

# BIGAMOUS MARRIAGE AND THE DIVISION OF COMMON PROPERTY UNDER THE ETHIOPIAN LAW: REGULATORY CHALLENGES AND OPTIONS

Jetu E. Chewaka\*

## INTRODUCTION

The practice of bigamous marriage in rural and urban Ethiopia is deeply rooted in religious and customary practices. According to the Ethiopian Demographic and Health Survey Report of 2011 (EDHS), eleven percent of married women in Ethiopia are in bigamous marriage, with nine percent having only one co-wife and two percent having two or more co-wives.<sup>1</sup> Similarly, five percent among the married men in Ethiopia live as a bigamous marriage having two or more wives.<sup>2</sup> Despite its prevalence, however, the practice of bigamy is prohibited under the Family and Criminal Code of Ethiopia. Though the prevalence of bigamous marriage in developed countries is defended on the basis of the right to religion and culture,<sup>3</sup> the socio-economic justification for its prevalence is stronger and more felt in developing countries such as Ethiopia. Particularly, given the low economic

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\* LLB (Mekelle University), LLM (Addis Ababa University), Lecturer, University of Gondar, Law School. The writer is grateful to Mr. Mehari Redae (Associate Professor of Law, Addis Ababa University, School of Law) for his valuable comment and suggestions on the first draft of this manuscript and to the anonymous reviewer for further comments.

<sup>1</sup>Ethiopia Demographic and Health Survey, 2011, Central Statistical Agency Addis Ababa, Ethiopia ICF International Calverton, Maryland, USA March 2012. [Hereinafter Ethiopia Demographic and Health Survey 2011].

<sup>2</sup> Ibid.

<sup>3</sup> See Martha Bailey and Amy J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (USA: 2010), p. 7.

and educational status of women in rural area, the likelihood of contracting bigamous marriage would inevitably be high. Therefore, the idea that bigamous marriage is an affront to gender justice and equality hitherto remains a paradox. As such, an attempt to legally prohibit bigamous marriage has laid bare the legal status of women in bigamous family unit due to lack of specific regulatory option that would be contemplated to address matters that relates to dissolution and division of common property.

The purpose of this paper is, therefore, to provide an insight into the legal principles that ought to be contemplated in regulating dissolution of bigamous marriage and the division of common property. Given the prevalence of bigamous marriage practice in Ethiopia, the paper argue that the regulation of dissolution of bigamous marriage and division of common property requires the weighing of the rebounding effects of either legalizing or prohibiting bigamous marriage on the rights of bigamous spouses. The paper further contends that bigamous marriage in Ethiopia, if remains unregulated, generates specific costs and vulnerabilities, as well as opportunities for exploitative and opportunistic behavior.

Against the above backdrops, this article intends to address the following two major questions. First, given the prevalence of bigamous marriage practice in Ethiopia, what will happen to the effects of a bigamous marriage where its practice is criminalized and its recognition denied on what so ever grounds? Second, what additional steps are contemplated to fully regulate the effects of bigamous marriage in case where polygamy is criminalized but yet recognition is imposed for the purpose of granting relief? Alternatively, what appropriate

and alternative legal principles could Ethiopian courts seek to address the puzzle of common property division in bigamous marriages absent specific and clear legal regime to be contemplated?

In order to address these questions and other interrelated legal issues, the paper is divided into six major parts. The first part provides general highlights on the meaning and rationalizations of bigamous marriage. Part two examines the legal aspects of bigamy in both human rights and Ethiopian legal contexts. Part three attempts to analyze rules that regulate dissolution of bigamous marriage. It investigates conventional family and general contract law principles including judicial decisions applicable to dissolution of bigamous marriage. Part four analyze appropriate principles and evaluates judicial practices governing the division of common property in case of dissolution bigamous marriage by one of the spouses. This part also looks into the principles enshrined in the conventional Ethiopian family laws and critically examines whether these principles would be applicable to common property division in bigamous marriage in case of its dissolution. Part five juxtapose the jurisprudence of Ethiopian Federal Supreme Court Cassation Division regarding the division of common property in bigamous marriage and the theoretical and legal principles analyzed in the preceding part. The final part provides concluding remarks.

## 1. DEFINITIONS AND RATIONALIZATIONS OF BIGAMOUS MARRIAGE

The term bigamy refers to “the act of marrying one person while legally married to another.”<sup>4</sup> As the name indicates the term bigamy connotes the duality of marriage in which a man or women marries another spouse while bound by the previous monogamous marriage. On the other hand, the state of bigamy in which a man and women marries to more than two spouses could be termed as polygamous marriage. Black, in his Law Dictionary, defines the term polygamy as “the state or practice of having more than one spouse simultaneously.” According to this definition polygamy may be considered as “one-marriage-at-a-time if more than one spouse is present simultaneously”.<sup>5</sup> However, as a plural marriage, polygamy can also be successive “if spouses are married one after the other”.<sup>6</sup> Hence, it should be noted that, in strict legal terms, polygamy and bigamy have a more specific meaning. Yet, it is very common in the literature to see the term polygamy at times employed as a synonym of bigamy and at other times to indicate simultaneous marriage of two or more spouses.<sup>7</sup>

Another point worth mentioning is that the term polygamy is inclusive of both polygyny and polyandry as the condition or practice of having more than one wife and more than one husband respectively.<sup>8</sup> In Ethiopian context, polygyny

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<sup>4</sup> Black’s Law Dictionary (8th ed. 2004).

<sup>5</sup> Marry Ann Glendon, *The Transformation of Family Law* (1989), p. 52.

<sup>6</sup> *Ibid.*

<sup>7</sup> Marjorie A. Shields, *Annotation, Validity of Bigamy and Polygamy Statutes and Constitutional Provisions*, *American Law Review*, Vol. 6 No. 1, and 2 (2007), p. 22.

<sup>8</sup> *Ibid.*

is much more prevalent and it is difficult to find evidence that show the tradition of marriage practice in which a woman is publically married to more than one husband. Likewise, as far as the knowledge of the writer is concerned, the practice of simultaneous polygamy in Ethiopian society is also not observable. Thus, bigamous marriage in Ethiopia could also be used to refer to a polygamous marriage in which a man maintains conjugal relations with more than two spouses forming a single matrimonial entity.<sup>9</sup> As such, in this paper, the term bigamy and polygamy will be used interchangeably to denote a plural marriage in which a man has more than one women spouse.

The prevalence of bigamy has been also continued to be rationalized mainly based on socio-economic grounds.<sup>10</sup> The social rationalization for the prevalence of bigamous marriage emanates from the widely held belief that bigamy/polygamy “ensures the stability and continuity of the family and clan due to its capability of producing a large family in a given time period.”<sup>11</sup> O'Donovan, for instance, noted that “having several wives has been a symbol of power, wealth, and influence in traditional African societies for many

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<sup>9</sup> In Ethiopian Context, it should however be noted that in case of *de facto* dissolution, it may happen that a woman may marry to another man without dissolving the first marriage. In such case one may argue that up until dissolution of the first marriage is pronounced by the court of law, such woman is in bigamous legal status. Amy J. Kaufman, *Polygamous Marriages in Canada, Canadian Journal of Family Law*, Vol. 21 (2005), p.317.

<sup>10</sup> See Obonye Jonas, *The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Critical Appraisal, Journal of African Studies and Development*, Vol. 4 No.5 (2012), p. 143.

<sup>11</sup> Chavunduka GL., *Polygyny among Urban Shona and Ndebele Christians: A Case study, The Southern Rhodesia Native Affairs Department Annual*, Vol. 12, No.1 (1979), p. 19.

centuries”<sup>12</sup> as “the numerous children produced from these wives can assist in building and strengthening a power base.”<sup>13</sup>

The economic justification for the prevalence of polygamy contends that polygamy is capable of delivering benefits to women as long as substantial resource inequality prevails among men and women.<sup>14</sup> It is argued that economic rationality dictates women to contract bigamous marriage through cost and benefit analysis. According to Becker, a woman in bigamous marriage may be economically advantageous sharing a high-status male with other women than monopolizing access to low-status partner in monogamous relationship, if male inequality is sufficiently pronounced.<sup>15</sup> Bigamy in these contexts, not only benefits woman, but also provides “economic and social security for her family especially in societies where bride price [dowry] at the time of the marriage is practiced.”<sup>16</sup> Therefore, as Dlamini argued, bigamy cannot be seen as discrimination against women in favour of it and benefit from it. He further argued that “it is not a form of general indiscriminate and invidious discrimination against women.”<sup>17</sup> That is why some argue that “monogamy is either a self-denying ordinance, in the sense that a man

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<sup>12</sup> O'Donovan, Wilbur, *Biblical Christianity in African Perspective* (Paternoster Press, 2nd ed., 1995) pp. 281-289.

<sup>13</sup> Chavunduka, *Supra note 11*.

<sup>14</sup> Walter Scheidel, (2009), *Monogamy and Polygyny*.

<http://www.princeton.edu/~pswpc/pdfs/scheidel/010903.pdf>. (accessed February 20, 2013)

<sup>15</sup> Gary S. Becker, *A Treatise on the Family* (USA: Harvard University Press, 1991), p. 87.

<sup>16</sup> Donovan, *Supra note 12*.

<sup>17</sup> CRM Dlamini, *Should We Legalise or Abolish Polygamy? Comparative & International Law Journal of South Africa*, Vol. 22, (1989), p.341 .

voluntarily renounces or abstains from polygamy, or it is dictated by an inability to afford more than one wife.”<sup>18</sup>

In Ethiopia, official reports and case studies also unfold similar reasons for the prevalence of bigamous marriage practice. According to the 2011 EDHS report, “rural women are more likely to be in bigamous unions (12 percent) than urban women (five percent).”<sup>19</sup> As per this national statistical report, “women in the lowest wealth quintile are the most likely to be in a bigamous union (16 percent), compared with just six percent of women in the highest wealth quintile.”<sup>20</sup> Another economic reason for the prevalence of polygynous marriage practice is attributable to the agreement between husband and wife to welcome a co-wife for its “merits of co-operation among co-wives in homestead and farms and activities of religious and social festivity.”<sup>21</sup> In rural Ethiopia, rich men opts plural marriage as their farm land is so vast that makes it difficult for the first wife to cope with extensive agricultural activities. Particularly, she is expected to provide food and thirst-quencher for a large group of workmen and women who come in support of their farm activities (locally called *daboo*) in the homestead. So, ultimately she agrees with her husband or encourages him to marry another woman to share the labour force.

