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PERSONAL NATURE OF DIVORCE
THE LAW AND THE PRACTICE

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ADDIS ABABA, ETHIOPIA

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BIBLIOGRAPHY

List of Laws:-

- **The constitution of the Federal Democratic Republic of Ethiopia** (1995). Addis Ababa.
- **The Revised Family Code of the Federal Government of Ethiopia** (2000). Addis Ababa.
- **The Civil Code of Ethiopia** (1960).
- **The Civil Procedure Code of Ethiopia** (1965).

List of Books

- **Explanatory book on the RFC of the Federal Government** (Amharic).
- Robert G. Oliphant and Nancy Versteegh (2004). **Family law**, examples and explanations, New York USA.
- **Marriage laws** (1991). FIDA GHANA LEGAL LITERACY PROJECT. Published In Ghana.

List of Websites

- <http://en.wikipedia.org/wiki/law> and divorce around the world

List of others

- SACAB (August 2007). **A situational study of Family disorganization in Addis Ababa**. Addis Ababa.

Declarations of Divorce at the Federal Lideta First Instance Court	
Budget Year	No. of Divorce Declared
2004	550
2005	1750
2006	2211
2007	5948
2008	8447

Annexes

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I hereby declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation.

Name: _____

Signed: _____

INTRODUCTION

Marriage is the smallest unit forming the basis of society through the establishment of family, which lays the basis for the existence and perpetuation of the society. Marriage plays a significant role for bearing, raising children and educating them for responsible leadership. Marriage needs the protection of law, rules and regulations to keep and sustain its vital role in society.

Divorce is not desired in marital relations because of its devastating consequences on family members and the society at large. This has not yet received attention by the law professional especially by the judiciary who are responsible to translate the intentions of the legislature and accordingly do not seem to understand the objectives of the legislature. The research encompasses the treatment of the divorce epidemic practiced through the legal proceedings on behalf of legitimate marriage partners.

In general the research intends to make known to the legislative, executive body and interested audiences how the legal rules are being neglected due to the irregularities occurring in the interpretation and application of the law, rule and procedures that promote the disrespect and unworthiness of matrimonial relationship. Thus, to remind the judicial the duty expected of courts is not only to pronounce the dissolution of marriage but includes the obligation to sustain the fractured marriage relation. Avoiding the representation of spouses at court through agents and securing the social value of marriage are also tasks of the courts.

CHAPTER ONE

1. HISTORICAL DEVELOPMENT OF MARRIAGE & DIVORCE

Dealing with the history of marriage and divorce, people have different approaches, thoughts and opinions whereabout to start its formation. Even some have controversies on its meaning. Some relate it with religion referring to the creation of mankind; others stick to the sociological aspect of the formation of societal groups. However, family law principles and practices often have centuries of custom and tradition behind them as early sources of family law. Through the Catholic Church marriage was characterized as a sacrament. Social political factors and scientific advancement have brought about enormous changes in family law.¹

In England marriage regulation was controlled by ecclesiastical or church courts and the church claimed jurisdiction over marriage.

From 1200-1500 A.D, the church was recognized, as the one universal sovereign of the west that governed all of Christendom and the canon law was the one universal law of the west. Despite numerous amendments over the centuries, the sacramental model of marriage remains reasonably close to the heart of catholic theology today.

In England, after the Catholic Church gained control over marriage and divorce by ecclesiastical courts through canon law, marriage was viewed as a sacrament and indissoluble except by death. Not even the pope could break the bonds of marriage. Church theology was fortified by a conviction that sexual indulgence outside marriage involved mortal sin and created a formidable barrier within marriage for achievement of spiritual purity.

¹ Family Law: examples and explanations by Robert E. Oliphant and Nancy Ver Steegh (2004) P.1-5

Although the church forbade divorce when the marriage was broken by adultery or acts of cruelty that rendered further cohabitation unsafe, the innocent spouse was permitted by judicial decree, to live apart from the wrong doer. This relief was afforded by a decree of judicial separation, called divorce a *mensa et thoro*, or a divorce from bed and board. The decree of divorce a *mensa et thoro* did not sever the marital tie and the parties remained husband and wife. The parties could not remarry during the lifetime of their spouse and the husband was normally required to provide his wife with permanent support.

The church claimed exclusive jurisdiction in England over marriage, annulment, and family relations. It established a list of mortal offenses against God, including homosexuality, sodomy, prostitution, concubinage, abortion, and infanticide and developed a body of canon law to govern family disputes.

Under the rules established by the ecclesiastical courts, a person who asked the church for permission to live apart from a spouse had to prove fault. To determine fault, the court asked whether the erring spouse had committed one of the sins recognized by the church. Adultery, physical cruelty, or unnatural sexual practices were recognized as valid reasons for parties to live apart although they were not permanently divorced.

Fault also played a role in determining whether support was to be provided. If a wife committed adultery during the marriage, she was "at fault" and the ecclesiastical courts were not obliged to require that her husband support her.

1.1 Modern Period Marriage and Divorce in U.S.A

During America's colonial period "The principal objectives of marriage were wealth, social position and love usually in that order. Most parents considered marriage a matter too serious to be left to the individuals directly concerned. Consequently, it was not uncommon for a young man to seek permission from the parents of single young woman before he dated her, but the father of the girl had a legal right to permit or deny consent to marry. For the most part, when one married in colonial America, the marriage was intended to last forever, and the law reflected this view by making it difficult for married couples to divorce or separate. Connecticut courts encouraged men to keep marriage secure, live with their wives and if they were estranged from them for more than three years, the husbands were expelled from the colony.

