

THE SHARE OF WOMEN DURING SUCCESSION UNDER STATE LAWS AND SHARIA LAW: COMPARATIVE STUDY

Mohammed Ibrahim*

ABSTRACT

The Federal Democratic Republic of Ethiopian Constitution recognizes equality of gender and prohibits all forms of discrimination against women. Equality of share on inheritance is one of the mechanisms through which the equality of two genders is recognized under the Constitution. At the same time, the Constitution recognizes 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. However, Sharia Courts which are established pursuant to this recognition and apply substantive Sharia laws (succession laws) allow women to inherit half of men which is totally distinctive from equality clause recognized under the Constitution. Since legal pluralism that is recognized in this manner presupposes the acceptance of overlapping rule or potential difference between multiplicities of legal orders, according to the author, decisions rendered by Sharia courts (that apply Islamic succession law) should not be expected to meet standards of the Constitution as long as the procedural requirements to institute a case before Sharia courts (which require the consent of the litigating parties to be adjudicated in a Sharia court) are fulfilled. It is also better if the share given to women under Islamic succession law is considered from the perspectives of the reason that justifies it and not from the perspectives of constitutional order.

Key words: *Sharia Law, State Law, Sharia Court, State Succession Law, Sharia Succession Law*

1. INTRODUCTION

The Federal Democratic Republic of Ethiopia's Constitution¹ (here in after cited as the FDRE Constitution) provides the framework for the independent

* LL.B (Mekelle University), LL.M (Jimma University), Lecturer at the Law School of Ambo University, Ethiopia; Email address: ibshi66@yahoo.com.

validity of non-state or unofficial laws such as customary and religious laws in some fields of social activity.² It provides that: "*This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious and customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.*"³ The same constitution also stipulates that: "*pursuant to sub-article 5 of Article 34 the House of Peoples' Representative and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.*"⁴

It is based on this constitutional framework that Sharia Courts that deal with some personal disputes have been established. To date, Sharia Courts that apply Islamic law are the only religious courts that have been officially established both at the federal and state levels. Sharia Courts apply only Islamic law.

In Ethiopia, the jurisdiction of Sharia courts is drawn from the Constitution and Federal Courts of Sharia Consolidation Proclamation⁵ that was promulgated pursuant to the above Articles of the FDRE Constitution. The FDRE Constitution does not directly determine the specific jurisdiction granted to Sharia courts, but rather recognizes the possibility of settlement of personal disputes by customary and religious systems. It does not define the personal matters amenable to the jurisdiction of such systems. However, the Constitution provides the general areas of competence (i.e., personal matters) and the condition attached (i.e., consent of parties) to the exercise of jurisdiction by Sharia courts. The specific types of cases falling within the competence of Sharia courts are defined under the Federal Courts of Sharia Consolidation Proclamation.⁶

¹Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, *Federal Negarit Gazeta*, 1st Year No.1, Addis Ababa - 21st August, 1995.

²FDRE Constitution, Art.34.

³FDRE Constitution, Art.34 (5).

⁴FDRE Constitution, Art.78 (5).

⁵Federal Courts of Sharia Consolidation Proc. No.188/1999, *Negarit Gazeta*, 6th Year No. 10, Addis Ababa – 7th December, 1999.

⁶*Ibid.*

The proclamation provides that the court has the jurisdiction on *any question regarding Wakf, gift/Hiba/, succession of wills; provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.*⁷ Following, the proclamation stipulates that *the courts shall have jurisdiction over the aforementioned matters only where, pursuant to the provisions of Article 34 sub-article (5) of the Constitution, the parties thereof have expressly consented to be adjudicated under Islamic law.*⁸ According to this provision, Sharia courts can entertain issues related to succession by applying Islamic law provided that parties are interested to litigate their cases before these courts.

In Ethiopia, historically the settlement of personal and family matters has been based on each community's religions and customary norms. Personal and family affairs are intrinsically tied to the preservation of one's culture and identity. That is why the government moves to recognize the Sharia courts to adjudicate in this area. Adjudicating personal and family matters by religious and customary norms involves sensitivity and for this reason it is taken as an indicator to the right to be governed by one's own religious law and enjoyment to the freedom of religion. This is the case, especially in area where family and personal matters are entertained through religious and customary rules since the time immemorial. Hence, the establishment of Sharia courts in Ethiopia has enormous significance particularly in areas where Islam has a stronghold and the communities are religious or cultural. Its establishment is also very important in terms of the population size of Muslim community it serves throughout the country and the court congestion it reduces in regular court.

As it is known, state laws have recognized absolute equality of share on succession between men and women.⁹ Contrary to this, women in Islamic law are allowed to inherit a half of the men's share most of the time. This makes many people in Ethiopia to think Sharia succession law as unjust to women. They believe that succession law of Sharia does not recognize

⁷ Federal Courts of Sharia Consolidation Proc. No.188/1999, Art. 4(1)(b).