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<sup>18</sup> Phillips, (eds) *Survey of African Marriage and Family Life* (London: published for the International African Institute by Oxford University Press, 1953) xiii-xiv.

<sup>19</sup> Ethiopia Demographic and Health Survey 2011, *Supra note 1 p. 61*.

<sup>20</sup> Donovan, *Supra note 12*.

<sup>21</sup> Minale A. Beyene, *Polygamy and its impact on the life of women among the Oromos of Western Ethiopia: A case study of Illubabor Zone*(Addis Ababa University unpublished Research report, 2000).

Furthermore, lack of women's education is also another reason for the practice of polygamy in Ethiopia. For instance, according to the 2011 EDHS, "there is an inverse relationship between education and polygamy." That is, "the proportion of currently married women in bigamous union decreases from thirteen percent among women with no education to less than one percent among women with more than secondary education."<sup>22</sup> Similarly, "older men living in rural areas, those with little or no education, are more likely to be in bigamous unions than other men."<sup>23</sup> The following table indicates the prevalence of both women and men living in polygamous marriage in percentage according to the 2011 EDHS Report.<sup>24</sup>

Regions and Cities	Women (%)	Men (%)
Tigray	0.8	0.4
Afar	21.8	9.7
Amhara	2.5	0.3
Oromia	13.8	6.6
Somali	27	13.8
Harari	5.5	2.2
Benishangul-Gumuz	18.3	13.3
SNNPR*	18.1	9.4
Addis Ababa	1.9	0
Diredawa	3.6	1.5

\*Southern Nations Nationalities and Peoples Region

<sup>22</sup> Ethiopia Demographic and Health Survey 2011, *Supra note 1*.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.



## 2. THE LEGAL ASPECT OF BIGAMOUS MARRIAGE

### A. Bigamy Under the Human Rights Law

The legality of bigamous marriage under international human rights instruments are debatable due to the contentions of the rights involved. On the one hand, “bigamy is viewed as a discrimination against women that promotes sex inequality.”<sup>25</sup> On the other hand, bigamy as a variety of marriage is also viewed as the right of women “to marry and form a family” in the exercise of their free consent and choice per national and international bills of rights.<sup>26</sup> The legal authority which is often invoked to support the former claim emanates from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its General Comment no. 28. According to this legal instrument, state parties are obliged to take appropriate steps to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudice and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>27</sup> However, this legal instrument is criticized for its failure to expressly prohibit bigamy as a “discrimination against women and violation of their right to dignity.”<sup>28</sup>

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<sup>25</sup> Kaufman, *Supra note 9*, p. 332. For more detailed discussion of Human rights treatment of bigamous marriage see Samuel Chapman, *Polygamy, Bigamy and Human Rights Law*, (USA: Xlibris Corporation, 2001).

<sup>26</sup> *Ibid.*

<sup>27</sup> See Convention on the Elimination of Discrimination Against Women, Article 5( a).

<sup>28</sup> See Ruth Gaffney-Rhys, *Polygamy: A Human Right or Human Rights’ Violation? Women in Society*, Vol. 2, (2011), pp. 2-13. This writer noted that though both Human Rights Committee and the Committee on the Elimination of Discrimination against Women have asserted that polygamy should be eradicated, the instruments that they uphold do not make this

In view of the critique, the United Nations treaty-monitoring bodies – the Human Rights Committee (HRC) and CEDAW Committee have both interpreted the provisions relating to equality within a marriage under the International Convention on Civil and Political Rights (ICCPR) and CEDAW as requiring States to abolish polygamy. According to this General Comment, “equal treatment with regard to the right to marry is noted to imply that polygamy violates the dignity of women since it discriminates against women.”<sup>29</sup>

The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Protocol “recognize polygamous marital relationships as a compromise which takes cultural and religious diversity” into account.<sup>30</sup> According to this Protocol, state parties are obligated to enact appropriate national legislative measures to guarantee the enjoyment of equal rights between women and men in marriage.<sup>31</sup> However, though the protocol encourages monogamy as the preferred form of marriage, the rights of women in marriage and family, including that of polygamous marital relationships are promoted and protected.<sup>32</sup> Though this protocol may be criticized for its failure to reject polygamy outrightly, it is crucial to note that it has attempted

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clear’. Hence, an instrument that explicitly outlaws polygamy is unlikely to be ratified by the states that condone the practice.

<sup>29</sup> See Human Rights Committee, General Comment 28, Equality of Rights Between Men and Women, Article 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000). Para. 24.

<sup>30</sup> Manisuli Ssenyonjo, *Women’s Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and The Role of Uganda’s Constitutional Court*, *International Journal of Law, Policy and the Family* Vol. 21 (2007), pp. 341-372. See also Jonas, *Supra* note 10.

<sup>31</sup> See African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Protocol, Art. 6(c).

<sup>32</sup> *Ibid.* [My emphasis]

to respond to the plights of women in polygamous marital relationships by obliging state to ensure the promotion and protection of their rights in such status quos. Hence, unlike the former legal instrument which outrightly rejected the practice of polygamy in disregard of the treatment of women in polygamous marriages, the African protocol is perceptive in responding to the equal treatment of women and men even in bigamous marriage where ever it already become a lived reality of women.

On the other hand, the practice of polygamy is viewed as human rights of women to marry and form a family.<sup>33</sup> The gist of this argument lies on the fact that a women who contracts a bigamous marriage “do so in exercise of their right to free choice – choosing for themselves the form of marriage to enter, whether it being monogamous or bigamous.”<sup>34</sup> This argument further contends that if one can genuinely ensure the “full and free consent” of a woman who wants to contract a bigamous marriage, regard for “the nature of the marriage, whether bigamous or monogamous, counts for nothing.”<sup>35</sup> Dlamini noted this very fact as follows:

*If a woman voluntarily waives her right, should we prevent her from doing so on paternalistic grounds of protecting her from*

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<sup>33</sup> Dlamini, *Supra note 17* p. 341. See also G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, *Memphis State University Law Review*, Vol. 11 (1981), p. 326. It is argued that polygamy is not always immoral, and it is a woman’s right to choose to be married to a man who has more than one wife. See Plea for Polygamy (Panurge Press 1929), p. 24, cited in Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail To Protect Mothers and Children From Its Abuses*, *Saint Louis University Law Journal*, Vol 56, No. 967 (2010), P. 977.

<sup>34</sup> Ibid, see at Nedrow.

<sup>35</sup> Nhlapo T., *African Family Law Under an Undecided Constitution.*, in Eekelaar J, Nhlapo T (eds), *The Challenge for Law Reform in South Africa* (2008), p. 116.

*herself? There is nothing unusual if a woman decides to waive her right to her dignity or autonomy and consents to being part of a bigamous establishment, unless of course the legislature feels so strongly that the right which is involved is so fundamental that even the holder of this right should be precluded from waiving it – acts which are so objectionable as to be contra bonos mores.*<sup>36</sup>

This argument may also be equally persuading for the first wife who in exercising her right to free choice may require dissolution of marriage in opposition to the second bigamous marriage if her husband insists. As precisely noted above, given the compelling social and economic reality of African women in general and Ethiopian women in particular divorce won't be a rational decision for the first wife. Furthermore, suppose also an infertile or sick woman in Ethiopian monogamous marriage. Does this woman suggest her husband to marry another woman to bare him a child or opt for divorce? Or at least, can she convince her husband not to marry another woman? A case study on polygamous marriage practice in Ethiopia noted above reveals that, "infertility, sickness and old age of the first wife is a prevalent cause for married men to contract polygynous marriage with the second co-wife."<sup>37</sup> According to this case study, polygamy is practiced to maintain the stability of first marriage that would have been broken had it not been for the occurrence of second marriage.<sup>38</sup>

## B. Bigamous Marriage under the Ethiopian Law

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<sup>36</sup> See Dlamini, *Supra note 17, p.342*.

<sup>37</sup> Minale, *Supra note 21*.

<sup>38</sup> Ibid.

The legitimacy of regulating plural marriage raises a host of debatable questions in terms of the role of state in the interference of private family relationships. This section tries to analyze and evaluate how the FDRE Constitution, the Criminal Code and the Family Law respond to these tensions so as to ensure states commitments to gender equality.

## I. Bigamy and the FDRE Constitution

The FDRE Constitution stipulates that “family is the natural and fundamental unit of society and is entitled to protection by society and the State.”<sup>39</sup> Accordingly, every men and women has the right to marry and found a family.<sup>40</sup> It is also provided that marriage shall be entered into only with the free and full consent of the intending spouses – man and woman.<sup>41</sup> Furthermore, it also provides for the equal rights of man and woman while entering into, during marriage and at the time of divorce.<sup>42</sup> Thus, as indicated before, bigamous marriage in which a man exercises another bigamous and bigamous marriage, as the case may be, would be an infringement of the equality clause in marriage. But, if a woman, for different reasons indicated before, enters into a marriage with a married man only with her “free and full consent”, could this act be considered as the “right to marry and found a family” or a violations of the equality clause that discriminates such woman?

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<sup>39</sup> The Federal Democratic Republic of Ethiopian Constitution (1995) Proclamation No. 1/1995, Fed. Neg. Gaz. Year 1 No. 1, Art. 34 (3) [hereinafter the FDRE Constitution].

<sup>40</sup> FDRE Constitution, Art. 34(2).

<sup>41</sup> FDRE Constitution, Art. 34(1).

<sup>42</sup> FDRE Constitution, Art. 34(1).

As the case one may argue this question begs the answer as to the legality or recognition of multiplicity of marriage under the FDRE Constitution.