Slaves were not allowed to legal marriage in some colonies and marriages between slaves had to be approved and performed by the slave owner also. Racial intermarriage in most states was prohibited, as marriage between a white person and a negro or mulatto was prohibited and as person who violated this law could be fined 50 pounds.

During the nineteenth and early twentieth centuries, the patriarchic family model predominated in the united States. The husband was the legal head of the household, responsible for its support and its links to external society, while the wife was the mistress of the home, responsible for the day-to-day management of its internal affairs and the care and education of children.

Early decisions reflected the nineteenth century view that a husband had a life-long 'duty' to support his wife. Therefore, should a divorce occur and the wife was not "at fault", an ex-husband was required to provide for her for the rest of her life.

Capacity and Age Restrictions

To marry, one must have the state of mind and the capacity to marry. State of mind consists of voluntarily entering into the relationship with the intent to marry at that time. Capacity requires that the parties be of opposite gender (male-female), not be married to someone else (bigamy), not be related as defined by local statute, be of the age where local law permits them to marry, and capable of understanding the nature of the act.

The state imposes a minimum legal age for marriage that varies from jurisdiction to jurisdiction. In some jurisdictions without parental consent, a man and a woman 18 or older can marry. With the permission of the under-aged person's parents, guardian, or Juvenile Court, a person 16 or 17 years old may also marry. Some jurisdictions will allow persons to marry with parental permission when the individuals are 15.

Form of Marriage

Most states do not prescribe a particular form of marriage ceremony, some require solemnizing a marriage for the purpose to provide public notice and a permanent public record of the marriage, which may also satisfy a religious tradition and act to impress on the couple the seriousness of marriage.

The uniform marriage and divorce act states that a marriage maybe solemnized by a judge of a court of record, by a public official whose powers include solemnization of marriages, or in accordance with any mode of solemnization recognized by any religious denomination. However, it is usually performed by a judge of a court of record, a member of the clergy, a clerk of court, an administrator. Courts are reluctant to invalidate a marriage merely because certain formal

requirements were not met, absent specific legislation mandating that the claimed marital relationship is void.

Dissolution of Marriage

During America's colonial period, colonies differed greatly in their specific approach to divorce; they vested power in colonial legislatures or courts of equity to handle divorce matters. Divorce was not allowed in some of the colonies.

Following the American Revolution, statutory divorce was introduced in most jurisdictions. During this period, divorce action were rare and were treated in a manner similar to other civil disputes, that is, as a means of providing compensation to a person who had been wronged. For example, in most jurisdictions, a divorced wife could recover the dower that she brought to the marriage if she could prove to the jury that her husband was guilty of adultery. Furthermore, if she met her burden of proving she was wronged and her dowry did not adequately provide for her, her husband might be required to provide her with a limited means of support from his personal estate.

1.2 Laws of Marriage in Ghana

There are three forms of marriage, which may be contracted by a couple in Ghana.²

There are –

- A. Marriage under customary law
- B. Statutory marriage under the marriage ordinance
- C. Marriage according to Islamic rites

² Marriage laws: (1991). Fida Publication. p. 1-15

Marriage Under Customary Law

This form of marriage is what the indigenous people before the advent of any foreign influences, that is Christianity, English Law and Islam, knew. It is still the form of marriage contracted by the vast majority of Ghanaians, especially in the rural areas. Indeed, it is significant that almost all of those who marry under the ordinance first go through formalities, which would constitute a valid customary marriage.

The Elements of Customary Marriage

A customary marriage is contracted when a man and a woman agree to marry and certain formalities are observed. These formalities may vary from one part of the country to the other or from one ethnic group to another. There are certain essential features however, which are fairly common and these are:

- (I) The intended husband must ask for the hand of the intended wife from her parents or family. This is done usually by sending emissaries from the man's family to the woman's family with various tokens, which vary from place to place.
- (II) The family of the woman accepts the tokens.
- (III) The couple lives as man and wife. It must be noted that they need not necessarily live under the same roof. They will generally hold themselves out as man and wife and be seen as such by their respective families.

One characteristic of customary marriage is that it is potentially polygamous. This means that a man may marry as many wives as would suit him. It is the polygamous nature of a customary marriage, which distinguishes it from an ordinance marriage.

A customary marriage may be dissolved at the instance of either spouse, on a number of grounds, for example, adultery by the wife, infertility of the wife, impotence of the husband and general incompatibility of the couple. Before dissolution, it is the almost invariable practice that the complaints of the spouse seeking divorce will be considered by the families of the parties and attempts made to reconcile the couple, if possible. If reconciliation is impossible for any reason, the marriage will be declared dissolved by the families on presentation of drinks by the party who wanted the divorce to the family of the other party and the couple are then free to leave. Either the wife or the husband can take steps to have a marriage dissolved by informing the family of the partner that he or she is no longer interested in the marriage and would want it dissolved. Ordinarily, this can be done by the evidence of the members of the families of either spouse or by some other persons who witnessed the ceremony at which the husband presented his tokens. Difficulties may arise where there has developed some hostilities between the respective families. These have been cases in which the family of a man after his death denied the existence of his marriage to a woman with whom he may have lived for a number of years and who may have given him several children. Conflicts of evidence in such situation are very difficult to dissolve, especially where the persons who were actually present at the marriage ceremony may have died or give different versions of the story. One possible solution to the difficulty is for a court to presume a valid customary marriage in all cases where a couple have lived as man and wife to the knowledge of their respective families and where such families have accepted and treated the couple as a man and wife. This approach is however not entirely satisfactory especially in seriously contested cases. It is for this reason thus a law such as the customary marriage (registration and divorce) law PNDC law III is necessary.

