parents i.e. both adoptive and natural, and public interest.

✓ The child has an interest to know his identity.

✓ Security is a guarantee based in part of a desire to protect the parent from public embarrassment. The adoptive parents are guaranteed the same anonymity as the biological parents. The adoptive family needs to be protected from intrusion in order that a healthy and stable relationship may be allowed to develop. Beyond this, the adoptive parent may feel his/her parenthood be threatened by disclosure and by the unknown results of any possible reunion. They can't easily put distance between themselves as parents and their child's personal need for identity.

✓ Adopted children unlike natural children don't share ancestry, genetic heritage, or family resemblance with their adoptive parents. They struggle with questions like 'why was I placed for adoption?"; "To whom do I belong?", "who am I?", "who are my natural parents?" As they mature, they need acceptance, reassurance, and positive but realistic, responses to their questions from their families and communities. They also need to understand that the decision made by their natural parents was based on their own personal circumstances and not on the child's being bad or damaged.

✓ The longer an adoptive parent kept secret the fact of adoption from a child, the more serious the consequences be when the fact is finally revealed. Similarly, the less information is revealed about the adoptee's origins, the greater the problems for the adoptee. Thus, generally parental motivation and commitment, the adoptive parent's openness in discussing adoption issues with their child, the age of the child at the time of placement, and the child's individual temperament have an influence on adoption adjustment.

3. Prevention of Unlawful Acts in Inter-country Adoption

✓ The parent, guardian or foster parent may claim or accept money or other material goods, for himself or somebody else, in exchange for a child's adoption. A person may also obtain improper financial gain through acting as an intermediary or facilitator in a child adoption. But, in most states it is a crime to offer or receive money or any valuable consideration for relinquishing or accepting a child for adoption since adoption is based on the child's need to have a family and not on the economic profit of intermediaries.

✓ Moreover, under the guise of adoption, certain people engage in child abuse such as exploitation of children through pornography, prostitution, cheap labor, the removal and sale of organs used in transplants and other forms of abuse, some beyond even the wildest stretch of the imagination. To avoid this, Art.11 of the Convention on the Rights of the Child states that parties shall take measures to combat the illicit transfer and non-return of children from abroad. And Art.35 of same convention calls for the counteraction of abduction, sale, or trafficking in children for any purpose or in any form. In addition, the Hague Conference on Inter-country Adoptions calls for adoptions to be organized by authorized adoption agencies. Therefore, although biological parents are often willing to make private arrangements for adoptions, the government has to deter this by regulating and supervising adoptions to eliminate illegal trafficking in children. And hence strong administrative screening and legal supervision to avoid intermediaries from making profit in inter-country adoption is needed.

Revocation of Adoption

✓ Although adoptive filiation is established by the agreement of the adopter and the adoptee, it cannot produce any legal effect unless it is approved by the court. The court, before giving the decision of approval, conducts serious investigations and inquires to make sure that the agreement of adoption is in the best interest of the child in all respects. If an adoption is approved by the court, as a matter of rule, if is not revocable as clearly provided in Art. 195(1) of the RFC. Art. 195(2) of the RFC states that adoption may be revoked for the reasons mentioned there under. According to this sub article, adoption may be revoked by the court where the adopter, instead of looking after the adopted child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his future.

✓ The petition for revocation of adoption may be made by the child, a government organ authorized to follow up the well-being of children or any other interested person (Art. 196(1)).When petition is submitted to the court the court shall determine whether the grounds for petition are real and sufficient to warrant revocation. If the court is satisfied that the petition is well founded, then it revokes the adoption.

CHAPTER NINE: OBLIGATION TO SUPPLY MAINTENANCE

Rationale behind the Obligation

✓ Obligation is a legal relation, which consists in the duty of one person (called the debtor) to perform or not to perform something towards another person (named the creditor). Obligation emanates from two sources-contractual obligations and legal obligations. The former is an obligation created by the agreement of the creditor and the debtor while legal obligations, however, emanate from the law itself. The obligation to supply maintenance is a typical example of legal obligation.

✓ The rationale behind such obligation is a moral duty that exists among family members. When a member of a family becomes needy, no one is nearer than the family members to maintain such member.

Subject Matter of the Obligation

✓ According to Art.197 of the RFC, the person who is obliged to supply maintenance is bound to supply to his creditor things that are necessary for the livelihood of the creditor.

