

THE NEED FOR LEGISLATIVE PROTECTION OF WOMEN LAND RIGHTS IN ETHIOPIA: EMPHASIS ON THE LAND RIGHTS OF WOMEN IN THE POLYGAMOUS MARRIAGE

Temesgen Solomon Wabelo*

Abstract

This article looks into the need for legislative protection of women land rights in Ethiopia with a focus on the land rights of women in the polygamous marriage. Mostly, the author has utilized doctrinal legal research approach so as to respond the intended objectives the article and to this end, international and regional (African) human rights instruments are deeply consulted concerning the issue at hand. The article has also examined the domestic (Ethiopian) legislations including the Federal Supreme Court Cassation Division decisions in order to respond to the issue raised by the article. Doing so, the article has found out that, even though the international human rights instruments have clearly incorporated non-discrimination clause on the enjoyment of rights contained therein, all of them have not clearly built-in protection for the land rights of women in the polygamous marriages. Regionally, it is only the African Women's Rights Protocol, which has recognized polygamous marriage relations provided that if such union is due to the influence of culture or religion and obliges state parties in order to enact laws to ensure and promote such relations. Since, the Protocol has given place for the protection of polygamous marriage, and then one can reckon that, the Protocol has impliedly recognized land rights of women in the polygamous marriage. In the domestic laws arena, the FDRE Constitution prescribes women to have equal rights with men with respect to use, transfer, administer and control of land. But the Constitution has not clearly recognized polygamous marriage in general and land rights of women in the polygamous marriage in particular. Nevertheless, if we consult Article 34(4) of the Constitution, it impliedly accepts the possibility of recognizing polygamous marriage practices provided that such practice is maintained within the religious and customary laws of the intending spouses' community. Since, the Constitution has impliedly recognized polygamous marriage relations, then one can correspondingly say that, it has not totally denied the land rights of women in the polygamous marriage by leaving place for other detailed legislations in order to fill the gap.

Keywords: Women, Land Rights, Land Registration, Land Certification, Polygamy

INTRODUCTION

Land is a critical issue for women; in many cases it can even be said that the question of land itself is a prism through which structural patterns of gender inequality can be revealed. Throughout the world, it is women who overwhelmingly work on the land, producing food for themselves, their families and

communities. 50% of crop globally is cultivated by women and this figure increases to 60-80% for countries in the developing world.¹ Women rely on land not only to produce crop, but also to generate family income and therefore support the health care, educational and nutritional needs of their family members. This relationship (i.e., the relationship between women and land) is vital for women in general, but becomes more significant when women become the single head of the household due to men's migration, divorce, abandonment or death of a spouse or male relative.² Secure rights to land for women also helps to raise the status of women within their families and communities which is an important step towards achieving gender equality, as it leads to women's increased decision making power, greater autonomy and economic independence, and greater participation in the community.³ Specifically, achieving equal and secure rights to land has a positive impact on family food security.⁴ For instance, giving women the same access to productive resources like land as men can deliver a 20% -30% increase in agricultural yields; improve risk management and mitigation for poor families and communities.⁵ Giving women access to land rights can have great positive impact upon improving natural resource management, environmental sustainability, and by reducing land degradation.⁶

In general, secure land rights for women have potential impacts to transform the lives of women, their families, and their communities at large. However, the land rights of women in the polygamous marriage relations are more vulnerable to abuse than women in the monogamous marriage. The socio-economic, cultural and religious factors which give rise to polygamy make women in polygamous marriages more vulnerable to human rights abuses as they have no legal

* Temesgen Solomon Wabelo, LL.B, LL.M, Attorney and Consultant at Law, Former Lecturer of Law, School of Law, Madda Walabu University, Ethiopia. Currently the author is Lecturer of Law, School of Law, Wolaita Sodo University, Ethiopia. Email address: temesgensolomon1@gmail.com.

¹ Preliminary study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, 19 Feb., 2011, A/HRC/16/63, p. 7.

² Statement by the Food and Agricultural Organization of the United Nations to the 64th session of the Commission on the Status of Women, 8th Mar. 2010.

³ *Id.*

⁴ Mayra Gomez & Hien Tran, *Women's Land and Property Rights and the Post-2015 Agenda, official Back-ground Paper-Global Thematic Consultation on Addressing Inequalities*, (2012), <http://www.worldwewant2015.org/node/283485>, p. 10.

⁵ *Id.*

⁶ *Id.*

protection in most African states.⁷ This is also true in Ethiopia as women in the polygamous marriage relations has no laws that regulate their property rights in general and land rights in particular.

In relation to this, the article intends to deal with the following three basic questions. Firstly, is it possible to deny the legislative recognition of polygamous marriage relations in general and land rights of the polygamous marriage given the prevalence of polygamous marriage practices in Ethiopia? In the second place, does the Federal Democratic Republic of Ethiopia (FDRE) Constitution have depicted a leeway for federal and regional state governments so as to issue laws that regulate polygamous marriage relations in general and land rights of the polygamous marriage in particular? Thirdly, what would be the alternative remedy that the federal and regional state governments in Ethiopia supposed to consider to fully regulate the land rights of polygamous marriage, though polygamy is prohibited but yet its recognition is necessitated for more practical reasons?

In order to deal with these and other related legal issues, the article is captioned into five sections. The first section of the article reveals the need to legislate laws that protect land rights of women in the polygamous marriages. Section two of the article examines the recognition of land rights of women in polygamous marriage within the international, regional (African) human rights systems and in the Ethiopian legal system scenarios. Section three of the article deals with the protection of land rights of women in the polygamous marriage under the rural land registration and certification process of Ethiopia which has got a legal base in both of the current federal and regional states rural land administration and use laws. Section four of the article evaluates the Federal Supreme Court Cassation Division decisions in response to the protection granted for the land rights of women in the polygamous marriage. Lastly, section five provides the conclusion and the way forward for the gaps identified by the article.

1. THE NEED TO LEGISLATE LAWS TO PROTECT LAND RIGHTS OF WOMEN IN THE POLYGAMOUS MARRIAGE

Polygamy has been deeply entrenched in the culture and religion of most communities in Africa since pre-colonial times.⁸ The socio-economic and cultural factors which give rise to polygamy make

⁷ Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: global critical race feminism as legal reform for the twenty-first century*, *Journal of Contemporary Legal Issues*, 811, (2000).