Customary Marriage (Registration and Divorce)

The importances of this law are that it provides that a customary marriage shall be registered and a certificate of marriage issued. The registration is done by applying to the registrar of marriage in the district in which the marriage was entered into by filling a form obtainable from the registrar. The application form must be accompanied by a statutory declaration, such as, all the customary rites necessary to seal the marriage and make it valid in accordance with customary law applicable to the parties have been performed and if the parents or some other people in the position of the parents of the parties are alive, they must also support the statutory declaration of the parties. This they can do by themselves making a declaration that the parties have been properly married in accordance with the applicable customary law.

Then, after the registrar receives the application he gives public notice that the marriage has been registered. If any person has any objection to the marriage he may file his objection to the district court where the marriage was registered and the objection must be notified to the parties. The district court will after hearing all parties, dismiss the objection or uphold it. If the objection is upheld, the registration will be cancelled, and is then followed by dissolution by customary procedure or an action in a district court then given to the district in which the marriage was registered not later than three months after the dissolution and the notice is accompanied by a statutory declaration of the parties and their parents if they are living.

The Benefit of Registration

Registration provides proof of the marriage and will prevent people from denying its existence. Secondly, if one of the parties dies intestate, the surviving spouse will be able to enjoy a share in the estate of the other under the provisions of the intestate succession law.

Marriage Under the Marriage Ordinance

This is monogamous marriage. A man or woman who has chosen to marry under the ordinance cannot, after the marriage go through any other form of marriage under any law with someone else. Until his wife or husband dies or the marriage is validly dissolved according to law, he cannot validly marry any one else. Therefore, a purported customary marriage by a man already married under the ordinance to a woman other than his wife is invalid. The woman is not a wife recognized by law and is not entitled to any of the rights and privileges of a wife.

The ordinance has laid down the procedure for contracting a statutory marriage and this must be strictly complied with before the issue of a marriage certificate seals a marriage and it is this certificate, which validates the marriage. A wedding in a church for example, does not create a valid monogamous marriage unless the requirements of the ordinance have been complied with and a marriage certificate issued in accordance with the provisions of the ordinance.

It is important to bear in mind because some couples who have had their marriages "blessed" in some churches without complying with the provisions of the ordinance mistakenly believe that they have contracted a valid monogamous marriage especially if the woman assumes the name of the man there after. Such "blessing" does not create a valid marriage unless the particular church has been licensed to perform such marriage.

Statutory Marriage

In Ghana there are three forms of marriage under the ordinance and these are:

- (I) Marriage by a registrar of marriage.
 - (II) Marriage by marriage officer's certificate,
 - (III) Marriage by special license from the registrar or general.
- A registrar of marriage is an officer appointed by government to perform marriages under the ordinance in the registrar-general's office or district, municipal and city council offices.

The requirements for marriage under registrar of marriage are:

- (I) One of the parties to the intended marriage shall give notice in writing to the registrar of their intention to marry with in three months. The notice shall contain the following information.
 - a) The names of the parties.
 - b) Condition of the parties, that is, in the case of the women whether spinster or widow and for the man, whether bachelor or widower.
 - c) Occupation, rank or profession of the parties.
 - d) Age of the parties.
 - e) Place of residence of parties.
 - f) Consent, if any, and by whom given.
- (II) The registrar shall then enter in the marriage notice book the notice received from the party.
- (III) The registrar shall then publish the notice on a notice board continuously for 21 days or until such time as he grants his certificate.

If, however, the certificate is not issued within three months, then the notice shall lapse.

- (IV) The registrar shall, at any time after 21 days and within three months of the notice, upon payment of the prescribed fee, issue the marriage certificate after he has satisfied himself, on receiving an affidavit from the parties containing the following:
- a) that one of the parties has lived in the district in which the marriage is intended to be celebrated at least 15 days preceding the granting of the certificate.
 - b) that both parties have or either of them has attained the age of 21 years and above. However, parental consent can be obtained for any party who is below the stipulated age of 21.
 - c) that there is no impediment of kindred or affinity or any other lawful hindrance to the marriage.

- Marriage under marriage officer's certificate is one of the forms of marriage, which is conducted before an officer of a religious body authorized to perform marriage ceremony in a church or premises licensed for that purpose.
- Marriage under special license is where the registrar general, after satisfying himself that there is no lawful impediment to the proposed marriage, shall waive the notice and proceed to issue the certificate of the registrar authorizing the celebration of the marriage between the parties. Any such marriage may take place in a registrar's office, a place of religious worship or any other place to be determined by the Registrar.

Invalidation of Marriage

A marriage is considered to be invalid if:

- (I) at the time of the celebration of the marriage one of the parties was married to a third person.
- (II) marriage was celebrated at a place not licensed or authorized.
- (III) the officer who officiated the ceremony had no authority to perform the marriage ceremony.
- (IV) The parties to the marriage are related by blood.

This could be done by the court for the following reasons:

- (I) the marriage has never been consummated.
- (II) the marriage has broken down beyond re-consideration.
- (III) persistent cruelty by one parties against the other.
- (IV) one of the parties to the marriage has left the matrimonial home and taken up residence else where without the consent or knowledge of the other party to the marriage.

