The Effect of Bigamous Marriage on Distribution of Marital Property in Ethiopia: A Case comment

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1. Introduction

Marriage is a sacred institution which has been well accepted by society in every corner of the world. As such, marriage has been recognized and protected by both national laws of countries[1] and international legal instruments.[2]Legal recognition and protection is given to marriage because it is through marriage that humanity establishes and maintains family, which is the fundamental unit of society.[3]The recognition and protection of marriage becomes meaningful when the law gives recognition and protection to the effects produced by marriage. The basic effects of marriage can be divided into personal and pecuniary.[4] In Ethiopia, personal effects of marriage

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[1]Nowadays, it is possible to conclude that almost all countries of the world have put in place laws dealing with the family in general and marriage in particular.

[2]The Universal Declaration of Human Rights of 1948 (hereinafter cited as the UDHR), the International Convention on Civil and Political Rights(hereinafter cited as ICCPR), adopted in 1966 which entered into force in 1976, Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature in 1979 and entered in to force in 1981.

[3]But we have to bear in mind that marriage is not the only arrangement through which family is established as family may be established by irregular union and/or cohabitation.

[4]The effects of marriage in Ethiopia are the same regardless of the mode of celebration of marriage. See generally, chapter three of the Revised Family Code of Federal Ethiopia, 2000, Arts.40-73, Proc.No.213, Federal Neg,Gaz.,Year 6, Extraordinary Issue No.1.

pertain to respect, support, assistance,[5] joint management of family,[6] cohabitation,[7] determination of residence,[8] duty of fidelity[9] and the like.

Pecuniary effects of marriage, in turn, relates to the creation of new legal relationship between the spouses regarding property. In this regard, the most fundamental effect is the presumption that all property of the spouses shall be deemed to be common property even if registered in the name of one of the spouses[10] unless such spouse proves that he/she is the sole owner thereof.[11] From this, we can understand that in the absence of contrary proof, spouses have equal share from the common property. This can be true only when the marriage is a monogamous marriage.

However, there are circumstances where a man may have two or more wives at the same time, although polygamous marriage or bigamous marriage is not allowed under the Revised Family Code of Ethiopia of 2000. In this regard, Art 11 of the Code clearly provides that a person shall not conclude marriage as long as he/she is bound by bonds of a preceding marriage. In addition to the Federal Family Code, the Criminal Code of the Federal Democratic Republic of Ethiopia of 2005 had declares that bigamy is a criminal act.[12]Despite the fact that bigamy is prohibited both by the Federal Family Code and the Criminal Code, there are incidences of bigamous marriages in Ethiopia.

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

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[5] Id, Art.49
[6] Id, Arts.50-52
[7] Id,Art.53
[8] Id,Art.54
[9] Id,56
[10] Id, Art. 63
[11] Ibid
[12]See of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Art.650(1),Proc.No.214, Federal Neg.Gaz. According to this provision of the Code whosoever, being tied by a bond of a valid marriage, intentionally contracts another marriage before the first union is dissolved or annulled, is punishable with simple imprisonment not exceeding five years. Art 650(2) has stipulated that any unmarried person who marries another he knows to be tied by a bond of an existing marriage is punishable with simple imprisonment. However, it must be borne in mind thatArt.651 of the Code has put an exception to the rule as it provides [bigamy is not punishable] where it is committed in conformity with religious or traditional practices recognized by law.

words, determining the exact share of the spouses has remained to be an arduous task for courts when a bigamous marriage is dissolved for various reasons. Because of this, Ethiopian courts, both at the Federal and regional level, have held divergent positions on the issue under consideration. Nonetheless, because treating many court decisions is absolutely beyond the scope of this short case comment, I have confined to the analysis of two decisions of the Cassation Division of the Federal Supreme Court of Ethiopia (hereinafter cited as the Cassation Division) in which the Cassation Division held two conflicting positions though the facts of the case were similar and the questions of law involved in both the cases were identical.

The first case I selected was litigated between two wives of a man (their husband) who had died at the time of the litigation. In this case, the Cassation Division decided that half of a building (a common property) was to be given to the son of the deceased born to one of the disputants, and the remaining half to be divided between the two wives. The second case I have selected was again litigated between two wives of a man(the husband) in which the Cassation Division decided that one of the wives was entitled to half of a house (which was the subject of the litigation) and the other half should be divided between the husband and the other wife of this man.[13]

From the above brief presentation of the facts and decision of the Cassation Division, we can grasp that the Cassation Division has held different positions at different times with regard to determining the actual share of spouses, out of the common property, in the case of dissolution of a bigamous marriage. The question, however, is how did the same Bench arrive at different conclusions in a similar case brought to it? Did the Cassation Division have any concrete legal basis to negate its previous position and to hold the latter position? Will the vacillating approach of the court mean any thing towards insuring the predictability of the decisions of the Bench? At any rate, how can we put in place a lasting solution to the problem of determining share of spouses in the case of bigamous marriages? As a modest response to the call made by the Federal Supreme Court of Ethiopia,[14] this case comment is, therefore, meant to carefully analyze the

[13]For full account of the facts of the case and the holding of the courts, see the discussions made under section two of this piece, particularly 2.1 and 2.2 of the work.
[14]The preface of the publications of the Cassation Division in which the decisions of the Division are contained has clearly called up on legal professionals engaged in different fields and students to give their constructive comments and critics on such decisions so that these comments and critics will be important inputs for the improvement of the decisions of the court. In this regard, see, the prefaces of Decisions *of the Cassation Division of the Federal Supreme Court*, any volume. So far 12 volumes have been published and distributed to the public.

above issues and recommend possible solutions. Nevertheless, the author cannot claim that he will suggest an absolute solution to the problem. Rather this case comment is basically aimed at exposing the problem and provoking thoughts among legal scholars and students of law. To this end, this case comment has been organized as follows. The second section of the work has been devoted to the summary and presentation of the facts of the case and the holding of the courts while the third part deals with the analysis of the cases and the accompanying comments. The fourth section deals with brief concluding remarks.

