GIVING LEGAL PROTECTION TO IRREGULAR UNION WITHOUT GOING AGAINST THE INSTITUTION OF MARRIAGE UNDER ETHIOPIAN FAMILY LAW

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Table of contents **page no.**

ACRONYMS AND ABRIVATION

AAU: Addis Abeba University

Civ. code: Civil code

FDRE: Federal Democratic Republic of Ethiopia

Neg.gaz: negarit gazetta

No.: number

PACS: Pacte Civil de Solidarite

Proc.: proclamation.

RFC: Revised family code

RESEARCH TITLE: GIVING LEGAL PROTECTION TO IRREGULAR UNION WITHOUT GOING AGAINST THE INSTITUTION OF MARRIAGE UNDER ETHIOPIAN FAMILY LAW

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CHAPTER ONE

PROPOSAL OF THE STUDY

1.1 Background of the study

Over the past half century the concept of family and what constitute a couple in the western world Globalization is radically changed in which the law slowly must adjust to new realities.[1] Irregular union is an arrangement where two people who are not married live together. Such arrangement have become increasingly common in western countries during the past few decades ,being led by changing social view ,especially regarding marriage ,gender roles and religion. They often involve a romantic relationship or sexually intimate relationship on the long term or permanent basis.[2]More broadly, the term irregular union can mean any number of people living together, to "cohabit", and in

[1]Stimmel and Stmith, (2003), Cohabitation and Right Conferred under the Law, Law office Published

[2] http:/enM.WIKIPD.ORG/Wiki/cohabitation

broad sense, means to "coexist".[3] The origin of the term come from the mid-16th century, from the Latin *cohabitere*,from co-'together 'and *habitare 'dwell* '.[4]

Under Ethiopian legal system irregular union had a long history beginning from the time of the *FetehaNegest*(the law of the kings) which is promulgated by Emperor *Zar'aya'equob*(r.1434-1468).under the *FetehaNegest* it were known by the name of "concubine" which means being engaged in sexual intercourse without having marriage.[5] but for the sake of morality to ward society, increment in the number of person live in such union and to give some protection under the law the name is modified to" Irregular union".[6] Concubine is very for bidden since it is contrary to marriage before enactment of civil code.[7] There were great debates to ward incorporation of irregular union to the revised family code of FDRE (2000E.C).[8]Ironically unlike the previous view of Irregular union or what we called non -marital cohabitation with consent, the current socio economic development result in increment of union of man and women around the world to which Ethiopia is not an exception . For example in 1970, in USA, the numbers of those live in irregular union were 530,000 couples reportedly live outside marriage but in 2000 year the number s continued to increase to 5.5 million.[9]

Even if the law has not traditionally looked favorable upon individual living together outside marriage, the law is true for Ethiopia during where there was influenced by socio-traditional and religious influence has been very tense over those who were living in irregular union without concluding marriage. They were considered those who living with sin.[10]Thus they were very rare in number but today they go forward in numbers, due to the high influence of socio-economic, globalization, immigration and so on. Here

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[3] " Oxford dictionary.com"definition of cohabit"

[4] id

[5]FetehaNegest 1986, states that having concubine is very forbidden in our saintly law.
Getachewu and Martha Belete, (2009) Family Law Teaching Material (unpublished) page 109 ff and[6] Negarit Gazeta, Gezatte Extraordinary proc No.165 of 1960 Art 708 and Revised family code proc .No. 213/2000 Art 98

[7] ibid

[8] Mehari Redae (1995 E.C) YeteshashalewuYebetesebHigLemegenzebYemireduAndandNitiboch, AAU pritingpress.

[9] ibid

[10] ibid

irregular union is widely practiced as a way minimizing the legal, social, ethical and spiritual commitments of institution of marriage.[11]

Moreover today due to the religious, social and traditional view of irregular union declined today, because of influence of globalization from western world, the number of couples (irregular union) are increased from year to year, decade to decade in Ethiopia. Recently as one researcher reported the number of those who living in irregular union relationship is increasing, it is expected that in Ethiopia, the number of people who will engage in such union will increase in future for various reason.[12] Under Ethiopian family law it has no legal protection granted to other type of marriage clearly stipulated under (Art 2-5) of the revised family code. In Ethiopia irregular union will have legal effect only after three years of having together as husband and wife. This is only in relation to pecuniary related issue, but it did not given due protection similar to the other three type of marriage recognized under Ethiopian revised family.

1.2 Statement of the problem

Non-marital cohabitation with consent or irregular union was previously considered both as sine and illegal in which there is no legal and moral protection pressured from sociological prospective of the law and harshly treatment from the major world religious practice. But due to economic, social, political development and social interaction, for instance immigration both intra-territorial and inter-territory of workers, the influence of economic constraint ,burden and expensive commitment imposed by marriage necessitate and enforce the increment of the couples to live in such union even if it have no or minimal legal and moral protection.[13]

In view of increasing number of no- marital union between men and women , the family outside marriage just as much in need of legal protection as the traditional family formed

[11]SamerawitAbebe (June, 2015) Factors Contributing to Cohabitation Among Heterosexual in Addis Ababa,.(unpublished)
[12] ibid

[13]URL:http://www.jstor.org/stable/839623 the Yugoslavian experience.

by marriage.[14] The same applies in case of unmarried cohabiting partners without common children although this union is of less significance than traditional family therefore legal interventions is necessary due to undeniable and incremental engagement of cohabitant in such union without going forward against the benefit law accorded to traditional family, its legal fulfillments to engage in such marriage.