Islamic Marriage

It is a marriage contracted by Muslims in accordance with Islamic rules of marriage. Valid Islamic marriage contains:

- (a) mutual agreement to marry.
- (b) there must be a wali (a matrimonial guardian who is the legal representative of the bride)
- (c) there is the payment of dower /dowry/. It is either cash or in the form of property.
- (d) irreproachable witness must be present to witness the marriage ceremony.
- (e) the marriage must be registered in a district office to be valid.
- (f) a licensed Islamic priest must perform the marriage.

Registration of the Islamic Marriage

- i. The registrar of Islamic marriage is notified not later than one week after the celebration of the marriage, by the bridegroom, the bride's wali, two witnesses to the marriage and the priest who performed the marriage.
- ii. The registrar then enters the marriage into the Mohammedan marriage and divorce register.
- iii. The register will then be signed by the bridegroom, the bride's wali, the priest and the two witnesses.
- iv. A marriage certificate will then be issued accordingly.
- v. If the marriage is not registered within one week, then the marriage will be declared null and void.
- vi. Where the marriage cannot be registered within the stipulated time for the following reasons:
 - a. that it is impossible to get all the parties whose signatures are necessary to be present at the registrar's office;
 - b. that the registration could not be carried out before the expiration of one week; then either the bride's or bridegroom's wali may make an application, supported by an affidavit stating the reason for the delay or non attendance to the High Court. A judge may then authorize in writing the district registrar to register the marriage.

Registration of Divorce

Registration of a divorce is done in the same way as the marriage is registered and the ordinance provides that any marriage or divorce contracted by persons professing the Mohammedan faith shall not be valid if it is not registered.

1.3 Ethiopian History of Marriage and Divorce

The terms marriage and divorce are legal terms showing the legitimate marital relations of a man and a woman, subject to the legal dissolution of a valid marriage by a court. In the Ethiopian context such social practices can be divided into two parts: One is the period where no laws and regulations existed. The other is the time where rules, regulations and appropriate proceedings were established. Corresponding to these two historic events, I will, try to show some features of the historic period.

Period of Absence of Laws and Regulations

Ethiopia as the home of different nations and nationalities has various customary rules, cultures and religions. People practice different forms of marriage, based on religion, language, caste and class status. There was a great diversity on the selection of spouses and the possibilities and mechanisms of divorce and remarriage in Ethiopia. The practices of marriage received acceptance as an essential obligation to form a family, to procreate and rear children and such practice also permitted, socially approved access to the spouse's sexuality, labour and property. This led to the establishment of variety of relationship between the persons and between social groups.

Marriage, during this period was conducted without the parties' consent and was planned and arranged by the parents of the future married couples. Above all, the married couples has no right to know whom they were going to marry before the occasion took place. This type of marriage was held to prevent complaints that might be expected to arise like, refusal of the marriage and to show the obedience of descendants to the orders of their parents. Such types of marriage was based on lack of love and mutual understanding and most of the times ended in failure.

The other type of marriage was that marriage between different age groups which was practiced between an underage girl and aged man, who went through marriage for the second time. This type of marriage was accepted by the parents of the girl with out her consent, especially if the male is wealthy to up grade the social status of the family.

Period of Enactment of Laws

Ethiopian legal history of marriage and divorce begins with the enactment of the law called "Fitha-Negest". The law was composed of criminal and civil matters and related to Christianity. Thus, it did not achieve the desired goal up on the society due to the lack of publication of the law, in adequate legal structure and because it lacked influence on the Islamic society.

The Promulgation of the Civil Code

In 1960 a modern civil code of Ethiopia was enacted detached from the criminal code, constituted of five different laws on civil matters one of which was the family law. During this period in-adequate judicial system was established. Muslim religious courts named "Sherian court" were also formed to resolve conflicts arising between Islamic married spouses. The new law recognized three forms of marriage called civil marriage concluded before a public officer, customary marriage and religious marriage. The law also decided on the age of marriage and the rules required in the relationship, cause, effects and mechanisms of divorce were stated. Marital property, maintenance and responsibility of child care received better attention.

The Revised Family Code

The family law was separated from the civil code under the Revised Family Code Proclamation No. 213/2000. The code emphasized, marriage as the smallest unit of society that plays a significant role for raising children and educating them to become mature, responsible and productive citizens. Thus the family is the natural and fundamental unit for the physical, intellectual, emotional, and psychological development of children. It is clear that the family is an institution where children learn the culture, tradition, and norms of the society through which they could actively participate in the social, political and economic life of the society.

In to day's society the family plays substantial roles and responsibilities in fulfilling the socio economic needs of its members. In particular it is shouldered with natural, social and legal responsibility of fulfilling the needs of its children for the realization of their survival and development. In light of this, marriage which is the foundation of the family should be given proper attention by all concerned.

In this regard the revised family code 2000 realized the idea of the family being the natural basis of the society protected by the society and the state to provide and guarantee the equality, the free consent of spouses during the conclusion, duration and dissolution of marriage and by giving emphasis to the well being upbringing and protection of children. This implies that the law focused on laying a strong social foundation for marriage.

As the structure, roles and functions of the family determine its impact on the growth and development of children, this important institution has been given proper recognition, attention and support so that it could discharge its responsibilities.