⁸ Federal Courts of Sharia Consolidation Proc. No.188/1999,Art.4(2).

⁹ FDRE Constitution, Art.35(7) and Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Arts. 836,837 and 842.

gender equality. This leads not only the followers of other religion but also the followers of this religion into confusion and results in disobedience among the followers. According to the author, that is why most of Ethiopian Muslims, specially the females may prefer to litigate through state regular court seeking absolute equality of share with men. For the author such kind of attitude towards Islamic law is without merit. It emanates from lack of knowledge on what legal pluralism presupposes and true sense of Islamic laws. In order to avoid such kind of attitude, the role of state, media, school of laws, and scholars are very vital.

This article comparatively tries to examine the share of women during succession under Islamic and state laws. The discussion is based only on the analysis of the relevant legal provisions related to the share of women during inheritance under Islamic and State laws with a view to draw a conclusion. It does not concern with actual problem that can be seen on the ground. Structurally, the article is divided into six parts. Following this introductory part, part two tries to discuss the equality of men and women in general under international and state laws. Part three tries to describe the share of women during inheritance both under Sharia and state laws. Part four describes about the concept of pluralism under the FDRE constitution. It also measures the constitutionality of women's share on succession under Islamic law in line with the principle enshrined under the FDRE constitution, that is, equality of women's share on succession. Part five tries to describe the reason why women are made to inherit half of men's share under Sharia law in conjunction with State laws. Finally, part six provides conclusions and recommendations.

2. EQUALITY OF MEN AND WOMEN UNDER INTERNATIONAL INSTRUMENTS AND NATIONAL LAWS

The equality of men and women is an issue that was debatable for a long period of time. Now, internationally ratified treaties recognize absolute equality between men and women. Some of these treaties are International Covenant on Civil and Political Right, The International Covenant on Economic, Social and Cultural Right, The Convention of Elimination of All Forms of Discrimination against Women, and Convention of Right of Children's. Ethiopia is the signatory of these treaties. The treaties recognize

the equality of men and women in all matters and prohibit any form of discrimination between the two sex.¹⁰

For example, International Covenant on Elimination of All Form of Discrimination against Women (UN, CEDAW, 1979) defines discrimination which made against women based on sex as:

“.....any discrimination, exclusion or restriction made on the bases of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on bases of equality of men and women, of human right andin economic, social, cultural, civil or any other field.”¹¹

International Convention on Civil and Political Rights (ICCPR, 1966) also defines discrimination against women based on sex as:

“Any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all right and freedom.”¹²

Equality that is conferred in this manner is based on the assertion that all human beings are born free and equal in dignity and right.¹³ This again presupposes the right and responsibility of men and women as equal and same.

¹⁰Anglophone Africa, Women of the World: Law and Policies Affecting their Reproductivities (1997), Pp.16-17.

¹¹International Covenant on Elimination of All Forms of Discrimination against Women, Adopted by General Assembly (CEDAW), 16 December 1979, Art.1.

¹²International Convention on Civil and Political Rights (ICCPR,Commentary,1966), Art.26.

¹³ Universal Declaration of Human Right (UDHR), (1948),Art.1.

According to the FDRE Constitution, all international agreements ratified by Ethiopia have the status of national law.¹⁴ Furthermore, the Constitution obliges the interpretation of fundamental rights and freedoms stated under chapter three in a manner conforming to universal declaration of human right, international human right covenant and other relevant international instrument which Ethiopia has ratified.¹⁵ For this reason, the equality of men and women without any discrimination based on sex is made fundamental right and freedom under chapter three of the FDRE Constitution.

The Constitution guarantees equality before the law and equal protection of the law. Accordingly, it states that all persons are equal before the law and are entitled without discrimination to equal protection of the law.¹⁶ The provision stipulates that “*the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.*”¹⁷ To ensure that other laws are compatible with the constitutional provisions on equality, some laws, including the 1960 Civil Code provisions on family law and the 1957 Penal Code were revised in 2000 and 2004 respectively.

Under the FDRE Constitution, one article is totally devoted to list the specific rights of women and titled as ‘*Rights of Women*’.¹⁸ This article reiterates the right to equality of men and women in the enjoyment of rights and the protection provided for by the Constitution.¹⁹ The provision also states the equal rights of women and men in marriage, employment, and property ownership and administration.²⁰ Moreover, the provision prohibits laws, customs, practices that oppress or cause harm to women and it champions affirmative action for women to rectify the inequality between men and women in the political, social and economic realms.²¹ Under its Art.91(1), the Constitution also promised to support the growth and

¹⁴ The FDRE Constitution, Art.9 (4).

¹⁵ The FDRE Constitution, Art.13 (2).

¹⁶ The FDRE Constitution, Art.25.

