BIGAMOUS MARRIAGE AND ITS IMPACTS ON DIVISION OF COMMON PROPERTY UNDER OROMIAN FAMILY LAW

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Bigamous marriage and its impacts on division of common property under Oromian family law

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Declaration

I, the under signed, here by declared that this thesis entitled `` Bigamous marriage and its impacts on division of common property oromian family law`` is my bonafide work, and that all sources I have used or quoted have been indicated or acknowledge by means of completed references.

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Abstract

Though bigamous marriage is an offense punishable by the criminal code, most bigamous marriages were revealed before the court of law not as the dispute over their bigamous nature but on the division of common property after the dissolution of bigamous spouses. All family codes in the federal democratic republic of Ethiopia enacted to regulate monogamous marriage. In the absence of specific legal provisions that govern bigamous marriage, conventional family law principles, contract law principles and judicial decisions were used as regulatory options for dissolution of bigamous marriage. This study was conducted to identify impact of bigamous marriage on the division of common property under Oromia family law.

CHAPTER ONE

1. INTRODUCTION

1.1. Background of study

It is useful to have a general understanding of marriage as a whole, before being introduced to bigamous marriage. Marriage is an institution entered in to by free and full consent. Marriage is a socially or ritually recognized union or legal contract between spouses.

Marriage is a sacred institution which has been well accepted by society in every corner of the world. As such, marriage has been recognized and protected by both national laws of countries and international legal instruments. Legal recognition and protection is given to marriage because it is through marriage that humanity establishes and maintains family, which is the fundamental unit of society. The recognition and protection of marriage becomes meaningful when the law gives recognition and protection to the effects produced by marriage. The basic effects of marriage can be divided into personal and pecuniary.

In Ethiopia, personal effects of marriage pertain to respect, support, assistance, joint management of family, cohabitation, determination of residence, duty of fidelity and the like. Pecuniary effects of marriage, in turn, relates to the creation of new legal relationship between the spouses regarding property. In this regard, the most fundamental effect is the presumption that all property of the spouses shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he/she is the sole owner thereof. From this, we can understand that in the absence of contrary proof, spouses have equal share from the common property. This can be true only when the marriage is a monogamous marriage.

Bigamy occurs when a person is married to two different people at the same time as part of two different marriage contracts. If person is married, it is requirement for him or her to have marriage dissolved through death, annulment or divorce before he or she can legally enter in to new marriage (Katherine O'Donovan). In this regard, Art 11 of the Code clearly provides that a person shall not conclude marriage as long as he/she is bound by bonds of a preceding marriage. In addition to the Federal Family Code, the Criminal Code of the Federal Democratic Republic of Ethiopia of 2005 had declares that bigamy is a criminal act. Despite the fact that bigamy is

prohibited both by the Federal Family Code and the Criminal Code, there are incidences of bigamous marriages in Ethiopia.

Bigamy is different than polygamy, which involves more than two people entering into a single marriage. Bigamous marriage falls into the categories of marriages which are voidable but valid table. Either of spouses of bigamous marriage and the public prosecutor is given the right to apply for dissolution of bigamous marriage. The application for dissolution maybe made only as long as the former spouses of bigamous marriages alive (Katherine O'Donovan)

1.2. STATEMENT OF PROBLEM

Bigamous marriage is one of the violations of essential conditions of marriages. Presumptions of validity are attached to bigamous marriage until avoided by dissolution. Bigamous marriage maybe allowed in some religions and cultures. If family law of certain region allows bigamous marriage, there is no reason for criminal code to penalize those who concluded bigamous marriage. However; some regions are silent regarding bigamous marriage (Katherine O'Donovan)

Under Oromia family law, law is silent whether bigamy is prohibited or not. As per article 2 of FDRE criminal code there is no crime unless prescribed by the law. Pursuant this provision of penal code bigamy is not a crime in oromia. However, in default of the law that govern bigamy, it has significant impact on division of common property upon dissolution bigamous of bigamous spouses.

As a matter of fact, bigamous marriage poses multifaceted problems. The problem posed by a bigamous marriage, inter alia, looms large when the issue of determining the share of the spouses from the common property comes into the picture in the case of dissolution of such bigamous marriage for various reasons. In other words, determining the exact share of the

spouses has remained to be the difficult task for courts when a bigamous marriage is dissolved for various reasons. Because of this, Ethiopian courts, both at the Federal and regional level, have held divergent positions on the issue under consideration.

