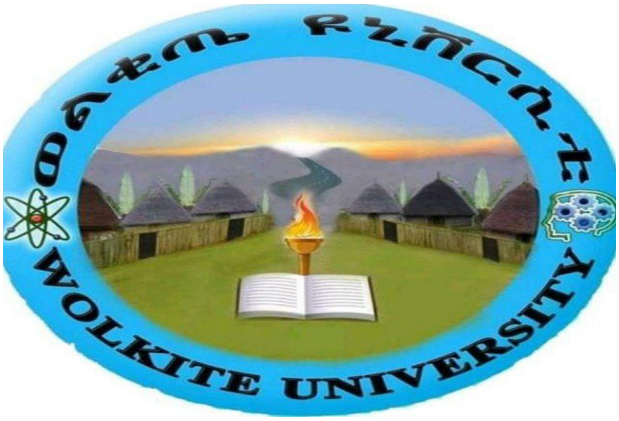
WOLKITE UNIVERSITY



SCHOOL OF LAW

RESEARCH TITLE: IMPACTS OF BIGAMOUS MARRIAGE ON DIVISION OF COMMON PROPERTY UNDER OROMIAN REGION IN CASE OF SENDAFA TOWN

BY: DAWIT TAYE

ID NO.: SLR/016/11

ADVISOR: MR.GIRUM GETU (LLB, LLM)

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WOLKITE, ETHIOPIA

Declaration

I, the undersigned, here by declared that this entitled “impact of bigamous marriage on division of common property under oromian region in case of sendafa town” is my work and that all sources I have used or quoted have been in dictated or acknowledged by means of completed references.

Name: Dawit Taye

Signature: _____

List of abbreviations

CEDAW: Convention on elimination of all forms of discrimination of against woman

CRC: Convention on the right of children

EDHS: Ethiopian demographic and health survey

FDRE: Federal democratic republic of Ethiopia

FSC: Federal supreme court

FSCC: Federal supreme court cassation

HRC: Human right committee

ICCPR: International convention on civil and political rights

OFC: Oromian family code

SNNP: Southern nation nationality and people

UN: United nation

Acknowledgement

Above all, I would like to thank from the bottom of my heart almighty God who given me health and peace and made this work completed. Secondly, I would like to express my heart full gratitude to my advisor Girum Getu, for his unreserved efforts in providing professional advice which helped me in preparing this paper. Finally, I thank all my family members who supported me when I asked everything.

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, convention, family law principles, contract law Principles and judicial decisions were used as regulatory options for dissolution of Bigamous marriage. This research was conducted to identify impact of bigamous marriage on division of common property under oromian region in case of sendafa town.

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CHAPTER ONE
1 INTRODUCTION
1.1 Background of the study

Family means a group of persons who are united by marriage, by filiations or even, exceptionally by adoption.[1] It is also defined by Murdok as a social group characterised by common residence, economic cooperation, and reproduction. It includes adults of both sexes at least two of whom maintain a socially approved sexual relationship and one and more children own or adopted, of the sexually cohabiting adults.

It is a very important constitutive part of a society. It has natural, economic as well as social importance.[2] Family in the Ethiopian constitution is recognized as the natural and fundamental unit of a society and an important legal and social institution. As a result it is given legal protection.

Family can be formed in three ways. These are through marriage, filiations and adoption. Relationship by consanguinity (filiations) results from the birth. It is the tie which exists between two persons such as the son and father, the grandson and grandfather, or who descends from common ancestor, such as two brothers or two cousins. Relationship by affinity is created as a result of marriage. Relatives through marriage are persons who are not relatives, but which join the family by means of a marriage. When a marriage is concluded the relationship is formed between one of the spouses with the blood relatives of the other spouse. The third is relationship by adoption. It is created as a result of special contract between the adopter and the adopted child.

As we have said above marriage is one of the ways through which family is formed. When we come to its definition, marriage is the voluntary union of one man and one woman to the exclusion of all others.[3] The definitional part as well as section 36 of the Australian marriage act defines marriage as voluntary union of one man and one woman for life to the exclusion of all others. The above two Definitions have three common elements. Firstly, the marriage has to be concluded between a man and a woman, there is no legal marriage between same sex persons. Secondly, the institution of marriage is to be entered into with the absolute consent of the parties i.e. voluntarily. Thirdly, the marriage is expected to last for a life time, death being the only cause for dissolution.

The definitions given by the different legal systems have their own shortcomings.[4]All the documents tend to be ideal in the sense they expect the union to last for life while in reality marriages breakdown for different reasons other than death. Moreover the central aim of

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[1] . *Aschalew A., Martha B.,law of family course material, first edition, justice and legal research institute, Addis Ababa, Ethiopia, 2008, pp. 21_273, at p. 25.*[Here in after, Aschalew A. and Martha B., law of family course material]

[2] . *Id.,p.26*

[3] . *Id.,p.37*

[4]. *Id., p.38*

concluding marriage seems to be establishment of family, while in reality, some couples conclude marriage knowing that they cannot have their own children.

Under Ethiopian revised family code, Marriage can be concluded through different ways.[5] The first one is called civil marriage (marriage concluded before officer of civil status). In this a man and a woman need to appear before officer for the purpose of concluding marriage and give their respective consent to enter into marriage.

The second mode of conclusion of marriage is religious marriage as provided under article 3 and 26 of the RFC. It takes place when a man and woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them. The third is customary marriage.

What we have to understand regarding these three modes of conclusion of marriage is that they have to observe the essential condition of marriage stipulated by the RFC. There are different essential conditions for the conclusion of valid marriage. The first one is consent. Pursuant to article 1 of the UN convention, no marriage shall be legally entered into without the free and full consent of both parties. When we come to the Ethiopian legal system article 34/2 of the constitution reiterates the requirement that marriages should be entered into upon the free and full consent of the parties. In addition to this the RFC considers the free and full consent of the parties as a validity requirement for conclusion of marriage as provided under article 6 of RFC. There are some grounds which vitiate the consent of the parties. These are fundamental error and violence (duress).

The second element is judicial interdiction. It exists in the case where a person is insane. The court orders interdictions of the person because his health and his interest so require. The other element is age. Under the revised family code (RFC), the minimum marriageable age is 18 years. However, there are circumstances in which a valid marriage could be concluded without the fulfilment of this requirement as provided under article 7/2 of the RFC. The fourth element is relationship. The restrictions under the RFC are based on two groups of relations: those based on blood relationship i.e. consanguinity and those based on marriage i.e. affinity. The fifth is period of widowhood as provided under article 16. The rationale for this is to respect right of children enshrined in the constitution and other international human right instruments to which Ethiopia is a party.

The last but not the least element is bigamy which is the basic concern of this study. The term bigamy refers to "the act of marrying one person while legally married to another".[6] As the name

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[5] *Aschalew A., Martha B., Law of family course material, p.38*

[6]*. Jetu E., Chewaka, "bigamous and the division of common property under the Ethiopian law," Oromian law journal, 2014, Vol.3, No.1,pp. 1_57, at p. 4.[Here in after, Jetu E.,Bigamous marriage and the division of common property under the Ethiopian law]*

indicates the term bigamy connotes the duality of marriage in which a man or woman marries another spouse while bound by the previous monogamous marriage. On the other hand, the state of bigamy in which a man and a woman marries to more than two spouses could be termed as polygamous marriage.

Black, in his law dictionary, defines the term polygamy as" the state or practice of having more than one spouse simultaneously."[7] 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 spouses are married one after the other. Hence, it should be noted that, in strict legal terms, polygamy and bigamy have a more specific meaning. Bigamous marriage in Ethiopia could be used to refer to a polygamous marriage in which a man maintains conjugal relations with more than two spouses forming a single matrimonial entity.

The prevalence of bigamy has been also continued to be rationalized mainly based on socio-economic grounds. The social rationalization for the prevalence of bigamous marriage emanates from the widely held belief that bigamy/polygamy/ ensures the stability and continuity of the family and clan due to its capability of producing a large family in a given time period. The economic justification for the prevalence of polygamy contends that polygamy is capable of delivering benefits to woman as long as substantial resource inequality prevails among men and woman.

Generally, when we come to Ethiopian revised family code, article 11 provided that a person is not allowed to conclude marriage when he is bound by the bonds of a previous marriage.[8] Hence for a person to conclude a valid marriage there should not be a preceding marriage.

The contract of marriage, if valid under the law, will govern the pecuniary effect as well as the personal relationship of the spouses. However, if the parties did not conclude a contract of marriage or if the contract is not valid, the law intervenes and regulate their relationship. Personal effects of marriage include respect, support and assistance, cohabitation, duty of fidelity as provided under the RFC. The RFC governs pecuniary relationship of spouse as personal and common property of spouses.Most of the time marriage concluded to last forever.[9] However, the reality shows us otherwise and many reasons can be enumerated for the dissolution of marriage. Generally, we may classify the reasons into operation of the law and acts of the parties.

1.2 Statement of the problem

Bigamous marriage is one of the essential conditions of marriage. Presumptions of validity are attached to bigamous marriage until avoided by dissolution. It has an adverse impact on division of common property of spouses. Bigamous marriage affects the rule of equity in the division of

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[7]. *Jetu E.,Bigamous marriage and the division of common property under the Ethiopian law.,p.4*

[8]. *Aschalew A., Martha B., Law of family course material, p.55*

[9] *Id., p.99*

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.

Family law of the region must have the provision that regulate the division of common property in case of bigamous marriage to fill the gap.

Therefore, the purpose of the study is to know the manner of division of common property in case of bigamous marriage and impact of bigamous marriage on division of common property under oromian region in case of sendafa town.