⁸ Akin Ibidapo-Obe, *The Dilemma of African Criminal Law: Tradition versus Modernity*, *Southern University Law Review*, 327, 320-343, (1992).

women in polygamous marriages more vulnerable to human rights abuse especially because they have no legal protection in most of the African states.⁹ According to the Human Rights Committee which is the body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all forms of discrimination against women (CEDAW) Committee, the move to prohibit polygamy might further alienate women engaged in polygamous marriages. The prohibition of polygamy in many African countries did not bring an end to this practice. Instead, it led to the denial of the rights of women in polygamous marriages for example by excluding them from inheriting their husband's property upon death.¹⁰ This justifies the conclusion that, despite the prohibition, so long as the socio-economic, cultural, and religious factors continue to exist, there will always be women engaged in polygamous marriages and who need protection.¹¹ Thus, the prohibition of polygamy by legislations is not an effective method of protecting the rights of women in polygamous relations. This is because, in the first place, polygamy has been deeply entrenched in the culture and religion of most ethnic communities in Africa starting from colonial times and, therefore, legal prohibition will not put an end to it. Secondly, as polygamy will continue to be practiced, in spite of legal prohibition, such prohibition will only increase the vulnerability of women in polygamous marriages because it will leave them without recourse to legal action.¹²

In relation to this, the African Women's Rights Protocol obligates state parties to enact legislation to ensure that the rights of women in polygamous unions are promoted and protected.¹³ Basically, the recognition of the rights of women in the polygamous marriage by the Protocol can be justified by the socio-economic, cultural and religious practices that hinder the empowerment of women. Due to this, the protocol obliges state parties to legislate laws that ensure the rights of women in polygamous marriage within their respective domestic legislations.

⁹ Wing, *supra* note 7.

¹⁰ Phoebe Oyugi, *Article 6 of the African Women's Rights Protocol: towards the protection of the rights of women in polygamous marriages*, African Human Rights Yearbook, 300, 290-310 (2017), URL. <http://doi.org/10.29053/2523-1367/2017/v1n1a14>.

¹¹ *Id.*

¹² *Id.*

¹³ Article 6(c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, herein after called, (African Women's Rights Protocol).

When we see the practice of polygamy in the Ethiopian legal arena, it is one of deeply rooted religious and customary practice that is exercised within many parts of the community. According to the Ethiopian demographic and health survey report, 11% of married women in Ethiopia are in polygamous marriage, with 9% having only one co-wife and 2% having two or more co-wives.¹⁴ Similarly, 5% among the married men in Ethiopia live as a polygamous marriage having two or more wives.¹⁵

However, the practice of polygamy is prohibited under the federal and regional states Family Laws and the Criminal Code of Ethiopia. For example, if we consult article 11 of the Revised Federal Family Code, a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage. The Code prohibits polygamous marriage so long as the person is bound with the bond of preceding marriage.

In the regional states arenas, all of the nine regional states in Ethiopia have copy pasted the provision depicted under the Revised Federal Family Code within their regional state Family Laws. For example, when we consult the Amhara regional state Family Code, it defines marriage as a relationship whereby a man and a woman, having attained majority, officially establish out of their own free will and consent with an intention to sustainable live together united in law, or a legal institution structured as a result of this relationship thereto.¹⁶ From the phrase, "...a relationship whereby a man and a woman...." what we can discern is that, marriage is a consensual union between single man and woman to form a family. The Code has clearly prohibited bigamy under article 22 of it by confirming it as; 'a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage.'

Similar connotation is enshrined in the Southern, Nation, Nationalities and Peoples' (SNNP) regional state Family Code. The Code plainly prohibits bigamy by dictating it as; 'a person may not conclude marriage or engage in an irregular union as long as he is bound by bonds of preceding

¹⁴ Ethiopia Demographic and Health Survey, Central Statistical Agency Addis Ababa, Ethiopia ICF International Calverton, Maryland, USA March 2012.

¹⁵ *Id.*

¹⁶ Article 11 of the Amhara Regional State Family Code, Proclamation No. 79/2003, 25th Day of June, 2003.

marriage.’¹⁷ Here, the Code prohibits bigamy not only on formal marriage relations but also in the irregular union as well.

It is only Harari regional state Family Code which has exceptionally permitted bigamous marriage relations which is concluded in accordance with religious practice of the intending spouses.¹⁸ In essence, the Harari Family Code provides for similar prohibition, but article 11(2) provides that, the prohibition does not apply to the conclusion of marriage as permitted by religion. Hence, except for the permission of religious bigamy under the Harari regional state Family Code, bigamous marriage in the Ethiopian legal system is prohibited one. But apart from granting recognition to polygamous marriages on account of religion, the Harari Regional State Family Code does not provide for any specific rules to govern such marriages. The Code does not provide for any exceptional provisions regulating such marriages and even, the code has not indicated whether specific rules on the regulation of such marriages are left for future enactment.

In a similar token, the Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004 under article 650 also punishes a person being tied by the bond of a valid marriage intentionally contracts another marriage before the first union has been dissolved or annulled. But, article 651 of this code has provided an exception for this principle by saying the principle shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law. The exception of article 651 of the Criminal Code is seemingly in conformity with article 34(4) of the FDRE Constitution which provides that, in accordance with provisions to be specified by law, ‘a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted.’

But, the main issue that is unanswered here is that, whether there is a civil law that recognizes polygamy as a legitimate customary or religious practice. It is indisputable that, both the federal and regional states Family Codes in Ethiopia recognize three forms of marriage, i.e. the civil marriage,

¹⁷ Article 21 of the Southern Nation Nationalities and Peoples Region State Family Code, Proclamation No. 75/2004. Debub Negarit Gazeta, 9th year, No. 8, Feb. 2004.

¹⁸ Article 11(2) of the Harari Region Family Code (2000), Neg. Gaz. year 13, extraordinary issue No. 1/2000, [Emphasis added].

marriages concluded in accordance with the religion or custom of the future spouses.¹⁹ Here the Family Codes have depicted mandatory formality requirement for all forms of marriage to be registered by the competent Officer of Civil Status.²⁰ But one cannot presume that, a competent officer of Civil Status can register and formalize polygamous marriages even if those marriages are celebrated in conformity with the customary and religious practices of the intending spouses. Impliedly, this confirms the fact that, the competent officer of Civil Status should decline the registrations of both polygamous customary and religious marriages, even if those marriages are celebrated in compliance with the customary and religious practices of the intending spouses. Regional states in Ethiopia have also copy pasted the practice of federal family Code provisions that prohibits bigamy by recognizing monogamous marriage relations as the only valid marriages. It is only Harari regional state Family Code which has exceptionally permitted bigamous marriage relations which is concluded according to religious practice of the intending spouses.²¹ Hence, except for the permission of religious bigamy under the Harari regional state Family Code, bigamous marriage in the Ethiopian legal system is prohibited one. This can help us to reach on a conclusion that, even though, there are implications for the federal and regional states legislators to enact laws that regulate polygamous marriage within the FDRE Constitution, there are no civil laws that legalize those marriage relations in general and regulate property rights of those relations in particular.