✓ The things that are necessary for the well-being of the creditor must be given to him based on the social conditions and local custom of the area in which the creditor lives.

✓ Generally, things that are necessary for the livelihood of the creditor are; the means to feed, lodge, and clothe, to care for his health and education, depending on conditions of the creditor.

Persons between Whom the Obligation Exists

✓ As provided in Art. 198 of the RFC, a person may be obliged to supply maintenance to his spouse, ascendants, and descendants, his brothers and sisters. Although it is not expressly provided in this article, a person is obliged to supply maintenance to his/her adoptee or adopter as the case may be. This is because Art.181 of the RFC clearly provides that (without prejudice to Art.182 of the same code) an adopted child for all purposes, be deemed to be the child of the adopter.

- ✓ No person may be obliged to supply maintenance to his uncles, aunts, nephews, nieces and other relatives.
- ✓ According to Art.201 of the RFC, the obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work.
- ✓ Generally, minors are in need of maintenance. Their parents are obliged to supply maintenance to them. Moreover, persons who have no sufficient means to take care of themselves as a result of poverty may be considered to be needy if they are unable to work and earn an income. Aged persons and those who are seriously sick are considered to be not in a state of earning their livelihood by their work.
- ✓ The obligation to supply maintenance shall, as a rule, be fulfilled by means of a maintenance allowance paid by the debtor to the creditor for maintenance.
- ✓ Maintenance may be reduced or increased proportionally, according to the reduction or increase of the necessities of the creditor and the resources or means of the debtor to furnish the same.
- ✓ As the maintenance allowance is believed to be extremely necessary for the survival of the creditor, it cannot be attached nor can it be assigned.
- ✓ As per Art 207 of the RFC, in fulfilling his obligation of maintenance allowance, the debtor may offer to discharge his obligation by taking the creditor for maintenance into his/her house.
- ✓ Where several persons are liable to supply maintenance, the creditor may claim maintenance from any one of such persons. Particularly, when all of the debtors have similar relationship with the creditor, the creditor may claim the payment of maintenance from anyone of such debtors (Art. 208) However, the debtor who has paid the allowance shall have recourse against those who have not paid their shares (Art. 209). That is when the obligation to supply maintenance falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each. However, in case of urgent need and special circumstances, only one of them may furnish the support provisionally, without prejudice to his right to claim from the other obligors the share due from them.
- ✓ The debtors for maintenance may validly agree, as regards their reciprocal relations, that maintenance shall be supplied to their common creditor by one of them. This agreement is beneficial to the creditor, because he can pursue only against one debtor instead of many debtors to get his maintenance allowance paid. In such conditions, the creditor may not make a claim against the other debtors to obtain maintenance unless he has a serious reason for not respecting such agreement (Art 211).
- ✓ The adopted child, his spouse and his descendants may claim maintenance from the family of origin of the adopted child when the adoptive family is not in a position to supply such maintenance. It is said that adopted child has two families. The family that has to take the prior obligation to supply maintenance is the adoptive family. It is only when the adoptive family is unable to supply maintenance that the family of origin is obliged to do so.
- ✓ The obligation of supply maintenance shall include the funeral expense of the creditor of the maintenance For instance, if the neighbor of the creditor covers the funeral expense of the creditor, the person who is obliged to supply maintenance for the deceased has to pay back the funeral expense to the neighbor of the creditor (Art. 213 of the RFC).

Termination of the Obligation

- ✓ Although the Ethiopian Family laws have not fully incorporated the grounds of termination, we can validly maintain that the following can be taken as the grounds of termination of the obligation:
  - ***Agreement of the parties:-*** The debtor and the creditor may agree to terminate such relationship without affecting the mandatory provisions of the law. This is because under Art. 1675 of the Ethiopian Civil Code a contract is defined as an agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of proprietary nature.
  - ***The ability of the creditor to earn his/her livelihood:-*** But when it is possible to show that the creditor is in a position to earn his livelihood or has acquired enough means to sustain his/her life, there is no reason that makes the obligation continue.
  - ***Inability of the debtor to discharge the obligation:-*** the relationship that exists between the debtor and the creditor does not suffice to entitle the creditor for maintenance allowance. Rather the debtor must be able to provide maintenance. Hence, although debtor-creditor relationship has been established between the parties, such relationship terminates when the debtor is unable to discharge his obligation for various reasons.
  - ***Condemnation of creditor (Art. 200 RFC):-*** The creditor loses his right of maintenance where he commits or attempts to commit a criminal act against the debtor. The creditor may also lose his right of maintenance where he has committed or attempted to commit a criminal act on the life or property of the spouse, ascendants or descendants of the debtor.