On this matter, Meaza and Zenebeworke argued that Article 34 of the FDRE Constitution does not stipulate any minimum requirements for a legally valid marriage, such as monogamy.<sup>43</sup> According to this writers, Article 34 of the FDRE Constitution lacks clarity regarding any minimum requirement for a “men and women” to found a legally valid marriage – monogamous or bigamous marriage? However, this writer has the opinion that a constitution as a general law is not expected to provide each and every particular that regulates marital, personal and family matters. It is a generally agreed legal principle that a constitution should provide only the basics and leave the particulars for subordinate legislations for any further dispensation. This is very important given the plurality of marriage practice in Ethiopia signified also by the plurality of family laws in the federating units that in turn equips regional states to treat different aspects of marriage practice differently depending on their own context. Hence, the answer for the question should be

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<sup>43</sup> Meaza Ashenafi and Zenebeworke Tadesse, *Women, HIV/AIDS, Property and Inheritance Rights: The Case of Ethiopia*, (2005)

<<http://www.pe.undp.org/content/dam/aplaws/publication/en/publications/hiv-aids/women-hiv-aids-property-and-inheritance-rights-the-case-of-ethiopia/23.pdf>> (accessed on February 20, 2013). Meaza Ashenafi has been a legal advisor to the Ethiopian Constitution Commission of the Transitional Government, which drafted the constitution in 1993. She also ‘produced the first drafts of the constitution’s articles on the rights of women and children which ultimately led to its inclusion in the 1995 Constitution of Ethiopia. But it is not clear for this writer why she criticized the provision of the constitution which has been utterly contributed by her own effort that would otherwise have been rectified in the first place. See, Meaza Ashenafi: *Fighting for Women’s Rights in Africa*. <<http://africaisdonesuffering.com/2013/01/20/meaza-ashenafi-fighting-for-womens-rights-in-africa/>>

sought closely in Article 34(4) of the FDRE Constitution. The Constitution provides that “in accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted”. In other words, personal, marital and family law that specifies and recognize marriage practice concluded under the systems of religious or customary laws may be adopted.

Thus, it could be strongly argued that the FDRE Constitution impliedly hint at the possibility of recognizing bigamous marriage practice “in accordance with the provisions to be specified by law” provided that such marriage derives its source of validity from the religious and customary laws of the intending spouses in their own community. It is also further stipulated that “the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute is not precluded under the constitution.”<sup>44</sup> Thus, one may argue that the above constitutional provisions show the existence of legal plurality for the regulation of marital, personal and family rights. But, the problem is what happens if the adjudication of disputes relating family laws in accordance with religious or customary laws is discriminatory? The FDRE Constitution seems to address this very problem. It stipulates that, “the State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.”<sup>45</sup> Yet, the problem lies not on the normative prohibition but on taking practical measures to identify, and describe what constitutes “harmful

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<sup>44</sup> The FDRE Constitution, Art. 35(5).

<sup>45</sup> Id. Art. 35(4).

customs” to tackle it. As indicated so far, polygamy is harmful to women as it is discriminatory by its very nature. But, as we shall see in what follows, little effort is done to regulate it in Ethiopian family codes despite its outright prohibition.

In general, the writer has the opinion that the right to marry and found a bigamous family under the FDRE Constitution requires constitutional interpretation by the House of Federation if gender equality is to be fully realized. Yet, one thing is certain from the plain reading of the constitutional provision. As indicated above, the legitimacy of bigamous marriage under the FDRE Constitution is conditional upon the provisions of specific law yet to be enacted by subordinate legislations. By so doing, the FDRE Constitution reserved itself from clearly permitting or prohibiting bigamous marriage practice in Ethiopia. It opted for specific matters to be regulated by enabling legislation to be enacted by the parliament or state councils in recognition of marriage concluded under religious and customary laws as a legitimate exercise of the right to religion and cultural freedom on condition that these rights are limited if their practice “oppress or cause bodily or mental harm to women”. On top of this, as noted before, the FDRE Constitution clearly stipulates that both men and women “have equal rights while entering into, during marriage and at the time of divorce”. Hence, a husband contracting a second marriage during marriage discriminates against the first wife and violates the constitutional principle of equality clause during marriage. Likewise, a legal norm or any judicial decision which fails to recognize



equality of the husband and the second bigamous women spouses during divorce is also equally discriminatory.

## II. Bigamy under the FDRE Criminal Code

As indicated above, the practice of bigamy as a plural marriage in Ethiopia is a social reality in both urban and rural areas despite disparities in percentages. So, the pertinent question is given the prevalence of bigamous marriage to what extent its criminalization in Ethiopia would be justified? Let us look at what the Criminal Code says regarding polygamy in Ethiopian context. According to the FDRE Criminal Code, bigamy is generally casted as an offence punishable by the law. It reads as follows:

*Whoever, being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled, is punishable with simple imprisonment, or, in grave cases, and especially where the criminal has knowingly misled his partner in the second union as to his true state, with rigorous imprisonment not exceeding five years.<sup>46</sup>*

It is previously noted that there exists a definitional difference between polygamy and bigamy. Needless to mention it, while bigamy relates to the intentional act of marrying another person while legally bound by the first marriage, polygamy may be about the practice of having more than one spouse simultaneously or successively. In some jurisdictions such as

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<sup>46</sup> The Federal Democratic Republic of Ethiopia Criminal Code (2004), Art. 650(1) [hereinafter the Criminal Code].

Canada, the Criminal Code treats both “bigamy” and “polygamy” under separate sections indicating instances of how criminal legislation construed these terms differently.<sup>47</sup> According to the Canadian Criminal Code, while the former offence involves participating in the ceremony of marriage while already married, or with someone who is known to be married, the offence of polygamy, however, does not necessarily focus on the act of “marriage” *per se*, but rather on the status of having more than one spouse, or being in conjugal union with more than one person, simultaneously.<sup>48</sup> However, given the successive nature of polygamous marriage, the debate on the distinction between bigamy and polygamy becomes more theoretical. It should be also noted that practically whether a bigamous marriage is successive or simultaneous does not matter since both cases contravenes the legal principle of marriage as union of man and woman. Hence, it should be clear from the outset that given the prevalence of successive bigamous marriage in Ethiopia, the term polygamy would be used in this paper to refer to bigamous marriages, which as noted above, is illegal under the Ethiopian Criminal Code save in cases provided by the law. As such, it is crucial to examine the decriminalizing provision stipulated under the Criminal Code.

The exception clause of bigamy reads that “[the provisions of Article 650] shall not apply where bigamy is committed in conformity with

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<sup>47</sup> Kelly Lisa M., *Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy*, *University of Toronto Faculty of Law Review*, Vol. 65 (2007), p. 21.

<sup>48</sup> *Ibid.*

religious or traditional practices recognized by law.”<sup>49</sup> Here, it should be noted carefully that the fact that the practice of polygamy is in conformity with customary or religious practice does not make it an excuse under the Criminal Code of Ethiopia. Rather, it is only when bigamy is practiced in conformity with traditional or religious practices but this time duly recognized by the law. Yet the issue worth examination is whether there exists a law recognizing polygamy as a legitimate customary or religious practice. The following sub-section embarks on this task

### III. Bigamy under the Ethiopian Family Codes

It is previously indicated that the enactment of family law is reserved for respective Regional states under the FDRE Constitution.<sup>50</sup> Currently, in addition to the Revised Family Code of 2000<sup>51</sup>, the State of Tigray, Amhara, Oromiya, Harari, and SNNPR enacted their own Family Code.<sup>52</sup> But, the State of Afar, Somali, Benishangul-Gumuz, and Gambela still don't have their own

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<sup>49</sup> Id. Art. 651.

<sup>50</sup> The FDRE Constitution, Art. 52.

<sup>51</sup> The Revised Family Code of 2000, Fed. Neg. Gaz. 6<sup>th</sup> year Extra Ordinary Issue No. 1, It is revised version of Ethiopian Civil Code by the Federal government [hereinafter the RFC]. This family Code is applicable only in Addis Ababa City Administration and Diredawa City Council.

<sup>52</sup> One of the peculiar features of these family codes in the federal system of Ethiopia is that except for very few departures such as marriageable age, all codes are directly copied from the RFC even with similar article. Though it is beyond the ambit of this paper, this issue may raise the necessity and demand of enacting different family laws in the absence of substantial differences that reflect its plural nature signifying the federal structure. It should be noted that in this paper the provisions of the RFC will be used unless there exist clear differences between States family codes and RFC in which case separate reference will be made.

Family Code.<sup>53</sup> Now, let us see whether the customary and religious practice of polygamy is recognized under the above respective family codes.

To begin with, under the RFC, three forms of marriage can be identified – Civil Marriage and marriages concluded in accordance with the religion or custom of the future spouses.<sup>54</sup> A Civil Marriage is concluded between a consented ‘man and woman’ appeared before an Officer of civil status.<sup>55</sup> Therefore, Civil Marriage is purely monogamous marriage. On the other hand, Religious Marriage is concluded when “a man and a woman” have performed such “acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them.”<sup>56</sup> Similarly, Customary Marriage is concluded when “a man and a woman” have performed such “rites as deemed to constitute a valid marriage by the custom of the community” in which they live or by the custom of the community to which they belong or to which one of them belongs”.<sup>57</sup> So, it is very easy to compare the three types of marriage.

Accordingly, all forms of marriages are the same except for the manner of their conclusion or celebration. In other words, all types of marriages are monogamous in form with varying set of procedures where one is concluded before the Officer of Civil Status and the others taking place according to the ceremonial acts of religious and customary practices of the intending spouses. It is also mandatory for all forms of marriage to be “registered by a competent

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<sup>53</sup> It should be noted that these regional states are required to resort to the Civil Code of the 1960 since the scope of application of the Revised Family Code of 2000 is reserved for Addis Ababa and Direedawa only.

<sup>54</sup> RFC, Art. 1.

<sup>55</sup> RFC, Art. 2.

<sup>56</sup> RFC, Art. 3.

<sup>57</sup> RFC, Art. 4.

Officer of Civil Status”.<sup>58</sup> This shows us that a competent Officer of Civil Status should decline the registrations of both bigamous customary and religious marriages even if celebrated in conformity with the customary and religious practices of the intending spouses. Furthermore, it is also expressly provided that, “a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage.”<sup>59</sup>

Coming to the Regional Family Codes, the provisions on bigamy and recognition of only monogamous marriage is verbatim of the RFC.<sup>60</sup> However, under the State of Harari, the only exception to bigamy is the recognition of religious bigamous marriages. Like the RFC and Family Codes of other Regional States, the Harari Family Code also recognizes monogamous Civil, Customary and Religious marriages.<sup>61</sup> In principle, like other Family Codes, it also prohibits the conclusion of bigamous marriage.<sup>62</sup> Its major departure from other regional family codes is it exceptionally permits bigamous marriage specifically concluded according to religious practice.<sup>63</sup> But, like other family codes, the Harari Family Code does not permit the practice of bigamous customary marriage. As noted before, the State of Harari host men and women with a low percentage of bigamous marriage compared to other regions such

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<sup>58</sup> RFC, Art. 28.