Under Ethiopian family law irregular union do not have any personal effect except cohabitation. However other behaviors which are analogous to the marriage like presumption of paternity taken from duty of fidelity are equally applicable to irregular union.[15]Ethiopian revised family code should recognize in unequivocal manner in addition to cohabitation some personal effects like fidelity and joint management of family under the same for irregular union, if the above listed personal effects of marriage does not equally applicable to irregular union the couples may engage with other partner which may have adverse effects such as sexually transmitted disease, its termination which may in turn have effect on children born of such union. As we believe these above cited problems are occurred due to the non-incrimination of fidelity and failure of upbringing of child applicable to irregular union under Ethiopian criminal code.[16]

Irregular union has a number of effects on community, state, family and child. The possible effect it may have on the state are: living as husband and wife by having sexual intercourse without formally concluding valid marriage although offends public morals, in case they live as such for life and possess every characteristics of traditional family institution or marriage like common children, owe duty to support, assist and help each other, devoid of becoming a family, joint management of family, owe duty of fidelity, couples in irregular union devoid of becoming a family, which make them pessimistic of that they are allowed further offends public morals (as one effect of infidelity) and social values , social stigma against child born of such union. The second effect is it increases the public welfare funds which is paid by state (indirectly paid by community at

[14]Stimmel and Stmith, (2003), Cohabitation and Right Conferred under the Law, Law office the American Journal of comparative Law vol. 29 No.2 Spring 1981,published

[15] Federal Negarit Gazetta Extra Ordinary Issue NO.1/2000 The Revised Family code proc NO. 213/2000, Art 130

The Federal Democratic Republic Of Ethiopia Proc NO.414/2004,9th of May 2005 A.A ,Art 652,658&659 [16]

large) when child born of such union devoid of the right to upbringing of joint Management of their family when both couples neglect to up bring their child. The third effect it may cause to state is due to the failure of Ethiopian criminal code to make crime adultery under irregular union, the couples in such union are freely engaged with other partner and this may result in prevalence of sexually transmitted disease which run counter way to the states policy to minimize and reduce such epidemic are the result of infidelity, most of the time in contemporary incremental union of man and women.

The other effect of non-protected irregular union on the family are: - the first effect is unstable and un secure family due to non-involvement of court during termination of such union unlike divorce of marriage under Ethiopian family code. The second effect is since women are economically weak and one group of vulnerable under human right convection communality of property after three years of their engagement in such union amounts to the unfair without prejudicing their agreement to form common property before the lapse of three years. The last effect may be the silence of FDRE constitution on irregular union and non-recognition of such union as one categories of marriage in general and as other sin institution of family amounts to discrimination under Convention on Elimination of all Discrimination Against Women (CEDAW) since when the later prefer to live in such union due to they are economically weak.

1.3 Research Question

This thesis targets the following question

1. What are the legal effects of irregular union on state, family, community and child?
2. How the law can regulate and govern the problems arising out of irregular union?
3. what are the rationale behind segregating irregular union from other sources of family relation and does irregular union have constitutional base for its protection under the revised family code?
4. What are the pros and cons if the law gives better protection to irregular union?

1.4 Objective of the study

The general objective of this thesis is to give better protection to irregular union and require the need for flexibility of the laws on its effect. Within the general objective,the thesis has the following specific objectives:-

- To show the way to regulate the personal as well as the pecuniary relationship of those couples in union.
- To address the legal lacuna on the legal effect of irregular union under the revised family code of Ethiopia.
- To strike balance between advantage and dis advantage of giving better legal protection to irregular union.
- To show the growing trend of irregular union and grounds of granting legal protection to irregular union.

1.5 Hypothesis of thesis

The researchers try to conclude that the irregular union has no almost legal protection so that it could affect the state in providing public welfare fund to those child exposed to street due to absence of legal protection of irregular union. Similarly it also affects the rights of child recognized under the Convection on Right of Child (CRC) and under FDRE constitution although the law of filiation protects the rights of children born of irregular union ,where there is no common management of family including common upbringing of their child in irregular union it indirectly impair the right of children directly given under the above legal regime such as the right to education, the right to live with his or her family and the right to maintenance. The non-involvement of court during termination of irregular union of the couples results in unsecure and unstable family even though they live for life in such union.

To that effect the researchers will recommend that:-

- Irregular union must be granted legal protection and as one form of institution of marriage.
- The revised family code and the respective regional family codes must be repealed so as to grant legal protection to irregular union.

- ❖ Creating public awareness with regard to couples living in irregular union requires legal protection as one form marriage.

1.6 Methodology of the thesis

The researcher has employed the combination of both primary and secondary sources such as the FDRE constitution, Convention on Elimination of All Discrimination against Women (CEDAW), Convention on Right of Child (CRC), Ethiopian revised family code are the primary sources we utilized. We also used secondary sources such as scholarly written materials, decided cases, journal and books, and other types of research methods are employed as the case may be.