In deed, Bigamous marriage affects the rule of equity in the division of common property. In case of multiple common property regimes, it does not account for personal efforts of the spouses that legally form the part of common property of all marriages during their coexistence.

Therefore, a family law of the region must have the provisions that regulate the division of common property in case of bigamous marriage to fill the gap. Also the position of both regional and federal courts should not be divergent on this issues. Many researchers were conducted by different persons on bigamous marriage practice but, no one of them has shown the impact of bigamous marriage on the division of common property. As the result the researcher is interested to fill this gap. The purpose of this study is to know bigamous marriage and its impact on division of common property under *Oromian* family law.

1.3. RESEARCH QUESTIONS

This study will try to give answer to the following questions:

- ✓ Is bigamy void marriage?
- ✓ What are the causes of bigamous marriage?
- ✓ What are the impacts of bigamous marriage on division of common property?
- ✓ Is bigamy legally prohibited in Ethiopia in general and Oromia in particular?

1.4. Objectives of study

1.4.1. General objectives of study

The general objectives of this study are to understand the over all concept of bigamous marriage and its impact on division of common property under Oromia family law.

1.4.2. Specific objectives

In addition to general objectives, specific objectives include: to examine

- To examine the legal aspect of bigamous marriage under national and international human right laws.
- Rationalization of bigamous marriage
- Manner of division of common property under bigamous marriage
- To provide an insight to the legal principles that ought to be contemplated in regulating the division of common property.

1.5. Significance of study

This study will provide an understanding to know the impact of bigamous marriage on division of common property.

It helps states to amend their law. It also helps to develop knowledge about the legal aspects of bigamous marriage.

1.6. **Scope of study**

The scope of the study was focusing on bigamous marriage and its impacts on division of common property under family law of Oromia. The problem of bigamous marriage is not limited to Oromia, but due to time and financial constraints, the study would be about bigamous marriage and its impacts on division of common property under oromian family law.

1.7. Limitation of study

The quality of this study depended on acquiring relevant information and available reference materials. But there is lack of relevant information and available reference materials.

In addition to shortage of time and lack of sufficient fund may have their own impact on the quality of the study.

1.8 Research methodology

The research methodologies used under this paper will the qualitative research method. To this end, addressing and consulting relevant secondary sources, inter alia, books, commentaries, journals, laws and cassation decisions will be used. It will also assess the national and regional legal aspects of bigamous marriage.

1.9 Organization of the study

This research paper was organized in to five chapters:

- Chapter one presents the back ground of the study, statement of problem, the objectives of the study, significance of the study, scope study and limitation of the study.
- Chapter two would give literature review
- Chapter three deal with research methodology and data sources
- Chapter four presents finding of the study
- Chapter five provides conclusion and recommendations.

CHAPTER TWO

REVIEW LITERATURE

2.1 Concept of bigamous marriage

The term" bigamy" refers to the act of marrying one person while legally married to another(Black law dictionary)[1]As the name indicates the term

[1] Black's Law Dictionary (8th.ed.2004)

bigamy connotes the duality of marriage in which a man or woman marries another spouse while bound by previous monogamous marriage.

On other hand, bigamy in which a man and a woman marry to more than two spouses could be termed as polygamous marriage. Black, in his law dictionary, defines polygamy as" a state or a practice of having more than one spouses simultaneously[2]. According to this definition polygamy may be considered as one marriage at a time if more than one spouse is present simultaneously. However, as a plural marriage, polygamy can also be successive if spouse are married one after another. Hence, it should be noted that, in strict legal terms, polygamy and bigamy have more specific meaning.

In Ethiopia, bigamous marriage could be used to refer to polygamous marriage man maintains conjugal relations with more than two spouses forming a single matrimonial entity[3]. As such in this study, the term bigamy and poly gamy will be used interchangeably.