Here, Ethiopia can learn a good lesson from Kenya and South Africa as far as the protection of rights of women in the polygamous marriage is concerned. In line with article 6 of the Protocol on the Rights of Women in Africa, Kenyan government has adopted a law that regulates polygamy which is cited as Kenyan Marriage Act of 2014. This Act defines polygamy as the state or practice of a man having more than one wives simultaneously. The Act also defines marriage as “the voluntary union of a man and a woman whether monogamous or polygamous”.²² This Act has made express provisions for polygamous marriages in order to promote and protect the rights of women in polygamous marriages in line with the provisions of the Protocol.²³

The other African country that Ethiopia can learn with regard to the protection of women’s rights to polygamous marriage is South Africa. South Africa has adopted a statute called “South

¹⁹ Article 1 of the Revised Federal Family Code, Proclamation No. 213/2000, Fed. Neg. Gazeta, 6th year Extra Ordinary Issue No. 1.

²⁰ *Id.*, Art. 28.

²¹ Article 11(2) of Harari Region Family Code, *supra* note 18.

²² Section 2 of Kenyan Marriage Act of 2014.

²³ *Id.*

African Recognition of Customary Marriages Act 120 of 1998” that came into force in November 2000. As to the Act, a marriage which is a valid marriage at customary law and existing at the commencement of this act is for all purposes recognized as a marriage.²⁴ In essence, there is no clear stipulation mentioning polygamy within the Act but the act uses other clause that equally refers the recognition of polygamous marriage within it. Section two of the Act stipulates that, if a person is a spouse on more than one customary marriage, all valid customary marriages entered in to before the commencement of this act, is for all purposes recognized as a marriage.²⁵ From the clause, “if a person is a spouse on more than one customary marriage” we can deduce that the act recognizes polygamous marriage and gives place for women’s rights under the polygamous marriage. Hence, the protection of polygamous marriage is justified on more practical reasons like socio-economic, cultural and religious reasons on one hand, and the Women’s Protocol that obliges state parties to legislate laws that regulate polygamous marriage, on the other hand.

2. LEGAL FRAMEWORKS REGULATING WOMEN LAND RIGHTS: ASSESSING THE PLACE OF LAND RIGHTS OF WOMEN IN POLYGAMOUS MARRIAGE

2.1. International Human Right Instruments

A) Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the first international human rights instrument to articulate the rights to be accorded to every individual. Article 2 of the Declaration provides for the enjoyment of the rights contained therein without distinction of any kind, including sex or other status. The Declaration provides that everyone has the right to property and it gives full recognition to property rights as human rights.²⁶ Article 2 of the Declaration is about non-discrimination in the enjoyment of rights between men and women. Article 17 of the Declaration provides provision for property rights and sub-article one of this provision dictates that, everyone has the right to own property alone as well as in association with others. Basically, the Declaration has not depicted provision for the land rights of women but from a cumulative reading of articles 2 and 17 of the

²⁴ Section 2(1) of the South African Recognition of Customary Marriages Act 120 of 1998.

²⁵ *Id.*, Section 2(3).

²⁶ Article 17 of the Universal Declaration of Human Rights here in after cited as UDHR, 10 Dec. 1948.

Declaration, we can deduce that women's are entitled equally with men with regard to the enjoyment of land rights because the term property can also connote land rights as well. The Declaration has also provided the right to marriage by granting men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. It entitles both men and women equal rights as to marriage, during marriage and at its dissolution.²⁷ Here, what we can deduce from this provision is that, the Declaration promotes only monogamous marriage as of right. Since, the Declaration doesn't give place for polygamous marriage, and then we cannot entirely argue that the declaration has safeguarded land rights of women in the polygamous marriage.

B) International Covenant on Civil and Political Rights (ICCPR)

The Covenant has no provision on property rights like that of UDHR. But the Covenant provides that, "Each State Party to the present Covenant undertakes to respect and ensure to all individuals the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".²⁸ The Covenant under article 3 guarantees equality between women and men, and it prohibits discrimination based on sex, among other grounds listed in its article 2. The rights of women and men should be protected and promoted equally, regardless of their race, sex, language, economic status, national and social origin. Here, we can say that since the covenant safeguards non-discrimination on the enjoyment of rights between men and women then the otherwise reading of the covenant has safeguarded equal protection of rights in the property including land use rights between men and women.

Like UDHR, the Covenant also provides the right to marriage and recognizes the right of men and women of marriageable age to marry and to found a family.²⁹ The Covenant obliges the states parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.³⁰ Though ICCPR provides for the right to marriage and equality in marriage, none of the provisions of the Covenant expressly mentions polygamy. The interpretation given to these treaties by most scholars and human

²⁷ *Id.*, article 16(1).

²⁸ Article 2(1) of the International Covenant on Civil and Political Rights here in after cited as ICCPR, UNGA 16 Dec. 1966 come into force 23 March 1976.

²⁹ *Id.*, article 23(2).

³⁰ *Id.*, article 23(4).

rights activists is that, polygamy is against a woman's right to dignity and equality and should therefore be prohibited. For instance, the Human Rights Committee, the body of independent experts that monitors the implementation of the ICCPR, issued a general comment on the interpretation of article 3 of the ICCPR- the clause on equality between men and women stated, "It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women".³¹ Thus, one can confirm that, as the covenant has not recognized polygamous marriage relations, then it is unfeasible to say that it has given a room for the land rights of women for such marriage relations.

Essentially, the covenant has denied the recognition of polygamy allegedly to give protection for the rights of women. This instrument accepts that, polygamy is against a woman's right to dignity and equality. But, this strong lock on the recognition of polygamy can hamper the rights of women in the communities where cultural and religious practices proliferates it, such as the continent Africa. In essence, the non-recognition of polygamy by the ICCPR cannot thwarts states not to enact laws that legalizes polygamy and protects the land rights of polygamous marriage within their respective jurisdictions, but the recognition induces the states parties so as to enact laws that regulate polygamy in general and the land rights of polygamous marriage in particular. At this juncture, the author of this article is not strongly criticizing the ICCPR for failing to promote polygamy but the author believes that the Covenant has failed to give a room for the protection polygamy and the property rights of polygamous marriage by considering socio-economic, cultural, and religious factors that brings about the practice.

C) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) sets out the obligations on states to eliminate all forms of discrimination against women starting from its foundational principles of equality and non-discrimination. CEDAW defines discrimination and emphasizes both formal or *de jure* and *de facto* discrimination.³² This means that women should be

³¹ UN Human Rights Committee General Comment 28 (2000) UN Doc CCPR/C/21/Rev.1/Add.10.

³² Article 1 of the Convention on the Elimination of all forms of Discrimination Against Women, here in after cited as CEDAW, UNGA 19 December 1979 came into force on 3 September 1981. For the purposes of the present Convention,

treated equally with men both in law and in practice. Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds. For example, laws should protect women's equal rights to own, inherit and administer property and land. Eliminating discrimination in practice requires more than a law stating that women have equal rights to own, inherit and administer property. Practices, customs and traditions that discriminate against women should also be eliminated and special measures may be required to enable women to claim these rights. The Convention calls on states parties to end discrimination against women in laws, policies and practices, including through the adoption of temporary special measures. It obliges states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.³³

CEDAW contains many articles which bear directly on women's rights to land and property. Some are general provisions such as article 2, which obliges states to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women". CEDAW has also other articles that are specifically related to women's land rights and that obliges states parties to ensure women the right 'to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes'.³⁴ This clearly shows that, CEDAW has clearly safeguarded land rights of women's sound fully within its provisions.

The convention also provides the rights to marriage and recognizes both men and women the right to freely choose a spouse, the right to enter into marriage only with their free and full consent; the same rights and responsibilities during marriage and at its dissolution.³⁵ But, the Convention only recognizes monogamous marriage and has not given place for polygamous marriage. Furthermore, the committee on the elimination of discrimination against women, while interpreting the CEDAW, similarly stated that the practice of polygamy is against the rights of women and should be prohibited.³⁶ Apart from this, other scholars have encouraged the legal prohibition of polygamy and

the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

³³ *Id.*, article 2(f)

³⁴ *Id.*, article 14(g)

³⁵ *Id.*, article 16 (a)(b)(c)

³⁶ CEDAW Committee General Recommendation 21 (1994), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

believe that polygamy violates the internationally recognized rights and the dignity of women; and secondly, polygamy is often associated with many harmful practices, such as forced marriages, child marriages, gender-based violence and female genital mutilation.³⁷ Since the Convention has no place for the protection of polygamous marriage then the otherwise reading of the covenant hasn't safeguarded land rights of the polygamous marriage as well.

2.2. Regional (African) Human Rights Instruments

A) African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination on grounds of race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.³⁸ It guarantees equality to everyone in every sphere in the community and it prohibits any form of discrimination. Thus any discrimination against individuals in their access to or enjoyment of economic, social and cultural rights on any of the prohibited grounds is a violation of the African Charter. The Charter also provides state parties to ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman as stipulated in international declarations and conventions.³⁹ So, here we can say that, even though the charter has not listed land rights of women specifically but the non discrimination clause on the enjoyment of rights mandates both of men and women in order to exercise rights equally. Like ICCPR and CEDAW, the Charter has not incorporated the right to marriage within its provisions but the right to marriage is stipulated within the African women's rights Protocol that is adopted to complement the Charter and discussed herein under.

³⁷ Ruth Gaffney-Rhys, *Polygamy: a human right or human rights' violation?* (2011) 2 *Women in Society* 1; V von Struensee, *The contribution of polygamy to women's impoverishment: an argument for its prohibition*, (2005) 2 *Murdoch University Electronic Journal of Law* 1 <http://www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#fn1>.

³⁸ Article 2 of the African Charter on Human and Peoples' Rights, here in after called ACHPR, adopted on 27 June 1981 entered into force 21 Oct. 1986.

³⁹ *Id.*, article 18(3).

B) The Protocol to the African Charter on Human and Peoples' Rights in Africa (African Women's Rights Protocol)

The Protocol to the African Charter on Human and Peoples' rights on the rights of women in Africa (African Women's Rights Protocol) was adopted to supplement the provisions of the African Charter in accordance with article 66 of the Charter.⁴⁰

The Protocol specifically provides that, African governments should 'promote women's access to and control over productive resources such as land and guarantee their right to property'.⁴¹ The protocol constrains state parties to take appropriate measures, among other things, to land and the means of producing nutritious food in the context of women's right to food security.⁴²

The other and the most notable provision of the Protocol is article 6, which provides for the right to marriage. This provision of the Protocol obliges states to enact legislation which ensures that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'.⁴³ The message of the provision is that, in the first place states should prefer monogamous marriage but if there is occurrence of polygamy due the influence of culture and/or religion, then states should have to promote and protect the rights of women in that polygamous marriages. This Protocol is justified by the appreciation of the African reality, that there are many socio-economic, cultural and religious factors which continue to give life to polygamy and which require long term solutions in order to protect property rights of women within this relation. What distinguishes the Protocol from other international human rights instruments is that, it indulges states parties to give protection and promotion to such union. The Protocol has not specifically dealt with the protection of the land rights of polygamous marriage relations. But, one can suppose that, since it has given protection for the union then the provision of the Protocol under article 19(c) of it, which obliges state parties to promote women's access to and control over productive resources such as land, uniformly applies for polygamous marriage relations since the Protocol gives place for the polygamous marriage union.

⁴⁰ Preamble of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, here in after called (African Women's Rights Protocol).

⁴¹ *Id.*, article 19(c).

⁴² *Id.*, article 15.

⁴³ *Id.*, article 6(c).

C) The Framework and Guidelines on the Land Policy in Africa

The Framework and Guidelines on Land Policy in Africa, adopted by the African Union in 2009, contains a specific section on strengthening the land rights of women.⁴⁴ Section three of the Framework and Guideline dictates that, throughout Africa, agricultural production and preservation of land resources is primarily the responsibility of women and children. The Framework and Guideline has confirmed that, gender discrimination in access to land resources is a serious problem particularly in rural Africa. This is both undemocratic and a constraint on economic development. The Framework and Guideline in the same section of it emphasized that, better and more productive use of land requires that the land rights of women be strengthened through a variety of mechanisms including enactment of legislation that allows women to enforce documented claims to land within and outside marriage. So, we can say that the issues of women's land rights are well-established within framework and guidelines on the land policy in Africa. But, here the Framework and Guideline has not contained clear provisions with regard to the protection of land rights of women in the polygamous marriage.