1.7 Limitation of the study

Lack of materials and finance, lack of enough time and scarcity of pertinent decision of the subject matter makes us to rush to consider and refer authorative and non- authorative sources of foreign countries are which hinder us to know how Ethiopian courts regulate or deals with the problems arises from personal and pecuniary effect of irregular union.

1.8 Significance of the study

These thesis addresses various problems arising within irregular union and its possible legal protection and regulation ,the relative gab of laws on its effect, pros and cons of giving better legal protection ,to show experience of other countries legal regulation of problems arising out of irregular union.

Thus this thesis enables legislative organs to repeal the Ethiopian revised family code and come up with flexible family code which gives protection and regulate effects of irregular union.it also equip lawyers to have a legal stand before court with respect to effects of irregular union and argue for or against their client. Finally it enables the law school to give due consideration in lecturing the law student about the effects of irregular union.

CHAPTER TWO

GENERAL OVER VIEW OF MARRIAGE

2.1 Introduction

During the fourth and fifth century a system of tie theology of marriage began to emerge as the Church of Rome provided a shape for it under church doctrine. During that time marriage was characterized as a sacrament and when properly contracted. The concept of marriage began to evolve into a social institution during the period of Roman domination of Europe. However even during this period in history, marriages were viewed as private matters and there is little evidence indicating that there was significant concern or control by government authority.[17] The sixteen century Reformation had a significant impact on how marriage was viewed in which the former dramatically rejected the church's view that marriage was a sacrament even though the concept of the indissoluble marriage had to some extent been mitigated by the law of annulment.[18]

Marriage has its foundations in a variety of bailiwicks beyond the legal realm, including philosophy, religion, culture and social practice. In Rattigan v chief immigration officer, Zimbabwe.[19]Gubbay CJ described marriage as *a juristic act sui generis.* It gives rise to a

[17] Family law Robert E. Oliphant p.2
[18] Ibid
[19] Id

physical, moral and spiritual community of life consortium *Omnis vitae*. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively up on each other. Marriage is regulated by state and each state determines who maymerry, the duties and obligation of marriage and how marriages are terminated. Although eligibility requirements for marriage differ from state to state, which generally include minimum age thresholds prohibitions.[20] The duties of spouses are cohabitation, loyalty, fidelity, mutual assistance and support flow from the marital relationship. To live together as a spouses in community of life, to afford each other marital privilege and to be ever faith full, are the inherent commands which lie as the very heart of marriage.[21]

2.2 Marriage defined

The traditional definition of marriage is a "legally recognized lifelong voluntary union between a man and woman who mutually agree to live together as spouses until the marriage is dissolved by death of one of them or as otherwise provided by law.[22]

Marriage is a socially recognized and approved union between a man and woman who commit to one another with expectation of stable and lasting intimate relationship[23]. It begins with a ceremony known as weeding. Marriage is one of society's most important and basic institution in which family unites the married partners.[24]It is often said that marriage is a contract and to an extent that is true but it is unlike other civil contracts because of the extent of the governmental regulation.[25] The Philippines' family code of 1987, on other hand defines marriage as special contact of permanent union between a man and a woman entered in to in accordance with law for the establishment of conjugal and family life.

[20] Frank A. Schubers Introduction to law and legal system, 17th edition p.411
[21]Habtamu, Wuletawu, (2004),The Legal Effects Of Irregular Union under Revised Family code, Senior thesis, Faculty of law Addis Ababa University, unpublished p.46
[22] Number of common law definition of marriage are cited van zyljin EX parte inkley and inkley 19953Sa528(c)535-536
[23] Encyclopedia Encarta 2004,Arlane Shlnick p.1
[24] ibid
[25] Supra note at 4 page 411

As discussed elsewhere in English legal system, marriage is defined by Sir *James Wilde* in the land mark case of Hyde v Hyde, is the voluntary union for life of one man and one woman to the exclusion of all others. There are three elements under definition given above. First, the marriage has to be concluded between a man and a woman, there is no legal marriage between the same sex persons. Secondly the institution of marriage is to be entered into with the absolute consent of the parties, i.e. voluntarily.Thirdly the marriage is expected to last for a life time. Death is being the only cause for dissolution.[26]

In Ethiopia Marriage is regarded as institution rather than contract under the 1960 Civil Code, the 2000 Revised Family Code and the respective Regional Family Codes[27]. However when it comes to defining this institution, neither laws are helpful. Hence, to have a common understanding of the institution, it is necessary to resort to the definition's given by other foreign laws as defined above in English legal system.

Therefore when we define the conclusive definition of Marriage as institution in Ethiopia it is one source of family relationship next to kinshipor consanguine relationship and adoptive filiation under FDRE Constitution, Revised Family Code and Civil Code in particular.

2.3 Types of Marriage recognized under Ethiopian Family law

The Revised family code as well as the respective Regional family codes recognized three modes or types of conclusion of Marriage. These are civil marriage, religious marriage and customary marriage.

2.3.1 Civil marriage (marriage concluded before 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.[28]In order to conclude civil marriage, there are certain formalities and

[26] Getachewu Ashagre, Family law teaching Material, (unpolished)by page 36
[27]Tilahun Teshome , International survey of Family law,2000 ,p 157 unpublished.
[28] Federal Negarit Gazetta Extra ordinary issue No: 1/2000 RFCProc .no 213/2000, art 2.