2.2 Historical development of bigamy

In the culture that practice marital monogamy, bigamy is the act of entering in to a marriage with one person while still legally married to another. [4] Bigamy is crime in most western countries, and when it occurs in this context often neither of the first or second spouse is aware of the other.[5] In countries that have bigamy laws, consent from the prior spouse makes no difference to the legality of the second marriage, which is usually considered void.

[2] Marry Ann Glen don ,The transformation of family law(1989), p.52
[3]Ibid
[4] Merriam Webster: Bigamy
[5] George monger (2004).Marriage custom of the world, calif; ABC CLIO p.31

Before Christianity becomes the official religion of Roman Empire, Diocletian and Maximilian passed strict anti-polygamy laws in 285 AD that mandated monogamy as the only form legal marital relationship, as had traditionally been the case in classical Greece and Rome.In393, the Byzantine emperor Theodosius issued an imperial edict to extend the ban on polygamy to Jewish communities.[6]

According to feminist historian Sar ah Mc Dougall,the Christian European insistence on the monogamy and its enforcement arose as a consequence of 16th century Islamic incursions in to central Europe and advent of European colonialism within the Americas, Africa's and Asia's, which exposed European Christian to cultures which practiced polygamy .As a consequence, a Christians male bigamist were subjected to un precedence harsh punishment, such as execution ,gallery servitude, exile, and prolonged imprisonment. Mc Dougall argues that female bigamists were not as harshly punished due to women have perceived absence of moral agency.[7] Most western countries not recognize polygamous marriages, and consider bigamy a crime. Several countries also prohibit people from living a polygamous life style.

2.3 Bigamous marriage under Ethiopian law

2.3.1 Bigamy under FDRE constitution

FDRE constitution stipulates that "family is the fundamental and natural unit of the society and the state.[8]Accordingly every man and woman has the right marry and found family.[9] It also provides that marriage shall be entered into only with free and full consent of intending spouse.[10] Furthermore, it also provides for equal rights of man and woman while

[6] 'Sex offenses : consensual bigamy" law library American law and legal information.
[7] Sarah Mc dou gall, Bigamy and Christian identity in late medival champagne, Philadelphia,pennysylvania university press,2012
[8]FDRE Constitution (1995) proclamation no.1/1995,Fed Gaz.Year 1 No.1 Art 34(3)
[9] Ibid Art 34(2)
[10] Ibid Art 34(1)

entering into, during marriage and at the time of divorce. Thus, bigamous marriage in which a man exercises another bigamous and bigamous marriage, as the would be an infringement of the equality clause in marriage.

As to the legality of multiplicity marriage under FDRE constitution, Meaza and Zenebe Worke argued that article 34 of the FDRE constitution doesn't stipulate any minimum requirements for a legally valid marriage ,such as monogamy.[11]

According to these writers, article 34 of the FDRE constitution lacks clarity regarding any minimum requirement for men and woman to legally valid marriage. However, this writer has the opinion that a constitution as general law is not expected to provide each and every particular that regulates marital, personal and family matters.

It is generally accepted legal principles that constitution should provide only the basis and leave the particulars for subordinate legislations for any 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 aspect of marriage practice differently depending on own context.

Under Article 34(4) of FDRE constitution, the constitution provides that in accordance with the provisions to be specified by law, a law giving recognition to marriage concluded under system of religious or customary laws may be enacted in other words, personal and family law that specifies and recognizes marriage practice concluded under the system of religious or customary laws may be adopted.

Thus, it could be strongly argued that the FDRE constitution impliedly hint that the possibility of recognizing bigamous marriage practice in

[11] Meaza Ashenafi and zenebeworke Tadese,Women,HIV/AIDS, Property and inheritance rights: The case of Ethiopia,(2005)

accordance with the provisions to be specified by law "provided that such marriage its source of validity from the religious and the customary law of the intending spouse 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 the parties to the dispute is not precluded under the constitution.[12] Thus, one may argues that the above constitutional provision shows 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."[13] Yet, the problem lies not on the normative prohibition but on taking practical measures to identify, and describe what constitutes "harmful customs" to tackle it.

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

[12] FDRE constitution ,Art.35(5)
[13] Id. Art. 35(4).

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.