¹⁷ The FDRE Constitution, Art.25.

¹⁸ The FDRE Constitution, Art.35

¹⁹ The FDRE Constitution, Art.35(1)

²⁰ The FDRE Constitution, Art.35.2 cum. 35.8

²¹ The FDRE Constitution, Art.35 (3).

enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution. The Constitution thus provides a strong protection to the rights of women and forbids discrimination against them.

3. THE SHARE OF WOMEN DURING SUCCESSION UNDER STATE AND ISLAMIC LAWS

As per the above discussion, one of the mechanisms by which the equality of men and women is recognized is through the enjoyment of equal share during succession. As it is commonly known, in most of the customs in Ethiopia as it was elsewhere in the past, male children are favored to succeed their parents. As it is also commonly known, in some nationalities, female children are totally precluded from succeeding their parents. That is why the FDRE Constitution recognizes the property right of women and their equal enjoyment of inheritance with men during succession. It provides this fact as follows:

*“Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property”.*²²

Since the Constitution is the cornerstone of all laws, in no ways men and women inherit unequal share in Ethiopia because of this constitutional provision. The idea under the constitution is further corroborated by proclamation no.165 of 1960 which reads as: *“Each of them shall receive an equal portion of the succession.”*²³ Hence, according to the Ethiopian succession law children or other descendants are number one candidates to succeed a person²⁴ and all children of the person who died have equal rights in the succession irrespective of their age, sex, etc. differences. Also, Ethiopian law of succession makes no distinction based on the status of a child whether such child is born in marriage, outside a wedlock marriage or

²² The FDRE Constitution, Art.35 (7).

²³ Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Art.842 (2).

²⁴ Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Art.842(1).

he/she is an adopted child. An adopted child, for all intents and purposes, is assimilated to a natural child. Therefore, the state law does not make any distinction among children of the deceased based on the fact that they are legitimate or otherwise.²⁵

There is also other similar provision that ensures the equality of share between men and women during inheritance under Civil Code of 1960. It is provided as follow:“*The sex, age, and nationality of the heir shall not affect in any way the ascertainment of his rights to succession.*”²⁶ This is to mean that no distinctions are made on any ground such as sex, age, nationality, etc. to succeed the deceased among heirs and all inherit equal portion of share irrespective of their differences.

However, Islamic law has a different approach. Under Islamic law, women are not allowed to inherit equal to men. They are entitled to inherit half of men although this is not without exception. Sometimes, women in Islam are allowed to inherit equal or above men. Except in these circumstances, in principle, women in Islam are allowed to inherit only half of men. The three types of women who inherit equal, above, and half of men are categorized here in under, respectively.

The women who are entitled to inherit equal to men are uterine sisters and mothers of the deceased. In the presence of children, the mother and the father of the deceased each allowed to inherit one sixth (1/6) of the estate of the deceased.²⁷ Also, the female uterine sisters inherit equally with her uterine brothers.²⁸

In a situation where the deceased is a female and she has died without leaving behind any children, sister and brother, the women are entitled to inherit more than men. But, the only surviving heirs (husband/and both parent) inherits half after payment of any debts and bequest. Then, the

²⁵ Civil Code of the Empire of Ethiopia, Proc. No.165/1960,Art.836.

²⁶Civil Code of the Empire of Ethiopia, Proc. No.165/1960,Art.837.

²⁷ The Holly Qur`an English Translation and Commentary, Abulqasim Publishing House, Chapter 4, verses 12.

²⁸Hammudah AbdalAti, The Family Structure in Islam (1977), P.267.

mother is given 1/3 of the estate, but the father inherits 1/6. Here, the mother is inheriting double of the father.²⁹

Except in the above situations, the remaining all types of women in Islam are permitted to inherit only half of men's share. Here are the instances of the case:³⁰

- The daughter inherits half of what the son/her brother inherits;
- The wife inherits 1/8 of her husband property if he died while the husband inherits 1/4 his wife property if she died (this is in a situation where they are survived by a children);
- The wife inherits 1/4 of her husband property if he died while the husband inherits 1/2 of his wife property if she died (this is in a situation where they have not survived by a children);
- If the deceased is not survived by any children and parents, the sister of the deceased inherits half of what the brothers of the deceased inherit.

In pre-Islamic Arab society, women were not allowed to inherit. It was discriminatory system that confined only to patrilineal line (hereditary from male to male).³¹ Such kinds of inheritance that follow the paternal line only were true to all ancient civilized state.³² It was after the coming of Islam that women are allowed to inherit in Muslim Community.

The first verse of Qur'an that recognize the right to inherit for women reads as, *"There is share for men and share for women from what is left by parents and those nearest related, whether (the property be) small or large- a legal*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹In pre-Islam Arab society, women were not entitled to inherit from their parents, husbands, or other relatives because they believe that inheritance should only be granted to those who could ride a horse, fight, gain war booties and help, protect the tribe and territory (See Abdul Rahman Alsheha, *Women in the Shade of Islam* (3rd ed., 2000), P.17.