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.[29] The purpose of notifying the officer is to make sure that there are no impediments to the conclusion of Marriage and to allow anyone who want to oppose to the Marriage to do so in accordance with the law.

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 the above sighted requirement, the issue of proxy Marriage 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 it's 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[30]. 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.

[29] Ibid art 23
[30]Id art 12

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. 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 and as far as doing so will not be contrary to public morality. This recognized marriage which is concluded abroad may be either it is accordance with custom or religious or the law of place celebration of the Marriage.

2.3.2 Religious Marriage

A religious marriage is other type of marriage recognized under Ethiopian revised family code as well as under Civil Code. It is mode of conclusion of 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.[31]

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.

2.3.3 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.

2.4 The validity requirements for conclusion of Marriage

For marriage to have legal protection and effects before court of the law and to build stable, secure and socially acceptable institution it must be concluded by fulfilling the following validity requirements provided by the law. The non-fulfillment of essential requirement for conclusion of marriage may offend public moral, may entail penal

[31]Id art 3

sanction or may be resulted in instable family or it may affect the community and the state at large. As derived started from *FetehaNegest,the*1960 Civil Code and the now working 2000 Revised Family Code these validity requirements pertains to biological factors(age, sex and state of health of future spouses), psychological factors(consent of the parties) and sociological factors(issues like marriage between persons related by consanguinity, affinity ,adoption and bigamy).[32]

The overall validity requirements for conclusion of marriage are :-

a) Consent: - free and full consent of the future spouses is very necessary requirement for conclusion of marriage. Article 1 of UN convention on consent to marriage, minimum age of marriage and registration, the FDRE constitution , Revised Family Code of Ethiopia and regional family codes calls for consent as a pre requisite of conclusion of marriage.
b) Age: - in order to freely consent to marriage and to understand the consequence of their acts the parties must attain a minimum marriageable age provided by law[33]. As a rule the minimum marriageable age is 18 years. But in exceptional circumstance the Ministry of justice may grant dispensation of two years. Hence it may be 16 years when good cause calls for such grant of dispensation.
c) Relationship: - prohibition of existence of relationship to certain degree among the future spouses is one of essential requirement for validity of marriage. The relationship can be consanguine, affinity and adoptive filiation. The law device this requirement to protect public moral and fear of genetic danger involved in permitting procreation between close relatives.[34]
d) Bigamy: - absence of prior bonds of marriage is another prerequisite for conclusion of marriage.[35]
e) Period of widowhood: -this requirement is only applicable to woman which is used to protect the conflict of paternity and best interest of child guaranteed under the constitution.[36]

[32] Supra note at 11
[33]Supra note at 12 art 15
[34] John Dewar ,46
[35] Supra note at 12 art 11
[36] Supra note at 12 art 16

CHAPTER THREE

IRREGULAR UNION

3.1 INTRODUCTION

Irregular union is consent based union or living together of one man and one woman for indefinite period and cohabit in the same household as husband and wife.[37]The element cohabitation or otherwise is the peculiar future of irregular union to be distinguished from other male-female relation and kept woman only used for mere sexual gratification. So, cohabitation is defined as to live together as husband and wife, the mutual assumption of those marital rights duration and obligation which are usually manifested by married people but not necessary dependent on sexual relation.[38]

Another scholar defined irregular union as a union of a man and a woman based on intimate life, as between husband and wife founded on the relationship of affection, love, devotion, fidelity, and the running of common household.[39]In nutshell Irregular Union is an arrangement when a man and a woman who are not married live together. Such arrangement have become increasingly common in western countries during the past few decades being led by changing social views especially regarding Marriage gender roles and religion. They often involve a romantic relationship and sexually intimate relationship on a long term or premature basis.[40]

[37]Peter Sparks, " The Language of Cohabitation", Family Law Quarterly vol.19, page 328
[38] H.C Black, Black's law dictionary 6th edition 1990, page 260
[39]D.Freid man , "the un married wife in Israel" , Israel year book on human rights vol.2(1972, page 290)
[40]Stimmel and Stmith, (2003), cohabitation and right conferred under the law, law office

Traditionally the concept of irregular union has been understood as a situation in which a man and woman live together and hold themselves out to the public as husband and wife without fulfilling the formalities required by law for lawful marriage. It differs from ceremonial marriage in that it is one which has not been celebrated in any particular form being based only up on mutual agreement of the parties.[41]

During the last four decades of 20th century a revolution occurred in United States regarding the formation of family and the roles of its members played the social stigma of bearing children out of wedlock was eliminated along with shame an associated with couples living together without Marriage. However the number of person living together without Marriage has dramatically increased which shows the growing trend of Irregular Union which necessitate legal protection. The unmarried relationship of cohabitees (in our context Irregular Union) was considered meretricious and usually criminals and thought to be scoundrels.[42] Accordingly the legal and much social stigma of illegitimacy is gone.

Whatever implication it may have, Irregular Union is both increasingly prevalent and being recognized as theoretically defense able life style and contrary to widely held public opinion.In other words irregular union is the modern growing trend of family formation although it's contrary to public morality and got unacceptance from public which requires legal protection as one form of family under the FDRE Constitution.