2.3.2 Bigamy under FDRE criminal code

According to FDRE criminal code, bigamy is generally casted as an offense 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 a grave cases, and specially when the criminal has knowingly mislead his partner in the second union as to his state, with rigorous imprisonment not exceeding five years.[14]

It is previously noted that there exist a definitional difference between polygamy and bigamy needless to mention it, while bigamy relates to the intentional acts of marrying another person while legally bounding by the first marriage. Polygamy may be about the practice of having more than one spouse simultaneously or successively.

In some jurisdiction such as Canada, criminal code treats both polygamy and bigamy under the sections indicating instance of how criminal legislation construed this terms differently.[15] According the Canadian

[14] The Federal Democratic Republic of Ethiopia Criminal code (2004) art. 650(1)
[15] Kelly lisa M,bringing International human rights law Home: an evaluation of canadas family law treatment of bigamy, university of toronto faculty of law Review,vol.65(2007), p.21

criminal code, while the former offense involves participating in the ceremony of marriage while already married, offense of polygamy however does not necessarily focus on the act of marriage “perse, but rather on the status of having more than spouse, or being in conjugal union with more than one person simultaneously.[16]

However, given the successive nature of polygamous marriage, the debate on distinction between polygamy and bigamy becomes more theoretical. Practically whether bigamous marriage is successive or simultaneous doesn’t matter since both cases contravenes the legal principles of marriage as union of man and woman. Hence, it should be clear that given prevalence of bigamous marriage in Ethiopia, the term polygamy would be used in this paper to refer to bigamous marriage, which is illegal under Ethiopian criminal code save in case provided by law.

The exception clause of bigamy reads that “(the provision of Article 650) shall not apply where bigamy is committed inconformity with religious or traditional practices recognized by law.[17] Here it should note carefully that the fact that it is only when bigamy is practiced in conformity with traditional or religious practice but this dully recognized by law.

2.3.3 Bigamy under revised family code

The enactment of family law is reserved for respective regional states under the FDRE constitution.[18] Currently, in addition to the Revised family code of

[16] Ibid
[17] Id.Art.651
[18] FDRE constitution Art.52

2000,[19] the state of Tigrai, Amhara, Oromia, Harari, and SNNP enacted their own family code.[20] But, state of Afar, Somali, Benishangul, and Gambela still don't have their own family code. [21] As to whether customary and religious bigamous marriage recognized under RFC, there are three forms marriage including civil marriage and marriages concluded in accordance with the religion or custom of future spouses.[22]

2.4 International legal aspect of bigamous marriage

2.4.1 Bigamy under human right law

The legality of bigamous marriage under international human right instruments are debatable due to the contentions of the rights involved. On one hand bigamy is viewed as a discrimination against woman that promotes sex in equality.[23] 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.[24] The legal authority that is invoked to support this claim emanates from the convention on the elimination of all forms of discrimination against women (CEDAW) and its general comments No.28.

[19] The Revised Family Code of 2000, Fed. Neg. Gaz. 6th year Extra Ordinary Issue No. 1, It isrevised 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 CityCouncil.

[20] 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.

[21] It should be noted that these regional states are required to resort the civil code of the 1960 since the scope of application of revised family code of 2000 is reserved for Addis Ababa and dire Dawa only.

[22]RFC, Art 1

[23] 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).

[24] Ibid

According to this legal instrument, state parties are obliged to take appropriate steps to modify the social and cultural patterns conduct of man and woman in order to eliminate prejudice and customary practices which are based on the idea of inferiority or superiority of either of sexes or on stereotyped roles for men and women.[25] However, this legal instrument criticized for failure to expressly prohibit bigamy as a discrimination against women and violation of their rights to dignity.[26]

The United Nation monitoring bodies the Human right committee and CEDAW committee have both interpreted provisions relating to equality within marriage under the international convention on civil and political rights (ICCPR) and CEDAW as requiring states to abolish bigamy. According to this general comment equal treatment with regard to the right to marry is noted to imply that bigamy violates the diginity of women since it discriminates against women.[27]

African charter on Human and people's Rights on the rights of human in Africa protocol recognize polygamous marital relationship as a compromise which takes cultural and religious diversity in to account.[28] According to this protocol, state parties are obliged to enact appropriate national legislative measures to guarantee the enjoyment of equal rights between men and women in marriage.[29] 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. Though this protocol may be criticized for its