<sup>59</sup> RFC, Art. 11.

<sup>60</sup> Family Code of the Oromiya Regional State clearly recognized bigamy when it was first enacted. But later on the Regional State legislators are forced to amend this Family Code to abolish the bigamy provision for reasons that is not specified. It should be noted that in this paper the provisions of the RFC will be used unless there exist clear and substantial differences between States family codes and RFC in which case separate reference will be opted.

<sup>61</sup> Harari Region Family Code (2000), Neg. Gaz. year 13, extraordinary issue No. 1/2000, Art. 1, 2 and 3.

<sup>62</sup> Harari Region Family Code, Art. 11(1).

<sup>63</sup> Harari Region Family Code, Art. 11(2).

as Oromia and Southern Nations Nationalities Peoples Region. However, the Family Codes of the two Regional States failed to recognize or at least acknowledge the practice of both customary and religious bigamous marriages.

In a nutshell, the above consecutive topics attempted to investigate the legal aspects of bigamous marriage. The investigations of the legal regimes indicate that, except for the permission of religious “bigamy” under the State of Harari Family Code, bigamous marriage in Ethiopia is generally prohibited. Therefore, in the present context, two issues are at stake. First, what will happen to the effects of a bigamous marriage where its practice is totally banned or criminalized and recognition denied on what so ever grounds? The second issue is what additional steps are contemplated to fully regulate the effects of bigamous marriage in an area where it is criminalized yet recognition is imposed for the purpose of granting relief or decriminalized yet there is no legal framework to regulate its legal effects? The following parts try to shed lights on these issues.

### 3. DISSOLUTION OF BIGAMOUS MARRIAGE

In our navigation so far, attempt is made to provide a brief background regarding the conception, rationalization and legal aspects of bigamous marriage. Accordingly, despite the prevalence of bigamous marriage practice in Ethiopia, it is generally concluded that except for the recognition of bigamous marriage celebrated according to religion under the Harari Family Code, bigamous marriage in Ethiopia is illegal and a crime punishable under

the Criminal Code. Therefore, given the prevalence of bigamous marriage in Ethiopia but absent the legal regimes that regulates the matter, how would a bigamous spouses attempt to seek dissolution of such marriage before the court of law? As we shall see latter on, marriage produces legal effects as regards the common property division after its dissolution has been pronounced by the court of law.

As indicated before, all Family Codes in the Federal Republic of Ethiopia enacted so far are designed to regulate monogamous marriage. In the absence of specific legal provisions that governs bigamous marriage practice, there are host of questions that require answer. Would a woman in bigamous marriage be able to seek safe exit and require any relief from the situation? In what way would courts be able to regulate the dissolution of bigamous marriage compared to that of monogamous marriage? These questions are very critical and deserve separate treatment in this paper. In the following, conventional family law principles, contract law principles and judicial decisions will be considered as regulatory options for the dissolution of bigamous marriage in Ethiopia.

#### **A. Termination of Marriage in Bigamous Union: Dissolution vis-à-vis Annulment**

Dissolution or annulment of marriage in bigamous union *per se* is regulated under the bigamy provisions of the Criminal and Family Codes. On the one hand, bigamous marriage may be “dissolved or annulled” by a court order where an application is made by either of the spouses of the bigamous

marriage or by the public prosecutor.<sup>64</sup> The term dissolution is defined as “the act of bringing to an end” while the term annulment is defined as “the act of nullifying or making void.”<sup>65</sup> According to this definition, annulment and dissolution of marriage are fundamentally different. An annulment renders a marriage void from the beginning, while dissolution of marriage terminates the marriage as of the date of the judgment of dissolution. On the other hand, a marriage may be dissolved through a court ordered divorce though such cause of termination of marriage presupposes a validly concluded marriage.<sup>66</sup> Thus, the major distinction between a divorce and an annulment is that the former severs the bonds of matrimony, whereas the latter asserts that such bonds never existed. Thus, a bigamous marriage is an annulable marriage that would be considered as never to have occurred. But a marriage terminated by divorce is considered to have legal existence and produces legal effects after its termination.

In Ethiopia, except for religious bigamy under Harari Family Code, it could be argued that a bigamous marriage is an annulable marriage but only unless and until such marriage is annulled. But, what would be the pecuniary effects of the couple who had been married and during which they laboured together to accumulate wealth? This question clearly shows the repercussions of declaring bigamous marriage as “null and void.”<sup>67</sup> In Uganda, for instance, the judicial

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<sup>64</sup> RFC, Art. 33(1) and see also same provision of Harari Family Code, *Supra note 61*.

<sup>65</sup> Black’s Law, *Supra note 4*.

<sup>66</sup> RFC, Art. 75(c).

<sup>67</sup> For more detailed discussion on legal issues of void and voidable marriage in the context of bigamous marriage see *The Effect of Void and Voidable Marriages, Arkansas Law Review*, Vol. 10 (1956) pp.189-190. The Cassation Division of the Federal supreme Court of Ethiopia ruled that bigamous marriage may not be considered as “*void ab initio*”. See Aregawi Abache



doctrine has long vindicated the reluctance of declaring bigamy as null and void. The judgment of Ugandan court which is more relevant to the present case can be re-cited as follows:

*It would be sheer hypocrisy to shut our eyes to realities of life in Africa in general and Uganda in particular. In this part of Uganda, bigamous marriages are not rare. Many customs and traditions do not frown upon second marriages during the pendency of the first marriage (...) many a man here have married second wives without any penal sanctions visiting them. I would therefore be reluctant to declare the second marriage (...) null and void for the simple reason that problems have since cropped up between husband and wife. (...) This is however not to declare that it is legal.<sup>68</sup>*

In Ethiopia, the judicial recognition of bigamous marriage in Regional and Federal Supreme Cassations vary even though Federal Cassation has a final say on the matter.<sup>69</sup> For instance, in the National Regional State of Oromia, bigamous marriages are silently recognized by courts simply by dissolving it and liquidating its pecuniary effects. According to an informant judge in the Oromiya National Regional State Supreme Court, judges are not much

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v. Mrs. Aster Abegaz *et al*, Federal Supreme Court, Civ. Cassation No. 39408, published Federal Supreme Court Cassation Decisions, Vol. 10, 2002.

<sup>68</sup> Lynn Khadiagala, *Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda*, *Journal of African Law*, Vol. 46, No. 1 (2002) p. 9.

<sup>69</sup> See Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, Art. 2 sub article 4 and 5. It should be noted that since the decisions passed by five judges of the Federal Supreme Court Cassation Division pass binding interpretation of laws to all levels of courts and other relevant bodies, it could be said that the position of the regional courts should reflect the interpretation of laws given by the Federal Cassation.

concerned with the criminality of bigamous marriage since it is dominantly practiced in Oromia.<sup>70</sup> He further noted that though bigamous marriage is an offence punishable by the Criminal Code, most bigamous marriages were revealed before the court of law not as a dispute over their bigamous nature but on division of matrimonial property after the dissolution or divorce of bigamous spouses has been successfully declared by the lower courts.

The practice of Amhara Supreme Court is clearer on the illegality of bigamous marriage. In a matrimonial property dispute case between *Aminat Ali v. Fatuma Wubet*, the Supreme Court and its Cassation division declared the marriage of petitioner Aminat Ali bigamous since she married to Mehammad Hussein in 1990 Ethiopian Calendar (EC) as a second co-wives to respondent Fatuma Wubet whose marriage is prior in time (1987).<sup>71</sup> Though State lower courts passed a judgment recognizing the existence separate monogamous marriage, the Supreme Court and the Cassation division reasoned out that the law does not encourage bigamous marriage and the decision on the disputed matrimonial property should be given in such a way to protect the first legal marriage.<sup>72</sup> The Amhara Supreme Court further reasoned that the decision of the lower courts that the common property acquired after the second marriage should be divided between the three spouses affects the interests of the first legal spouse.<sup>73</sup> Accordingly, the Supreme Court held the view that though

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<sup>70</sup> Interview with Ato Nasir Faris, Oromiya Supreme Court, Judicial Service Delivery Process Owner, (March 4, 2013 at his office).

<sup>71</sup> *Aminat Ali v. Fatuma Wubet*, Federal Supreme Court, Civ. Cassation No 45548, Published Federal Court Cassation Decisions, Vol. 13.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

*Aminat Ali* may take her personal property by adducing evidence, the common property acquired until the first marriage is dissolved should be equally divided only between the first monogamous spouses – Fatuma Wubet and Mehammad Hussein.<sup>74</sup> But, though the marriage of Aminat Ali and Mehammad Hussein is now become a monogamous marriage due to the dissolution of the first marriage of Fatuma Wubet, the Amhara Supreme Court declared it a bigamous marriage without having legal effect.

On the other hand, the judgment of Federal Supreme Court Cassation (FSCC) is sympathetic to the situations of women in bigamous marriage who clearly declared it a “social reality” that breeds “social chaos” unless prudent decision is made by the courts of law.<sup>75</sup> In the previous case, Aminat Ali pleaded the committal of basic error of law by the Amhara Regional Supreme Court Cassation before the FSCC, where she argued the inappropriateness of declaring her marriage bigamous without giving considerations to the dissolution of the first bond of marriage and without giving considerations to the proof as to the existence of separate marriage bond between herself and Mehammad Hussein.<sup>76</sup> On the other hand, Fatuma Wubet argued since the marriage of Aminat Ali is bigamous it should not have to be considered as if her marriage has been legally existed. Hence, Fatuma Wubet argued that in the absence of marriage bond, there is no legal basis where Aminat Ali could embark on the division of common property which is the effect of marriage.

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<sup>74</sup> Ibid.

<sup>75</sup> Aminat Ali v. Fatuma Wubet, *Supra note 71*.

<sup>76</sup> Ibid.

The FSCC noted the fact that bigamous marriage is prohibited under both RFC and regional family codes and the lower courts should have dissolved such bigamous marriage on the application of Fatuma Wubet or the public prosecutor long before the matrimonial property disputes.<sup>77</sup> However, the court realized that Fatuma Wubet was in bad faith and was not just or fair to bring an action for nullifying the second marriage right at the time when disputes over the division of property ensue in the absence of evidence that shows opposition at time of conclusion of marriage or during the marriage for more than ten years.<sup>78</sup> The FSCC noted that once the existence of consecutive marriages between the spouses is proved as was done in the case at hand, the important legal issue that needs to be addressed is the principle governing the division of property acquired during the life of marriage if the first marriage is dissolved and the second marriage continued.