2.3. Domestic/Ethiopian Laws

i. Federal Democratic Republic of Ethiopian Constitution

The Ethiopian government has adopted laws and policies to ensure gender equality since 1991. Taking the historical legacy of women's discrimination in the country and with a view to remedying a long lasting gender inequality, the FDRE Constitution separately provides for women's rights.⁴⁵ The Constitution stipulates that: 'Men and women, without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined by law, have the right to marry and find a family. They have equal rights while entering into, during marriage and at the time of divorce'.⁴⁶ Article 35(1) of the same Constitution has confirmed that, 'Women shall, in the enjoyment of the rights and protections provided for by this Constitution, have equal right with men'. The Constitution under sub-article 2 of the same provision dictates that, 'Women have equal rights with men in marriage as prescribed by this Constitution'. The same provision under sub article 3 of it also provides

⁴⁴ Framework and Guidelines on Land Policy in Africa, (adopted by the African Union, 2009).

⁴⁵ Article 34 & 35 of FDRE Constitution, Proclamation No. 1/1995, Year 1, No. 1.

⁴⁶ *Id.*, article 34.

that ‘the historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures.’

The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions. The state is duty bound to enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.⁴⁷

The Constitution further prescribes that ‘Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property’.⁴⁸ Further, the Constitution assures that peasants, pastoralists and semi-pastoralists of both sexes have the right to get land for cultivation and grazing free of charge and without any danger of eviction from their possession.⁴⁹

So, these constitutional provisions construe the Ethiopia’s commitment to protect women’s rights in general and their right to use and control land in equal footing with men in particular. The Constitution’s guarantee of providing special measure to women as a response to the problem of gender inequality and historical legacies of the past is also an indicative provision to safeguard women’s rights in general and land use rights of women’s in particular.

Basically, the provisions of FDRE Constitution have not plainly stipulated protection for the land rights of women in polygamous marriage. But the writer of this article believes that, the FDRE Constitution has not clearly denied polygamous marriage in general and the protection of land rights of women in the polygamous marriage in particular. In relation to this, if we consult article 34(4) of the FDRE Constitution, it stipulates that “in accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted”. In other words, personal, marital and family law that specifies and recognize marriage practice concluded under the systems of religious or customary laws may be adopted. Hence, it could be strongly confirmed that the FDRE Constitution impliedly accepts the possibility of recognizing

⁴⁷ *Id.*, article 35(4)

⁴⁸ *Id.*, article 35(7)

⁴⁹ *Id.*, article 40 (4)(5)

bigamous or polygamous marriage practices provided that such act is maintained within the religious and customary laws of the intending spouses' community and such is recognized by the law.

But, on this matter, some legal scholars consider that article 34 of the FDRE Constitution does not stipulate any minimum requirements for a legally valid marriage, such as monogamy.⁵⁰ They accept that, article 34 of the FDRE Constitution lacks clarity regarding any minimum requirement for men and women to be bound by a legally valid marriage - monogamous or bigamous marriage.⁵¹ But, the author of this article believes that, since the Constitution is a general law then it is not expected to provide each and every detail that regulates marital, personal and family matters. It is a generally agreed legal principle that a constitution should provide only the basics and leave the particulars for subordinate legislations for any detail clarification. Hence, the room is open for the federal and regional states to enact laws upon considering the practice within their respective jurisdictions. The FDRE Constitution has not totally closed a door for the federal and regional states to enact family laws that equally accommodate polygamous marriages in accordance with the cultural and religious practice of their community. Hence, the author of this article argues that since the FDRE Constitution has impliedly recognized polygamous marriage, one can similarly say that the Constitution has given coverage for the land rights of women in the polygamous marriage by reserving a room for subordinate laws with more details in order to fill the gap.

ii. Federal Rural Land Administration and Use Proclamation No. 456/2005

Based on the provisions of the FDRE Constitution pertaining to land, the current government of Ethiopia issued a rural land law entitled federal rural land administration and use proclamation, (Proc. No. 456/2005). Accordingly, this legislation proclaims that any Ethiopian citizen who wants to engage in agriculture and is 18 years or above can get user right over rural lands.⁵² The proclamation also recognizes women's access to rural land for undertaking agriculture irrespective of their marital status.⁵³ It has also affirmed a life-long usage rights for peasants, semi pastoralists and pastoralists of

⁵⁰ Meaza Ashenafi & Zenebeworke Tadesse, *Women, HIV/AIDS, Property and Inheritance Rights: The Case of Ethiopia*, (2005), <http://www.pe.undp.org/content/dam/aplaws/publication/en/publications/hiv-aids/womenhiv-aids-property-and-inheritance-rights-the-case-of-ethiopia/23.pdf>.

⁵¹ *Id.*

⁵² Article 5/1(b), Federal Rural Land Administration and Use Proclamation, (2005) Proc. No. 456/2005.

⁵³ *Id.*, article 5/1(c).

both sexes.⁵⁴ Thus, it can be accepted that the land rights of rural women are well established under the federal rural land administration and use proclamation.

The proclamation also bestows the regional states the power to enact regional rural land administration and use proclamations and establish institutions within their respective regions so as to implement the proclamation.⁵⁵ The proclamation has mandated regional states the power to enact their respective proclamations based on the FDRE Constitution that stipulates regional states to have the power to administer land and other natural resources in accordance with federal laws.⁵⁶ Because of this stipulation, most of the regional states have enacted their own rural land administration and use law so as to implement proc. No. 456/2005.⁵⁷ What we can bear in mind on the part of regional states proclamations is that, they have not made women land rights subordinate rather the proclamations has mandated women's to use land equally with men. For example, if we consult SNNP regional state rural land administration and use proclamation No. 110/2007, even starting from its preamble, the proclamation expressly proclaims the land rights of women, by expressing its conviction that ensuring women's land right is necessary for agricultural production and productivity and to speed up environmental conservation and development in the region.⁵⁸ Article 5(3) of the proclamation clearly constructed women land rights by dictating that, women who want to engage in agriculture shall have the right to get and use rural land free of charge. The use right of women over land in male-headed and a female-headed household is also fully acknowledged by the proclamation.⁵⁹ Regarding the first case, the proclamation provides that a husband and wife have equal user right on their common land holdings. The same article also states that both of them will not lose their use right over land that each possess before marriage. The very message of this provision is that if one of the spouses has acquired personal land holding before the conclusion of marriage, then that spouse can also maintain holding right over that plot during the marital tie as well. In the case of female-headed households, the law

⁵⁴ *Id.*, article 7(1).

⁵⁵ *Id.*, article 17(1)(2).

⁵⁶ Article 52/2d/ of FDRE Constitution, at n 45.

