FAMILY LAW

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 some how 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.

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**; 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, filiations, marriage, and adoption.

1. **Relationship by consanguinity**

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.

3. Incapacities: 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.

FORMALITIES OF CIVIL MARRIAGE

In order to conclude civil marriage, there are certain formalities and requirements which are stipulated by the RFC.

A. 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.

B. 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.

C. 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

D. 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**

E. The other 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 on Consent to Marriage, no marriage shall be legally entered into without the full and free consent of both parties.
- 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.

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

- 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.
- 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:-
- Error on the bodily confirmation of the spouse who does not have the requisite sexual organ for the consummation of the marriage
- Error on the behavior of the spouse who has the habit of performing sexual acts with person of the same sex.

B. 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.

C. 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.**

3. 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.

4. Bigamy

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

5. Period of Widowhood

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

1. Age

- 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.

- 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.

2. Consanguinity or affinity

- 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.

3. Bigamous marriages

- 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.

4. Judicial interdiction

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

To whom opposition is made?

- 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.

- **Form and time of opposition to marriage**
- 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.
- 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.

- **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.