Recently living together as unmarried couples known as cohabitation (irregular union) and has become wide spread practice in United States roughly have of all newly weeds have lived together before marriage. Some jurisdiction legally recognized common law marriage laws in such places consider couples as married if they have live together for certain length of time[43]. Currently there are a number of couples living in irregular union including in Ethiopia where there are multi-cultural societies which has under gone fundamental transformation in matter of sexual companionship (irregular union),

[41](Encyclopedia Encarta2004), Arlene shlnick page. 1.
[42]AschalewAshagre, Marta B,Family law teaching material,2008,p100,un published
[43]Family law M.PlaniolTraite page 385

marriage and family formation.[44] Although the concept of irregular union is ancient phenomena due to its growing trend, the law starts to afford minimal legal protection even if its significance throughout the world is debatable.

3.2 The Experiences of Countries of other Civil Law Legal System

3.2.1 Norway

The Scandinavian countries in general and Norway in particular there have been long term of tradition of irregular union.[45] The radical protesters against bourgeois marriage have been few in number but their views were well aired. Social value dimension has major effects up on the marriage like cohabitation choice, traditional vs. modern regional differences, religious activities pregnancy status, etc. Irregular Union is developed from two opposite origins, the educational elites and the working classes.[46]*Blom*[47] (1994) conclude that the spread of Irregular Union is the main mechanism behind the decline in marriage formation, a question of test has entered the scene as cohabitation has developed to functional equivalent of marriage for growing number of people especially in early phase. As alight version of marriage private social contract with more individual freedom and less restriction and exclusiveness than marriage, Irregular Union may for many be the optimal solution. That is development fuelled by secularization and value change thus *Gidden* called it transformed intimacy, a pure relationship based on love and identity building between equal partners where formal confirmation from outside and involvement from family and religious are irrelevant to the duration of the union.[48]

Regulatory frameworks: - The European Observatory on National Family Policy (1961) calls for member states to conduct a comprehensive and systematic review of law and policy responses to irregular union and try to map irregular union and social policy measures. As a response to that call, irregular union has achieved the status of an accepted social institution through family policy in a Norway. Norway through family

[44]TilahunTeshome , SaygabuNuroDuronaZandiro , Ethiopian bar review vol.2 no. 1, August 2007, page 61-113

[45] Irregular union is known as non- marital cohabitation or consensual union or partnership union in Scandinavian countries.

[46] Becker, G.S.(1994) A Treatise on the Family, Cambridge,MA, Harvard University press

[47]Blom, S(19940 Mariage and Cohabitation in a changing society, the experience of Norwegian, men and women born in 1945 and 1960,Europian journal of population ,v 9

[48]Giddens, A.(1992) The transformation of intimacy, Cambridge, polity press.

policy mechanism under ministry of family affairs to take measures which affect family and family behavior through its appointed Commissions. Women policy, child policy, abortion and mother-child health service and taxation are included under family policy. of family policies objectives and requires the parties to be registered which aims at equalization between marriage and Irregular Union. In 1999 government commission assigns the requirement of voluntary or compulsory registration. Requirements of registration either voluntarily or compulsorily, payment of more tax are indirectly used to protect institution of marriage.[49]This implies the report indirectly deals with the status of couples in irregular union and defines giving rights in priority to family formed by marriage than family formed by irregular union.Norwegian taxation legislation and regulation are among those laws that give rights and obligation like that of welfare benefits for the purpose of taxation and family importance for state.

To summarize family policy in Norway gives more freedom to partners in Irregular union and while economically weak partners are best protected in marriage.

3.2.2 France

France over the last decades there had been remarkable changes in the pattern of union formation and in extent of having children in irregular union.[50] Next to the spread of fertility there are hardly any other changes in family life which were as dramatic as the rapid raise in Irregular union and non- marital births. Parallel to the first marriage rate declined, the average age at marriage increased and already existent marriage ended more of in divorce. Due to its long history in Europe, irregular union and its reason of forming such relationship is historically between poor partners who could not afford the cost.[51]

Whatever the reasons forwarded for engagement of the parties in a union intervention and legal regulation of irregular union is mandatory in family matter for the following reasons. The first reason is to protect the decline of traditional formation of family (marriage) which is revenue source for state in which state impose marriage tax. The

[49]Bloms , (1994), Marriage and cohabitation in a changing society, The experience of Norwegian man and woman born in 1945 and 1960, European journal of population vol. 9)

[50] Irregular Union is known as non-marital or outside marriage in many western European states including France

[51] Kiernan, K.(2001), The rise of cohabitation and child bearing outside Marriage in Western Europe ,International Journal of law , Policy and The Family 15(1), 1-21.

second is to promote and protect child bearing and child interest because France is a pro natalist country which promotes population growth. The third reason is through family policy intervention as a system of social benefits, family allowance and public child care are the better protection afforded in France. Here family policy dealt with different characteristics of the system particularly in regard to child care in which both parents want or need to be employed in up bringing the child. Lastly to protect a party who is economically dependent to live in that cohabitation.