³²For example, Women's in ancient civilized Hindu had no financial nor civil right and were oppressed and humiliated through their lives. They were never allowed to inherit a property in a ways. Women under ancient civilized Rome suffer the same thing. They suffered oppression and rejection in all aspects of social, civil, political, financial life. They were deprived the right of inheritance. *Id.*,P.23

share.”³³ This verse of the Qur’an recognizes the right of inheritance for the women. No one can deprive this right from them. Since the Qur’an is the cornerstone of all laws under Islamic law, in no ways women are deprived the right of inheritance whether the amount of share is small or large. Under Islamic law, the first degree heir that is called to succession at one time is twelve.³⁴ Out of these primary heirs, the female inheritors are eight in numbers. Except in a situation that is mentioned here in above, most of them inherit half of men. In the above verse of Qur’an, the sex and age of the heir shall not affect in any way the ascertainment of his/her rights to succession. This is to mean that no distinctions are made on any ground such as sex and age to succeed the deceased among heirs even if there is variation on the amount to be inherited.

Islamic law of succession also makes distinction based on the status of a child. Under Islamic law, no legal paternity exists between a father and his illegitimate child, and illegitimacy precludes the existence of any legal bond between the blood relatives of the father on the one hand, and illegitimate child and its issue on the other³⁵. Hence, since there is no legal tie between a father and his illegitimate child, or between their respective ‘legal’ relatives, the root cause of inheritance does not exist.³⁶

4. FDRE CONSTITUTIONAL MATTER, LEGAL PLURALISM, AND WOMEN INHERITANCE UNDER ISLAMIC LAW

Legal pluralism is the incorporation or recognition of customary law norms or institutions within state law, or the independent coexistence of indigenous norms and institutions alongside state law.³⁷ It is based on this idea that the FDRE Constitution provides the framework for laws such as customary and religious laws in some fields of social activity. It provides that:

This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance

³³The Holly Qur`an, *supra* note 27, Chapter 4, verse 7.

³⁴Dr. A. Hussein, *Islamic Law of Succession* (2005), P.63.

³⁵Prof. N. J. Coulson, *Succession in Muslim Family* (1997), P.22.

³⁶*Id.*, p.172.

³⁷ Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, *Sydney Law Review* (2007), Vol. 30, P.390.

*with religious and customary law, with the consent of the parties to the dispute. Particulars shall be determined by law*³⁸.

It also stipulates that:

*Pursuant to sub-article 5 of Article 34, the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts that had state recognition and functioned prior to the adoption of the constitution shall be organized on the basis of recognition accorded to them by this constitution.*³⁹

In order to execute this constitutional provisions dealing with legal pluralism, the House of Peoples' Representatives has issued the Federal Courts of Sharia Consolidation Proclamation.⁴⁰ Article 4(1) of this Proclamation stipulates that:

Federal Courts of Sharia shall have common jurisdiction over the following matters:

- a) any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded or the parties have consented to be adjudicated in accordance with Islamic law;*
- b) any question regarding Wakf, gift/Hiba/, succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death;*
- c) any question regarding payment of costs incurred in any suit relating to the aforementioned matters.*

Sub-article 2 of the same proclamation reiterates the principle of parties consent as the basis for the adjudicatory similar to the provision of article 34(5) of the FDRE Constitution. From this, we can understand that Sharia

³⁸FDRE Constitution, Art.34 (5).

³⁹FDRE Constitution, Art.78 (5).

⁴⁰Federal Courts of Sharia Consolidation Proc. No.188 /1999,*supra* note 5.

Courts can assume jurisdiction only where the parties have expressly consented to be adjudicated under Islamic law. As it is understood from article 4(1) (a) and (2) of the same proclamation, Sharia Courts have a jurisdiction in two ways. Namely, when the marriage is concluded according to Islamic law, and when the parties have expressly consented to be adjudicated under Islamic law. The FDRE Constitution and the Sharia Court Consolidation Proclamation attached, to the exercise of the jurisdiction, the demonstration of express consent by the parties as a condition. In this regard, the same proclamation provides under art. 5(1) & (2) how consent of the parties is expressly demonstrated.

Accordingly, parties who file a case as a plaintiff can be presumed to have shown his/her consent to the jurisdiction of the court. As to the establishment of defendant's consent, the proclamation provides that along with the notice to be served on the defendant, a form shall be attached in which the defendant declares that he/she expressly consents to the hearing of the case by Sharia Courts. It is also possible that the defendant may not fill in the declaration but appear during the opening of the hearing of a suit and raise his/her preliminary objection orally against the exercise of jurisdiction by a Sharia Court. Tacit consent is also recognized under this article as instance that shows the expression of party's consents. It is a situation where the parties that are duly summoned failed to appear. In such situation, the Sharia Court proceeds to hear a case, *ex parte*.