1.4 Marriage and Divorce Under the RFC 2000

The Revised Family Code issued in June 2000 by the federal legislative body, has introduced a major reform to the 1960 family law. One of the reasons accounting for the reform, as stated in the preamble of the law is to make the law consonant with the equality principles enshrined in the current constitution of the country. The old family law generally regarded women as appendage and complementary to men. This was against the constitutional right of equality before the law. As a result all provisions of the previous law, which have directly or indirectly discriminated against women, were removed and substituted with equitable ones. Among the changes made in the new family law are guaranteeing equal rights for women and men at the time of establishment of the marriage, during the marriage and the time of its dissolution.

Marriage

As one of the most important legal and social institutions, the family is accorded constitutional protection in Ethiopia. The emphasis on marriage more as an institution than as a contract, characteristic of the RFC stems from this reality. Although the element of consent in the formation of marriage is important, The RFC give more weight to its social attributes than to the patrimonial obligation of the spouses. That is mainly the reason why essential marriage obligations are governed by mandatory provisions of the law that cannot be easily derogated from at the wishes of the spouses. The Revised Family Code recognizes three forms of marriage, which are civil, customary and religious marriage. But whatever the form of celebration, the law requires essential conditions such as age, consent, relationship and bigamy to be fully observed. All the three forms of marriage do also have identical effects, as the law does

not draw any distinction between marriages on the basis of the manner in which they are celebrated. Again, the causes and effects of dissolution of marriage are the same whatever the form of celebration. RFC Art 1-4, 6-11, 40.

Essential Conditions

Essential conditions for validity of marriage pertain to biological (sex, age and state of health), psychological (freedom of will) and sociological (bigamy, marriage between persons related by affinity and, to a certain degree by consanguinity as well as by adoption) factors. On attaching weight to the validity or otherwise of marriages, the Ethiopian legal regime does not draw much of a distinction between void and voidable marriages. Marriages that do not fulfill any one or some of the essential conditions for their conclusion are only deprived of effects for the future but hold good for the past.

Effects of Marriage

The RFC regarding personal effects of marriage are therefore mutual respect and equality of the spouses. These principles are expressed in the provisions dealing with cohabitation and choice of residence, with the sharing of life in common, with support and assistance to one another and with the duty of fidelity. Rule of the RFC in this connection provide for joint management of the family, for co-operation in all matters affecting their common life, particularly in child up bringing, in the determination of their residence and administration of common property.

The RFC also provides for the regulation of pecuniary matters by means of the contract of marriage or through the legal regime. Spouses may conclude the contract before, upon or after conclusion of marriage and

agree on the pecuniary effects of their union or even on some aspects of their personal relations. RFC 46-50, 66/1, 210, 42-48, 73.

Dissolution of Marriage

Dissolution either by death or on account of nullity or by divorce results in the breaking a part of the conjugal bond and the cessation of most of the effects of marriage. But for obvious reasons, the most complex one of the three is divorce. As the phenomenon of divorce assumes a valid marriage, the FRC requires for it to be pronounced only by a court of law. The petition may be made by mutual consent or by an application of either of them. RFC Art 77-80, 81-84.

Where a petition for divorce is presented before the court in whatever form, the court is required to discuss with the spouses, separately or jointly, and council them to renounce their intention to divorce provided, however, that spouses whose marriage has lasted for less than six months are not permitted to fill such an application RFC Art 77/3. If this does not work out and where it is an application for divorce by mutual consent, the court gives them a cooling period of not more than three months after which it may approve the agreement. But the court is also duty bound to see to it that the divorce request presented before it is the genuine expression of the will of the spouses RFC Art 78, 80/1.

Where it is divorce by petition, the court may direct the spouses to make a choice of their own arbitrators who would attempt to settle the dispute amicably. If this again fails, the court gives the spouses an additional cooling period of not more than three months after which it may pronounce the divorce. Upon the request of the court or on their own motion, the spouses may agree on the consequences of their divorce before or after its pronouncement Art 82 & 83. The RFC in addition

carries detailed rules of procedure on the settlement of disputes leading to divorce and other forms of matrimonial disputes RFC Art 108-122.

The RFC in light of USA and Ghana Family Law

Ethiopia following the 1995 constitution, established a federal state government structure, which gave regional states legislative and judicial power. The federal government has repealed the family law, which was incorporated under the Civil Code in 2000 and replaced it by the Revised Family Code now under going treatment by the federal government family courts. The regional states also assumed power to have their own family codes. Therefore, Ethiopia as a nation has no standardized family law across the country or comparison between states like Ghana.

USA being structured by federal arrangement each state in America has its own marriage and divorce law exercising in the jurisdiction. Most states in US have uniform laws and application of proceedings for marriage and divorce act. Regarding to the uniform law of USA the law doesn't provide any of the marriage forms rather solemnization of marriage has been left to the future married couple. Under the uniform law of marriage and divorce in USA marriage ceremonies in what ever form shall require the representation of courts and public officials or religious body representative in order to be registered valid in public document.

Under Ghana's family law three forms of marriage have been recognized which are customary marriage that is performed under the customary law, statutory marriage, which is performed in accordance to the statutory law before the public officer or authorized by special license and religious marriage conducted before the religious priest who is licensed to perform. According to the family law of Ghana each form of marriage has formalities, which the marriage ceremony has to follow.

Representation of courts or the attendance of an officer of the public register shall be required during the celebration of marriage, under the statutory marriage. Customary marriage also shall follow the essentials under customary law of marriage and shall be approved by the parents of the married spouses before the public officer of the registrar in order to validate the marriage.