⁵⁷ For example, Oromia regional state has enacted a Rural Land Administration and Use Proclamation, Proc. No. 130/2007; SNNP regional state enacted has enacted rural land administration and use proclamation, Proc. No. 110/07; Amhara regional state has also enacted Rural Land Administration and Use Proclamation cited proc. No. 133/2006 and also Tigray regional state has also enacted Rural Land Administration and Use Proclamation cited as proc. No. 136/2007 but this proclamation was recently amended by the current proclamation called Proc. No. 239/2014.

⁵⁸ Preamble of SNNP regional state Rural Land Administration and Use Proc. No. 110/07, Paragraph 7.

⁵⁹ *Id.*, article 5(5)(6).

stipulates that women have full use right on their holdings.⁶⁰ Here it is sound to say that the proclamation has sufficiently incorporated women's land rights.

Additionally, when we see the land rights of women in the Oromia regional state, the current regional state rural land administration and use proc. No. 130/2007 provides secured land rights for both men and women as one of its primary goal to ensure better rights for rural land users.⁶¹ The proclamation affirms that, women have equal rights with men to possess, use and administer rural land.⁶² The proclamation further provides that husband and wife have equal land right on their common land holdings and can have common holding certificate for the land that they have hold jointly.⁶³ It also dictates that, if husband and wife have a private holding then they can possess separate certificate for their land holding.⁶⁴ Here also, the proclamation made significant improvement in terms of protecting women's right to land by providing equal rights for women to access rural land, recognizing equal rights to obtain land titles and joint titling for spouses presuming joint holding of family land and the right to share their landholdings equally upon divorce, outlawing land rental agreements without consent of both spouses and permitting women to use hired labor on their farm plots.⁶⁵

But, what we can deduce from these proclamations is that, both of them have not clearly stipulated land rights of women in the polygamous marriages. Regional states in Ethiopia have different cultures and religions that admit polygamous marriage, but they have not enacted land laws that safeguards land rights of women in the polygamous marriage in line with article 34(4) of FDRE Constitution. However, when we see the practice within the regional states, they are admitting land rights of women in the polygamous marriage at the time of certifying landholding certificates. Regional states are giving separate land holding certificates for polygamous marriage even if their land laws does not clearly stipulate how the situation is entertained. The next section clearly deals with how regional states are entertaining the issue of polygamous marriage at the time of securing landholding certificates for land holders.

⁶⁰ *Id.*

⁶¹ Preamble of Oromia Regional State Rural Land Administration and Use Proclamation, Proc. No. 130/2007.

⁶² *Id.*, article 5(2).

⁶³ *Id.*, article 15(8).

⁶⁴ *Id.*, article 15(9).

⁶⁵ *Id.*, article 15(8); article 6(13); article 10(6); article 6(14).

3. THE PROTECTION OF LAND RIGHTS OF WOMEN IN THE POLYGAMOUS MARRIAGE UNDER THE RURAL LAND REGISTRATION AND CERTIFICATION PROCESS OF ETHIOPIA

Though, rural land registration and issuance of land holding certificates cannot fall under the ambit of the law, the process has a legal base in both Federal and Regional States Rural Land Administration and Use Laws. Even if the program was started prior to the issuance of the current Federal and Regional States Rural Land Administration and Use Proclamations, but the process was deeply expanded to all over the country after the adoption of the legal base in the Federal and Regional States Rural Land Administration and Use Laws. Since the process has a legal base, then it is imperative here to discuss it on the manner of incorporation of land rights of women in the polygamous marriage relations.

Rural land registration and granting land use certificates to holders become a government policy and it has been initiated when Tigray regional state started a comprehensive rural land registration and certification process in 1998.⁶⁶ The Amhara Regional State, by starting formal land registration in 2003, is the first to introduce a more scientific and technically advanced method of land registration in Ethiopia.⁶⁷ The Oromia and the SNNP regional states started the program in 2004. The intent of the program by issuing landholding certificates jointly in the names of both husband and wife is an indicative stipulation in order to safeguard women land rights. Basically, the program is started in line with the Rural Land Administration and Use Proclamation of the federal government that obliges regional state to give land certificates for landholders.

The federal Rural Land Administration and Use Proclamation No. 456/2005 has firmly provided a mechanism for land holding certificates equally for both men and women land holders. The proclamation reads that, ‘any holder of rural land shall be given holding certificate prepared by the competent authority.’⁶⁸ From the phrase ‘any holder of rural land...’ what we can deduce is that, the proclamation has sanctioned equal protection for both men and women land holders. Where land is jointly held by husband and wife or by other persons, holding certificate shall be prepared in the name

⁶⁶ Berhanu Adenew & Fayera Abdi, *Land registration in Amhara Region, Ethiopia: Securing land right in Africa*, p. 10 (iied. Russell press, Nottingham, UK, 2005).

⁶⁷ *Id.*

⁶⁸ Article 6(3) of proc. 456/2005, at n 52.

of all joint holders.⁶⁹ Thus, it can be said that women rights to hold rural land use certificates equally with men is well-established in federal rural land administration and use proclamation.

Regional states rural land administration and use proclamations have also given equal footing for both men and women for land holding certificate over rural land like that of the federal rural land administrations proclamation. For example, when we see SNNP regional state rural land administration and use proclamation, women are entitled to one of the following three landholding certificates depending on their condition. If they are in a male-headed household, they are awarded a joint landholding certificate. In cases where women are household heads, they are given a landholding certificate in their names. The same is applicable to women whose husbands are engaged in activities other than farming.⁷⁰ Like SNNP regional state, Oromia regional state rural land administration and use proclamation also provides that husband and wife have equal common holding certificate for the land that they have hold jointly.⁷¹ The proclamation has also provided that, husband and wife who have separate private holding can possess separate certificate for their land holding.⁷² Other regional states (Amhara, Tigray and Benshangul Gumuz) have also given equal place land holding certificates for women.

Even though, both the federal and regional states rural land proclamations has given equal room for men and women for landholding certificates, but the proclamations have not indicated the way how land rights of women in the polygamous marriage is registered and certified. In practice, regional states are entitling women's land rights in the polygamous marriage, though their respective regional states rural land proclamations have not indicated the way how such rights are certified. For example, when we see the contents of the certificate in Oromia regional state, the certificate bears the name of the husband as the landholder and provides a space for the list of wife or wives, thereby acknowledging the facts of polygamy. The certificate is given in the name of the husband yet the wife/wives are mentioned in the name of the certificate, and only the photograph of the landholder is affixed at the end of the green book.⁷³ When see the contents of the certificate in Amhara and SNNP

⁶⁹ *Id.*, article 6(4).

⁷⁰ Article 6(4) (5)(6) of SNNPRS Rural Land Administration and Use Proclamation No. 110/07.

⁷¹ Article 15(8) of Proclamation No. 130/2007, *supra* note 57.