1.3 Objectives of the study

1.3.1 General objective of the study

The general objective of the study is to understand impact of bigamous marriage on division of common property under oromian region in case of sendafa town.

1.3.2 Special objectives of the study

The specific objectives of the study are:

- to examine the legal aspect of bigamous marriage
- detecting existence of bigamous marriage in sendafa town
- To identify causes of bigamous marriage
- Studying the manner of division of common property under bigamous marriage in sendafa town

1.4 The research questions

This research tries to answer the following questions:

- Is bigamous marriage void or voidable marriage?
- What are the causes of bigamous marriage?
- What are the impacts of bigamous marriage on division of common property of spouses generally and particularly in sendafa town?

1.5 Literatures review

Bigamy refers to the act of marrying one person while legally married to another. The legality of bigamous marriage under international human rights instruments are debatable due to the contentions of the rights involved.[10]On the one hand, “bigamy is viewed as a discrimination against woman that promotes sex inequality.” on the other hand, bigamy as a variety of marriage is also viewed as the right of woman “to marry and form a family” in the exercise of their free consent and choice per national and international bills of rights.

[10]. *Jetu E.,Bigamous marriage and the division of common property under the Ethiopian law,p.4.*

The legal authority which is often invoked to support the former claim emanates from the convention on the elimination of all forms of discrimination against woman (CEDAW) and its general comment no. 28.[11] According to this legal instrument, state parties are obliged to take appropriate steps to modify the social and cultural patterns of conduct of men and woman in order to eliminate prejudice and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and woman. However, this legal instrument is criticised for its failure to expressly prohibit bigamy as a discrimination against woman.

The African charter on human and people's rights on the rights of woman in African protocol "recognize polygamous marital relationships as compromise which takes cultural and religious diversity" into account[12].

According to this protocol, state parties are obligated to enact appropriate national legislative measures to guarantee the enjoyment of equal rights between men and woman in marriage. However, though the protocol encourages monogamy as the preferred form of marriage, the rights of woman in marriage and family, including that of polygamous marital relationships are promoted and protected.

Under the Ethiopian law, the legitimacy of regulating plural marriage raises a host of debatable questions in terms of the role of state in the interference of private family relationships. The FDRE constitution stipulates that "family is the natural and fundamental unit of a society and is entitled to protection by the society and state." accordingly every men and woman has the right to marry and found a family. It is also provided that marriage shall be entered into only with the free and full consent of the intending spouses i.e. man and woman.

Furthermore, it also provides for the equal rights man and woman while entering into, during marriage and at the time of divorce.[13]Thus, as indicated before, bigamous marriage in which a man exercises another bigamous and bigamous marriage, as the case may be, would be an infringement of the equality clause in marriage.

But, if a woman, for different reasons indicated before, enters into a marriage with a married man only with her "free and full consent", could this act co be considered as the right to marry and found a family or violations of the equality clause that discriminates such woman? As the case one may argue this question begs the answer as to the legality or recognition of multiplicity of marriage under the FDRE constitution.

The right to marry and found a bigamous family under the FDRE constitution requires constitutional interpretation by the house of federation if gender equality is to be fully

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[11] *Jetu E.,Bigamous marriage and the division of common property under the Ethiopian law , p.9*

[12]. *Id., p. 10*

[13]. *Id., p.,13*

realized.[14]Yet, one thing is certain from the plain reading of the constitutional provision. As, indicated above, the legitimacy of bigamous marriage under the FDRE constitution is conditional upon the provisions of specific law yet to be enacted by subordinate legislations. By so doing, the FDRE constitution reserved itself from clearly permitting or prohibiting bigamous marriage practice in Ethiopia.

According to the FDRE criminal code, bigamy is generally casted as an offence punishable by law as provided under article 650(1) of the FDRE criminal code.[15] The exception clause of bigamy as provided under article 651 of the FDRE criminal code reads that the provisions of article 650 shall not apply where bigamy is committed in conformity with religious or customary practices recognized by law.

Currently, in addition to the revised family code of 2000, the state of Tigray, Amhara, Oromia, Harari, and SNNPR enacted their own family code. But, the state of Afar, Somali, Benishangul_gumuz, and Gambella still don't have their own family code.

Under the RFC, three forms of marriage can be identified. These are, as we have seen above in the background section, civil marriage, religious marriage, and customary marriage. They are the same except for the manner of their conclusion or celebration.[16] All types of marriages are monogamous in form with varying set of procedures where one is concluded before the officer of civil status and the others taking place according to the ceremonial acts of religious and customary practices of the intending spouses. It is also mandatory for all forms of marriage to be registered by a competent officer of civil status. This shows us that a competent of civil status should decline the registrations of both bigamous customary and religious marriages even if celebrated in conformity with the customary and religious practices of the intending spouses. Furthermore, it is also expressly provided that, "a person shall not conclude marriage as long as he is bound by the bonds of a preceding marriage."[17]

Coming to the regional family codes, the provisions 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.[18]

Coming to the oromian family code (OFC), bigamous marriage was not explicitly prohibited by the original version of the oromian family code that was enacted in 2003.[19] It is speculated that the initial legislative silence might have been due to the existence of a long tradition of bigamous

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[14]. *Jetu E.,Bigamous marriage and the division of common property under the Ethiopian law,p.16*
[15] . *Id., p. 17*
[16]. Id., p.20
[17]. *Id., p.21*
[18]. *Id.,p. 21*
[19]. Sileshi H., "the disputed constitutionality of the presidential practice of the federal supreme court and its implications for oromian family law: the case of bigamous marriage in Ethiopia," journal of African law, 2019, Vol. 63, No. 2, pp.2_32, at p.7 .*[Here in after, Sileshi H., the case of bigamous marriage in Ethiopia]*

marriage in the region. Now, the OFC prohibits the conclusion of a second marriage by a person who is bound by the preceding bond of a valid marriage.[20]

In principle, a bigamous marriage is subject to dissolution at any time. The dissolution of bigamous marriage removes the purported bond of the created martial union between the spouses.

The dissolution may be made on various grounds. A regular court can annul an existing bigamous marriage. Indeed, annulment is the usual legal means prescribed for the dissolution of an invalid marriage. Nonetheless, it is possible that the dissolution of bigamous marriage can be triggered by death or the declaration of a spouse's absence. The death of a bigamous spouse often entails the termination of both the valid and the bigamous marital unions.

A declaration of absence can also operate to prompt the dissolution of bigamous marriage.

1.6 Significance of the study

The study would enable one to know the impact of bigamous marriage on division of common property. Moreover, it helps peoples and state to have knowledge on impacts of bigamous marriage on division of common property under oromian region in case of sendafa town and surrounded area. It may also helpful in inspiring other researchers who need to make study on the area i.e. those who need to make research on the "impact of bigamous marriage on division of common property." The other is that it helps to develop knowledge about the legal aspects of bigamous marriage. It may also help the state to amend its law.

1.7 Research methodology

1.7.1 Research type

The research type will be the empirical research type. The researcher would use qualitative approach in the study. To make the end, addressing and consulting relevant secondary sources, internets, journals, laws and cassation decisions would use to assess the regional and national family codes that pertaining bigamous marriage.

1.7.2 Data collection tools

In order to gather information, the researcher would use primary and secondary source of data. The primary source such as interviews and court decisions and also secondary sources such as journal articles, textbooks and other internet based sources have been used for the fruitfulness of this study.

1.7.3 Data analysis

For the study, qualitative method of data analysis will be used and data which contain fact information would analyze qualitatively in a way that answer the research question.

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[20]. *Sileshi H., the case of bigamous marriage in Ethiopia.,p.7*

1.8 The scope of the study

The scope of this study is on oromian region in case of sendafa town in Area. The problem of bigamous marriage is not limited to sendafa town. Other towns may also face the problem of bigamous marriage on division of common property. But as there are time and financial hindrances to make study over all towns, the study covers only sendafa town.

When we come to the scope of the study in problem it covers, the study would be about bigamous marriage and its impact on division of common property generally under oromoian family law and specifically in sendafa.

1.9 Limitation of the study

The quality of the study would depend on existence of fund, acquiring of the relevant information and availability of valuable reference materials. But, as there are lack of sufficient fund, absence of relevant information as a result of small numbers of those who concluded bigamy at a sufficient needed level in sendafa and unavailability of valuable reference materials in addition to shortage of time, the quality of this study have been affected by these factors.

1.10 Research organization

This research paper was organized into four chapters:

- ✓ Chapter one_ deals with the background of the study, statement of the problem, objectives of the study, the research questions, literatures review, significance of the study, research methodology, scope of the study, limitation of the study, research organization and ethical consideration.
- ✓ Chapter two_ deals about the legal and institutional framework of bigamous marriage and division of common property in dissolution of bigamous marriage.
- ✓ Chapter three_ deals about analysis of law and practice.
- ✓ Chapter four_ is conclusion and recommendation.

1.11 Ethical consideration

In the working of this study, I respect the various laws of our country and different journals and I interpreted the laws with regarding of respect to various cultures, religions, beliefs and values. And I will use data accordingly and I would not plagiarize the others work ways.

CHAPTER TWO
2. THE LEGAL AND INSTITUTIONAL FRAMEWORK OF BIGAMOUS MARRIAGE AND DIVISION OF COMMON PROPERTY IN DISSOLUTION OF BIGAMOUS MARRIAGE

2.1 MARRIAGE AND VALIDITY ELEMENTS OF MARRIAGE

2.1.1 Marriage and its forms

Marriage is the voluntary union of one and one woman to the exclusion of all others.[21] It is also an institution which is to be entered into by the parties of their free will.