CHAPTER TEN: SETTLEMENT OF DISPUTES

Settlement of Disputes Arising out of Marriage and Irregular Union

- ✓ There are a lot of causes for disputes that arise between a husband and a wife or between a man and a woman living together in an irregular union. In order to resolve these disputes between these persons effort is made by third parties. These third parties may include courts, arbitrators, conciliators, mediators etc. Although courts are the ideal institutions to adjudicate family disputes in almost all countries, using the alternative dispute settlement mechanisms such as arbitration, conciliation or mediation is a common practice all over the world.
- ✓ In Ethiopian family laws, a solution is sought for disagreements between spouses or partners to an irregular union either by adjudication or by using arbitration. The law has put in place both the substantive and procedural provisions in order to help the disputants resolve their problems by regular courts or arbitration. These are clearly incorporated under the RFC and Regional Family Laws.

5. Settlement of Disputes by Court

- ✓ Although Art. 118 of the RFC provides that any dispute arising out of marriage or irregular union is to be decided except for deciding divorce, by arbitrators chosen by the spouses, if reconciliation becomes difficult to arbitrators or if one of the parties or both of them feel that the way the arbitrators handle the arbitration process is wrong then they may appeal to a court having jurisdiction.
- ✓ In the case of marriage, even though the spouses petitioned for divorce, the court does not immediately give decision to divorce. As per Article 91 of RFC, when the spouses either conjointly or one of them petition for divorce, the court speaks to the spouses separately or jointly in order to make them renounce their intention to separate for good and Article 82(1) of the RFC can be referred for this. Where this effort is not successful, it will direct the parties to arbitrators to settle their disputes. A cooling period of up to three months is given to the disputants where they did not agree to settle their dispute through arbitration (Refer to article 82(3)). This time, after the court has exhausted all the means to bring the spouses into an agreement in order to renounce their petition for divorce, the court according to article 82(4) of the RFC shall pronounce divorce within one month from the receipt of the reports of arbitrators, or the end of the cooling period as the case may be (Arts. 81 and 82 of the RFC).
- ✓ However, under the Civil Code, failing the agreement between the parties, the family arbitrators would pronounce the divorce within one year from the petition for divorce having been made to them (see article 678(1) of the Civil Code).

- ✓ The departure of the RFC and regional family codes is that they have reduced the period from one year to three months, if divorce related disputes are not decided by the courts within short time, they will cause unnecessary suffering both to the parties themselves and to their children.
- ✓ The court is duty-bound to give an order regarding the matters to be settled after divorce, i.e., regarding maintenance of the spouses, the custody and maintenance of their children and the management of their property (Read Art. 81 and 82 of the RFC).
- ✓ In order to advance the best interest of children, Art 113 of the RFC gives direction to the courts to treat the custody of children very carefully. Prior to the pronouncement of divorce, it may encounter personal matters of the spouses that could not be displayed to the public. Therefore, according to Article 110 of RFC, the court sits **in camera** while consulting with the spouses either jointly or separately about these personal issues.