[25] See Convention on the Elimination of Discrimination Against Women, Art 5(a)

[26] See Ruth Gaffney Rhys, polygamy: Human rights violation) women in society.
[27] Human right Committee ,General comment 28, Equality of rights between men and women ,Article 3, UN DOC. CCPR/C//21/Rev.1/Add10/2000)
[28]Manisuli senyonjo, women's rights to equality and non discrimination :Discriminatory family legislation in Uganda and role of uganda's constitutional court, International journal of law,policy and the family vol.21(2007), pp.341
[29]Supra note 10.

failure to reject bigamy out rightly, it is crucial to note that it has attempted to respond to the plights of women in bigamous 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 out rightly rejected the practice of bigamy in disregard of the treatment of women in bigamous 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.[30] 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."[31] 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.'[32] 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 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

[30] Dlamini, Supra note 17 p. 341. See also G. Keith Nedrow, Polygamy and the Right toMarry: 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 F ail To Protect Mothers and Children F rom Its Abuses, Saint Louis University Law Journal , Vol 56, No. 967 (2010), P. 977.

[31] Ibid, see at Nedrow. 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.

[32]

the holder of this right should be precluded from waiving it acts which are so objectionable as to be contra bonos mores.[33]

2.5 Reason for prevalence of bigamous marriage

2.5.1 Social reason

The prevalence of bigamy rationalized mainly based on socioeconomic grounds. The social rationalization for the prevalence of bigamy emanated from the widely held belief that bigamy ensures the stability and continuity of producing a large family in a given time

O'Donovan, states that having several wives has been a symbol of power, wealth and influence in traditional African societies for many centuries.[34]

2.5.2 Economic reason

The economic reason for prevalence of bigamous marriage contends that bigamy is capable of delivering benefits to women as long as substantial resource inequality prevails between men and women. It is argued that economic rationality dictates women to contract bigamous marriage through cost and benefit analysis.

According to Becker, women 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 in equality is sufficiently pronounced[35]. Another economic reason for the prevalence of bigamous marriage practice is attributable to the agreement between husband and wife to welcome a co-wife for its "merits

[33] See Dlamini, Supra note 17, p.342
[34] See African charter on human and peoples rights of women in African protocol, Art.6(c)
[35] Ibid

of co-operation among co-wives in homestead and farms and activities of religious and social festivity."[36]

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

2.6 Bigamy under Oromia family law

It is previously noted that the enactment of family law reserved for respective regional states under FDRE constitution. Thus, in addition to revised family code of 2000,[37] states of Amhara, Oromia,Tigrai, SNNPR and Harari enacted their own family code. As to the legality of bigamous marriage under respective family codes, the provision on bigamy and recognition of only monogamous marriage is verbatim of the RFC. However, under the state of Harari, the only exception to bigamy is the recognition of religious bigamous marriage. Like any other family codes, harari family codes also recognizes monogamous civil, customary and religious marriages.[38]

Family code of oromia regional state clearly recognizes bigamy when it was first enacted. But later on the regional state legislators are forced to amend the family code to abolish the bigamy provision for reason that is not specified. Thus, under this paper the provision of revised family code will be used unless there exist clear and substantial difference between states

[36] Minale A. Beyene, Polygamy and its impact on the life of women among the Oromos ofWestern Ethiopia: A case study of Illubabor Zone (Addis Ababa University unpublished Research report, 2000
[37] FDRE constitution Art.52.
[38]Harari regional family code (2000), Neg.Gaz.year 13, extraordinary issue No.1/2000,Art 1,2 and 3

family codes and RFC in which the separate reference opted. As compared to other regions, Oromia has high percentage of bigamous marriage. However, the family code of oromia failed to recognize or at least acknowledge the practice of customary and religious bigamous marriages. Thus, the reference should be made to the RFC. Therefore, except for the permission of religious bigamy under the state of Harari family code, bigamous marriage in Ethiopia is prohibited.