Once the declaration of consents are shown by parties to the adjudication of court, under no circumstance a case brought before a court of Sharia be transferred to a regular court; nor a case before a regular court be transferred to a Court of Sharia as it is mentioned under sub- article 4 of the same Article. Hence, according to the author, it is the waiver of the right of party (to be adjudicated by regular court) who consent to the jurisdiction of Sharia Court.

Legal pluralism makes it inevitable that there are multiplicities of legal orders where there are interactions and overlapping between the multiple

systems.⁴¹ Thus, legal pluralism opens room for the potential difference between customary and religious laws and state laws. A case in point relates to matters that are to be resolved by Islamic law, which has normative and conceptual differences with state laws regarding the rights of women during inheritance.

Sharia courts apply substantive sharia law (succession law) that follows different approaches from state laws regarding issues related with women succession. Under Islamic law of succession, women are allowed to inherit half of men, and this is totally different from the FDRE Constitution and internationally ratified treaties standard that provide absolute equality of share for men and women.⁴² This difference raises a question that needs an answer. How can this be reconciled with the issue of supremacy clause under article 9 of the FDRE Constitution? This article states that the Constitution is the supreme law of the land. It also states that “any law, customary practice, and act of an agency of government or official act that contravenes the Constitution is invalid”. In this article, the phrase “any law” is used to cover all laws, which are now in force both at the federal and regional levels. Islamic law that is applied in Sharia Court becomes one aspect of state law because of the recognition it is endowed with by the Constitution. This factor makes it to fall under the phrase “any law” that covers all laws, which are now in force including Islamic law in Sharia Court.

The answer to the above question can be answered in two ways. The first one is - based on pro-supremacy clause of the Constitution and human rights treaties ratified by the country. The support for this line of answer is found in the provisions of the Constitution itself. The Constitution contains a supremacy clause that provides that any law, decision of state organ or official and customary practices that are contrary to the spirit of the Constitution shall be of no effect.⁴³ Hence, if decisions of Islamic Succession laws are in contradiction with constitutional provisions, they shall be of no

⁴¹Elias N. Stebek and Muradu Abdo, Law and Development, and Legal Pluralism in Ethiopia (Justice and Legal System Research Institute, Addis Ababa, 2013),P.145.

⁴²For example, Art. 35(7) of the FDRE Constitution stipulates: “*Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.*”

⁴³FDRE Constitution, Art.9 (1).

effect. This means that any decision by Islamic succession law through application of this law by Sharia court should be compatible with the supremacy clause of the Constitution and other provisions of the Constitution relating to fundamental rights, including the rights of women during succession.⁴⁴

The second one is –based on the assertion that the decisions of Sharia Courts should rather be treated as an exception to the supremacy clause and treaties ratified by the country. The Constitution recognizes the settlement of disputes related to personal matters by customary and religious bodies so long as parties refer a matter to such institution through their own consent. This implies that the Constitution acknowledges the difference between state law and customary and religious laws; and also tolerates their decision in matters affecting personal status of individuals. This is to mean recognition for the application of customary and religious law in area of personal matter when the parties are voluntarily consented to such organ under the principle of legal pluralism presupposes the willingness to admit decision in conflict with the constitutional standard that is rendered by such institutions. Hence, it can be argued that the supremacy clause of the Constitution does not apply to decisions of Islamic Succession Law that is applied by Sharia courts even if the substantive decisions made by this law are in conflict with the standard under the Constitution.⁴⁵

The author prefers the second line of argument, because subjecting the decision of Islamic Succession Law to the supremacy clause of the Constitution goes against the very essence of legal pluralism acknowledged by the Constitution itself provided that parties to a dispute voluntarily consent to take their case to a Sharia Court. This is to mean the first line of argument may, in the final analysis, bring about denial of recognition to religious and customary laws that contradicts with the Constitution, which is against the principle of legal pluralism. At the end of the day, it may bring about the substitution of religious and customary laws by the state laws.

⁴⁴ Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, Mizan Law Review (2011), Vol. 5, No.1,P.94.

⁴⁵*Ibid.*

5. THE REASON WHY WOMEN INHERIT HALF OF MEN'S SHARE UNDER ISLAMIC LAW

Regarding the question why men are getting double share of women, there are many reasons or justifications that are provided by Muslim scholars. This section deals with some of these reasons.

