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

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Abstract

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

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

I. INTRODUCTORY NOTE

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

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

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

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

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

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

A. Conclusion of a Marriage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] *Id*. at 775.

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

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

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

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

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

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

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

B. Formation of an Irregular Union

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

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

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

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

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

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

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

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

[32] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[55] *Id.*

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

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

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

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

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

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

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

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

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

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

[61] *Id*. Art. 85.

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

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

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

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

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

II. SUMMARY OF FACTS OF THE CASE

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

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

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

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

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

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

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

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

III. RULINGS AND REASONING OF THE COURTS

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

A. Ruling and Reasoning of the Federal First Instance Court

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

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

B. Ruling and Reasoning of the Federal High Court

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

C. Ruling and Reasoning of the Federal Supreme Court

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

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

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

D. Ruling and Reasoning of the Cassation Division

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

IV. CRITIQUE

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

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

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

A. The Decision of the Federal First Instance Court

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

1. Presumption of Conclusion of a Remarriage

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

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

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

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

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

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

2. Sufficiency of Evidence for the Presumption

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Cohabitation Not a Proof of Remarriage

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

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

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

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

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

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

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

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

B. The Decision of the Federal High Court

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

1. Reconciliation Not A Substitute for Remarriage

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

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

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

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

2. Remarriage at Odds with the Practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[120] *Id*.

[121] *See supra* note 117.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. No Claim of Conclusion of Remarriage

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

2. No Issue of Proof of Marital Status

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

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

3. Reconciliation and Cohabitation Not Enough

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

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

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

1. Deviation from the Issue Framed

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

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

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

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

2. No Room for Interpretation

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

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

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

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

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

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

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

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

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

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

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

3. Incomplete Possession of Marital Status

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

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

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

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[136] *Id.* at para 12.

[137] *Id.*

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

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

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

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

4. Presumption of (Re)marriage Conclusion

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

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

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

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

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

[144] *See* THE REVISED FAMILY CODE, Art. 97(1). It is worth noting that the use of the word "…*may*…" must be construed to mean the court would take the presumption only if it is satisfied with the evidence for proof of possession of status. As indicated elsewhere, despite misleading wording, the presumption must remain operative once the required standard is met.

[145] *See Yeshareg Abatkun v.Mesert Admasu*, *supra* note 22. *See also Alehegn Mekonnen* v. *Aster Arahaya*, *supra* note 50.

[146] *See supra* footnote 142.

It should be noted that the presumed fact is conclusion of a (re)marriage, not its celebration.[147] As a rule of evidence dictates, proof of the first fact requires no evidence for the presumption would serve the same purpose. In contrast, proof of the celebration calls for evidence as it is not the presumed fact. In other words, conclusion of a marriage should not be confused with its celebration. Yet, there is a logical connection between celebration and conclusion of a (re)marriage. Thus, proof of the former fact, *inter alia*, entails presumption of the latter.[148] In the case at hand, such a distinction was overlooked. Instead, a non-marital cohabitation was accorded the status of a remarriage.[149]

In short, presumption of the conclusion of the remarriage was inferred from an incomplete proof of the ostensible possession of status. In effect, a quasi-marital union or, more appropriately, the so-called *defacto* remarriage was judicially created. In other jurisdictions, presumption of a (re)marriage may operate so as to give legal recognition to a non-marital cohabitation.[150] Such recognition is necessitated due to the absence of the regime of common-law marriage in their jurisdictions.[151] The situation in Ethiopia is quite different as an irregular union is maintained with equivalent function.

5. A Letter of Declaration Not Sufficient for Rebuttal

As judicial presumption of conclusion of a (re)marriage is rebuttable, the question is how sufficient should the rebuttal evidence be. This was another legal point with no analysis in the decision of the court. At issue was the sufficiency of the letter of declaration of non-cohabitation from the *kebele* administration. In contrast to the ruling of the lower court, the Cassation Division found the evidence insufficient to refute the presumption. As any kind of reliable evidence can be pro-

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[147] Though logically and necessarily connected, both facts are not the same. As such, providing the presumption of conclusion of a marriage shall not be overstretched to mean presumption of celebration of the marriage in a certain form.

[148] For a presumption based on proof of a certain basic fact such as the one in the case at hand, the presumption is created only after the basic fact is sufficiently proved. *See* Betatek Tadesse, *supra* note 99, at 85.