Marriage refers the act of becoming married or to the ceremony in which one becomes married and to the legal contract that makes a man and a woman husband and wife.[22] Or it may be defined as the status or relation of a man and a woman who have been legally united as husband and wife. It is natural that human society reproduces through marriage. Marriage is unavoidable as far there is a society. Society can continue existing when there is reproduction and marriage is natural as well as societal. As natural it is unavoidable and as social it has to be regulated by certain rule of conduct. Thus, it becomes a necessity to arrange marriage in a certain contractual manner in order to give it social respect and legal protection to make it sustainable.[23]

Marriage has three forms.[24]The first one is civil marriage. Civil marriage is a marriage solemnized in front of an officer who is empowered to accept the consent of the parties wishing to enter into marriage. The second form of marriage is religious marriage. It is a form of marriage which takes place when a man and a woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them.

The third form is customary marriage which is taken place when a man and a woman have performed such rites as deemed to constitute valid marriage by the custom of the community in which they live or by the custom of the community to which they belong or to which one of them belong.

What makes these three forms of marriage common is that all of them need to observe the essential conditions of marriage as we will discuss them in the next section.

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[21] . Aschalew A. and Martha B., law of family course material, p. 37

[22].*Meron S., "divorce under the revised family code of federal government: its impact on woman, St. Mary's university college, faculty of law, 2008, .[unpublished],p. 8*

[23]. *Meron S., "divorce under the revised family code of federal government: its impact on woman, St. Mary's university college, faculty of law, 2008, .[unpublished],p. 8*

[24].. Aschalew A. and Martha B., law of family course material, *p.3*

Generally, marriage has its own peculiar qualities that differ it from other ordinary relationship initiated by agreement one of which is marital relationship is intends to last "forever" while other contractual relationship last until obligation is discharged.[25] Marriage is a contractual relationship creates duties and obligations as between the spouses, i.e. the contracting parties. These duties and obligation will exist at conclusion, duration and dissolution stage.

2.1.2 Validity elements of marriage

Essential conditions of marriage for validity of marriage pertain to biological, psychological and sociological factors.[26] The biological factor relate to age, sex and state of health of the future spouses, whereas the psychological factor relate to the freedom of will of the parties i.e. consent. On the other hand, the sociological aspect pertains to issues like marriage between persons related by consanguinity and affinity as well as by adoption and it also incorporates bigamy. They are expressed one by one as follows.

- ✓ **Consent:** pursuant to article 1 of the UN Convention, no marriage shall be legally entered into without the full and free consent of both parties. This requirement is further strengthened by the recommendation. The convention as well as the recommendation put an obligation on member states to make sure that future spouses have decided, of their free will and consent, to enter into marriage.
  When we come to Ethiopian legal system, article 34/2 of the constitution reiterates the requirement that marriages should be entered into upon the free and full consent of the parties. In addition to this the RFC considers the free and full consent of the parties as a validity requirement for conclusion of marriage. The RFC recognizes some grounds which would vitiate the consent of the spouses. These are fundamental error as provided under article 13, violence or duress as provided under article 14 and judicial interdiction which is given under article 15 of the RFC.
- ✓ **Age:** specifying the minimum age for marriage is left for the individual countries to govern through legislation. However this power of the state is not without any limitation. As can be seen from the recommendation on consent to marriage, member states shall Take legislative action to specify a minimum age for marriage which in any case shall not be less than fifteen years of age.

  When we come to the RFC, the minimum marriageable age is 18 years for both sexes. However there are circumstances, in which a valid marriage could be concluded without fulfilment of this requirement if the minister of justice, for serious cause, grants for dispensation, on application of the future spouses, or the parents or guardian of one of them, marriage could be validly concluded. The dispensation, however, may not be more

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[25]. *Meron S., "divorce under the revised family code of federal government: its impact on woman, St. Mary's university college, faculty of law, 2008, .,p.11*

[26]. Aschalew A. and Martha B., law of family course material, *p 47*.

than two years. This means, the maximum year that can be dispensed by the minister is two years, and hence, the lowest age of marriage can be 16 years.

- ✓ **Relationship:** in many societies across the world there are laws which prohibit marriage between people who are related. The same is true in Ethiopia. The restrictions under the RFC are based on two groups of relations: those based on blood relationship i.e. consanguinity and those based on affinity. The prohibited consanguinity restrictions involve marriage between persons related in the direct line between ascendants and descendants. Marriage between persons who are related by affinity in the direct line is also prohibited under the RFC article 9.
- ✓ **Bigamy:** the other essential condition for the conclusion of a valid marriage is the absence of prior marriage. As stipulated under article 11 of the RFC, a person is not allowed to conclude marriage when he is bound by the bonds of preceding marriages.
- ✓ **Period of widowhood:** this refers to the fact that a woman is under prohibition to remarry within the next one hundred and eighty days following the dissolution of her former marriage.
  The rationale for the limitation is to respect the right of children enshrined in the constitution and other international human right instruments to which Ethiopia is a party.

2.2 Bigamous marriage and its legal effects

INTRODUCTION

The practice of bigamous marriage in rural and urban Ethiopia is deeply rooted in religious and customary practices. According to the Ethiopian demographic and health survey report of 2011(EDHS), eleven percent of married woman in Ethiopia are in bigamous marriage, with nine percent having only one co wife and two percent having two or more co wives.[27]Similarly, five percent among the married men in Ethiopia live as a bigamous marriage two or wives.

Despite its prevalence, however, the practice of bigamy is prohibited under the family and criminal code of Ethiopia. Though, the prevalence of bigamous marriage in developed countries is defended on the basis of the right to religion and culture, the socio-economic justification for its prevalence is stronger and more felt in developing countries such as Ethiopia.

The purpose of this chapter is, therefore, to provide an insight into the legal principles that ought to be contemplated in regulating dissolution of bigamous marriage and the division of common property.[28]

It also intends to address the following two questions. First, given the prevalence of bigamous marriage practice in Ethiopia, what will happen to the effects of a bigamous marriage where its practice is criminalised and its recognition denied on what so ever grounds? Second, what

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[27]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law,p.1*
[28]. Id., *p.2.*

additional steps are contemplated to fully regulate the effects of bigamous marriage in case where polygamy is criminalised but yet recognition is imposed for the purpose of granting relief?

2.2.1Definitions and rationalizations of bigamous marriage

The term bigamy refers to the "act of marrying one person while legally married to another."[29]As the name indicates the term bigamy connotes the duality of marriage in which a man or woman marries another spouse while bound by the previous monogamous marriage. On the other hand, the state of bigamy in which a man or woman marries to more than two spouses could be termed as polygamous marriage.

The prevalence of bigamy has been also continued to be rationalised mainly on socio-economic grounds.[30] The social rationalization for the prevalence of bigamous marriage emanates from the widely held belief that bigamy/polygamy ensures the stability and continuity of the family and clan due to its capability of producing a large family in a given time period.

The economic justification for the prevalence of polygamy contends that polygamy is capable of delivering benefits to woman as long as substantial resource inequality prevails among men and woman. It is argued that economic rationality dictates woman to contract bigamous marriage through cost and benefit analysis.

In Ethiopia, official reports and case studies also unfold similar reasons for the prevalence of bigamous marriage practice. According to the 2011 EDHS report, "rural woman are more likely to be in bigamous union (12 percent) than urban woman (5 percent). As per this national statistical report, "woman in the lowest wealth quintile are the most likely to be in a bigamous union (16 percent), compared with just six percent of woman in the highest wealth quintile."

Furthermore, lack of woman's education is also another reason for the practice of polygamy in Ethiopia.[31] For instance, according to the 2011 EDHS, "there is an inverse relationship between education and polygamy. That is, "the proportion of currently married woman in bigamous union decreases from thirteen percent among woman with no education to less than one percent among woman with more than secondary education. Similarly, "older men living in rural areas, those with little or no education, are more likely to be in bigamous union than other men.

2.2.2 Bigamous marriage under international instruments

- **Bigamous marriage under human rights law**

The legality of bigamous marriage under international human rights instruments are debatable as due to the contentions of the rights involved.[32] On the one hand, "bigamy is viewed a discrimination against woman that promotes sex inequality." On the other hand, bigamy as a

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[29]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law* p. 4
[30]. Id., p. 5
[31]. *Id.,p.8*
[32]. Id.,p.9

variety of marriage is also viewed as the right of woman "to marry and form a family" in the exercise of their free consent and choice per national and international bills of rights.

The legal authority which is often invoked to support the former claim emanates from the former convention on the elimination of all forms of discrimination against woman (CEDAW) and its general comment no.28. According to this legal instrument, state parties are obliged to take appropriate steps to modify the social and cultural patters of conducts of men and woman in order to eliminate prejudice and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and woman. However, this legal instrument is criticised for its failure to expressly prohibit bigamy as a "discrimination against woman and violation of their right to dignity."

In view of the critique, the United Nations treaty monitoring bodies, the human rights committee (HRC) and CEDAW committee have both interpreted the provisions relating to equality within a marriage under the international convention on civil and political rights (ICCPR) and CEDAW as requiring states to abolish polygamy. According to this general comment, "equal treatment with regard to the right to marry is noted to imply that polygamy violates the dignity of woman since it discriminates against woman.