5.1. FINANCIAL RESPONSIBILITY/BURDEN BORN BY MEN

In Islam, it is the husband who marries the women and undertakes to maintain her and their children; he bears the responsibility of the whole structure of the family.⁴⁶ It is also his duty to contribute financially to all good causes in his society.⁴⁷ All financial burdens are born by him alone.⁴⁸

The reason why a man is made responsible for his household is due to financial and moral responsibility of the household which requires a strong personality, precision, and decisiveness in decision-making. For this reason, the responsibility of managing, directing, and running the household affair is imposed on men, not on women. This is for the fact that physical and mental makeup of men qualifies them to take charge of this responsibility.⁴⁹ This responsibility does not show supremacy or preference of the husband in any way, rather it is the imposition of duty or obligation that results from his physical strength and sturdy. In other words, women are free from carrying household financial responsibility. In Islam, they are not legally required to provide for any person, including themselves. If they have no independent resource, they are fully maintained by their able male relatives. Even the wealthy wife is maintained by the husband, the needy sister by her brother, the mother by the son, and the daughter by the father.⁵⁰

The reason why women are exempted from carrying household financial responsibility is due to their inability to carryout such responsibility in the same manner with men. However, this does not mean that women are unable

⁴⁶Sayyid Qutb, *Social Justice in Islam* (2000),P.73.

⁴⁷Hammudah Abdal Ati, *Islam in Focus*, P.188.

⁴⁸ *Ibid.*

⁴⁹ Abdul Rahman Alsheha, *supra* note 31,P.85.

⁵⁰Hammudah Abdal Ati, *supra* note 28,P.184.

to carryout every duty as a whole. Due to many things that happen to them physically and take place in their life such as bearing children, delivery, nursing, child care and custody, etc, they are not qualified as men to take charge of this responsibility.⁵¹For example, during pregnancy, they are more fatigue and a slight effort will negatively affect them; they are more concerned with the fetus than themselves; they worry about their delivery whether it is going to be normal or not; and they concern much with the welfare of the child whether it will be normal, healthy or otherwise.⁵² Women require confinement period for rest after delivery for a period that varies from women to women. All these facts affect the mentality of women, and are reflected in their life, attitude, and behavior which make them unqualified to hold financial responsibility. Moreover, the muscles of men are naturally more powerful than women. This fact enables them to perform tedious, tiring, laborious, and manual jobs than women. Thus, they are naturally equipped to take financial responsibility of their household.⁵³

Unlike Islamic law, state laws oblige women to contribute to the household expenses in proportion to their earning.⁵⁴ As it can be inferred from this provision, women under state laws are expected to bear similar responsibility with men. That is why they are entitled to inherit equal to men when the issue of succession arises.

Indeed, when women get less than a man does, she is not actually deprived of anything that she has worked for. It is something coming to her from another source as additional or extra. It is something that neither a man nor a woman struggled for. It is a sort of aid, and any aid has to be distributed according to the urgent needs and responsibility they have.⁵⁵ As it is mentioned here in above, women under Islam are not bound to contribute to their household expense including any expense on themselves since it is covered by men relatives. Thus, according to the author, from the legal point of view, it would have been injustice if a woman who has not bound to

⁵¹ *Id*,P.86.

⁵² አቡ-ልክሳኅ አልመውዱዲ , አልሂዳብ, P.142.

⁵³ Abdul Rahman Alsheha, *supra* note 31,P.87.

⁵⁴ Revised Family Code of Ethiopia, Proc. No.213/ 2000,Art.72 stipulates that “the spouses shall contribute to the household expenses in proportion to their respective means.”

⁵⁵ Hammudah AbdalAti, *supra* note 28.

contribute anything in the way of earning toward the family got an equal share with men.

5.2. NON-EXISTENCE OF COMMUNALITY OF PROPERTY BETWEEN HUSBAND AND WIFE

In Islam, whatever property a woman acquired and produced or generated before, during, and after marriage remains her own private property. She has no obligation to spend on her family, including on herself since all her needs is covered by her husband. If she divorced, she has the right to retake back all what she has already acquired or possessed as personal property with all income she has generated from this personal property together with the alimony she has entitled from her ex-husband.⁵⁶ In contrast to this, women under state law are not allowed to retake back all of income she has generated by her personal effort and from her personal property after marriage for it is considered as common property of the two.⁵⁷

Indeed in Islam, women are given the right to work and be employed. She has permitted to directly conduct her business contact and financial transaction. She has the right to keep this wealth and spend as she wants. She is also not obliged to expend from this wealth even on herself to satisfy some of her need since it is covered by her able male relatives as it is said earlier.⁵⁸ She is not forbidden from seeking employment and there is no ban on benefiting from women talent in any field. Whatever she earns from employment becomes her independent income that no one has a share from it⁵⁹. Unlike Islamic, under state laws, the income women's earn/generated from employment or personal effort after marriage is considered as common property of the two, and it is not her independent income.⁶⁰

Furthermore, in spite of non-existence of communal property between husband and wife, the women in Islam are allowed to dispose their husband

⁵⁶ World Assembly of Muslim Youth, Women and Family life in Islam, (Jeddah,1998),P.32.