Regulatory frame work:-The most important reform, however, has been the introduction of the *Pacte Civil de Solidarit´1e*(PACS) in 1999. It is open to irregular union and established as the basis of legal policy on cohabitation. Whereas marriages are conducted in Town Halls, PACS are recorded by the Clerk of the Court of First Instance (*tribunal d'instance*).Precondition is a*vie de couple* - partners have to live together as a couple. Partners of such contract are obligated to mutual personal and material assistance which includes mutual assistance regarding maintenance, expenses for joint domicile, and any outstanding debts. If one of the partners is not in the social security system (healthinsurance, maternity benefit, funeral benefit), he can be co-insured by his/her partner. After three years of living together the couple can be jointly assessed for taxation. This time has been shortened to the same year a PACS has been recorded in 2005.State employees can apply for a job transfer to continue or remain living together with their partner. In case of dissolution of a PACS, divorce provisions do not apply nor is judicial separation necessary. If the couple wants to get separated again they have to hand in a joint written statement at the office of the local court where they registered their PACS which ends the contract. A unilateral cancellation is possible, in this case the PACS ends three months after delivery of the written declaration through the marshal or if one of the partners marries.[52]The most important reform introduced following PACS agreement are the legal and moral stigma against those couples which deny them has gone away following registration reform under PACS agreement which recorded by clerk of first instance court.In PACS contract parties are obliged to mutual,personal and material assistance during,their life which includes issues of maintenance expense for joint domicile and any outstanding debts,and if one of the parties is not in social security system he/she can be co insured his/her partner. When they want to separate, they terminate their right at the court where they registered according to their contract.

In nutshell tax relief for non-married parents before 1996, afterwards treated like singles ;*PACS* joint assessment for income tax after a certain qualifying period.Irregular union co insurance in the health insurance of one partner if the insurant committee done

[52]Schreiber,C. 2001, ErfahrungenmitLebens partner schaften am BeispielFranckreichs.

self to pay alimony for the others ,PACS co insurance of non-employed couples in health insurance of employed partners, widows from cohabiting unions can apply for a kind of funeral benefits, continuation of hiring contract after death of cohabit and the law imposes the following duties on the couples as such, income of the couples considered in case of social benefits(educational grants and housing benefits), children has claim of maintenance and contact rights with their parents in case of separation.

3.3 The place of Irregular Union under Ethiopian law

3.3.1 Irregular union under the *Fewusemenfesawi* and *FetehaNegest*

During the reign of *Emperor Zara yaikob* (1434-1468) when the state was not secular Irregular Union (formerly known as concubine) was considered as taboo and socially deviant (sinful) behavior. Especially FetehaNegest expressly declares having concubine is a crime and is always against our saintly law[53].

3.3.2 Irregular Union under the 1960 Ethiopian Civil Code

Unlike the *FetehaNegest* and *FewuseMenfesawi*Ethiopian Civil Code is the first legal regime which recognize and gives minimum legal protection to Irregular Union.[54] It defines Irregular Union as state of fact which is created when a man and a woman to live together as husband and wife without concluding legal Marriage. However without living together under the same roof, ifa man and a woman exercised sexual relation repeatedly in a manner that is known to other person it do not considered as Irregular Union. In other words to constitute Irregular Union the way the couples live together must be analogous (similar and comparable) to that of married person.[55]

With regard to proof of Irregular Union when contest arise between the couples the mechanism the law employ is through possession of status shall be made by producing reliable witnesses, provided that when the couples behaving in the same way as married person and being considered as such by their families and their neighbors only. Therefore the Civil Code granted to some extent protection to the institution.

[53]Fetehanegest1986 .
[54]The Civil Code of the Empire of Ethiopia Proc. No 165 of 1960, art 708.
[55] Ibid art 721(1)

3.3.3 Irregular Union under FDRE Constitution and Revised Family Code

FDRE Revised Family Code is the derivative of the Civil Code on areas of definition and criteria of the couples to be considered as a party in Irregular union, with some differences on areas of proof and its legal effects.[56] The recognition of irregular union may be appropriate if seen from the point of view of the protection of family under article 34(3) of FDRE Constitution, which provided that the family is the natural and fundamental unit of society and is entitled to protection by law, society and the state. However the FDRE constitution neither expressly deny nor recognize Irregular union as source of family which shows us the silent feature as to the family formed by such union except protection given to child born out of wedlock under article 36(4) of the constitution.This indirectly shows that those children may be born from parties engage in irregular union. But parties in a union are not neither recognized nor prohibited on effect of their union. Here it is better to see that family is created either through marriage or irregular union even though there is no clear and express recognition of irregular union as source of family under FDRE Constitution and RFC. As far as the Constitution and Family code are concerned, a family whatever its origin it must be entitled protection.

Generally irregular union is dealt with under article (98-107) of the Revised Family code. The couples in irregular inion shall proportionately contribute to their common expenses that property shall be considered as a common, provided that their relationship has been lasted for three years and above.[57]

3.4 Recognizing Irregular Union as a fourth form of Marriage

In ancient time, in many non-secular nation states where the laws of such states are backed by a religious and public morality are primarily up held according to natural law and religious dogmas. There is no way to afford legal protection to persons who are in irregular union. The reasons are living in irregular union is contrary to public morality and religious rite of concerned community which subject such law to universal principle of natural law(divine law). Now a day in secular, multi religious, ethnic and diverse federal countries following the dominant position held by positivist legal school of

[56] Federal Negarit Gazetta Extra Ordinary Issue NO.1/2000 The Revised Family Code Proc NO. 213/2000, Art 98,99, &708,709 Of The Civil Code On The area of their Similarity Vs art 102 ,106 RFC &Art 712, 719 of the C.C on the area of their difference.