The FSCC further noted that the reason for controversy in such kinds of marital disputes arises from the fact that both Regional and the RFC do not allow bigamous marriage that in turn resulted in lack of legal clarity as to the division of property acquired between the spouses. So, though the FSCC rebuked the bigamy claim of Fatuma Wubet as “untimely and in bad faith,” nothing is said as to whether such bigamous marriage should be given judicial recognition despite its legal prohibition and judicial recognition for relief purpose. But, the writer contends that the present judicial discretion of the FSCC reveals the implicit judicial recognition of bigamous marriage and its

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<sup>77</sup> It should be noted that the Federal Cassation failed to take notices of the fact that Harari family Code permits religious bigamous marriage as clearly indicated before.

<sup>78</sup> See *Aminat Ali v. Fatuma Wubet*, *Supra note 71*.

legal effects. The fact that the FSCC declared bigamous marriage as a social reality in Ethiopia unfolds the recognition of bigamous marriage for relief purpose though it is difficult to conclude that the position of the Federal Cassation represents clear and net positions of Ethiopian State on the legality of bigamous marriage.

In general, our understanding of annulment or dissolution of bigamous marriage should be tuned in such a way that justice be done to the concerned parties in bigamous union. Hence, the use of the terms “dissolved or annulled” in the Ethiopian Criminal Code is not without reason if the meanings of the two terms are taken seriously. So, the court in rendering a bigamous marriage either annulled or dissolved must be careful in weigh its far-reaching effect on the parties concerned. As noted previously, conventional family law is designed to regulate dissolution of monogamous marriage but not bigamous marriage.<sup>79</sup> As such, the argument that bigamous marriage produces no legal effect since it’s legally non-existent from the very beginning may end up in being unfair to the bigamous spouses as the FSCC commented on the descions of Regional Supreme Court indicated above. Therefore, justice requires that rules governing dissolution of monogamous marriage should be applied to the dissolution of marriages in bigamous union in order to proceed to the pecuniary effects of such bigamous marriage.

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<sup>79</sup> The RFC, Art. 74 and *et seq.*

## B. Applying General Contract Principles

Though marriage is more than a contract, its genesis hinges in a contract, for it cannot come into existence unless the spouses have entered into an agreement with full and free consent – the one to marry the other.<sup>80</sup> Cheshire noted that, on the one hand, marriage is more than a contract due to its nature of creating personal status to both the spouses and their community.<sup>81</sup> On the other hand, the genesis of marriage is a matter for the ordinary law of contract, but its prolongation is regulated by personal status law of the spouses, who have no power to modify its attributes as fixed by that law.<sup>82</sup> But, what Cheshire failed to mention is as to whether contract or personal laws of the parties regulates its dissolution. Thus, as we are now very much concerned with dissolution of bigamous marriage, the importance of regulating the genesis of marriage as a matter of contract hint us the existence of regulatory options or alternative possibility of applying general principles of contract law in the absence of specific law governing bigamous marriage. Can we argue that contract law is still best suited to determine the effects of dissolution of bigamous marriage?

As noted before, one can contract a valid monogamous marriage but can't contract a valid bigamous marriage due to its illegality. So, what would be the effect of such illegal contract at least in so far as its common property aspect is concerned? A reference to the Ethiopian Civil Code Contract provision reveals

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<sup>80</sup> G. C. Cheshire, *The English Private International Law of Husband and Wife*, *Recueil des cours*, Vol. 108 (1963), p. 119.

<sup>81</sup> *Ibid.* Under Ethiopian RFC, the ambit of a contract of marriage is not restricted to the regulation of the pecuniary effects of marriage but also regulates the reciprocal rights and obligations in matters concerning the personal relations of spouses save in case of the mandatory provisions of the law. See RFC Art. 42.

<sup>82</sup> *Ibid.*

the answer.<sup>83</sup> It stipulates that “a contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party.”<sup>84</sup> It is indicated that a bigamous marriage may be invalidated on the opposition made by the prior spouse or by the public prosecutor.<sup>85</sup> However, the RFC do not provide the period of time within which action for the invalidation of bigamous marriage could be brought before the court in case where such action is not brought during the conclusion of bigamous marriage.<sup>86</sup> Be it as the case may be, the pertinent question, however, is what contractual provisions could be contemplated to regulate the effect of invalidation of bigamous marriage as regards the matrimonial property effects under Ethiopian contract law once such a marriage is dissolved on the request of the first wife, the public prosecutor or by one of the bigamous spouses?

The pertinent provisions of the Civil Code on the matter provides that “where a contract is invalidated the parties shall as far as possible be reinstated in the

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<sup>83</sup> It should be noted that Federal Supreme Court Cassation in the case of *Dinke Tedla v. Abate Chane et al.*, crystallized the applicability of contract law relating to period of limitations on matrimonial property dispute. In this case, the Federal Cassation Court, by citing Art. 1677 of the Civil Code on general contract, argued that in case of legal gaps in the family code regarding the matter under dispute, the relevant provision of the contract law (art. 1845) could be applied to fill this gap. See *Dinke Tedla v. Abate Chane et al.*, Federal Supreme Court, Civ. Cassation Decision No. 17937, Published on Vol. 4.

<sup>84</sup> The Civil Code of the Empire of Ethiopia, 1960, Neg. Gaz. Art. 1808(2). See also Art.1677 (1) regarding the scope of the application of Contract in General: ‘the relevant provisions of this title [Contract in General] shall apply to obligations notwithstanding that they do not arise out of a contracts.’ It is also important to note that Ethiopian courts have just analogized contract law period of limitation in determining the right to bring court action regarding the pecuniary aspects of marriage.

<sup>85</sup> The RFC, Art. 18(c). See also Ethiopian Civil Code, Art. 1677 on the applicability of the “general contract rules to obligations notwithstanding that they do not arise out of contract.”

<sup>86</sup> It may be argued that the general contract principles enshrined under the Civil Code (Art. 1810 cum. Art. 1808(2)) could be applicable.

position which would have existed, had the contract not been made.”<sup>87</sup> But paradoxically, it continues to stipulate that “acts done in performance of the contract shall be of no effect.”<sup>88</sup> Does the latter provision signify the performance of acts such as building a house and buying cars during the life of bigamous marriage “shall be of no effect”? A closer look at another general provision of contract law provides a way out in case where “restoring previous position is not possible”.<sup>89</sup> Accordingly,

*[A]cts done in performance of the contract shall not be invalidated where such invalidation is not possible or would involve serious disadvantages or inconveniences. The parties shall as far as possible be reinstated in the position which would have existed, had the contract not been made, by the payment of damages or any other remedy which the court thinks fit.*<sup>90</sup>

So much so that, acts performed in a bigamous marriage have legal effects if invalidation “involve serious disadvantages or inconveniences” to the parties concerned. It goes without saying that in the absence of specific legal provisions governing marital property in the context of bigamous marriage, invalidation may involve serious disadvantages or

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<sup>87</sup> Id. Art. 1815(1) [my emphasis]. It should be noted that in bigamous marriage there is an agreement between the husband and the latter wives though it is not sustainable in the eyes of the law. It should be noted also that noted the difference between void and voidable contract result from the wording of Articles 1808, 1811, 1814. But, the effects of an invalidation decree obtained on either ground are the same under Ethiopian contract law(see Ethiopian Civil Code, articles 1815 to 1818) See George Krzeczunowich, Formation and Effects of Contracts in Ethiopian Law (Faculty of Law, Addis Ababa University, 1983), p. 16.

<sup>88</sup> Id. Art. 1815(2).

<sup>89</sup> Id. Art. 1817.

<sup>90</sup> Id.



inconveniences to spouses. Therefore, even if bigamous marriage is annulled in Ethiopia effects shall have a legal effect under the contract law in so far as the property interests of spouses are concerned.

#### 4. DIVISION OF COMMON PROPERTY IN BIGAMOUS MARRIAGES

It goes without saying that as soon as dissolution spells termination of marriage disputes over property reigns. Once the legal issue that a bigamous marriage produces legal effects as regards property division is resolved, next most daunting task is determining the appropriate legal principle applicable to the division of matrimonial common property in the absence of specific legal regimes. This part subsequently considers the general principles applicable to common property in monogamous marriages and then critically examines whether these principles are apt to govern the division of common property in bigamous marriage in a similar logical equivalence.

##### A. General Rules Governing Matrimonial Common Property Regime

In order to avoid disputes between intending spouses, the widely established principle of family law is that their pecuniary effects are regulated by contract of marriage concluded either before or after its celebration.<sup>91</sup> In default of such contractual agreement the matrimonial property of spouses are regulated by law.<sup>92</sup> In Ethiopia, though it is difficult to come across statistical data, it can be

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<sup>91</sup> RFC, Art. 42(1).

<sup>92</sup> RFC. Art. 48(7) and Art. 85(2).

easily observed that most court cases over matrimonial property disputes are devoid of contract of marriage that are designed to regulate their pecuniary relationships. This is particularly true in most rural Ethiopia and in marriages celebrated in religious institutions in which the sanctity of marriage is believed to depend on the divine will rather than on the contractual regulations of the rights and obligations of the intending spouses.

Generally, in default of any contract of marriage, two tenets of matrimonial property principle can be identified. The first legal principle is that any property owned by spouses in common comes into being as distinct from the personal or “separate property” of either spouses during marriage. The gist of this principle emanates from the fact that properties acquired through labour of each spouses by their personal efforts and all of the proceeds therefrom during the life of the marriage becomes the common property of spouses.<sup>93</sup> Yet as both Sileshi and Bekele noted, the idea that requirement of proof of “joint contribution or joint effort” by Ethiopian Courts for the existence of a common property has no legal basis but only indicates a fabricated legal interpretations.<sup>94</sup> It is also important to distinguish what the law regards personal property on the one hand and common property on the other hand. As indicated before, during the life of marriage, all income derived by personal

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<sup>93</sup> The RFC, Art. 62(1).