Problems reflected in the practice of courts

- ✓ If the spouses petition the court for divorce, the RFC requires the courts to discuss with the parties patiently and give the parties a cooling period in order to calm down their anger. The court directs the parties to arbitrators of their own choice so that they will end up their dispute in reconciliation. Here you have to note taking the dispute to arbitrators is not compulsory; rather it is voluntary. But according to some sources what practically observed in courts is that the parties are not asked whether they are willing to take their case to arbitrators or not rather the courts direct them to arbitrators without doing what the law prescribes which is clearly against the spirit of the law.
- ✓ The problem, which was believed to be resolved by Article 82(5) of the RFC, is still without solution. According to this sub article, court shall give appropriate order regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property and it shall take into consideration the interest of children and the condition of the spouses who may be affected more by leaving their common abode. But after the file has been opened these matters take a considerable long period of time resulting in suffering of the parties particularly women.
- ✓ Among the issues that are to be regulated by courts, after the dissolution of the marriage by divorce or termination of irregular union is child custody. Article 681 of the 1960 Civil Code states that children under the age of five years are to be entrusted to their mother unless there is a serious condition to do otherwise. However, according to Article 113(1) of RFC, the court is expected to give an order as to which spouse shall have custody of the children, care of their education, health, maintenance and the rights of the parents and the children to visit each other. Most of the time, it is observed that spouses pray the court so that the decision would be in favor of one of them. In such conditions, practically courts render decisions without giving reasons as to why the custody of a child is entrusted to the father or the mother. This is a problem, which is practically observed while the court is entraining child custody issues. In most of the decided cases it, is shown that courts do not take into account the requirements listed under article 113(2) of the RFC (income, age, health and condition of living of the children) when deciding on child custody. The other practical problem observed in courts when they are adjudicating child custody issues is that, courts give decision only on the interests of the children. Even though the law demands the courts to consider the interests of the children, it does not suffice to give a decision only based on that, there must be additional conditions that are to be taken into account by the courts.
- ✓ The other issue is that of property liquidation decisions. Courts after pronouncing divorce close the file and there is another file to be opened for the partition of property of the spouses because the court considers this case anew. As a result of this, the parties will be in difficulty as they waste their time, energy and money
- ✓ Even if the petition for partition of property is brought by the parties to the court after the very moment of divorce pronouncement, still the case take a prolonged time to be completed. The grant of undue power to arbitrators is also another additional problem.

6. Settlement by Arbitration

- ✓ in certain part of Ethiopia, the persons with special qualities of personality and experience are those who are traditionally called *shimagiles* in order to save a marriage from falling apart and preserve the integrity of the family. Spouses whose marriage is in difficulty and as a result of this who seek for a divorce pronouncement, first present their case to a local judge who is traditionally known as "atbia dagna". But prior to the ending up of the marriage in divorce the parties as well, as the local judges should try their best to cool down the anger and the disagreements created between the spouses. This was done through the process of reconciliation. If the judges fail to bring the parties into an agreement they, will grant a divorce in cases of non-serious cause of divorce.
- ✓ This method of settlement of family disputes out of court was retained by the 1960 Civil Code of Ethiopia since the Civil Code incorporated provisions on arbitration.
- ✓ Although family arbitration was criticized for not treating women in equal footing with men, the RFC and the regional family laws have retained this alternative dispute resolution method.
- ✓ Arbitration is one of the traditional ways of avoiding disputes between conflicting parties irrespective of the causes of disputes. It is one of dispute settling mechanisms most people choose because of its simplicity and since it brings a solution to the conflict in the shortest possible time.
- ✓ Arbitration is an out-of-court mechanism of settlement of disputes in which the parties (disputants) take their cases before a tribunal of their own choice. The parties have the freedom to limit the power of arbitrators and regulate how the tribunal performs throughout the process.
- ✓ In the RFC, and other regional family laws, arbitration could only serve as an alternative mechanism of dispute settlement and the reason for this is that if arbitration outs regular courts for matters of family disputes then the rights of women would be at stake. This is because arbitrators, it is believed, in Ethiopia may not be qualified enough to resolve all family disputes including pronouncement of divorce.
- ✓ As regards appointment, Art. 119 of the RFC confer the power upon the disputants to appoint the arbitrators and the number of the arbitrators is not limited under this same article. What it simply puts is that their number can be one or more than that. Although the arbitrators are appointed by the parties, arbitrators are under the control of the court. The court makes an uninterrupted follow upon the arbitrators and gives direction as to how they entertain case. According to Article 119(1), the parties are expected to submit the names of the arbitrators they have selected within fifteen days from the date they were told to do so.
- ✓ As it is clearly stated under Article 121(1) the same code, sole duty of the arbitrators is to make an exhaustive effort to reconcile the spouses. And article 119 orders the court to give the proper direction to the arbitrators as to how they help the spouses reach agreement. The result of the arbitration or attempt of reconciliation has to be submitted to the court within three months.

Settlement of Other Family Disputes

- ✓ There are two possible outcomes from the processes of dispute settlement be it by courts or by alternative dispute settlement mechanisms, i.e., either the spouses be brought to reconciliation or their contention end up in divorce. According to the law, the court has to give its decisions on three very important post-divorce issues; namely, child custody, maintenance allowance for the child and visitation rights of the child by the non-custodial parent.