[57] Supra note at 33 art 102.

jurisprudence in general and separation thesis in particular in which the law and morality are quite separate, recognizing irregular union and its family as one form of marriage is justifiable. Moreover various international human right instruments and the rise of protected individual rights necessitate the states to enact secular law to govern family irrespective of its sources. In Ethiopia starting from the period of *fetehanegest* and the 1960's Civil Code, criminal laws, written Constitutions and Family laws are ought laws in which they subject the validity of any laws to higher moral principles and religious dogmas. In other words those laws mostly protect morality and religious virtue of the community and the state at large. For example article 34(3) of FDRE Constitution, the family is protected by the state and community in general irrespective of its basis of formation. But under the sub 4 of the same article, marriage as a source of family, expressly granted constitutional protection and priority due to its preservation of public morality, ensuring family stability, assuring support obligation and assigning responsibility for care of children[58]. But despite its silence as to recognition of Irregular Union as one source of family, the RFC indirectly recognize and protect family formed by Irregular Union in accordance with spirit of article 34(3) of FDRE Constitution. In today's globalized and secular states, in which states are committed to comply with various International human right instruments and its commitment to be a secular in its Constitution, it must be up held and legislate secular law to govern family irrespective of its sources and moral conformity. But to give priority to family formed in accordance with morals and religious of community law must make and discriminate in favor of such family.

3.5 The need for granting better legal protection to Irregular union and its Justifications

Irregular union is one source of family which is the result of industrial revolution and protected individualism which requires protection of state and community as traditional marriage. Even though the legal recognition and protection of irregular union is recent and growing phenomena due to its source of family and family in turn natural and fundamental unit of society entitled to protection by state and community irrespective of

[58] 50 BirruGebeyehu, Problems Arising out of Non- Marital Cohabitation,Ethiopian experience A.A.U, Faculty of Law, Senior Thesis, Unpublished.

its sources[59]. In other words family which is formed by whatever ways and its similarities of function necessitates legal protection by law state and society at large. The other reason is there are children, father and mother in irregular union as that of children husband and wife in marriage which implies what happens to family formed by irregular union is similar to family formed by marriage.[60] This is the possible social reality hence failing to give better protection to such relationship and family formed by such relationship is un fair, hardship and injustice will result. Therefore the reason of quite like the protection of children, couples, family, community and state in general are the points of our focus as follows.

3.5.1 Child protection

It is easy to imagine the possible effects that are caused to the children due to less protection given to the irregular union under the family law. If we take the provision regarding the irregular union under the Revised Family Code of Ethiopia art 102 and 105 creating community property from the time engage in such union is not recognized unless their relationship is lasted for at least three years and there is no any legal barrier to end their relationship at any time unlike the marriage. This may lead the strongest party most of the time a man to terminate the relationship at his own free will at any time he chooses denying the woman any share from the community property they accumulated during their union. Due to this their child is affected from lack of common proper upbringing, lack of family devotion. The child is also psychological affected by the attitude of society toward them through social stigma and by gossip by saying that (bastard) which means illegitimate child.

The girl born from such union is not being preferable for marriage by the family if the adult who wants to marry her and society at large. The absence of duty of fidelity to each other under the provision of the irregular union stipulated under the Revised Family Code unlike that of the marriage is also another reason for granting better protection because if such duty is not exist a man and a woman are free to engage in another union also and this may result in the sexually transmitted of different diseases to the family of such union including the children.

[59] The Constitution of the Federal Democratic Republic of Ethiopia art 34(3)
[60] Cited at 7

3.5.2 Family protection

The family formed by consent of only a party in irregular union is unsecured and unstable due to its simplicity in terminating the relationship without court involvement and hence almost a party in such union have no legal stand before court of the law unless prove it otherwise. The high emotional cost (psychological tension as to its contingent relationship is the result of non-better protected family formed by irregular union. Due to this problem parties or couples in such union may flee to alien country illegally their life taken away in desert as well as during crossing sea and ocean. Especially women who are poor and weak economically all ways prefer to live in such union and following termination of their union her probability to formally merry or re living in such union is very narrow after termination had taken place. This may in turn enforce her to flee away illegally to another country in which she become the food of Wales in the ocean. The further prevalence and transmission of sexual disease from one person to another is high and frequent due to the non-sanction of infidelity by criminal law which may in turn contaminate and easily affect the whole family formed by such union.

3.5.3For protection of the spouses

In case any party of the union un expectedly or accidentally day without any will before the lapse of three years in such union (according to Ethiopian family law)[61] and the deceased have no any heir, the surviving couple has no legal stand to inherit the deceased's insurance ,property and any other things. This may in turn the property of the deceased is inherited by state.[62] She/he has no right to be legally presumed a legal beneficiary of the deceased's life insurance, indemnity payment and no equal division of property formed during their union except if deceased left a will to that effect provided that the requirement for succession is upheld.