In light of the above two countries legal practices of marriage the RFC has no provisions to verify whether the marriage is truly made or is a false marriage. As to the current practice of citizens in order to fulfill the desire to go abroad such conduct of false marriage has become normal. The false marriage registration which recently is being conducted is done by searching for a person who goes overseas like under a DV Lottery by providing money deal and getting registration supported by false witnesses. That is which has caused burden on the family courts for divorce declaration.

The other failure of The RFC is that the law has not classified grounds for divorce and provides no means to pull back any of the spouses from claiming divorce without sufficient grounds.

CHAPTER TWO

2. LAW AND DIVORCE

CANADA

Until 1968 Canada did not have a federal divorce law. Before that time, the process of getting a divorce varied from province to province. The Federal Divorce Act of 1968 standardized the law of divorce across Canada and introduced the no-fault concept of permanent marriage breakdown as a ground for divorce as well as fault based grounds including adultery, cruelty and desertion (being separated for one year). Most divorces proceed on the basis of the spouses being separated for one year, even if there has been cruelty or adultery. This is because proving cruelty or adultery is expensive and time consuming.³

INDIA

Hindu women were banned to obtain divorce in India before the 1956 Hindu marriage Act. Hindus, Buddhists, Sikhs and Jains are governed by the Hindu Marriage Act. Christians are governed by the Indian Divorce Act Parsis by the Parsi marriage and Divorce Act and Muslims by the dissolution under the Muslim marriage act.

Only five reasons are allowed for the dissolution of marriage: adultery, abandonment, impotency, disease and spousal abuse, although court interpretation have widened their scope.

³ <http://en-wikipedia.org/wiki/law> and divorce around the world

IRELAND

The largely Catholic population of Ireland has tended to be averse to divorce. Divorce was prohibited by the 1937 constitution. In 1986, the electorate rejected the possibility of allowing divorce in a referendum. Subsequent to a 1995 referendum the fifteenth amendment repealed the prohibition of divorce, despite church opposition. The new regulations came into effect in 1997, making divorce possible under certain circumstances. In comparison to many other countries, it is difficult to obtain a divorce in Ireland.

A couple must be separated for four of the preceding five years before they can obtain a divorce. It is some times possible to be considered separated while living under the same roof.

Divorce obtained outside Ireland are recognized by the state only if the couple was living in that country. It is not therefore possible for a couple to travel abroad in order to obtain a divorce.

ITALY

Presumably due to the strong influence of the Roman Catholic Church, divorce was all but unobtainable in the Italian Republic and its predecessor states. On December 1, 1970, the Civil Code of Italy was amended to permit the granting of divorce by the civil courts. Subsequent efforts at repealing the divorce statute by referendum have so far been unsuccessful.

2.1 Divorce Under RFC

As to the RFC divorce is a legal dissolution of marriage to be pronounced only by a court of law. The petition may be made by mutual consent or by an application of either of them. RFC Art 75/c, 76-80, 81-84.

Where a petition for divorce is presented before the court in whatever form, the court is required to discuss with the spouses, separately or jointly, and counsel them to renounce their intention to divorce provided, however, that spouses whose marriage has lasted for less than six months are not permitted to fill such an application RFC Art 77/3. If this does not work out and where it is an application for divorce by mutual consent, the court gives them a cooling period of not more than three months after which it may approve the agreement. But the court is also duty bound to see to it that the divorce request presented before it is the genuine expression of the will of the spouses RFC Art 78, 80/1.

Where it is divorce by petition, the court may direct the spouses to make a choice of their own arbitrators who would attempt to settle the dispute amicably. If this again fails, the court gives the spouses an additional cooling period of not more than three months after which it may pronounce the divorce. Upon the request of the court or on their own motion, the spouses may agree on the consequences of their divorce before or after its pronouncement Art 82 & 83. The RFC in addition carries detailed rules of procedure on the settlement of disputes leading to divorce and other forms of matrimonial disputes RFC Art 108-122.

To conclude, in light of the mentioned laws of different states the RFC has failed to provide grounds for divorce. This in turn permits spouses to ignore the disciplines of marriage and involve themselves in, unnecessary divorce litigation which consequently results in suffering of family members and community groups. In addition the RFC due to the lack of requesting reasons for divorce has facilitated the opportunity to increase the number of disorganized families in Addis Ababa as to the attached data of divorce declaration at Federal Lideta Court. The bad features of the practice of failing to demand reasons for divorce permitted third parties to represent litigant spouses as agents in courtrooms. Which

permitted the judiciary to ignore mandatory provisions to secure the marriage relation from failing apart.

2.2 Consequences of Divorce

Often divorce has been seen just the dissolution of the relationship of the two persons who were involved in the marital relation. Rather divorce has serious impacts that can be divided into intended and unintended results. One is the negative effect on children as their life becomes divided between two families. Studies show, this in turn affects their emotional and mental development, which is an inevitable unintended consequence of divorce. On the other hand, there is the expected outcome of divorce, which is the splitting of the conflict-ridden family into two 'incomplete' families creating role vacuums for the two families concerned, for the community and society as a whole.⁴

2.2.1 Effects of Divorce on Family Members

Usually, before divorce is pronounced spouses have been involved in verbal and physical attacks against one other and those bitter experiences are not healthy for the personal and emotional development of family members involved. Especially, children are likely to develop a feeling of estrangement and weaker social ties with parents. In case of divorce, spouses loss their social status often treated as individuals who have failed to meet societal expectations such as being a responsible member which consequently resulted in a law profile in their respective communities.