⁵⁷Revised Family Code of Ethiopia, Proc. No. 213/2000, Art.62. Sub-article one of this provision states that "All income derived by personal efforts of the spouses and from their common or personal property shall be common property."

⁵⁸Abdul RahmanAlsheha, *supra* note 31,P.96.

⁵⁹ World Assembly of Muslim Youth, *supra* note 56,P.31.

⁶⁰ Revised Family Code of Ethiopia, Proc. No. 213/ 2000,Art.62 (1).

property without his permission and knowledge during the life time of their marriage.⁶¹ However, this is not possible under state law since they are not allowed to dispose without the consent of their husband even their common property. Under state law, the women are allowed to dispose freely only their personal property.⁶²

5.3. THE LEGAL LIABILITY/OBLIGATION MEN DO CARRY

Under Islam, women are made free from paying any financial penalties/compensation for the wrong they have committed for it is the obligation of their male relative to pay on their behalf.⁶³ However, under state laws, everybody is obliged to make good the wrong he/she has committed by himself/herself except where he/she is a minor, an insane, etc. in which case the able relatives are liable on his/her behalf.⁶⁴ From this, we can understand that women under state laws are obliged to make good the wrong they have committed by their own unless they are exempted like under vicarious liability.⁶⁵

According to state laws, if any of the spouses committed a wrong, the compensation is paid out of personal property of such spouses. It is only recovered from common property in the absence of such personal property. This means, in the absence of common property, s/he alone is obliged to pay the said compensation. Also, in case of an unmarried daughter, her family is obliged to pay in her behalf as long as she does not reach the age of majority

⁶¹ Fatima Umar Nasef, Women in Islam (1999),P.173.

⁶²Revised Family Code of Ethiopia, Arts.59 and 68.*Under article 59, it is stipulated as- (1) Each spouse shall administer his respective personal property and receive the income thereof. (2) Each spouse may freely dispose of his personal property. Under article 68, it is stipulated as- unless provided otherwise by other laws, the agreement of both spouses shall be required to: (a) sale, exchange, rent out, pledge, or mortgage or alienate in any other way a common immovable property to confer a right to third parties on such property; (b) sale, exchange, pledge or mortgage, or alienate in any other way, a common movable property or securities registered in the name of both spouses: the value of which exceeds five hundred Ethiopian birr. (c) transfer by donation of a common property the value of which exceeds one hundred Ethiopian birr, or money which exceeds such amount; (d) borrow or lend money exceeding five hundred Ethiopian birr or to stand surety for a debt of such amount to another person.*

⁶³Fatima Umar Nasef, *supra* note 61,P.180.

⁶⁴ Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Arts. 2124 and 2125.

⁶⁵ Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Arts. 2124-2132.

(i.e.18 years). However, under Islamic law, unmarried woman male relatives are obliged to pay on her behalf until she married irrespective of whether she has reached the age of majority.

Another point is, as we have said, women and men are treated differently under Islam. The father if he existed or any other male relatives of women is responsible for her maintenance and any other need until her marriage. This is to mean that her male relatives are responsible to her until she gets married, and if she does not get married until she died whether or not she reached the age of majority.⁶⁶ However, under state law, any one- either the parent, or tutor/guardian who entrusted to the proper care of the children are responsible for them only until they have reached the age of majority. On their attainment of this age, they have no legal obligation rather than moral obligation.⁶⁷

5.4. PECUNIARY SUPPLY MADE BY MEN DURING THE MARRIAGE

A woman under Islam is given dowry by her husband during her marriage. It is made a condition for a marriage contract to be valid. Dowry is exclusive right of women. It is a legal financial right that nobody can violate.⁶⁸ This dowry continues to be her personal property after marriage. Under state law, we cannot find the idea of dowry which can be given to women by husband as a condition for the validity of marriage.

5.5. THE FAVOUR MADE TO WOMEN DURING SUCCESSION ON THE NUMBER OF HEIR CALLED TO SUCCESSION

Under state law, up on the death of the deceased, the first degree relatives of the deceased who are called to succession are his/her children. It is only on the non-existence of his/her children that the next degree relatives are called to succession. What we understand from this rule is that women that can be called to succession of the deceased on the *first degree are only his*

⁶⁶Abdul Rahman Alsheha, *supra* note 31,P.85.

⁶⁷ Revised Family Code of Ethiopia, Proc. No. 213/ 2000,Arts. 241 and 310.

⁶⁸ Fatima Umar Nasef, *supra* note 61,P.176.