3.5.4 Protection of community and state at large

Irregular union which requires private commitment in turn open the way to each couple to have another relation with other party due to absence of obligation of fidelity adversely increases mortality rate from incurable sexually transmitted disease. From this what we deduce is that as their infidelity increases high mortality rate in which state and

[61] Supra note at 33 art 102(1)
[62] Supra note at art 852

community are affected also increases. It also increases prospective criminals and unemployment which in turn threat community which oblige State to pay the cost of protection and social welfare fund respectively. Therefore the couples are always in pessimistic relationship which makes them instable, unsecure and their general positive or negative repercussion have directly or indirectly will affect the community and state at large.

In general, to protect the child from un secured future, the family and society to bear unnecessary cost of upbringing the child, the spouses to loose legal benefit of the family and other reasons maintained above. It is a better solution to grant full legal protection to irregular union similar to other recognized marriage under Ethiopian legal system.

Registration

Registration is the prime mechanism that enables parties in irregular union to agree on their economic and domestic expense during their relationship in a like purpose of contract.

Registration of parties who wants to live in a union to appropriate courts like that of France or registrar of civil status which enables them to have a legal stand before the court when termination so requires.

Issues like responsibility in bringing up their children (guardianship), outstanding debts (personal or common), issue as to liability in case of one of them terminate with fault etc. are particulars required in registration.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 Conclusion

Over the past half century the concept of family and what constitute a couple in the western world Globalization is radically changed in which the law slowly must adjust to new realities. Ironically unlike the previous view of irregular union or what we called non -marital cohabitation with consent, the current socio economic development result in increment of union of man and women around the world to which Ethiopia is not an exception . Concubine is very for bidden because it is contrary to marriage before enactment of civil code. However today due to the religious, social and traditional view of irregular union declined today, because of influence of urban economic immigrants, commitment of state to be secular and globalization from western world, the number of couples in irregular union is increased from year to year, decade to decade in Ethiopia.

Traditionally the concept of irregular union has been understood as a situation in which a man and woman live together and hold themselves out to the public as husband and wife without fulfilling the formalities required by law for lawful marriage. Irregular union is consent based union or living together of a man and a woman for indefinite period and cohabit in the same household as husband and wife. Currently there are a number of couples living in irregular union including in Ethiopia where there are multi-cultural societies which has under gone fundamental transformation in matter of sexual companionship (irregular union), marriage and Family formation. Although the concept of irregular union is ancient phenomena due to its growing trend the law starts to afford minimal legal protection even if its significance throughout the world is not debatable. Ethiopian Civil Code is the first legal regime which recognize and gives minimum legal protection to irregular union. Like article 100 of Ethiopian Revised Family Code of 2000 supply of maintenance doesn‘t exist when two persons living like husband and wife. In addition, communal property doesn’t exist between couples in Irregular union under the

Civil Code. Ethiopian Revised Family Code is the derivative of the Civil Code on areas of definition and criteria of the couples to be considered as a party in irregular union, with some differences on areas of proof and its legal effects. However the FDRE constitutions neither expressly deny nor recognize irregular union as source of family.

In Norway Irregular Union has achieved the status of an accepted social institution through family policy as a response of The European Observatory on National Family Policy of 1961. Norway enact legislation on partnership union for implementation of family policies objectives and requires the parties to be registered which aims at equalization between marriage and irregular union. France takes measures to regulate irregular union through PACS as a family policy which offer registration of parties' who wants to live in irregular union as protection which is recorded by Clerk of first instance court. In Germany the couples in irregular union are discriminated against marital unions in terms of privileges but are often treated equally regarding liabilities. Protection of family, children, couples, community and state are the reasons that justify the need for better protection of Irregular Union.

4.2 Recommendation

Based on the growing trend of family formation by irregular union, un avoid ability of couples to lives in such unions, the importance of family as a natural bases of society which necessitate state intervention in family regulation and based on the experiences of other countries we recommend as to better legal protection to irregular union more than which are granted under Ethiopian family laws as follows:-

- Amendment of family code as to the inclusion of fidelity and joint management of family in upbringing child specially to tackle the problems of infidelity which further offends public morality and policy of the country and to protect conventionally granted best interest of child to live with both of his/her family as provided under article 3 of the 1990 CRC (as personal effect of irregular union and unrestricted termination of irregular union under article 105 of the RFC that which makes the family unstable , unsecure and pessimistic economic relationship. Requirement of registration either voluntarily or compulsorily with particularity of co-

insurance life policy and high tax burden imposed to the couples as a protection of marriage and fidelity given to marriage. So to enable the family formed in such union stable, secure and optimistic pecuniary relationship article 105 of the RFC should be amended and some restriction should be inserted for the termination of their union.

- Recognizing irregular union as a fourth forms of marriage next to the three known forms of marriage under the RFC. Requirement of registration including laws that gives and favor marriage as incentive and protection of marriage as we grasp from Norway trend of family policy .
- Recognizing irregular union as independent institution of family formation with slight difference and privilege afforded to marriage only. Requirement of voluntary or compulsory registration and imposing more tax on couples who wants to live in a union are privileges that protect the marriage institution.

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