<sup>94</sup> Bekele Haile Selassie, *Settlement of Matrimonial Disputes in Case of Divorce: A Case Comment on Civil Appeal No. 2133/78*, *Journal of Ethiopian Law* Vol. 18 (1982), p. 86. See also Silashi Bedasie, *Determination of Personal and Common Property During Dissolution of Marriage under Ethiopian Law: An Over view of the Law and Practice*, *Oromia Law Journal*, Vol. 2, No. 2 (2013), pp. 159 and 163.

efforts of the spouses and from their common or personal property is regarded as common property.<sup>95</sup>

According to this legal principle, even incomes received from the “personal property”<sup>96</sup> of each spouse which is administered and kept separate from the common property falls within the ambit of matrimonial common property. Furthermore, a personal property acquired by an onerous title, the act of donation or will, property donated or bequeathed conjointly to the spouses’ during marriage become common property unless otherwise declared personal or stipulated.<sup>97</sup> Thus, no property acquired in manners indicated above may be described as personal property unless it is unequivocally designated as personal in the eyes of the law or any court proceeding only upon proof.

The second legal tent involves the principle of legal presumption as to the existence of common property. The RFC declare that, “all property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he is the sole owner thereof.”<sup>98</sup> The words “all property” is generic and hence includes all movable and immovables, no matter how and when they are acquired, falling within the scope of the legal presumption – matrimonial common property.<sup>99</sup> However,

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<sup>95</sup> Id. Art. 62(2).

<sup>96</sup> Id. Art. 58(1); personal property may refers to a property acquired before the celebration of the marriage but which is provided on the contract of marriage or proved to be personal property in case of disputes by one of the spouses or a property acquired by onerous title after the marriage has been made by exchange for property owned personally, or with money owned personally or derived from the sale of property owned personally.

<sup>97</sup> Id. Art. 57 cum. 62(2)(3).

<sup>98</sup> Id. Art. 63(1).

<sup>99</sup> Bekele, *Supra note p.94*. For more detailed discussions see Silashi, *supra* note 94 at pp.144-164. But, it should be noted that the discussions of this two articles relates to the conventional

this legal principle is rebuttable in which case the burden of proof as to the existence of personal property lies on the party who alleges the fact. So, any spouse in a marriage who alleges the existence of common property must not be called upon to adduce evidence in support of her/his affirmation. According to Bekele, the significance of the cardinal principle of legal presumption of common property in the Family Code should not be underestimated since it serves a point of departure in the adjudication of all disputes of proprietary nature arising from the termination of marriage that ensue the division of matrimonial estate.<sup>100</sup> He further argue that the presumption must be given full legal application and the court need not look for evidence in favour of common property as it is legally required to take judicial notice. Obviously, the complete observance of the presumption of matrimonial common property is particularly crucial when doubts exist as to the personal nature of a given property in dispute. Therefore, the benefit of doubt must go to the spouse who affirms common property which of course is justified since it serves as a safe haven to the matrimonial interests of each spouses on equal terms.

#### B. Principles Applicable to Division of Common Property in Bigamous Marriage

As indicated above, the general principles applicable to common property per the conventional family law is utterly designed to govern marital property in monogamous marriage. So, having the cardinal principles indicated above in mind, the rule is simply to change the game in situations of plural marriage. Suppose a married couple in monogamous marriage where the husband after

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family law principles and do not delve into the specific nature of common property divisions in bigamous marriages.

<sup>100</sup>See *Ibid.* at Bekele.

some years was married to other woman. As indicated above, the husband and the second co-wife were engaged in the criminal practice of bigamy. Now, after the second marriage, husband would have two spouses but the first and second co-wives would each have only one. In such plural marriage what legal regime or principle regulates the division of common property in case where either the first marriage or the bigamous marriage is dissolved as per the law governing dissolution or divorce of marriage previously contemplated? After the husband, who is already married, marries the second spouse, is there now a single common property regime, including all three of them? Or are there multiple common property regimes – one pertaining to the first monogamous marriage and the other pertaining to the second bigamous marriage? Is the husband part of the common property regime with more than two spouses as a unison or part of multiple but separately dyadic common property regime?

It is very crucial to determine how many common and personal property regimes have been created in order to characterize the property of married persons correctly. Therefore, it goes without saying that the number of common property regimes has a repercussion on the principles of division that will apply when one of the marriage ends and the other continues, making the structure of the marriage a very important decision that the court should need to make when confronted with such problem. Accordingly, it is important to analyze some principles governing the division of property in case where each marriage noted above opted either for single common property regime or multiple common property regime model and the challenges associated with it.

In a single common property regime, all incomes or earnings of spouses in bigamous marriage would simply be added to the common estate without distinction between the spouses and without regard to the priority of order of time.<sup>101</sup> It is argued that this approach may be more appropriate and better reflect the expectations, intentions and behaviours of the parties in two cases. First, for marriages concluded simultaneously or very close together in time.<sup>102</sup> Second, for marriages in which every spouse live together as group members thinking of themselves as one family and all earnings are pooled together without making separate distinction.<sup>103</sup>

On the other hand, multiple common property regimes refer to the existence of different common property regime depending on their order in time.<sup>104</sup> This form of common property regime is argued to be more crucial since “analyzing each marriage as creating a new common property regime is simpler than regarding plural marriages as creating an ever-larger common property regime with a variable number of members.”<sup>105</sup> In support of this assertion, there exists a growing authority in the literature that pushes both monogamous and bigamous marriages as “variant forms of the same genus and they each create the status of husband and wife.”<sup>106</sup> For instance, it has been authored that, polygamy in reality is not so much a form of marriage fundamentally distinct from monogamy. It rather represents multiple

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<sup>101</sup> Diane J. Klein, *Plural Marriage and Community Property Law*, Golden Gate University Law Review, Vol. 41, (2010), p. 61

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Id.* p.59.

<sup>105</sup> *Ibid.*

<sup>106</sup> See *Encyclopedia Britannica*, Vol. 14, p. 949.

monogamies. According to this authority, bigamous marriage is in fact the repetition of a marriage contract, entered into individually with each wife, establishing an individual relationship between the man and each of his consorts.<sup>107</sup>

The multiplicity of monogamous marriage in bigamous marriage also in turn implies the multiplicity of common property regimes. Accordingly, distinct common property regimes would be created depending on the order of time within which such properties were acquired. However, how are we to determine the contribution of husband to the new common property regime in circumstance where the spouse's labor already belongs, in its entirety, to the first common property regime of the first marriage? In other words, how much of husband's marital earning or income go to the first common property in the first marriage and how much to the second common property regime of the second bigamous marriage? By analogizing common property principle applicable to monogamous marriage under the RFC to the situation of multiple marriages, common property regime in each case is divided equally between the spouses without prejudice to the provisions of the law and agreement entered into by the spouses.<sup>108</sup> But, to apply this legal analogy and to ensure fairness to all the spouses concerned, each common property regimes in the bigamous marriage should be separately administered and the earnings likewise should be separately accounted under the contract of each marriage.

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<sup>107</sup> Ibid. See also Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, And Bargaining For Equality*, *Columbia Law Review*, Vol. 110, (2010), p. 1955 Citing Gary S. Becker, *A Treatise on the Family* (ed. 1991), pp. 80–107 and Richard A. Posner, *Sex and Reason* (1992), pp. 253–60.

<sup>108</sup> The RFC, Art. 90.

In addition, it is also indicated that the subsequent women spouses of the bigamous marriage depends on the wealth of the polygamist husband requiring the determination of whether half of the common property acquired before each subsequent marriage to become part of such each subsequent marriage. Therefore, the application of the principles of common property under the RFC and other regional family laws of Ethiopia to bigamous marriage a don not only depends on the existence of separate contract of marriage, but also depends on the determination of whether the fractional share of the husband should constitute part of the second and subsequent separate common property regimes or remain part of the personal property of the polygamist husband.<sup>109</sup>

But, the big trouble in the accounting of common property regime in bigamous marriage is where a prenuptial agreement that regulates separate common property regime is absent. In such situations, it becomes difficult to identify whether the disputed common property falls in the matrimonial estate of the first marriage or subsequent bigamous marriages. Thus, this state of conditions creates a default scenario in which all marital earnings of all the spouses boils down to an entire single common property regime irrespective of the accounting of the order of time within which the property has been acquired. As noted above, the principle behind existing monogamous property division rules is that dissolution of marriage that ends common property regime requires the distribution of that common property to the former spouses in *pro rata*. So, it wouldn't be difficult to extend this principle in case where the

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<sup>109</sup> As already noted, this principle assumes that intention of the husband to sustain and support his second wife without which the second marriage would be in jeopardy.



numbers of spouses that are part of the single community property regime are multiplied subsequently.

Accordingly, dissolution of bigamous marriage that spells the end of a default single common property regime in which three spouses were present, end up in the distribution into three equal shares.<sup>110</sup> This kind of accounting considerably avoids unfairness of property division to all spouses after the first marriage. But, it is not fair to the first wife, as the subsequent marriages diminish any prior common property share of the preceding marriage. In other words, the first wife and the subsequent wives according to the order in time during which they laboured a wealth contributed to the common property become less advantageous because a fractional share of the first common property will be transmuted into the second and subsequent common property regimes. For instance, if the husband is the bread winner of the first family, his incomes or earnings are going to be allocated to the subsequent marriages which become part of the second and subsequent single common property regime in which all spouses are expected to share.