*daughters irrespective of their number.*⁶⁹ However, under Islam, there are *first twelve degree* heirs that are called to succession at one time. This is due to the wider distribution of property in smaller share or for the purpose of breaking up concentration of wealth among a few hands thereby ensuring the socio-economic welfare of a society at large. Out of these twelve primary heirs, the female inheritors are *eight* in number.⁷⁰ Here one may guess the situation in which the total amount of share inherited by these women becomes proportional with total amount inherited by the remaining men jointly even if it differs at individual level.

Another point is, remember what has been said in connection with a husband and a wife inheriting each other under Islam. The author has said that the wife inherits one eighth (1/8) of her husband property if he died while the husband inherits half of his wife property if she died (this is in a situation where they have survived by a children) and also we have said that the wife inherits one fourth (1/4) of her husband property if he died while the husband inherits half of his wife property if she died (this is in a situation where they have not survived by the children). In addition to the reason we have mentioned above, the full implication of this idea must be seen in light of the fact that the husband and wife hold their properties and possession independently of each other. This is to mean that there is no mandatory communality of property between husband and wife in Islam as we have mentioned above.

Thus, it is an interestingly verifiable proportion that the Muslim husband usually owns more than his wife and therefore he is likely to leave more behind than she should. For example, if he survives her, which is less likely from a demographic standpoints, his arithmetically larger share of inheritance – the one half of her independently held and owned property – may in fact be equal to or even less than her arithmetically smaller share, the one-fourth of his independently held and owned property⁷¹. This is assuming that there are no children involved; otherwise, his one-half becomes one-fourth and her one fourth an eighth.⁷² Yet the value of a larger share of a

⁶⁹ Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Art.842 (1).

⁷⁰ Abdul Rahman Alsheha, *supra* note 31, P.25.

⁷¹ Hammudah Abdal Ati, *supra* note 28, P.268.

⁷² *Ibid.*

small estate may be equal to or perhaps even less than the value of a small share of a large estate. Here the end result would seem while the two shares are arithmetically different, they are not necessarily unequal in the final result.⁷³

In general, based on the above reasons, demanding a fair, just, or equal share between Muslim men and women who do not carry equal financial obligation or responsibility becomes unfair and unjust demand as to the author.

If the women share in inheritance and her financial responsibility is juxtaposed, one can realize that Islamic law is more favorable to women than men since it allows women to inherit without imposing any financial obligation to spend for anything even for themselves. In short, the financial status of women, if maintenance right, inheritance right and right of marital gift are added together, the Muslim women are far in a better position than men. Here, one may say putting the women on a better position than men contradict with the principle of equality /fairness by itself. However, this has its own reason and justification that the author reserves it to be discussed under independent work.

As opposed to Islamic law, men and women are equally responsible under state law to contribute to their household expense in proportion to their earning. They are also equally obliged to carry inside home and outside home responsibility to serve their family even though the inside home responsibility is left to the women in reality.⁷⁴ This dual responsibility at inside home and outside home is the misuse of women in Ethiopia. This is strenuous and irksome for women to work both at inside home and outside home while men are working only at the outside home but carrying equal responsibility of household with women. This is far different from women under Islam who relieved free from the outside home responsibility/activity (this is not to mean that they are prohibited from working outside home, and whatever they work in outside home, it is their personal) at the same time

⁷³ *Ibid.*

⁷⁴ Revised Family Code of Ethiopia, Proc. No. 213/ 2000, Arts.72 and 50.

taking her obligatory share without carrying any household financial responsibility.

6. CONCLUSIONS AND RECOMMENDATIONS

Now, internationally ratified treaties recognized absolute equality between men and women. Similarly, the state laws also recognize absolute equality between men and women. As per these laws, one of the mechanisms by which the equality of men and women are recognized is through the enjoyment of equal share during succession. Different internationally ratified treaty and state laws are clearly and expressly recognized absolute equality of share between men and women.

However, Islamic law has a different approach towards the share of women during succession. Under Islamic law, women have no equal share with men in principle although this is not without exceptions. Hence, according to the author, it is better if the share given to women under Islamic Succession Law is considered from the perspectives of the reason that justifies it and legal pluralism that accommodates overlapping laws (as recognized by the FDRE Constitution), but not from the perspective of share of women under state laws. Also, decisions rendered by Sharia Courts (that apply Islamic Succession Law) should not be expected to meet absolute equality standard state laws as long as parties are voluntarily consented to be adjudicated by Sharia Court.

The negative attitude against Sharia succession law can be addressed by raising the awareness of people, especially women's. In this regard, the state is required to encourage and facilitate forum for discussion and awareness creation. Also, different Medias either governmental or private one can play vital roles. Furthermore, it is better if the government makes Islamic law related with personal matter to be delivered in the universities as separate and independent course in addition to Sharia law/course that is rendered in a general way. Because, this may help law students to raise and discuss the existing controversies in the area thereby increasing awareness and understanding on Islamic law in general and its succession law in particular. Even this may help law graduates to become a judge in Sharia Courts as one of the institution that endowed with judicial power.