In the National Regional State of Oromia, bigamous marriages are silently recognized by courts simply by dissolving it and liquidating its pecuniary effects. Judges are not much concerned with the criminality of bigamous marriage since it is dominantly practiced in Oromia. 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. F atuma 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).[39] 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.[40]

[39] Aminat Ali v. Fatuma Wubet, Federal Supreme Court, Civ. Cassation No 45548, Published Federal Court Cassation Decisions, Vol. 13.
[40] Ibid

CHAPTER THREE

RESEARCH METHTODOLOGY AND RESEARCH DESIGN

3.1 Research Methodology

The researcher was used qualitative approach in this study. To this end, addressing and consulting relevant secondary sources, inter alia, journals, laws and cassation decisions are used. It asses regional and national family code pertaining to bigamous marriage.

3.2 Research Design

3.2.1 Data type and source

In order to gather information the researcher was used secondary source of data.The secondary source was collected from books, journals and other written materials.

3.3 Dissolution and division of common property in bigamous marriage

3.3.1 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 in general and oromia in

particular, 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 have said earlier, marriage produces legal effects as regards the common property division after its dissolution has been pronounced by the court of law.

As indicated under previous chapter, all family codes in the FDRE enacted so far are designed to regulate monogamous marriage. In the absence of specific legal provision that govern bigamous marriage, the following conventional family law principles, contract law principles and judicial decisions will be used as a regulatory options for the dissolution of bigamous marriage .

Dissolution or annulment of bigamous marriage is regulated under the bigamy provisions of criminal and family codes. on one hand, bigamous marriage may be dissolved or annulled by a court order where an application is made by either of the spouses of bigamous marriage or by public prosecutor.

The “term dissolution defined as the act of bringing an end” while the term annulment is defined as act of nullifying or making void. From 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 the date of judgment of dissolution. Thus, annulment and dissolutions where different in that the

former never has the bond of matrimony, while the later severs bond of matrimony.

In Ethiopia, except for religious bigamy under Harari family code, it could be argued that bigamous marriage is an annullable marriage but only unless, and until such marriages annulled. Also the judicial recognition of bigamous marriage in regional and federal supreme cassations vary even though the federal cassation has a final say on the matter.[41]

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 concerned with the criminality of bigamous marriage since it is dominantly practiced in Oromia. 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.

3.3.2 Division o f common property y in bigamous Marriage

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 Regime. This part subsequently considers the general principles applicable

[41] 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

to Common property in monogamous marriages and then examines whether these principles are apt to govern the division of common property in Bigamous marriages 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.

In default of such contractual agreement the matrimonial property of spouses are regulated by law[42].

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 there from during the life of the marriage becomes the common property of spouses.[43] 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.[44]It is also important to

[42] RFC,Art.48(7) and 85(2)

[43] RFC,Art.62(1)

[44] Bekele Hailesellaise, settlement of matrimonial dispute in case of Divorce:A case comment on civil appeal no.2133/78, journal of Ethiopian law vol.18(1982),p.86

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 efforts of the spouses and from their common or personal property is regarded as common property.[45]

According to this legal principle, even incomes received from the "personal property"[46] 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.[47] 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."[48] The words "all property" is generic and hence includes all movable and immovable, no matter how and when they are acquired, falling within the scope of the legal presumption – matrimonial common property.[49] However, 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

[45] Id, Art.62(2)
[46] Id, Art 58(1)
[47] Id,Art.57 cum.62(2)
[48] Id,Art.63(1)
[49] Bekele, supra note p.94

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.[50] 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

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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 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.

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

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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.[51] It is argued that this approach may be more appropriate and better reflect the expectations, intentions and behaviors of the parties in two cases. First, for marriages concluded simultaneously or very close together in time.[52] 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.[53]

On the other hand, multiple common property regimes refer to the existence of different common property regime depending on their order in time.[54] 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."[55] 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."[56]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 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.107

The multiplicity of monogamous marriage in bigamous marriage also in turn implies the multiplicity of common property regimes. Accordingly, distinct

[51] Diane j.klein , plural marriage and community property law, Golden gate University law review, vol.41,(2010), p,61
[52] Ibid
[53] Ibid
[54] Id, p.59
[55] Ibid
[56] See Encyclopedia Britanicca, vol.14, p.949

common property regimes would be created depending on the order of time with in which such properties were acquired.

Thus, 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.108 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.