[149] Courts must be careful not to take cohabitation and repute of being married for inferring presumption of a marriage. That would result in eroding the strong values inherent in distinctive treatment of a formal marriage from an irregular union. Such a move would open up the door for the practice in other jurisdictions such the US where a formal marriage is merely reduced to the status of the prevailing practice of cohabitations. In those jurisdictions, the significance of a formal marriage itself is getting eroded. *See generally* Walter O. Weyrauch, *Informal and Formal Marriage: An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV.1 (88), 88-110(1960).

[150] *See generally* Frank Bates, *The Presumption of Marriage Arising from Cohabitation*, 13W. AUSTL. L. REV. 3(341), 341-353(1978). Yet, the presumption is applicable only as regards the civil aspects of the marriage. No such presumption applies where the proof the alleged marriage is required for determination of a criminal issue in criminal law. *Id*. at 350.

[151] *Id*. *See also* GILLIAN DOUGLAS, *supra* note 4, at 47-51.

duced in rebuttal, such written evidence could be deemed admissible.[152] At this juncture, one may question the relevance and sufficiency of the evidence for disproof of the alleged cohabitation. As a rule, written evidence is considered more reliable than oral evidence. Yet, the relevance and credibility of written evidence depend on the nature of the fact in issue. Though the reliability or otherwise of a certain evidence is ultimately determined by the court, not all facts are appropriately proved by written evidence. Thus, for the cohabitation, testimonial evidence from the community is much more credible than a letter from a *kebele* administration. As can be noted from the record, the declaration made by the letter was based on the testimony of three witnesses. Since the testimony at the *kebele* would not be subject to a cross-examination before the administrative officer, its credibility could be disputed. The letter, if credible, could still be used to corroborate the testimonial evidence before the court. However, the letter alone could not in itself suffice to rebut the presumption.

This appears to be the reason for the Cassation Division to reject the contention of the respondent on the issue of cohabitation. In this regard, the ruling of the Cassation Division on the issue is not amenable to criticism. Nevertheless, ruling on the issue without any legal reasoning as to the insufficiency of the evidence is susceptible to criticism.[153] It is important to note that every ruling along with the reasoning of the Cassation Division on a legal issue carries more weight than that of lower courts. The court would be expected to make a ruling on an issue with a legal reasoning.[154] A legal opinion of the court will be a vital *obiter dictum* to inform future decisions of lower courts.

V. CONCLUSION

The rulings and reasoning of the courts except that of the FSC were not based on a firm legal basis. The important issues were also overlooked. In particular, the issues of the (non-)conclusion of a remarriage after the divorce were sidelined. Moreover, unwarranted presumption of conclusion of remarriage was drawn on the basis of incomplete proof of possession of status. In this regard, the legal significance of proving celebration of a remarriage in a certain form was utterly neglected. In effect, a post-divorce non-marital cohabitation and reconciliation were erroneously regarded to imply the existence of the alleged remarriage. Eventually, an

[152] *See* THE REVISED FAMILY CODE, Art. 97(2).

[153] It is also arguable whether FSC Cassation Division can engage in evaluation of the sufficiency of evidence submitted at lower courts except as regards its admissibility or the required degree of proof that involves basic error of the relevant law. In one case, the FSC itself has indicated that weighing the sufficiency of the evidence submitted in a lower court lies outside the issue that is subject to cassation review. *See Muluworke Watche v. Social Security Agency*, *supra* note 25, at 41.

[154] *See Kaldis Link International v. Genet Wondimu*, Federal Supreme Court Cassation Division, Cass. File No.58540/2011, 12 FED. SUP. CT. CASS. DECS 326, 326-328(2011).

irregular union was rather mistaken for a remarriage. In so doing, several legal issues were misconstrued even in the cassation decision.

Therefore, it is quite compelling to revisit the precedent so tainted with serious legal flaws to guide future cases in light of the law. Celebration of a (re)marriage shall be considered essential in the proof of possession of marital status to draw a valid presumption of conclusion of the (re)marriage. Some recent decisions of the Cassation Division of the FSC confirm the need for proving the celebration of a marriage. This practice must be maintained consistently to govern proof of a (re)marriage. In particular, the subsequent precedent that is apparently set for proof of a former marriage must be applied to cases of alleged remarriage between ex-spouses. Another important point is the consequence of divorce that changes the legal status of the spouses. The change in the legal status must not be neglected. No post-divorce cohabitation short of celebration of a remarriage can be accorded the legal status of a remarriage. As such, the distinction between a (re)marriage and an irregular union shall be kept unclouded. Courts should be careful not to deviate from clear legal rules. If deviation is so desired, that can only be done by the legislator. A justified resort to the default mode of proof must be treated so narrowly. Otherwise, there remains no incentive to obtain (re)marriage certificate for the purpose.