However, one has to closely look the purposes of legal principles governing common property regime in monogamous marriage to forward an alternative arguments that tries to alleviate the problems of property division in bigamous single common property regime of this type. First, in the absence of written agreements that regulates multiple common property regimes, no matter how it affects the property interests of prior wives, the social policy that should be

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<sup>110</sup> This method of accounting matrimonial property is engaging particularly in dividing rural landholding as in most cases the title of the land is registered in the name of the husband and that every spouse has no better right to the land than the other as ownership of land belongs to the state and people of Ethiopia.

attained by the law is to ensure that the benefit of doubts must go to the spouses who asserts single common property regime, which as noted before, is a measure that safeguards the proprietary interests of all spouses on equal basis. Thus, the cardinal legal principle of presuming common property in the context of monogamous marriage once again could be contemplated in bigamous marriage on similar legal reasoning. One may find that pursuing this approach is practical to the present situation of Ethiopia in which contract of marriage that regulates the pecuniary effects of monogamous marriage is not accustomed and where the economic life of the incoming bigamous women spouses depends on the viability of such common property.<sup>111</sup>

The second alternative solution could be providing an opportunity for a woman spouse who is aggrieved by the unfairness of the marital single common property division to show that the property under dispute is acquired prior to the celebration of the subsequent marriages with her husband. As indicated in the first alternative approach, the presumption is still single common property regime in bigamous marriage but, this time, with the rebuttal right of the woman spouses in the prior marriages. At this juncture, one may ask why this principle is not equally worth mentioning to the husband concerned. It could be strongly argued that by contracting second and subsequent illegal bigamous marriages, the husband has risked his property interest which he willfully ventured to sustain his second and subsequent illegal marriages. Therefore, denying him the opportunity to adduce evidence to prove common property acquired during the first marriage strikes the

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<sup>111</sup> In rural area, this fact also holds true even to certificate of marriage where most spouses rely on procession of civil status to proof the existence of marriage.

balance between the discriminatory nature of bigamous marriage,<sup>112</sup> and reduce the effects of such property division on the life journey and stakeholders of the subsequent marriages. This approach combines the previous two regimes of common property and hence vital to ensure fairness to the first monogamous wife by safeguarding against the abuse of her husband while at the same time maintains the economic viability of the subsequent wives who depend on him.

Generally, in the absence of separate contract of marriage regulating multiple common property regimes of the bigamous marriage, the principle governing single common property regime indicated above could be validly invoked. But, in case where women spouses are succeeded in proving the existence of distinct common property regime both individually or in group that is acquired before any subsequent marriage, the division of such marital property could be accounted on that separate basis. The share of a dissolving woman spouse may be calculated simply based on the proved common property regime acquired before the subsequent marriage with the husband plus the fractional share of the property acquired during the subsequent marriage generally earned by all the spouses. For instance, if the first wife dissolves her marriage after some time her husband is married to the second co-wife, the division of the ascertained common property of the first wife becomes half plus one-third of the additional fraction of the common property acquired during the second marriage during which the life span of the first marriage has persisted. In the

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<sup>112</sup> If the right of the husband to marry other women is recognized despite its negative effect on the right of the first woman spouse, there is no wrong in recognizing the illegality of the husband who tries to benefit from such illegality, expressed in waiver of right to adduce evidence on equal footing. This point is better appreciated by reversing the scenario: take simply a woman in polyandry.

same vein, if the second wife dissolves her bigamous marriage ending distinct common property regime, she also deserves half of such property plus one-third fractional share of the property earned by all spouses during the life of the second marriage. On the other hand, a situation in which group of women spouses may proof the existence of distinct but single common property regime acquired before the celebration of the subsequent bigamous marriage. In the same fashion, if someone dissolves a marriage that ends such single common property regime, the calculation becomes the fractional share of the property that is divided by the number of spouses plus any additional fractional share earned by all spouses in common during the subsequent marriage.

Hence, in the presence of evidence and contractual arrangements, this rule creates a condition in which the *pro rata* shares of the women spouses would be treated as their “personal property” acquired before the husband entered into the subsequent marriages.<sup>113</sup> Accordingly, in case where fractional share of such “personal property” of one of the women spouse is transmuted to the subsequent common property regime, the principle of re-taking personal property under the RFC could be consulted.<sup>114</sup> This rule clearly stipulates the possibility of withdrawing personal property, money or things of value corresponding to such price that has been alienated or fallen in the common property provided that one of the spouses has succeed in proving such allegation. At this juncture, it has to be noted that though marriage

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<sup>113</sup> This idea simply extends the logic of the legal principle under monogamous marriage that dictates the separate treatment of the personal property acquired by each intending spouses before the conclusion of marriage.

<sup>114</sup> The RFC, Art. 86.

presumptively requires distribution of common property on equally terms, the shares of spouses may be also accounted in proportion to their contribution in case where the personal property of one of the spouses thereof has fallen in the common property. Hence, the burden of proof would be on each spouse to prove that either of the spouses contributed from their personal property (but not from the income derived from such property) more than the other and deserve greater proportion compared to the other partner.<sup>115</sup> In the same token, the family code also provides spouses with the right to claim indemnity if one of the spouses proves that the personal property of the other spouse or of the common property has been enriched to the prejudice of the others personal property.<sup>116</sup>

Generally, two important cautions should be made at all times while bothering for the division of common property as analyzed so far. First, it should be noted that all incomes derived from each and every personal property including earnings acquired by the personal efforts of all spouses' falls within the scope of common property that emerges into an entire single common property regime of the bigamous marriage absent contractual arrangements. Second, the departure of one spouse or two spouses at the same time or at different times does not warrant a separate property award to the other remaining spouses. Therefore, while the dissolving spouse takes the fractional share from the single common property regime, the remaining property continues to be the common estate of the remaining spouses until the day dissolution makes them apart. Having the above legal principles in mind, the

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<sup>115</sup> RFC, Art. 86(3).

<sup>116</sup> RFC, Art. 88.

following section further recapitulates how Federal Cassation approaches these issues in practice.

## 5. THE JURISPRUDENCE OF THE FEDERAL SUPREME COURT CASSATION

The FSCC holds the view that bigamous marriage is a multiplication of monogamous marriage in which women spouses are capable of establishing multiple common property estate during respective marriages.<sup>117</sup> One of the landmark decisions crystallizing this legal interpretation is in the case of *Aminat Ali v. Fatuma Wubet* indicated before. In this case, the FSCC recognized the problem of legal lacuna regarding matrimonial property division in such bigamous marriage but it, however, capitulated the existence of clear legal provisions in both RFC (Art. 86.1) and regional family codes that could be analogized to this situation.<sup>118</sup> The FSCC reasoned that the principles governing the common property under the RFC and other regional Family Codes, though adapted to regulate monogamous marriage, could “*for stronger reasons*” and “*by the operation of the law*”, be applicable to marriages in which two or more wives exist.<sup>119</sup>

Accordingly, it is decided that each wife shall have equal right to divide the property acquired with their own husband during the life of each marriage. Based on the legal presumption of equal division of common property noted before, the FSCC decided that a property acquired during the first marriage

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<sup>117</sup> *Aminat Ali v. Fatuma Wubet, Supra note 71.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

should be equally divided (50 percent each) between the first wife, Fatuma Wubet and her husband, Mehammad Hussein as forming part of the distinct common property regime.<sup>120</sup> In the same fashion, the FSCC also reasoned out that, the property acquired during the second marriage between the personal or common efforts of the second wife, Aminat Ali and her husband, Mehammad Hussein is decided to be equally divided (50 percent each) between the two spouses.<sup>121</sup> However, on top of establishing the multiplicity of common property regime, the FSCC decided that both Fatuma and Aminat has the right to fractional share from the property acquired by the personal efforts of their husband, Mehammad Hussein, during the first and second marriages respectively.<sup>122</sup> Accordingly, Mehammad Hussein and Fatuma shall equally divide the common property acquired during the first marriage and the fractional share (50 percent) of Mehammad Hussein from the first marriage goes to Aminat Ali (25 percent each) while Fatuma shall also equally divide the 50 percent fractional share of Mehammad Hussein from the second marriage after equally divided between Mehammad Hussein and Aminat Ali.<sup>123</sup>

The analysis of the FSCC in short projects from the spectrum of Mehammad Hussein as a center of all the marriages. The calculation is accounted from the point in which each wives share a distinct common property acquired with

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<sup>120</sup> Ibid.

<sup>121</sup> Ibid. The court however noted that as the second marriage between Aminat Ali and Mehammad Hussein is not dissolved it does not imply that such common property should be divided during the pendency of marriage.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

their husband, Mehammad Hussein, irrespective of the order of time during which the marriage is concluded and the property is earned. It is in this context that the FSCC permitted Aminat Ali to equally share half of Mehammad Hussein's fractional share of the common property acquired from the first marriage for reasons not provided in the judgment. As noted before, a fractional share of Mehammad Hussein from the first marriage constitutes a personal property acquired before the second bigamous marriage concluded with Aminat Ali. On the other hand, Fatuma Wubet has the right to fractional share from the second bigamous marriage since her marriage obviously co-exists until it is dissolved by divorce. In this particular case, the interpretation of the FSCC is cogent since the earnings of Mehammad Hussein during the second marriage constitute an earnings acquired by the personal efforts during the life of the first marriage forming also part of the common property regime of the first marriage. In the same logic, unless other parameter is used, there is no legal ground in which the property acquired by the personal efforts of Mehammad Hussein before the second marriage becomes the common property of the second bigamous marriage.

The pertinent issue overlooked by the FSCC was, therefore, whether it would be fair to equally divide half of the property acquired by the personal efforts of Mohammad Hussein during the first marriage to the second wife, Aminat Ali? As indicated before, it is a clearly established legal principle under the conventional Family law that a property acquired by the personal efforts of an intending spouse before marriage remains the private property of the spouses after marriage with the onus of proof to that effect. Of course, in the absence



of proof, the second and subsequent wives are more advantageous than the husband and the first wife as revealed by the decision of the FSCC in which Aminat Ali ripe 75 percent (25 plus 50) of the two common property division compared to the time order and contributions of Fatuma and Mehammad Hussein. As noted before, the decision made by the FSCC could be justified in so far as Mehammad Hussein is concerned since he consented to contract bigamous marriage thereby risking his own personal interest that otherwise would have become a sole personal property. But, as indicated before, it is possible to divide the second common property regime as it generally forms a single community property regime acquired during the life of Aminat's bigamous marriage in which Fatuma's marriage co-existed.

The writer shares the reasoning of the FSCC regarding the division of the fractional share of Mehammad Hussein acquired from the first common property to Aminat Ali since it sends a clear message to potentially polygamist husbands to take a good lesson. Accordingly, the calculation of the FSCC division in the case at hand somehow would be reshuffled in a more favourable way to the first monogamous wife and treat the bigamist husband equally with the bigamist wife. Thus, by applying the formula indicated above, the common property division should have been as follows. While Fatuma Wubet ripe half of the common property from the first marriage, she also deserve one-third (not one-fourth as the FSCC allocates) fractional share from the second marriage since the common property acquired with the efforts of her husband during the second marriage co-existed with the first marriage, forming part of the single common property regime. Likewise, while Aminat

Ali “deserves” one-fourth fractional share from the common property regime of the first marriage as it is acquired by the personal effort of her husband (in the same way allocated the FSCC) she however only deserves one-third (not half as the FSCC allocates) equal share from the common property acquired during the second marriage as it forms part of a single common property regime of the bigamous marriage. Thus, the share of Mehammad Hussein equals the share of Aminat Ali – which is one-fourth plus one-third.