The African charter on human and people's rights on the rights of woman in Africa protocol "recognize polygamous marital relationships as a compromise which takes cultural and religious diversity" into account. According to this protocol, state parties are obligated to enact appropriate national legislative measures to guarantee the enjoyment of equal rights between woman and men in marriage. However, though the protocol encourages monogamy as the preferred form of marriage, the rights of woman in marriage and family, including that of polygamous marital relationships are promoted and protected.

Though this protocol may be criticized for its failure to reject polygamy out rightly, it is crucial to note that it has attempted to respond to the plights of woman in polygamous marital relationships by obliging state to ensure the promotion and protection to their rights in such status quos. Hence, unlike the former legal instrument which out rightly rejected the practice of polygamy in disregard of the treatment of woman and men even in bigamous marriage where ever it already becomes a lived reality of woman.

On the other hand, the practice of polygamy is viewed as human rights of woman to marry form and form a family. The gist of this argument lies on the fact that a woman who contracts a bigamous marriage "does so in exercise of their right to free choice i.e. choosing for themselves the form of marriage to enter, weather it being monogamous or bigamous." 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, weather bigamous or monogamous, counts for nothing.

2.2.3 Bigamous marriage under the Ethiopian laws

2.2.3.1 Bigamy and the FDRE constitution

The FDRE Constitution stipulates that "family is the natural and fundamental unit of society and is entitled to protection by the society and the state."[33] Accordingly, every men and woman has the right to marry and found a family. It is also provided that marriage shall be entered into only with the free and full consent of the intending spouses i.e. man and woman. Furthermore, it also provides for the equal rights of man and woman while entering into, during marriage and at the time of divorce. Thus, as indicated before, bigamous marriage in which a man exercises another bigamous and bigamous marriage, as the case may be, would be an infringement of the equality clause in marriage.

In general, the writer has the opinion that the right to marry and found a bigamous family under the FDRE constitution requires constitutional interpretation by the house of federation if gender equality is to be realized. Yet, one thing is certain from the plain reading of the constitutional provision. As indicated above, the legitimacy of bigamous marriage under the FDRE Constitution is conditional upon the provisions of specific law yet to be enacted by subordinate legislations.

By so doing, the FDRE Constitution is conditional upon the provisions of specific law yet to be enacted by subordinate legislations.[34] It opted for specific matters to be regulated by enabling legislation to be enacted by the parliament or state councils in recognition of marriage concluded under religious and customary laws as a legitimate exercise of the right to religion and cultural freedom on condition that these rights are limited if their practice "oppress or cause bodily or mental harm to woman."

On top of this, as noted before, the FDRE constitution clearly stipulates that both men and woman "have equal rights while entering into, during marriage and at the time of divorce."[35]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 woman spouses during divorce is also equally discriminatory.[36]

2.2.3.2 Bigamy under the FDRE criminal code

According to article 650(1) of FDRE criminal code, Bigamy is generally casted as offence punishable by the law. A bigamous marriage is illegal under the FDRE criminal code save in cases provided by the law. As such, it is crucial to examine the decriminalizing provision stipulated under the criminal code.

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[33]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law,p.13*
[34]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law,p.* p.,16
[35]. *Ibid*
[36]. Ibid

The exception clause of bigamy reads that "the provisions of article 650 shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law.[37]

Here, it should be noted carefully that the fact that the practice of polygamy is inconformity with customary or religious practice does not make it excuse under the criminal code of Ethiopia.[38]Rather, it is only when bigamy is practiced in conformity with religious or customary practices but this time duly recognized by law. Yet, the issue worth examination is weather there exists a law recognizing polygamy as a legitimate customary or religious practice.

2.2.3.3 Bigamy under the Ethiopian family codes

It is previously noted indicated that the enactment of family law is reserved for respective regional states under the FDRE constitution.[39]

To begin with, under the RFC, three forms of marriage can be identified. They are civil marriage and marriages concluded in accordance with the religion or custom of the society. A civil marriage is concluded between a consented "man and woman" appeared before an officer of civil status. Therefore, civil marriage is purely monogamous marriage. On the other hand, religious marriage is concluded when a man and a woman have performed such acts or rites as deemed to constitute valid marriage by their religion or religion of one of them. Similarly, customary marriage is concluded when a man and woman have performed such rites as deemed to constitute a valid marriage by the custom of the community to which they belong or to which one of them belong.

So, all types of marriages are monogamous in form with varying set of procedures where one is concluded before the officer of civil status and the others taking place according to the ceremonial acts of religious and customary practices of the intending spouses. It is also mandatory for all forms of marriage "to be registered by a competent officer of civil status. This shows us that a competent officer of civil status should decline the registration of both bigamous customary and religious marriages even if celebrated in conformity with the customary and religious practices of intending spouses. Furthermore, it is also expressly provided that "a person shall not conclude marriage as long as he is bound by the bonds of a preceding marriage."

Coming to the regional family codes, the provisions 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. Its major departure from other regional family codes is it exceptionally permits bigamous marriage specifically concluded according to religious practice.[40]

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[37]. *Jetu E. Bigamous marriage and the division of common property under the Ethiopian law.* ,18.
[38]. Id.,19.
[39]. Id.,19.
[40]. *Id., p.21.*

2.3The institutional frameworks controlling bigamous marriage

Civil marriage is concluded between consented man and woman appeared before an officer of civil status.[41] Therefore civil marriage is purely monogamous marriage. On the other hand, religious marriage is concluded when a man and a woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them. Similarly, customary marriage is concluded when a man and a woman have performed such rites as deemed to constitute a valid marriage by the custom of the community in which they live or by the custom of the community to which they belong or to which one of them belongs.[42]So, it is very easy to compare the three types of marriage.

Accordingly, all forms of marriages are the same except for the manner of their conclusion or celebration. In other words, all types of marriages are monogamous in form with varying set of procedures where one is concluded before the officer of civil status and the others taking place according to the ceremonial acts of religious and customary practices of the intending spouses. It is also mandatory for all forms of marriage to be registered by a competent officer of civil status. This shows us that a competent officer of civil status should decline the registration of both bigamous customary and religious marriages even if celebrated in conformity with customary and religious practice of the intending spouses. Furthermore, it is also expressly provided that, "a person shall not conclude marriage as long as he is bound by bonds of preceding marriage."

When we come to FDRE Ethiopian criminal code, it provided that bigamy is generally casted as an offence punishable by the law.[43] Hence, bigamous marriage is illegal under the Ethiopian criminal code save in cases provided by the law. As such, it is crucial to examine the decriminalizing provision stipulated under the criminal code. The exception clause of bigamy reads that "the provisions of article 650 shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law. Therefore, based on the above criminal code provision the prosecutor office and police station can take measure against one who commits bigamy unless the religious or custom to which the bigamist belongs to given otherwise.

The judicial recognition of bigamous marriage in regional and federal supreme cassations varies even though federal cassation has a final say on the matter.[44] 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 oromia national regional state supreme court, judges are not so much concerned with the criminality of bigamous marriage since it is dominantly practiced in oromia.[45] He further noted that though bigamous marriage is an offence punishable by the criminal code, most bigamous marriage were revealed before the court

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[41]. *Jetu E. Bigamous marriage and the division of common property under the Ethiopian law.* , p.20
[42]. Ibid
[43]. *Id., p.17*
[44]. *Id., p. 25*

[45].Id., 26.

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.[46] in matrimonial property dispute case between Aminat Ali vs. Fatuma Wubet the supreme court and its cassation division declared the marriage of petitioner Aminat Ali bigamous since she married to Mehamed Husein in 1990 ethiopian calendar as a second co wives to respondent fatuma wubet whose marriage is prior in time (1987). The amhara Supreme Court reasoned that the decision of the lower couts that the common property acquired after the second marriage should be divided between the three spouses affects the interests of the first legal spouce. Though the marriage of Aminat ali and Mohamed Husein is now become monogamous marriage due to the dissolution of the first marriage of Fatuma Wubet, the amhara supreme court declared it a bigamous marriage without having legal effect.

Aminat Ali pleaded the committal of basic error of law by the amhara regional supreme court cassation before the FSCC, where she argued the appropriateness of declaring her marriage bigamous without giving considerations to the dissolution of the first bond of marriage and without giving considerations to the proof as to the existence of separate marriage bond between herself and Mohamed husein. On the other hand, fatuma wubet argued since the marriage of Aminat Ali is bigamous it should not have to be considered as if her marriage has been legally existed. Hence, fatuma wubet argued that in the absence of marriage bond, there is no legal basis where Aminat Ali could embark on the division of common property which is the effect of marriage.

The FSCC noted the fact that bigamous marriage is prohibited under both RFC and regional family codes and the lower courts should have dissolved such bigamous marriage on the application of fatuma wubet or the public prosecutor long before the matrimonial property disputes. However, the court realized that Fatuma Wubet was in bad faith and was not just or fair to bring an action for nullifying the second marriage right at the time when disputes over the division of property ensue in the absence of evidence that shows opposition at the time of conclusion of marriage or during the marriage for more than ten years.

So, though the FSCC rebuked the bigamy claim of fatuma wubet as “untimely and in bad faith” nothing is said as to whether such bigamous marriage should be given judicial recognition despite its legal prohibition and judicial recognition for relief purpose. But, the writer contends that the present judicial discretion of the FSCC reveals the implicit judicial recognition of bigamous marriage and its legal effects. The fact that the FSCC declared bigamous marriage as a social reality in Ethiopia unfolds the recognition of bigamous marriage for purpose though it is difficult to conclude that the position of the federal cassation represents clear and net positions of Ethiopian state on the legality of bigamous marriage.

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[46]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law.*,26.