⁷² *Id.*, article 15(9).

⁷³ Daniel Behailu, *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework*, p. 104, (eleven international publishing, Hague, Netherlands, 2015).

regional states, almost they are similar in that they both give space for joint holding, and the photos of the spouse are affixed side by side. They further provide space for the inscription of the name of the spouses' right under the picture of the spouses.⁷⁴ Regional states are following different mechanisms in order to issue land holding certificate for polygamous marriage. Among others, they are mentioning the name of the women in the second marriage equally with the name of the woman in first marriage, other states are giving separate certificate for women in the second marriage and also other state still mentioning the name of the women in the second marriage on the space that is left for children of land holders. Hence, this indicates that the land certification program is protecting women land rights in polygamous marriage by issuing land holding certificate for women in that marriage relation.

4. EVALUATING THE FEDERAL SUPREME COURT CASSATION DIVISION DECISIONS IN RESPONSE TO THE PROTECTION OF LAND RIGHTS OF WOMEN IN THE POLYGAMOUS MARRIAGE

As I have indicated in the preceding sections, there are no laws enacted by the federal and regional states governments that regulate the personal and pecuniary effects of marriage under systems of religious or customary laws. Although the FDRE Constitution has given a room for the federal and regional states in order to enact laws regulating personal and pecuniary relations of the polygamous marriage; there are no specific laws that regulate the existing relation in the polygamous marriage. If there is no law that regulates polygamous marriage relation then this is to mean that women within this marriage relation had no remedy to law for the protection or fulfillment of their rights. Women in these relations are more vulnerable to human rights abuses because they have no legal protection that regulates their personal and pecuniary relations.

In response to this, the Ethiopian Federal Supreme Court Cassation Division has passed decisions on some cases pertaining to protecting pecuniary relations of bigamous marriage. The decision rendered by this division has binding effect on all over the federal and regional states; and this is clearly depicted in the Federal Courts Proclamation Re-amendment Proclamation as, interpretation of a law by the federal supreme court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels.⁷⁵

⁷⁴ *Id.*

⁷⁵ Article 2(4) of the Federal Courts Proclamation Re-Amendment Proclamation, Proc. No. 454/2005.

One of such cassation decisions decided in a manner of protecting women property rights in bigamous marriage is Cassation File No. 24625 under Volume number 5.⁷⁶ This case was originated from the Amhara regional state, and finally it has made its way to the Federal Supreme Court Cassation Division. In this case, a man called Ato Maru Suleiman married two wives called W/ro Sadia Ahmed and W/ro Rahima Ali. Later on, the husband died and for this fact the marriage that he had with his two wives was dissolved by virtue of the law. The deceased left a son who was born from Sadia Ahmed. Following the death of her husband, Sadia sued Rahima claiming her share and the share of her son from the common property. In this case, the Federal Supreme Court Cassation Division has pronounced a decision that the deceased's property should be divided in a manner that the two wives would take one fourth (1/4) of the property each, and the son of the deceased would take the remaining half portion of it. In this cassation decision, it can be noted that the share of the lawful spouse was 25% of property, while half of the property was left to constitute the husband's share. This decision has also jurisprudential effect on the land rights as well. Since, the decision respects polygamous marriage, then it does not make distinctions on the property that is going to be partitioned between the monogamous or polygamous marriage relationships.

The other federal cassation decision that has entertained pecuniary effect of bigamous marriage is Federal Cassation File No. 50489 under Volume number 11.⁷⁷ In this case, a man called Haji Mohammed Halis had two wives named W/ro Zeineba Kelifa and W/ro Kedija Siraj. W/ro Kedija was a resident of Alaba-kulito/SNNP regional state while W/ro Zeineba was a resident of Saudi Arabia. Following the dissolution of the marriage that existed between W/ro Kedija and Haji Mohammed Halis by divorce, W/ro Kedija sued her husband for the division of common property. In this case, the Federal Supreme Court Cassation Division has pronounced a decision in a manner that half of the property should go to W/ro Kedija Siraji, and the other half should be divided between Haji Mohammed Halis and W/ro Zeineba Kalifa. From this decision we can realize that, one of the wives of Ato Haji Mohammed Halis, W/ro Kedja, was entitled to half of the common property while the other wife, w/ro Zeineba and her husband was entitled to ¼ (25%) of the common property each.

⁷⁶ *Sadia Ahmed vs. Rahima Ali*, Federal Supreme Court Cassation Division Decisions, Civil Cassation File No. 24625, Federal Supreme Court, Vol. 05, 2001.

⁷⁷ *Zeinaba Khalifa vs. Kedija Siraj*, Federal Supreme Court Cassation Division Decisions, Civil Cassation File No. 50489, Federal Supreme Court, Vol. 11, 2004.

In a similar manner in a Cassation File No. 45548 volume 13 between Aminat Ali and Fatuma Wubet, the Federal Cassation bench has reached a similar reasoning.⁷⁸ In this case, the Federal Cassation bench has decided that women in bigamous marriage should have to share their common property equally with their husband.

These Federal Supreme Court Cassation Division decisions also equally apply for rural land issues as well if the polygamous marriage is dissolved. This is to mean that if a person has concluded a second marriage and if that marriage is dissolved instantly, then he should have to share the land on his portion equally with a woman in second marriage and the woman in the previous marriage take half portion of the land. Even though there are no separate laws that regulate personal and pecuniary issues of polygamous marriage, regional states can entertain those issues in relation to Federal Supreme Court Cassation decisions because proclamation No. 454/2005 obliges states to dispose similar issues based on these decisions.

One may question the legal basis and justification for the Federal Supreme Court Cassation Division to reach on such decisions which are contrary to the federal and regional states Family Laws. Some argue that, the legal base for the legitimacy of polygamy in Ethiopia is the FDRE Constitution itself. It is argued that the FDRE Constitution does not categorically prohibit a polygamous marriage.⁷⁹ The contention appears to focus on the plural wording of “men and women” under article 34(1) of the FDRE Constitution.⁸⁰ However, such a literal reading of the phrase does not justify the argument. Yet, others appear to argue that article 34(4) of the FDRE Constitution tends to recognize polygamous marriage practice in the context of legal pluralism. This argument seems somewhat sound compared to the first line of argument.

Though, the FDRE Constitution has given a room for the federal and regional state governments in order to enact detail laws that regulate polygamous marriage relations, still now there are no laws enacted to regulate those marriage relations. Both the federal and state family laws recognize the conclusion of marriage in accordance with custom or religion of the future spouses. However, this recognition as found under all the family laws is basically recognition of custom or religion in the celebration or conclusion of marriage. This is to mean that, religion and custom are not

⁷⁸ Aminat Ali vs. Fatuma Wubet, Federal Supreme Court Cassation Division Decisions, Civil Cassation File No. 45548, Federal Supreme Court, Vol. 13.