The second landmark FSCC decision regarding bigamous matrimonial property dispute is the case of *Kedija Siraj v. Zeinaba Khalifa*.<sup>124</sup> Kedija Siraj married to Hadji Mehammad in 1984 Ethiopian Calendar (EC). While the first marriage is in force, Zeinaba Khalifa concluded a bigamous marriage with Hadji Mehammad in 1987 EC. However, due to the dissolution of the bigamous marriage between Kedija Siraj and Hadji Mehammad Halis, Zeinaba interfered in the dispute regarding the division of the house claiming that she deserves a share in the house built by her husband, Hadji Mehammad and Kedija Siraj. The lower court decided in favour of the second bigamous marriage arguing that Kedija Siraj failed to prove that she contributed to the house which was allegedly built by Kedija Siraj and Hadji Mehammad Halis. After the exhaustion of lower courts through appeal and Regional Cassation, Zeinaba petitioned to the FSCC for *basic error of law* over the division of a house acquired during the bigamous marriage between Kedija Siraj and Hadji Mehammad Halis arguing that she has the rights to share from the property earned by the personal efforts of her husband during the life of her marriage.

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<sup>124</sup> Zeinaba Khalifa v. Kedija Siraj, Federal Supreme Court, Civ. Cassation. No 50489, Division, (Published Federal Court Cassation Decisions, Vol. 11, 2004).

The FSCC by citing article 62(1) of the RFC reasoned out that, despite any contrary proof as to the existence or no-existence Zeinaba's contribution to the common property estate of the bigamous marriage, she is entitled to half of Hadji Mehammad's fractional share since it is acquired by his personal efforts during the life of the first marriage.<sup>125</sup> As noted before, article 62(1) of the RFC is designed to regulate all incomes derived by the personal efforts of the spouses and from their common or personal property during marriage to be considered as a common property. Accordingly, as long as the first marriage of Zeinaba and Hadji Mohammad co-existed with the bigamous marriage of Kedija, the property acquired by the personal efforts of Hadji Mohammad in the meantime constitutes an income of spouses acquired during the life of the first marriage thereby forming part of the common property. However, in order to ensure fairness to the three spouses as clearly indicated before, the FSCC should have applied the principle of single common property regime since the property acquired during the second marriage belongs to spouses in common earned during the co-existence of the two marriages. Pursuing this track of interpretation, Kedija should have been entitled to one-third of the share but not half of the share in the house as decided by the FSCC. This approach provides an opportunity for spouse to the share of the property acquired during the life of marriage without the need to require the spouses to prove contribution to the common property. Of course, it goes without saying that first wife shares half of her husband's fractional share from the house

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<sup>125</sup> Ibid.

acquired during the second marriage so long as such property was earned by the “personal efforts” during the subsistence of the first marriage.

Eventually, an exemplary decision crystallized by the FSCC in the case that complement the complex situation of property division in bigamous marriage is the reasoning that provides the opportunity to reclaim property that was allegedly unlawfully enriched by the other spouses resulting in the *inappropriate lose of the effects of one’s own labour*.<sup>126</sup> The FSCC held the view that in such state of affairs, a spouse who is able to proof an *exceptional contribution directly to the estate may claim a better right to the property during division* in such a way to accomplish the overall purpose for which the family law has been designed.<sup>127</sup> So, again the forum to re-take one’s own product of labour is open for the just and equitable dispensation of matrimonial property. However, this writer has the opinion that the jurisprudence of the FSCC that spouses who would proof exceptional contribution to the matrimonial estate may exercise a *better right* should have to take the legal principle that considers all incomes derived by personal efforts and personal property of one of the spouses as the common property and the legal presumption that accompany it.

## 6. CONCLUDING REMARKS

The introduction part of this article posed research questions to which the forgoing discussion targeted to provide analytical answers. The first of those

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<sup>126</sup> Aminat Ali v. Fatuma Wubet, *Supra note 71*.

<sup>127</sup> Ibid.

questions was: what will happen to the effects of a bigamous marriage where its practice is criminalized and its recognition denied on what so ever grounds? As is obvious from the preceding discussion, in such self-denying legal trajectory, woman cannot seek relief that resulted from the effects of such illegal marriage. Therefore, if a marriage of a woman happens to be bigamous, she will, in the eyes of the law, end up discriminated for the mere fact that such institution happens to be outlawed. If one general conclusion were to be drawn, it would be a clear discrimination between women in bigamous marriage and women in monogamous marriage. Thus, women who for different social, cultural, religious and economic reason contracted a bigamous marriage will ultimately face double discrimination – that she is unequally treated with her husband due to the discriminative nature of polygamy *per se* and that she would again unequally treated with the other women who contracted monogamous marriage by the mere fact that her marriage happens to be bigamous.

However, this article provides an alternative legal regime to which the eye and ears of our judicial system is yet unturned. Even if bigamous marriage is criminalized and recognition for the purpose of relief is still denied under the conventional family law, it is still legally possible to resort to the general principles of Ethiopian contract law to govern the legal effects of illegal or [immoral] bigamous marriage. The resort to general contract law principles in case of family law lacuna have been already crystallized in the binding legal interpretations passed by the FSCC. The contract of bigamous marriage can be “dissolved or annulled” on the ground of its illegality under both family and criminal law but can still produce legal effects under the ordinary contract law

being invalidated on the ground of its illegality or immorality. By resorting to general contract principles, we can still uphold the rubric of family and criminal law as a designation to regulate only monogamous marriage but still being fair to the claim and plights of bigamous spouses in bigamous marriage through the application of ordinary contract principles.

The second question addressed in this article was: what additional steps are contemplated to fully regulate the effects of bigamous marriage in case where polygamy is criminalized but yet recognition is imposed for the purpose of granting relief? As revealed by the analysis of this article, even if polygamy is decriminalized, the current conventional family laws are futile to fully regulate the effects of bigamous marriage. Let alone the RFC and other state Family Codes, even the Harari Family Code that excepted religious bigamous marriage is designed to regulate the pecuniary effects only where one man is married to one woman. The landmark decision made by the FSCC crystallized the fountain of justice by expressly recognizing the effects of bigamous marriage in the absence of clear legal regime.

In this regard, the conventional family law of Ethiopia regulating the division of common property in monogamous marriage was critically analyzed. The finding of the legal and court case analysis indicates that Ethiopian courts may seek to address the puzzle of property division in *de facto* bigamous marriage if the legal principles enshrined under the conventional family law are properly sought. As indicated in this paper, the principles of common property designed to govern dyadic marriage can be logically extended to apply to the situations of bigamous marriage. The conception that polygamy is a

multiplicity of monogamous marriage has gained acceptance by FSCC when it decided the division of common property acquired during the first marriage between the husband and the first wife on the one hand and the common property acquired during the second marriage between the same husband and the second wife on the other hand.

However, the puzzle encountered by the FSCC in the cases analyzed is that it failed to scrutinize the repercussion of treating the property acquired during the second marriage as creating single common property regime in which all spouses' together labour to enrich the common property belonging to three partners. There is the possibility in which the property acquired during the first marriage could be transferred to the second marriage without properly accounting for it. In such situation, justice will be jeopardized unless the re-classification of the common property of the first marriage is properly accounted for.

Generally, the article attempted to picture two situations in which common property would be divided between the spouses in bigamous marriage. The first situation relates to a multiple common property regimes in which a bigamous marriage forms a multiplicity of monogamous marriages. According to this model, each marriages forming the bigamous union constitutes separate common property regime separately regulated and administered based on separate contract of marriages. But, the problem with this multiple common property regimes is that it does not account for the personal efforts of the husband that legally forms part of the common property of all marriages during their co-existence.

The second situation is a single common property regime in which a bigamous marriage forms the sum total of all marriages during which common property is acquired. This model of common property regime is workable where a separate contract of marriage to regulate each common property acquired during the life of multiple marriages is absent. Particularly, in rural Ethiopia, bigamous marriage is characterized by a situation in which every bigamous spouse lives together and the members think of themselves as one family, and all earnings are pooled together. The legal principle that “all earnings derived from the personal efforts of all spouses and from their personal and common property should be considered as the common property of the spouses” is more practicable in single common property model of the bigamous marriage. This model is particularly more effective and fair to all spouses concerned since it is very easy to divide the single common property regimes acquired after the first marriage on equal fractional shares given the economic dependence of bigamous women spouses on the wealth of the “common” husband. Therefore, like equal division of common property in monogamous marriage, the same principle dictates the equal division of common property in bigamous marriage where more than two spouses are present. However, in case the first monogamous wife succeeds in proof of a separate common property regime before the subsequent marriages, she must be entitled to half of such property plus an equal fractional share from the common property acquired during the subsequent marriages during which her first marriage has co-existed. This is important to protect the rights of first legal wife from transmutation of her fractional share of the common property acquired during the first marriage to the property of the bigamous marriage. Thus, after the division of common



property of the first monogamous marriage, the working formula changes from  $\frac{1}{2}$  to  $\frac{1}{n}$ , where  $n$  represent the number of spouses in the bigamous union.

It is hoped that the foregoing analysis, while not necessarily definitive on the question of how best to accommodate the dissolution of bigamous marriage and the division of common property in the context of Ethiopia, it certainly made it clear that it is possible to do so in harmony with the principles that guide current Ethiopian contract and conventional family law if the legal principles are carefully weighed and properly accounted for. But, given the 11 percent of women living in bigamous union, the interpretations of the FSCC in favour property division in bigamous marriages is both a demanding and necessary judicial task despite some flaws of the decisions to effectively address the complexities of bigamous matrimonial property division in Ethiopia. It is submitted that the legislator should be equally sympathetic to the lived reality of women in bigamous marriage and should strive to enact the legal framework that is fully committed to regulate the situation of such women. Law as “the reflection of societal values, custom and norms” ought to address the social reality across a given time and space. If the legislator fears the official legal recognition of bigamous marriage, a legislation that regulates the effects of bigamous marriage should be enacted in order to avoid violations of rights in which the vulnerability of women spouse is high.