2.4 Dissolution of marriage and its effects

2.4.1 Dissolution of marriage: concept and grounds

Dissolution of marriage is the breaking of conjugal bond and the cessation of the effect the union of the spouses produce either as regards them or as regards third parties.[47]

There are various reasons for the dissolution of marriage. These causes can be classified into two: operation of the law and act of the parties' i.e. divorce.

- **Dissolution by operation of the law**: the first ground for the dissolution of marriage as provided under article 75/a of the RFC is the death of one of the spouses, which brings the marital conjugal to an end. Apart from actual death of one of the spouses, the law also recognizes declaration of absence as another ground for dissolution. The other ground for dissolution of marriage is the non fulfilment of essential conditions of marriage.

- **Divorce:** is the rupture of a valid marriage during the life of the two spouses.

Divorce as defined by bishop_ is the dissolution or partial suspension of marriage by law, the dissolution being termed as divorce from the bond of matrimony, or a vincule matrimonii, the suspension, divorce from the bed and board, a mensal at there, the former divorce put an end to the marriage, the leaves marriage bond in full force.[48]Divorce is the end result of the exhaustion of all hopes and emotion of the couple to live together for life or for indefinite period of time.[49]

Divorce, also known as, "dissolution of marriage," occurs when a marriage legally terminates. Divorce law governs the sometimes complicated process of divorce, helping to determine how property and assets are divided as well as who will have custody of children the couple may have.

There are two types of divorce. They are fault based and no fault based.[50] In some cases, one partner can be shown to be at fault in divorce. This is most common when abuse in an issue, one partner can be shown to be at fault in a divorce. This is in case of fault based divorce. In a no fault divorce there is no need for evidence or proof for a wrong doing. Instead, any legally recognized reason can be accepted.

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[47]. Aschalew A. and Martha B., law of family course material, *p 99*

[48]*. Meron S., "divorce under the revised family code of federal government: its impact on woman, St. Mary's university college, faculty of law, 2008, .[unpublished],p.15*

[49].Ibid

[50] .Ibid

Under Ethiopian law, The RFC classified divorce into divorce by mutual consent and by petition.[51]

Divorce by mutual consent_ the RFC allows parties to seek for divorce by mutual consent. Considering the freedom of the parties the law allows the spouses to petition for divorce by agreement.

Divorce by petition_ the other way of ending the conjugal union by divorce is when one of the parties requests the court to end the marriage. In case of mutual consent divorce, both parties have agreed as to the separation as well as the consequence of their separation. In divorce by petition, it may be only one of the spouses who requests for the ending of the union or alternatively, both the spouses may request the divorce.

In both types of divorce, an application has to be made to the court. That is to say, the power of declaring divorce is given only to the court.

2.4.2 Effects of dissolution of marriage

2.4.2.1 Child custody and Maintenance duty

When a marriage is dissolved through divorce, one of the questions which need to be answered by the court is as to who should have custody of this minor children.[52] Custody of minor child encompasses various set of rights and obligations under it, like the right to live with the child in a shared residence, authority over the discipline of the child and education as well as medical treatment. The visitation right of the non custodial parent is also an issue to be determined at the time of deciding on the custody of the minor.

Currently, what is envisaged under many laws is the principle of "best interest of the child" in determining custody issues. The principle of the best interest is incorporated in different human right instruments[53] one of such international human right instrument is the United Nations convention on the right of the child. Article 3 of the CRC states: "in all actions concerning children, weather undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child must be a primary consideration.

When we look into the Ethiopian family law on the issue of child custody, the civil code under article 681 requires the court to determine issues of child custody having regard solely to the interest of the children.[54]The best interest of the child principle had acceptance even under the civil code. Hence, courts have to investigate what would best interest be for the child at the time of deciding as to where the child will be placed after the dissolution of the marriage.

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[51]. Aschalew A. and Martha B., law of family course material, *p. 107*
[52]. Aschalew A. and Martha B., law of family course material, *p. 116.*
[53].Id.,p.118
[54].Id., 121

The 1995 FDRE constitution under article 36 recognizes the different rights of children. The best interest provision of the convention on the right of the child is also incorporated under sub article 2.Article 113 of the RFC deals with the role of the court in determining custody of children after the pronouncement of divorce. By virtue of this article, there are three questions to be addressed by the court at the time of determining custody case. The first one is who should have custody of the child? Regarding this question, the RFC provides guidelines which need to be observed by the court. First of all, if the divorce is made by mutual consent, the parties are also expected to determine the consequences of their divorce, including custody of their minor children, by their agreement. However, in case of any other divorce, article 221/2 gives the mandate to the court to determine as to who should be the guardian or tutor of the child. In doing so, the court is expected to observe the guidelines enumerated under article 113/2.

The second question is in relation to the maintenance of the child, how much should the non custodial parent give for the maintenance of the child?

The third important question is the right of the non custodial parent to visit the child. How often should this visitation be? For how long can the non custodial parent stay with the child and other related questions are to be given a response by the court.

2.4.2.2 Division of common property

There is a presumption that all property in marriage is common property of the spouses. The spouse who claims to be the personal owner of the particular property in question has to prove the fact. Once the property is determined to be the personal property, the owner of that property may retake it in kind. If the personal property has been mixed with the common property, the spouse will be given an equivalent some of money or a thing of value corresponding to such price from the common property.

Once what constitutes common property has been ascertained, the next thing to do is to decide on the manner of partitioning this common property between the spouses.[55] The rule in partition, as is reflected under article 90 RFC is that common property shall be divided equally between spouses. This is a reflection of constitutional provision which gives both spouses equal right in respect of property at the time of entering, during and at the end of marriage.

As far as the manner of partitioning is concerned, the rule is that partition will be made in kind in such a way that each souse receives some property from the common property.[56] If the property is difficult or impossible to divide, or alternatively if the spouses do not agree as to who should have the property, it will be sold and the proceeds will be divide between them.

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[55] Aschalew A. and Martha B., law of family course material, *p.126*
[56].Ibid

2.5 Dissolution of bigamous marriage

Despite the prevalence of bigamous marriage practice in Ethiopia, it is generally concluded that except for the recognition of bigamous marriage celebrated according to religion under the harari family code, bigamous marriage in Ethiopia is illegal and a crime punishable under the criminal code.[57]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?

All family codes in the federal republic of Ethiopia enacted so far are designed to regulate monogamous marriage.[58] In the absence of specific legal provisions that governs bigamous marriage practice; there are host of questions that require answer. Would a woman in bigamous marriage be able to seek safe exit and require any relief from the situation? In what way would courts be able to regulate the dissolution of bigamous marriage compared to that of monogamous marriage? In the following, conventional family law, contract law principles and judicial decision will be considered as regulatory options for the dissolution of bigamous marriage in Ethiopia

2.5.1 Termination of marriage in bigamous union: dissolution vis_a vis_annulment

Dissolution or annulment of marriage in bigamous union per se is regulated under the bigamy provisions of the criminal and family codes.[59]On the one hand bigamous, bigamous marriage may be "dissolved or annulled" by a court order where an application is made by either of the spouses of the bigamous marriage or by the public prosecutor. The term dissolution is defined as "the act of bringing to an end" while the term annulment is defined as "the act of nullifying or making void." According to this definition annulment and dissolution of marriage are fundamentally different. An annulment renders a marriage void from the beginning, while dissolution of marriage terminates the marriage as of the date of the judgement of dissolution. On the other hand, a marriage may be dissolved through a court ordered divorce though such cause of termination of marriage presupposes a validly concluded marriage. Thus, a major distinction between divorce and an annulment is that the former severs the bonds of matrimony, whereas the latter asserts that such bonds never existed. Thus, a bigamous marriage is an annullable marriage that would be considered as never to have occurred. But a marriage terminated by divorce is considered to have legal existence and produces legal effects after its termination.

In Ethiopia, except for religious bigamy under harari family code, it could be argued that a bigamous marriage is an annullable marriage but only unless and until such marriage is annulled.[60]

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[57]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law., p. 22*
[58]*Ibid*

[59] . *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law., p. 23*
[60].Id.,p. 24

In general, our understanding of annulment or dissolution of bigamous marriage should be tuned in such a way that justice be done to the concerned parties in bigamous union. Hence, the use of the terms "dissolved or annulled" in the Ethiopian criminal code is not without reason if the meanings of the two terms are taken seriously. So, the court in rendering a bigamous marriage either annulled or dissolved must be careful in weigh its far reaching effect on the parties concerned.

2.5.2 Applying general contract principles

Though marriage is more than a contract, its genesis hinges in a contract, for it cannot come into existence unless the spouses have entered into an agreement with full and free consent i.e. the one to marry the other.[61] Cheshire noted that, on the one hand, marriage is more than a contract due to its nature of creating personal status to both the spouses and their community. On the other hand, the genesis of marriage is a matter for the ordinary law of contract, but its prolongation is regulated by personal status law of the spouses, who have no power to modify its attributes as fixed by that law. But, what Cheshire failed to mention is as to whether contract or personal laws of the parties regulates its dissolution. Thus, as we are now very much concerned with dissolution of bigamous marriage, the importance of regulating the genesis of marriage as a matter of contract law in the absence of specific law governing bigamous marriage.

As noted before, one can contract a valid monogamous marriage but cannot contract a valid bigamous marriage due to its illegality.[62] Ethiopian civil code contract provision stipulates that "a contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party." it is indicated that a bigamous marriage may be invalidated on the opposition made by the prior spouse or by the public prosecutor.