1. Child Custody

- ✓ The choice of determining the custody of a child lies either on the parents themselves or on the court.
- ✓ The word custody pertains to whom the child is to live with, and which parent has the responsibility to make major decisions about the life of the child. Child custody may be understood as the right to retain a child at one's home which at the same time empowers the parent to control the child.
- ✓ As per Article 618 of the Civil Code, the governing principle regarding custody of children above the age of five was the best interest of the child and this makes it "sex neutral". The "best-interest" standard was very wide and an indeterminate as it embraces so many things to be taken into account by the judges in order to grant a decision on child custody issues. Thus, this resulted in unlimited judicial authority. The movement from paternal custody to the application of best interest of the child doctrine, is movement from *"paternal patriarchy to judicial patriarchy" which shifted child custody issues from the unlimited paternal authority to unlimited judicial authority"*
- ✓ "maternal preference" rule was reflected under article 681(2) of the 1960 Civil Code.
- ✓ As per Article 113(2) of the RFC, since the court has to take into consideration the income, age, health, and condition of living of the spouses as well as the age and interests of the children, it is felt unnecessary to retain the provision of the 1960 Civil Code (Art.681 (2)), which entrusts children below the age of five to their mother.
- ✓ The aim of Article 113(2) of the RFC, is to avoid material preference to child custody without a justified reason.

2. Maintenance Allowance

- ✓ According to Black's Law Dictionary*…maintenance is sustenance support assistance and the furnishing by one person to another, for his or her support of the means of living, or food, clothing, shelter, etc, particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife, the supplying of the necessity of life. While the term similarly means food, clothing and shelter, it has also been held to include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, and household expenses…*
- ✓ Referring to Article 198 of the RFC, the person who is able to shoulder the responsibility of maintenance is obliged to supply maintenance only to his proximate relatives by consanguinity and affinity, and to his spouse.
- ✓ As per article 197 of the RFC, the obligation of the person who is ready to supply maintenance is limited only to things that are necessary for the livelihood of the creditor. The same article stipulates that the supply of maintenance be in decent manner having regard to social conditions and local custom of the area in which the creditor lives. In some jurisdictions, such rights of the creditor would extend even after he/she has attained his/her majority age and he is able to work and earn his income although this kind of rule is absent in our Revised Family Code and the regional family laws.
- ✓ As far as the maintenance of the children is concerned, once the marriage bond is dissolved by divorce of the spouses, the obligation to supply maintenance to the wife ceases and the execution proceedings taken after the divorce judgment would consequently have to be for maintenance of the children only. According to Article 202 of the RFC, the spouse (debtor) against whom the court passes its decision to maintain the children may fulfill the obligation to supply maintenance in kind or in cash. But this should fundamentally be based on both the needs of the person claiming it and the means of the person liable to pay maintenance.
- ✓ When the court is ready to decide on the payment of maintenance for the child it must take into account factors like for how long and how much does the non-custodial parent pays the maintenance to his child. Most of the time, the non-custodial parent is compelled to pay maintenance until his/her child attains majority age (18 years of age). But the parents may reach an agreement as to the additional time of payment of maintenance. As to the amount of the maintenance to be paid, the court will take into account the earning of both parents and the living condition of the family.

7. Visitation Right

- ✓ Visitation right is a right granted to non custodial parent. The other parent to whom the custody right of a child is given must permit the other non-custodial parent to visit the child. It is usually put in the decision of the court the manner and how often the non-custodian parent visits his child. However, the visitation right should not go against the best interests of the child. Courts put several restrictions on this right like frequency, length and location of visitation and whether someone else or third party besides the non-custodial patent must be present.
- ✓ According to Art. 113(2) of RFC, when the court provides its decision as to who would be the custodial parent of the child and other related matters like maintenance payment, and visitation right of the non- custodial parent, it has to take into account the income, age, health, and condition of living of the spouses as well as the age and interest of the children. But there are cases where by the court simply awards the child custody right and visitation right to either of the parents based on the mere joint agreement of the parents. This would go in contrary to what Article 113(2) puts as "the age and interests of the children."

Thanks GOD !!!