Divorce also entails readjustment of new social arrangements such as moving to a new neighborhood and establishing new friendship or finding a new job because of change of residences, which sometimes induce a sense of anxiety, of isolation and loneliness.

⁴ A situational study of family disorganization in Addis Ababa. (SACAB). (2007; p.80-85). Addis Ababa.

2.2.2 Effects on the Community

Divorce alters the composition and size of the community and some communities lose their members and others gain new members as a result of family disorganization. Some community roles are disrupted because of the departure of family members or new community roles are created because of the addition of new members. Because of the requirements of caring for and supporting members affected by divorce, it creates pressure on community resources such as extended kin support.

Generally, the impact of divorce on the community can be considered in three ways: in terms of community who loses its members as a result of family disorganizations, in terms of community who gains new members in the case of divorce/separation and in terms of over all impact on the community.

2.2.3 Societal – level Effects

A stable marriage is a foundation for a stable family and healthy society. Conversely, dissolution of marriage is a breeding ground for anti-social conditions such as delinquency. There is a general consensus among experts as well as lay observers that many of the social problems that are currently witnessed in Addis Ababa have their roots in divorce. At societal level family disorganization caused by divorce is manifested in the form of proliferation of street children, juvenile delinquency, beggary, widespread prostitution, etc.

Divorce also creates pressures on societal resources such as courts. Dissolution of marriage consumes a great deal of court time and limited resources. In recent times, the courts are under pressure to deal with an ever-increasing number of applications for divorce. Data obtained from

Addis Ababa, Lideta First Instance Federal Court indicate that application for divorce have been increasing from time to time to a point where judges are working around the clock to deal with the ever increasing number of divorce cases. The Ethiopian women lawyers' Association, is also busy dealing with disputes involving spouses through it is usually women who ask for help.

CHAPTER THREE

3. COURT PROCEEDINGS OF DIVORCE

Marriage is not just a contract in the ordinary sense but a spiritual union between the parties expected to last for the lifetime of the spouses. Nevertheless, it has become normal to see its dissolution occurring frequently. The Revised Family Code requires the registration of marriage by the officer of civil status in order to have legal effect. It is also provided under articles 28, 40, 74, 75 and 76 of the same that it shall be dissolved only by a court of law and the grounds of divorce have been established. Marriage can be dissolved because of the death of one of the spouses or a declaration of absence pronounced by a court of law. In these cases, the courts follow the normal rules of civil procedure and there is very little controversy in this area. The other grounds of dissolution of marriage are when the marriage does not fulfill the conditions required for a valid marriage or the marriage is concluded in violation of the prohibited degrees and the public prosecutor or other interested persons apply for its dissolution. The grounds of divorce provided under arts 31(1), (2), 32, 33(1), (2), 34-36 are not frequent in the civil courts because they are also criminal offenses. This also makes it inappropriate to use these provisions as a basis of criticizing the practice of courts in relation to divorce in addition to the fact that the public is largely unaware of them.

Art 76(1) and (2) of the RFC providing for the pronouncement of divorce at the request of one party or by the mutual consent of both parties. Under both types of petition the code does not require the inclusion of a cause in the request for divorce. It is known that under the previous law a cause was required and was classified as serious cause and non-serious cause for divorce. Art 676(1) of the civil code provided for the

direction of the case to family arbitrators in the case of non-serious causes with the objective of reconciling the parties, but did not provide a similar procedure for serious causes. This is an indication of respect given to marriage under the law in regard to the social customs.

Ato Mahari Redae a law scholar who participated in the drafting process of the RFC in his book published on the RFC in 2003 has indicated that the reason for excluding the presence of cause for a petition of divorce is because under the constitution the spouses have consented to the marriage relationship and would be contrary to this provision to oblige the parties to continue with a relationship they don't desire. An additional reason is that it would have an adverse effect on the upbringing of children. It is nevertheless provided under Art 78, 80, 82 that the court is authorized to grant the spouses a period of three months to review their decision and can invite them to appoint arbitrators who can examine their case and make recommendation. Under Art 76/2, 81-84 a special procedure is provided for newly married couple who have lived for less than six months together. The court is also empowered under Art 80/1 to verify that the petition of divorce has been freely expressed by the spouses. Art 80/3 also provides that the court has the responsibility of insuring that the divorce will not have an adverse effect on the upbringing of the children and on division of common property.

It is to be gathered from the book written by Ato Mahari Radae on the new family law that during the discussion leading to the law it was considered whether to authorize the court to refuse to grant divorce or to undertake proper investigation before granting divorce. The author also emphasizes that there is a difference between a petition of divorce brought by one party and a petition submitted by agreement bases and in the case of the latter the effect of the divorce may be settled by

arbitration chosen by the parties and that the court may assist the arbitrators in this respect (Art 82, 83, 119, 122).

The author has also stated that in both cases of petition by one party or petitions by both parties requesting divorce, it was indicated at the drafting stage that these actions cannot be brought through the intermediary of agents but must be brought personally by the parties themselves. The procedure by which parties bring their petition through agents would hinder the possibility of the court of reconciling the parties and marriage being a personal act and requiring the personal consent of the parties. It would also require that the desire of divorce should be personally regulated by the parties.⁵

The aim of this paper is to indicate that there is no basis in laws to permit the parties to undertake divorce proceeding through agents although this is being done by the courts.