CHAPTER FOUR

FINDINGS

Introduction

In previous chapters, we have seen that, the legal aspects, rationalization and dissolution of bigamous marriage as well as the principles applicable in division of common property in bigamous marriage. In this chapter we will see the impact of bigamous marriage on the division of common property under Oromia family law as well as the decision of the federal supreme courts.

Impact of bigamous marriage on division of common property under Oromia family law and decision of federal Supreme Court cassations

4.1 Impact Of Bigamous marriage on division of common property

As previously mentioned, both regional and RFC do not allow bigamous marriage that in turn resulted in lack of legal clarity as to the division of common property of spouses. Thus, the big trouble in the division of common property in bigamous marriage is where prenuptial agreement that regulates separate common property regime is absent. In such situations, it is becomes difficult to identify whether disputed common property falls in

the matrimonial state of first marriage or subsequent bigamous marriage. Thus, this condition creates a scenario in which all marital earnings of all spouses fall down to an entire single common property regime irrespective of the accounting of the order of time with in which the property has been acquired.

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. 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 first marriage diminishes any prior common property share of the preceding marriage. In other words, the first wife and subsequent wife according to the order in time during which they labored a wealth contributed to the common property becomes less advantageous because the fractional share of the first common property will be transmitted to the second and subsequent common property regime in which all spouses are expected share.

More over, determining the exact share of the spouses has remained to be an ardous task for a court when bigamous marriage is dissolved for various reason. Because of this Ethiopian courts both at regional and federal level have held a divergent position on the issue under consideration. On this regard there is a case from Amhara region[57] that Ato suileman married two wives called W/ro sadiya Ahmed and w/ro Rahima Ali. Later on the husband died and the marriage he had with his two wives dissolved by law. The deceased left a son born from sadiya Ahmed. In this litigation was made between the two wives of the husband on division of common property(house). The cassation division decided that half of common property have tobe given to the son of the deceased and remaining half to be divided between two wives. However in other similar case between Haji

[57] Cassation File No.24625

Mohammed and his two wives W/ro zeneba kelifa and w/ro kedija siraj, the cassation division decided that one of the wives was entitled to half of common property and the other half should be divided between the husband and other wife of the man. Thus,

4.2 T H E JURISPRUDENC E O F T H E F EDERA L SUPREME C OURT C ASSA T ION

The federal Supreme Court cassation (here in after 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[58]. One of the land mark 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[59]. 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 str*onger reasons*" and "by the operation of the law", be applicable to marriages in which two or more wives exist[60]. 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 should be equally divided (50 percent each) between the first wife, Fatuma

[58]Aminat Ali v. Fatuma Wubet, Supra note 71.
[59] Ibid.
[60] Ibid.

Wubet and her husband, Mehammad Hussein as forming part of the distinct common property regime[61]. 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[62]. 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[63].

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[64]

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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 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

[61] Ibid.
[62] 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.
[63] Ibid.
[64] Ibid.

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 coexists until it is di

Chapter five

5 Conclusions and Recommendation

5.1 Conclusion

Bigamous marriage is the act of marrying one person while legal married to another. It is a duality of marriage in which a man or women marries another spouses while bound by previous marriages.

The prevalence of bigamous marriage rationalized mainly based on socio economic grounds. Social rationalizations for prevalence of

bigamous marriage emanates from the widely held believe that bigamy ensures stability and continuity of the family.

Both regional and revised family code does not allow bigamous marriage. This resulted in lack of legal clarity as to the division of common property in case of bigamous marriage. A big trouble in division of common property, in case of bigamy is where prenuptial agreement that regulate separate common property is absent.

5.2 Recommendation

Urges the regions effectively to adapt education and public information programs, which will help eliminate prejudices and current practices that hinder the full operation of the principle of social equality of women.

To repealing or modifying discriminatory laws, to promote defacto equality between men and women.

The right to marry and found bigamous family, under Oromia family law requires judge interpretation if the gender equality is to be realized.

In the absence of agreement that regulates multiple common property regions the social policy that should be attained by the law is to ensure that the benefit of doubts must go to the spouses who asserts single common property region, which is measure that safe guards the property interest of all spouses on equal basis. Therefore, 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.

It also important to provide an opportunity for women spouses who is aggrieved by the unfairness of the marital single common property division to show that the property under dispute is acquired prior to celebration of the subsequent marriage with her husband.