⁷⁹ Meaza Ashenafi & Zenebework Taddesse, *supra* note 50.

⁸⁰ *Id.*

recognized to dictate the substance of the marriage apart from the celebratory aspect except in the case of the Harari Family Code.

Thus, it can be argued that if there are no separate laws that regulate the pecuniary aspects of such union, then this will result in the vulnerabilities of women in such union. Hence, the Federal Supreme Court Cassation Division while pronouncing a decision which is contrary to the family laws of the federal and regional states can be justified by the saving clause of the FDRE Constitution itself that gives recognition to marriage concluded under systems of religious or customary laws, on one hand, and giving protection for property rights of women's in the polygamous marriage in general, and land rights of such unions in particular.

In addition, conclusion of a polygamous marriage has various consequences, both during its existence and upon its dissolution. Since, there are no laws that regulate those relationships; this can highly impede the property rights of polygamous marriages. Now a days, courts are dealing with several post-dissolution legal issues pertaining to the pecuniary effects of the dissolution of a polygamous marriage but there are no specific laws that that regulate the property rights of the polygamous marriage other than the Federal Supreme Court Cassation Division decisions. To this end, the precedents are intended to form part of the jurisprudence of the federal and regional states family laws to govern similar issues on the division of common property.

CONCLUSION AND THE WAY FORWARD

International and regional (African) human rights instruments have clear provisions that provide non-discrimination between men and women in the enjoyment of the rights contained therein. Among the first international human rights instruments to dictate non-discrimination in the enjoyment of rights between men and women is UDHR. This Declaration entitles both men and women equal rights as to marriage, during marriage and at its dissolution. But here, the Declaration promotes only monogamous marriage as of right. ICCPR is another international human rights instrument to built-in non-discrimination on the enjoyment of rights between men and women. The Covenant provides the right to marriage and recognizes the right of men and women of marriageable age to marry and to found a family. Though the Covenant provides for the right to marriage and equality in marriage, it has not expressly mentions polygamy. Another international human rights instrument that sets out the

obligations on states to eliminate all forms of discrimination against women is CEDAW. CEDAW provides the rights to marriage and recognizes both men and women the same rights and responsibilities during marriage and at its dissolution. But like to that of UDHR and ICCPR, the Convention only recognizes monogamous marriage and has not given place for polygamous marriage.

Regionally, the African Charter on Human and Peoples' Rights is another instrument to provide elimination of discrimination against women and to ensure the protection of the rights of the women as stipulated in international declarations and conventions. Even though this Charter has not listed land rights of women specifically but the non-discrimination clause on the enjoyment of rights mandates both of men and women in order to exercise rights equally. Unlike international human rights instruments, the Charter has not incorporated the right to marriage within its provisions but the right to marriage is stipulated within the African Women's Rights Protocol that is adopted to complement the Charter. The Protocol specifically provides African governments to promote women's access to and control over productive resources such as land and guarantee their right to property. The other and the most notable innovation of the Protocol is that, it obliges states to enact legislation which ensures and promotes polygamous marriages. Though, the Protocol encourages monogamy as the preferred form of marriage, the rights of women in marriage, including that of polygamous marital relationship is promoted and protected.⁸¹ The Protocol recognizes polygamous marital relationships as a compromise by taking into account the cultural and religious diversity of the continent.⁸²

When we see the protection of land rights in the domestic laws arena, the FDRE Constitution prescribes women to have the right to acquire, administer, control, use and transfer property. In particular, women have equal rights with men with respect to use, transfer, administration and control of land. But here, the provisions of FDRE Constitution seemingly recognize protection for the land rights of women in the monogamous marriage only but not polygamous marriage. But the writer of this article believes that, the FDRE Constitution has not clearly denied polygamous marriage in general and the protection of land rights of women in the polygamous marriage in particular. In relation to this, article 34(4) of the FDRE Constitution stipulates that "in accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted". Hence, it could be strongly believed that, the FDRE Constitution

⁸¹ See Article 6(c) of African Charter on Human and Peoples' Rights on the Rights of Women in Africa [Emphasis added].

⁸² *Id.*

impliedly accepts the possibility of recognizing bigamous marriage practices provided that such act is maintained within the religious and customary laws of the intending spouses' community. Since the FDRE Constitution has impliedly recognized polygamy then one can obviously say that, the Constitution has given place for the land rights of women in the polygamous marriage by leaving room for other detailed legislations in order to fill the gap.

Though, the FDRE Constitution has given a room for the federal and regional states legislators in order to enact laws regulating personal and pecuniary relations of the polygamous marriage relations, but they have not issued detailed laws that regulate the union. In response to this, the Federal Supreme Court Cassation Division has passed different decisions on some cases pertaining to protecting pecuniary relations of polygamous marriage is concerned. In the meantime, courts are dealing property issues in the polygamous by referring Federal Supreme Court Cassation Division Decisions. Thus, it is imperative to have a law that regulates the property rights of polygamous marriage in Ethiopia.

As long as there are social, cultural, and religious factors that forces to polygamy, then there will always be women engaged in polygamous marriage relations. It is for this reason that the African Women's Rights Protocol forces States Parties to enact legislation to ensure the rights of Women in polygamous marriage unions. The Protocol also compels states parties to combat all forms of discrimination against Women through appropriate legislative, institutional and other measures. Among others, the Protocol obliges states parties to adjust their national constitutions and other legislative instruments to ensure the effective implementation of the principle of the Protocol. So, it is evident that, the better way to protect the rights of women in polygamous marriage is formulation of laws which regulate the practice of polygamy. Adopting laws that protect and promote those relations are not enough, rather it is imperative to adopt a law that protect the property rights of those marriage relations in general and land use rights in particular. So, Ethiopia as a state party to the Protocol of African Charter, it is imperative to adopt national laws that protect and promote the union on one hand and regulate the property issues of polygamous marriage on the other.

In addition, the FDRE Constitution has not denied both the federal and regional states from enacting laws which protect and promote such marriage relations. This is evident from the reading of article 34(4) of the Constitution. This provision pronounces that, in accordance with provisions to be

specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted. But, apart from the Harari regional state, all other regional states in the country have not enacted a law that regulates the union. Hence, by inferring this clause, the federal and regional state legislators should have to enact the detailed laws that regulate the relationship in general and the land rights of the union in particular in order confirm their constitutional obligations.