The pertinent provisions of the civil code on the matter provides that "where a contract is invalidated the parties shall as far as possible be reinstated in the position which would have existed, had the contract not been made.[63]

2.6 Bigamous marriage and its dissolution under oromian family code

2.6.1 Bigamous marriage under oromian family code

In order to stop the widespread practice of bigamy in oromia, the oromian family code (OFC hereafter) categorically prohibits the conclusion of bigamous marriage.[64] Nevertheless, the legislature's initial stance was not against the bigamous practice as such.

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[61]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law.*,p. 30

[62] . *Ibid*

[63]. Id.,31

[64]. *Sileshi H., the case of bigamous marriage in Ethiopia, p.6.*

In other words, bigamous marriage was not explicitly prohibited by the original version of the OFC that was enacted in 2003. It is speculated that the initial legislative silence might have been due to the existence of a long tradition of bigamous marriage in the region. Yet, such a deliberate legislative oversight stood in stark contrast to the relevant provisions of the then Ethiopian penal code of 1957(the penal code). Both the penal code and the current criminal code prohibit bigamy. Nevertheless, a very narrow exception on the grounds of customary and religious practice was anticipated, the operation of which is subject to explicit recognition by family law. Thus any implicit permission for a bigamous marriage would contradict the proscribed crime of bigamy under the criminal law. Following a swift change in the initial stance of the state legislature, the legal prohibition of bigamous marriage was explicitly stipulated by way of an amendment to the OFC.[65] As a result the OFC now prohibits the conclusion of a second marriage by a person who is bound by a preceding bond of a valid marriage. In prescribing the legal prohibition of bigamy, the regional family law has left no room for the exception contemplated by the criminal code. This contrasts with the harari regional family code that has recognized the exception.

2.6.2 The dissolution of bigamous marriage under the oromian family code

In principle, a bigamous marriage is subject to dissolution at any time.[66] The dissolution of bigamous marriage removes the purported bond of the created marital union between the spouses. The dissolution may be made on various grounds. As indicated somewhere above, a rgular court can annul an existing bigamous marriage.

Indeed, annulment is the usual legal means prescribed for the dissolution of an invalid marriage. Nonetheless, it is possible that the dissolution of a bigamous marriage can be triggered by death or a declaration of a spouse's absence. The death of a bigamous spouse often entails the termination of both the valid and the bigamous marital unions. In fact this is a consequence of a natural event and does not depend upon the contemplated legal action. Even so, the occurrence of the death (a triggering factor) does not change the under lying ground of invalidity. The same holds true for the effect of the declaration of absence.

Despite the triggering effect of these events, the sole and underpinning ground for the dissolution of a bigamous marriage remains the inherent invalidity of the marriage itself.[67] That is to say; annulment is the only legal cause for dissolution of an invalid marriage.

2.7 Division of common property in bigamous marriage

2.7.1 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 after or before its celebration.[68] In default of such contractual agreement the matrimonial property of

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[65]. *Sileshi H., the case of bigamous marriage in Ethiopia, p* . 7
[66]. *Ibid*
[67]. Id., 8
[68]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law., p.33.*

spouses is regulated by law. In Ethiopia, though it is difficult to come across statistical data, it can be easily observed that most court cases over matrimonial property disputes are devoid of contract of marriage that are designed to regulate their pecuniary relationships. This is particularly true in most rural Ethiopia and in marriages celebrated in religious institutions in which the sanctity of marriage is believed to depend on the divine will rather than on the contractual regulations of the rights and obligations of the intending spouses.

Generally, in default of any contract of marriage, two tenets of matrimonial property principle can be identified.[69] 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 spouse by their personal efforts and all of the proceeds there from during the life of the marriage becomes the common property of spouses.

According to this legal principle, even incomes received from the, "personal property" of each spouse which is administered and kept separate from the common property falls within the ambit of matrimonial common property.[70] 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 becomes common property unless otherwise declared personal or stipulated. 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 declares 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." 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 his /her affirmation.

2.7.2 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.[71] Suppose a married couple in monogamous marriage where the husband after some years was married to other. As indicated above, the husband and the second co wife were engaged in the criminal practice of bigamy. Now, after the second marriage,

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[69]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law.,* p. 34

[70].*Id p. 35.*

[71].Id.,p. 36

husband would have two spouses but the first and second co wives would each have only one. In such plural marriage what legal regime or principle regulates the division of common property in case where either the first marriage or bigamous marriage is dissolved as per the law governing dissolution or divorce of marriage previously contemplated? After the husband, who is already married, marries the second spouse, is there now a single common property, regime, including all of them? Or are there multiple common property regimes i.e. one pertaining to the first monogamous marriage and the other pertaining to the second bigamous marriage? Is the husband part of the common property regime with more than two spouses as a union or part of multiple but separately dyadic common property regime?

It is very crucial to determine how many common and personal property regimes have been created in order to characterize the property of married persons correctly.[72] 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 model and the challenges associated with it.

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.[73]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.

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.[74] This kind of accounting considerably avoids unfairness of property division to all spouses after the first marriage. But, it is not fair to the first wife, as the subsequent marriages diminish any prior common property share of the preceding marriage. In other words, the first wife and the subsequent wives according to the order in time during which they laboured a wealth contributed to the common property become less advantageous because a fractional share of the first common property will be transmuted into the second and subsequent common property regimes.

However, one has to closely look the purpose of legal principles governing common property regime in monogamous marriage to forward an alternative arguments that tries to alleviate the problems of property division in bigamous single common property regimes of this type.

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[72]. *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law., 37*

[73]. *Id., p., 39*

[74]. Id.,p. 41

first, in the absence of written agreements that regulates multiple common property regimes, no matter how it affects the property interests of prior wives, the social policy that should be attained by the law is to ensure that the benefit of doubts must go to the spouses who asserts single common property regime, which as noted before, is a measure that safeguards the proprietary interests of all spouses on equal basis. Thus, the cardinal legal principle of presuming common property in the context of monogamous marriage once again could be contemplated in bigamous marriage on similar legal reasoning.

The second alternative solution could be providing an opportunity for a woman spouse who is aggrieved by the unfairness of the marital single common property division to show that the property under dispute is acquired prior to the celebration of the subsequent marriages with her husband. As indicated in the first alternative approach, the presumption is still single common property regime in bigamous marriage but, this time, with the rebuttal right of the woman spouses in the prior marriages.

Generally, in the absence of separate contract of marriage regulating multiple common property regimes of the bigamous marriage, the principle governing single common property regime indicated above could be validly invoked.[75] But, in case where woman spouses are succeeded in proving the existence of distinct common property regime both individually or in group that is acquired before any subsequent marriage, the division of such marital property could be accounted on that separate basis. The share of a dissolving woman spouse may be calculated simply based on the proved common property regime acquired before the subsequent marriage with the husband plus the fractional share of the property acquired during the subsequent marriage generally earned by all the spouses.[76] This is in case of first wife dissolving marriage. In the same vein, if the second wife dissolves her bigamous marriage ending common property distinct regime, she also deserves half of such property plus one third fractional share of the property earned by all spouses during the life of the second marriage.[77] If someone dissolves a marriage that ends such single common property regime, the calculation becomes the fractional share of the property that is divided by the number of spouses plus any additional fractional share earned by all spouses in common during the subsequent marriage.

[75] *Jetu E., Bigamous marriage and the division of common property under the Ethiopian law,p., p.4*

[76].Ibid
[77].Ibid

CHAPTER THREE
ANALYZES OF LAW AND PRACTICE
3.1 Division of common property upon dissolution of a bigamous marriage and impact of bigamous marriage on division of common property under oromian family law in case of sendafa town
3.1.1 Division of common property upon dissolution of a bigamous marriage

- **The rule of equitable division of common property under the oromian family code**

Following the dissolution of a marriage, the common property of the spouses is often identified and divided between them.[78] As a rule, the existence of common property in a marriage and its ultimate partition upon the dissolution of the marriage is presumed. The most important rule in the process of the division is an equal partition of the common property. Nonetheless, there are two major exceptions, both of which are common to all the family laws currently in force in Ethiopia.[79] The application of the first exception is subject to the reasonable discretion of a court where one of the spouses is awarded damages or indemnity. This exception operates where the divorce results from the fault of the other spouse. The second exception to the presumption of an equal partition stems from the agreement of the spouses themselves.

While the presumption of an equal partition is indiscriminately applicable to all cases of the dissolution of a marriage under the revised family code, the OFC deviates significantly from this basic rule.[80] Accordingly, article 123 of the OFC stipulates that the pecuniary liquidation of an invalid marriage shall be made based on the rule of equity. To this effect, the OFC reinforces a significant distinction between the legal effects of valid and invalid marriages upon their dissolution. A bigamous marriage is a typical instance of an invalid marriage, due to its violation of the essential condition for a valid marriage.[81] Thus, the division of the common property in a bigamous marriage is supposed to be determined on the basis of the rule of equity, not the rule of equal partition intended for a valid marriage.

As a result, at the forefront are the issues pertaining to the very notion and practical operation of the rule of equity under the OFC. Unfortunately, the rule of equity espoused by the OFC is devoid of any substantive content or a useful set of guidelines for its application.[82] It is true that a comprehensive definition can never be given to fill the vacuum and substantiate such an elusive notion. Both academics and courts often grapple with the uneasy task of defining the notion of equity. At times, scholars have understood equity as a portion of natural justice that is more suitable to judicial enforcement or a sense of fairness as appreciated by a judge. Thus, the rule of

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[78] *Sileshi H., the case of bigamous marriage in Ethiopia* p.9
[79]. *Ibid*
[80]. Ibid
[81]. Ibid
[82]. *Ibid*

equity may be understood as a sense of fairness to be applied by courts in their decisions, based on the circumstances of the specific case at hand.