3.1 Court Practices of Dissolution of Marriage Through an Agent

Agency is covered by the Civil Code of Ethiopia under Articles 2179 to 2233 and consists of authority given by a principal to the agent to do acts on behalf of the principal. The agent is empowered and acts solely in the name of the principal and may have general or special authority according to art 2199-2205 depending on the scope of his authority. It is essentially related to the property relationship between the parties Art 2179, 2199, 2200, 1675, 1676 and 1678 of the civil code Art 63 of the civil procedure code.

According to Art 586 of the civil code and Art 12 of the RFC marriage cannot be accomplished through an agent. It is wrong to compare the

⁵ 340Å^M 34}hhK"< 34u?}cw QÓ Tw^]Á SN] [Ç= 1995 3Ç=e 3uv Ñi 95-96

institution of marriage with a simple contract and use Art 1675 of the civil code or Art 63 of the civil procedure and permit the establishment of marriage by an agent. It does not correspond with international conventions, social and religious practices or with human rights instruments to deprive this institution of the honorable place it deserves in society by permitting divorce through an agent. Art 666 of the Civil Code and RFC Arts 78, 79, 82-84.

In addition to placing the institution of marriage next to a simple contract the power that the courts have assumed in granting divorce on the basis of petitions presented by agents is a means changing the legal system from codified law to judge made law. It is clear to the author whether it is incompetence or lack of ethics, which is compelling judges to give such decisions in clear contradiction with the policy of the state of granting the institution of marriage maximum protection. The cases attached it is evident that courts are involved in such acts.

It is very clear that permitting divorce by an agent is neglecting the protection of the family as the agent cannot have these considerations in mind when applying for divorce in the name of a spouses. Although the agent is working for the principal it is evident that he is not the principal. The family law provisions state that divorce is based on law and morals RFC Art 12, 80/1 and the constitution of FDRE Art 34(2), (3).

3.2 Conclusion

Divorce being the center of the discussion under the research from the origin of the concept marriage and to the breakdown, "divorce" was handled first by church courts, and governed by canon law. Divorce in the modern world is governed by family law and conducted through court proceedings on the grounds of fault as well as no fault concept. The majority of states in the world uniformly introduced fault based divorce

such as adultery, cruelty and desertion and no fault acts of divorce commonly referred to as impotency or incompatibility.

In the RFC divorce is not being separated between fault and no fault and parties who seek for divorce personally or by agreement are not obliged to disclose reasons for divorce, rather courts are expected to persuade spouses to renounce the petition filed for divorce. Here, the intent of the legislature is to be underlined in that court proceedings can only be attended by the spouses or litigant parties. This is because keeping secrets of the married couple between themselves and the judge may restore the fragile marital relations. Some family courts consider marriage as any of ordinary contractual relations and are granting divorce through third parties or an agent which practically erodes the dignity and respect of marriage. The social value of marriage and the personal nature of divorce are ignored and mandatorial rules and procedures established under RFC are not followed.

Such unlawful acts of courts whether being done negligently or with intention have resulted in increasing numbers of the declaration of divorce through 3rd parties, this should be condemned and denounced because of its impact on family, community and society that bears the cumulative effects of divorce. For this, the organs of government should devise ways of forbidding divorce through representatives of couple by designing and implementing mechanism enforce the law or use other means of reducing divorce consonant with the aspiration of modern Ethiopia.

3.3 Recommendations

Divorce is an increasingly common occurrence in our society. Yet its effects on the parties, their property and children can often be devastating. Once entered, a divorce declaration can establish the

parties rights permanently in addition with the nearest and remote consequences of family disorganization.

As to my own personal observation on the subject, the research would like to propose two-interventions in order to tackle acquiring divorce through third parties or an agent. These are concerned with interrelated processes. Building the judicial capacity, increasing the numbers of judicial institutions.

Regarding the first point, there is an urgent need to conduct capacity building of the judiciary in order to reduce the increasing disastrous pronouncements of divorce through the delegation of third parties. Such conduct of courts is mainly related to spouses residing abroad or when one of the spouses lives overseas. The annexed declaration of divorce by one of the federal first instance courts approved the intervention of third party as an agent between litigants. To the extent the declaration permitted representing married couple in divorce will remain a legal form regardless of the type of petition and would again make divorce a very easy matter.

The mandatorial provisions of the RFC, states "each of the future spouses shall personally be present and consent to the marriage at the time and place of its celebration". If it does so it should mean that divorce also will not be declared by representation. Moreover, representation for divorce does not meet moral values besides being an illegal and illegitimate act. Authorizing disinterested party who doesn't care about the well being of the marital relation and acting like under any other contractual duty as performing proprietary functions is not ethical in the marriage relationship.

Therefore, family courts in order to stop such unlawful proceedings for the declaration of divorce should take some corrective measures. In the

opinion of the researcher capacity building in legal proceedings with awareness creation on the consequences of divorce shall be given to the judiciary to help marriage survive as well as adopting methods and techniques of resolving disputes between married couple.

The second part of this recommendation calls for establishment of some more family courts, to share the enormous number of divorce suits. More over this will facilitate for the judges to apply their skills acquired by learning and through practice or experience. In addition judges will have sufficient time to persuade litigants to resume the state of marriage. Finally the sum of these advantages increases the capacity of judges to serve the society rather than increasing divorce. Here, I would like to conclude by quoting Tony Blair who emphasized the importance of the marriage as the very foundation of society. He said, *we cannot say we want a strong and secure society when we ignore its very foundation; marriage life, this is not about preaching to individuals about their private lives. It is addressing a huge social problem* (Haralambos, 2004: 528).