Despite the variance in the specific normative content of the rule of equity depending upon the practice prevalent in a given society or part thereof, a set of guiding parameters can be provided to guide the courts in their application of the rule to the partition of common property upon the dissolution of an invalid marriage.[83] In particular, the rule is very significant with regard to the partition of common property, as personal property lies outside its ambit and a claim to personal property lies outside its ambit and a claim to personal property remains subject to the required proof. Relevant to the application of the rule of equity for the partition of common property under the OFC, are the guiding factors contemplated under the family code of the state of southern nations, nationalities and peoples (SNNP) and the civil code. It is worth mentioning that the SNNP family code has adopted the rule of equity from the corresponding provisions of the civil code verbatim. In so doing, the regional code provides that judges shall take into account the existence or non existence of spouse's good faith, consummation of the marriage, the interest of children, if any, and that of third parties acting in good faith.

Yet, the application of the rule of equity based on these factors should not be made to the detriment of the legitimate interests of the lawful spouse.[84] That is, the rule of equal partition that underlies the liquidation of pecuniary effects of a valid marriage shall remain intact as regards the share of monogamists. In other words, in the course of the partition of common property, 50 percent of the total common property acquired in the marriage must constitute the share of the legitimate spouse, while the remaining half is shared between the spouses having regard to the rule of equity.[85] For instance, where one of the bigamous spouses acts in bad faith, that spouse may be subject to a punitive reduction of his or her share in favour of the other who has acted in good faith. Indeed, such a mathematical rule is quite difficult to apply in practice where only a single set of common property is acquired during the overlapping occurrence of a valid and a bigamous marriage through the joint effort of all the spouses sharing a common abode.

The existence of such a scenario is unavoidable in the rural parts of the oromia region that are often dominated by a long history of bigamy and strong communal households.[86] The wives in such a case cannot be treated discriminately in the process of the partition. Instead, the rule of equity may be invoked to justify less favourable treatment for the bigamist husband. As a result, a careful application of the rule of equity by the court is important to safeguard the legitimate purpose of the law in protecting a valid marriage. A contract or practice that tends to defeat the application of the rule is likely to encroach upon the legitimate constitutional interests of the lawful spouse.

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[83] *Sileshi H., the case of bigamous marriage in Ethiopia.,p. 10*
[84]. *Ibid*
[85].Ibid
[86]. *Id.,*p. 11

The proper application of the rule would also draw the OFC closer to the purpose envisaged under the criminal law. As opposed to the revised family code and the FSC precedents that tend to treat the financial effect of a bigamous marriage quite liberally, the rule of equity under the OFC might also serve a punitive purpose as contemplated by the criminal code. At least, a bigamist in bad faith with the full knowledge of the consequences of his or her criminal act would not be allowed to benefit from the crime. The suggested punitive financial measure would also serve as a deterrent against similar conduct.

3.1.2 Impact of bigamous marriage on division of common property

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.[87] 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 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 within which the property has been acquired. Dissolution of bigamous marriage that spells the end of a defaults single common property regime in which three spouses were present end up in the distribution into three equal shares.[88] This kind of division avoids unfairness or 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 the subsequent wife according to the order in time during which they laboured wealth contributed to the common property becomes less advantageous because the fractional share of the first common property would be transmitted to the second and subsequent common property regime in which all spouses are expected share.

3.1.3 Impact of bigamous marriage on division of common property in sendafa town and surrounding area

The distribution of bigamous marriage in sendafa town is not as many as in other towns of oromia specially hararge and arsi provinces. As I have questioned Mr. Bashir Haji who is one of the judge in barrak woreda court on January 29/1/2023 GC at 9:30 _10:30, bigamous marriage is not broadly concluded in sendafa town and surrounding area when compared with other towns in hararge and arsi provinces.[89] As he said, the reason for this is religious. For instance, if we take peoples in towns in provinces above mentioned provinces, more of them are Muslim religion followers. So, as Quran permits the conclusion of bigamous marriage, many people conclude second marriage. On the other hand, when we come to sendafa town, Muslims are very few in

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[87]. Lalisa S., " bigamous marriage and its impact on division of common property under oromian family law," Mettu University, school of law, January 2021, *.[unpublished],p. 12*

[88]. Ibid

[89] .Interview with Mr. bashir Haji, judge in barrak woreda court, existence of bigamy in sendafa town, January 29, 2023.

number. More of them are Christians and as bible prohibited the marriage with more than one spouse, existence of bigamous marriage in this town is not as many as other towns of oromia.

The other reason is, as he answered, is that bigamous marriage is an act punishable by FDRE criminal code.[90] Article 650/1 of the criminal code provided 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 I grave cases and specially where the criminal has knowingly misled his partner in the second union as to his true state, with rigorous imprisonment not exceeding five years.

Similarly, Mr. Asefa Guto, president of the barrak woreda court, and Mr. Kebeda Negash, one of the judge of the court especially on family cases, on January 30/1/2023 GC at 3:30_4:30 answered me that there are a very few number of people who are in bigamous marriage life.[91]

I have questioned Mr. Bashir Haji many questions regarding bigamy. He responded me on a question "causes of bigamous marriage" as religious and lack of education as causes for the conclusion of bigamous marriage.[92] As he said Islamic religion has paved the way for the conclusion of second marriage particularly in areas where Muslim communities are there.

Lack of education was the second cause for bigamy. This is because illiterate woman do not know their rights and duties. For example, if the first wife of the man is not educated one, she may not oppose when her husband concluded second marriage. He said that they think themselves as subordinate to males. They have attitude of inferiority rather than equality with men. This made them to think that all rights belong to males. So, when their husband concludes second marriage, they do not oppose. So, this tradition made that their husband conclude bigamy at their discretion.

The other question was on "how they solve the problem of division of common property when bigamous marriage is dissolved?" regarding this question he said that there two scenarios. The first one is that the whole common property will be divided in to two equal portions for the two wives and then the husband will get half of the share of the first wife and half of the share of the second wife.[93]

The second method of solving this problem is proving whether or not the first wife has opposed to the conclusion of the second marriage. If proved that the first wife has not opposed when her

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[90] . Interview with Mr. bashir Haji, judge in barrak woreda court, existence of bigamy in sendafa town, January 29, 2023.

[91]. Interview with Mr. Asefa Guto, president of barrak woreda court, on existence of bigamy in sendafa town, January 30, 2023.

[92]. Interview with Mr. Bashir Haji, judge in barrak woreda court, causes of bigamous marriage, January 29,

[93]. Interview with Mr. Bashir Haji, judge in barrak woreda court, manner of solving the problem of division of common property when bigamous marriage is dissolved, January 29,

husband and the second wife married each other, the whole common property will be divided into three equal shares for the husband and the two wives.

The last question I asked him was "impact of bigamous marriage on division of common property in sendafa town and surrounding area?" he answered this question as that the bigamous marriage affects rule of equal partition in monogamous marriage.[94] In monogamous marriage, half of the common property will be given to the husband and the other half is for the wife. But, in bigamous marriage common property will be divided into three. If so, as he said, the first wife will be affected economically. This means, what she could have taken in monogamous marriage will be diminished/ decreased.

3.2 division of common property under the FSC precedents

Ever since the formal adoption of the current doctrine of judicial precedent, contentious issues regarding the liquidation of the pecuniary effects of a marriage have occurred frequently in family cases in the cassation division of the FSC.[95] In particular, cases involving the contentious partition of the common property upon the dissolution of bigamous marriages have repeatedly made their way to the federal cassation division. Yet, most of the cases have originated and, will continue to arise, from the regional states. Given the "binding" nature of the precedents, all regional courts are supposed to comply with the precedents when interpreting similar issues on the division of common property. In order to bind the regional and other federal lower courts, the legal interpretation set as precedents by the FSC are required to be published and distributed to the lower federal and all regional courts. Hence, the subsequent analysis of FSC decisions will be limited to the major precedents set in this regard since 2005.

In sadiya ahmad vs. rahima ali, the FSC ruled that half the common property should be partitioned between the spouses while the remaining half was considered to be an exclusive share of the deceased husband:

The share that is eventually devolves upon his heir.[96] Arising from the amhara regional state, the contention over the partition of common property was that the property acquired in one marriage by the effort of the spouses should not be shared by the spouse in another marriage for want of any effort in its acquisition. As a closer reading of its reasoning shows, the Supreme Court's ruling was based on the so called requirement of a joint contribution or effort.

Rejecting the contention and reversing the ruling of the regional Supreme Court, the FSC held that the property in issue should be presumed to be the common property of the spouses in both marriages unless proved otherwise. That is, the acquisition of the property during the marriages would suffice to trigger the legal presumption of common property. The ruling was made despite the bigamous nature of the marriage. Moreover, a joint contribution was not considered necessary.

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[94]. Interview with Mr. Bashir Haji, judge in barrak woreda court, impact of bigamous marriage on division of common property in sendafa town and surrounding area, January 29,

[95] *Sileshi H., the case of bigamous marriage in Ethiopia,* p.11

[96] *Id.,* p.,12

In this case, it must be noted that the ultimate share of the lawful spouse was 25 percent of the property, while half of the property to constitute the husbands share. Thus, the court derogated from the rule of equal partition between spouses in a valid marriage. Despite its origin outside oromia, this case is worth exploring as it illuminates the jurisprudential practice of the FSC on similar legal issues that originate from oromian regional state.

In 2010, the FSC laid down another similar and important precedent, which emerged from the case of aminat vs. fatuma involving a husband with multiple wives. In this case, the appellate division of the amhara state Supreme Court ruled for the partition of the common property between the spouses in the first marriage. The decision was affirmed by the courts cassation division. As a result, the second marriage was essentially rendered void of legal effect, regardless of its recognition as a voidable marriage under the pertinent regional law.

In the end, the FSC cassation division gave a ruling that has become a precedent.[97] The essence of a precedent dictates the partition of common property acquired in the first marriage between the spouses, while common property acquired in the second marriage would be partitioned between the bigamists. Nonetheless, this arbitrary rule of division is at odds with the legal presumption of common property stipulated for a valid marriage under the relevant law. As long as the first the first valid marriage remains intact, all property acquired during its overlapping continuance must be presumed to be common property acquired within that marital union. Besides, common property acquired during the first marriage and before the second marriage should remain the exclusive common property of the first two spouses.

The first wife is entitled to claim an equal share in common property acquired in the second marriage during an overlapping period with the first. It must be noted that the FSC did not make such a distinction. Instead, its decision was in favour of the bigamist. It is therefore argued that favourable treatment of the pecuniary effects of a bigamous marriage would tend to encourage the continued practice of bigamy. Even more, it would encroach upon the constitutional right of the monogamist over her pecuniary interests created during her valid marriage. In general the precedent went too far in search of rather unwarranted "fairness" for the subsequent bigamist to the detriment of the legitimate interests of the first lawful spouse.

Zeynaba vs. kedija is another illuminating case that has given rise to a more contentious precedent of the FSC with regard to the division of common property upon the dissolution of bigamous marriage.[98] Originating in the SNNP regional state, this case ultimately made its way to the FSC. Concerned with the partition of common property among multiple spouses, this case will have similar implications for oromia regional law, as it arose in a regional state that has a comparable legal provision to that in the OFC. In this respect, both regional codes share a striking similarity regarding the legal effects of an invalid marriage. Hence, the FSC precedent on a case based on regional law would have profound implications for the application of the relevant OFC

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[97]. *Sileshi H., the case of bigamous marriage in Ethiopia* p.13

[98] *Ibid*

provision. In the case at hand, the dispute between the wives arose over a dwelling house that was constructed by the joint efforts of the respondent and her husband during the continuance both marriages. The SNNP Supreme Court, in affirming the decision of the lower courts, ruled in favour of an equal partition of the property between the bigamous spouses, excluding the first wife from having a share in the property. The first wife was thus denied a share in the common property for want of a contribution in its acquisition though the property was acquired during the monogamous marriage.

In contrast to regional courts, the FSCs cassation division reached a slightly different decision from the regional Supreme Court by recognizing the first spouses claim over her husband's share. Eventually, the bigamous spouse was entitled to 50 percent of the property, while the lawful spouse and her husband were entitled to an equal share in the remaining half that constituted their common property during their marriage. The petitioner's claim of an equal share in the property as a whole with the other spouses was thus reduced to 25 percent of the property. Looking at the precedent, one can note the FSCs blatant deviation from the underlying principle of equal shares in reducing the legitimate spouses share to an amount far below that dictated the principle. In their respective cassation decisions neither the state supreme court nor the FSC made even a tangential reference to the rule of equity enshrined in the SNNP family code. This judicial oversight has a significant implication. It is worth nothing that the favourable treatment of a bigamous spouse to the detriment of a legitimate spouse's interest in a valid marriage would undermine the significance of the lawful marriage. In other words, there remains no incentive for the prospective spouses to conclude a lawful monogamous marriage. Above all, such a ruling is tantamount to violating the legitimate spouse's constitutional right to equality with regard to the common property acquired during the marriage.

At this juncture, it is notable that the precedent itself has evolved from a misapplication of the rule of equal partition to a bigamous marriage.[99] The rule intended for a valid marriage was applied to an invalid marriage. It is a well established statutory rule that common property shall be divided on an equal basis following the dissolution of a valid marriage. This is a fundamental principle that is central to the common property regimes of all family laws in Ethiopia. Moreover, both the federal and oromia regional state constitutions guarantee "equal rights of the spouses upon entering into, during and upon divorce of a marriage. In particular the federal constitutions integration into the domestic law of the relevant international human rights instruments enshrining marital rights adds a human rights dimension to the issues under consideration.[100] Although dwelling on this dimension at this point goes beyond the scope of this article, central to this article are the unfettered and equal rights of the legitimate spouses, inter alia, with regard to their pecuniary interests as regulated by family law. In particular, the equality principle is quite significant upon divorce for the equal partition of common property. As is evident from the reading of the constitutional provisions, the equality guaranteed is arguably limited to a valid

[99]. *Sileshi H., the case of bigamous marriage in Ethiopia*., p.14
[100] *Ibid*

marriage dissolved by divorce. In this regard, the Amharic version of the federal constitution uses the term Fitch, which is a direct translation of the term "divorce". Nonetheless, this literal interpretation of the legal provision is quite narrow in its remit, as it excludes other grounds for dissolution. Hence, it is plausible to argue that the term "divorce" should be understood in its broader sense to include other grounds for the dissolution of a valid marriage. This is in line with the purpose and spirit of the constitutional guarantee of equality between spouses. In this respect, the rule of purposive interpretation is much more sound and reasonable than the rule of literal interpretation. The constitutional provisions are not meant to retract the equality guaranteed for a lawful marriage merely due to its dissolution as a result of external factors, such as death or the declaration of absence. After all, these factors lie beyond the spouses' control.

Nevertheless, the principle of marital equality as guaranteed by the constitutions and enshrined in family laws does not stretch to embrace the various instances of the dissolution invalid marriages in general bigamous marriages in particular.[101] The rationale behind this exclusion is inherent in the very purpose of the constitutions and family laws to prohibit discrimination in the protection of marital rights in a lawful marriage. I principle, in guaranteeing equal marital rights, both the federal and regional constitutions are reasonably deemed to envisage the equality of rights in a lawful marriage.[102]

[101] *Sileshi H., the case of bigamous marriage in Ethiopia.,* p. 15
[102] Ibid

CHAPTER FOUR
4. CONCLUSIONS AND RECOMMENDATIONS

4.1 CONCLUSION

The term bigamy refers to "the act of marrying one person while legally married to another." As the name indicates the term bigamy connotes the duality of marriage in which a man or a woman marries another spouse while bound by the previous monogamous marriage.

The prevalence of bigamy has been rationalized mainly based on socio economic grounds. The social rationalization for the prevalence bigamous marriage emanates from the widely held belief that bigamy/polygamy "ensures the stability and continuity of the family and clan due its capability of producing a large family in a given time period."The economic justification for the prevalence of polygamy contends that polygamy is capable of delivering benefits to woman as long as substantial resource inequality prevails among men and woman.

Even if, bigamous marriage is criminalized and recognition for the purpose of relief is still denied under the conventional family law, it is still legally possible to resort to the general principles of Ethiopian contract law to govern the legal effects of illegal or immoral bigamous marriage. The resort to general contract law principles in case of family law lacuna have been already crystallized in the binding legal interpretations passed by the FSCC. The contract of bigamous marriage can be "dissolved or annulled" on the ground of its illegality under both family and criminal but can still produce legal effects under the ordinary contract law being invalidated on the ground of its illegality or immorality.

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

The second situation is a single common property regime in which a bigamous marriage forms the sum total of all marriages during which common property is acquired. This model of common property regime is workable where a separate contract of marriage to regulate each common property acquired during the life of multiple marriages is absent.

Bigamous marriage was not explicitly prohibited by the original version of the OFC that was enacted in 2003. It is speculated that the initial legislative silence might have been due to the existence of a long tradition of bigamous marriage in the region.

The OFC now prohibits the conclusion of a second marriage by a person who is bound by a preceding bond of a valid marriage. In principle, a bigamous marriage is subject to dissolution at any time. The dissolution of a bigamous marriage removes the purported bond of the created marital union between the spouses. The dissolution may be made on various grounds. As indicated in the preceding section, a regular court can annul an existing bigamous marriage.

The OFC has opted for a different stance with regard to the division of common property upon the dissolution of a bigamous marriage: it draws a basic distinction between a valid and an invalid marriage. As the law stands, the rule of equity governs the liquidation of the pecuniary effects of an invalid marriage. Hence, in terms of its pecuniary effects, a bigamous marriage is neither void nor voidable under the OFC.

A bigamous marriage is a typical instance of an invalid marriage, due to its violation of the essential condition for a valid marriage. Thus, the division of the common property in a bigamous marriage is supposed to be determined on the basis of the equity, not the rule of equal partition intended for a valid marriage.

4.2 RECOMMENDATIONS

- 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 woman.
- Including the provision regarding the validity of bigamous marriage and the manner of division of common property in bigamous marriage under both the federal and oromia regional state constitution.
- To repeal or modify discriminatory laws, to promote defacto equality between man and woman.
- In the absence of agreement that regulates multiple common property regimes the social policy that should be attained by the law is to ensure that the benefits of doubts must go to the spouses who asserts single common property regime, which is measure that safeguards the property of all spouses on equal basis. Therefore, the cardinal legal principle of presuming common property in the context of monogamous arrived again could be contemplated in bigamous marriage on similar legal reasoning.
- It is also important to provide an opportunity for woman spouses who is aggrieved by the unfairness of the marital common property division to show that the property under the dispute is acquired prior to celebration of the subsequent marriage with her husband.
- The FDRE revised family code has given that bigamous marriage is invalid. But, it has said nothing on the manner of division of common property in bigamous marriage. Therefore, RFC should include provision that govern the division of common property in bigamous marriage.

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