2. Summary of the Facts and Holding of the Courts

2.1 Case One (Cassation file No. 24625)

This case came from Amhara region. In this case, a man called Ato Maru Suleiman married two wives called W/ro Sadiya Ahmed and W/ro Rahima Ali. Later on, the husband died a natural death and the marriage that he had with his two wives was dissolved by virtue of the law.[15] The deceased left a son who was born from Sadiya Ahmed. Following the death of her husband, Sadiya sued Rahima claiming her share and the share of her son from the common property. The common property which was the subject of litigation was a house. The suit was brought at Debarq Woreda Court,[16]North Gondar Zone, Amhara National Regional State. The house, over which the parties litigated, was under the possession of W/ro Rahima. The relief sought by the plaintiff was that the defendant should give her (the plaintiff) share and the share of her son on the house which was known in the name of the deceased husband of both women.

Both the plaintiff and the defendant presented their arguments and proved to the satisfaction of the court that both were the wives of the deceased. Based on this, the Woreda Court decided that half of the house should be divided by the two wives and the remaining half should be given to the son of the deceased husband born from W/ro Sadiya. The defendant, W/ro Rahima, was aggrieved by the decision of the Woreda Court and lodged an appeal to

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[15]In Ethiopia, death is one of the grounds for the dissolution of marriage as clearly provided in Art.75(a) of the Revised Family Code, cited above at note 4.The regional family codes have also recognized that death is one of the grounds of dissolution of marriage irrespective of the mode of celebration of marriage.

[16]Here, I am not able to indicate the file number of the Woreda Court because the Cassation Division did not cite the case number of the woreda court except it did declare that the decision of the woreda court was affirmed. Yet, the Cassation Division should have cited the file number of the case at the woreda court in its decision for easy reference.

High Court of North Gondar Zone.[17] The appellate court, having heard the arguments of both sides, reversed the decision of the Woreda Court, on 31 December 2004, holding that the house was bought by the deceased husband and W/ro Rahima which means that W/ro Sadiaya was not entitled to take any share from it. Then W/ro Sadiya lodged an appeal to the Supreme Court of Amhara Regional State. However, to the dismay of the appellant, the appellate division of the Supreme Court affirmed the decision of the Zonal High Court.[18]

As W/ro Sadiya was discontented by the decisions of the Zonal High Court and the regional Supreme Court, she lodged an application to the Cassation Division of the Federal Supreme Court.[19] The Cassation Division (of the Federal Supreme Court) accepted her application and summoned W/ro Rahima. Both parties presented their case. W/ro Sadiya prayed the Cassation Bench for the reversal of the decisions of the Zonal High Court and the regional Supreme Court while W/ro Rahima prayed for the affirmation of those decisions. The Cassation Division examined the case and framed an issue. The issue framed by the Cassation Division was: *if the house, which was the subject of litigation, was bought during the conjugal life of W/ro Sadiya and the deceased Ato Maru Suleiman, how could W/ro Sadiya be deprived of her right of getting her legitimate share from the common property?* In the course of the litigation and by examining the files of the lower courts, the Cassation Division realized that the house was bought by Maru Suleiman, while the marriage between the deceased and the W/ro Sadiya was still valid. Owing to this, the Cassation Division reversed the decisions of the regional courts on the 7th of November 2008.[20] The Cassation Division stressed that since no adequate proof was adduced by the defendant to the effect that the house belonged only to her (the defendant) and the deceased, it is presumed that the house was a common property. Consequently, the Cassation Division reversed the decisions of the Zonal High Court and of the regional Supreme

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[17]See W/ro Sadiya Ahmed v W/ro Rahima Ali, (Civil File Number 07983, North Gondar Zone High Court, December 31, 2004)

[18]See W/ro Sadiya Ahmed v, W/ro Rahima Ali ((Civil File Number 005615, Amhara National Regional State Supreme Court, Appellate Division, March 16, 2006)

[19]This was so because the Amhara Regional Supreme Court did not organize the Regional Cassation Bench at that time. Currently, all regional states of the Ethiopian Federation have established cassation benches at regional levels which entertain final decisions of regional courts decided on regional matters.

[20]See W/ro Sadiya Ahmed v, W/ro Rahima Ali (Cassation Civil File Number 24625, Federal Supreme Court, Cassation Division, November 7, 2008).This decision has also be published under Decisions of the Federal Supreme Court, Cassation Division, vol.8, pp195-197.

Court. Instead, the Cassation Division affirmed the decision of the Woreda Court. The Cassation Division maintained that the decisions of the Zonal High Court and the Supreme Court of the Region contained fundamental error of law as they denied the right of W/ro Sadiya to take her share from the house which led to litigation. The Cassation Division decreed that the division of the house should be executed in accordance with the decision of the Woreda Court which declared that the two wives would take one fourth (1/4) of the house each, and the son of the deceased would take the remaining half.

2.2 Case Two (Cassation File No. 50489)

This case arose from another corner of Ethiopia, Southern Nations, Nationalities and peoples' Region. 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-kolito while w/ro Zeineba was a resident of Saudi Arabia. Following the dissolution of the marriage that existed between her and Haji Mohammed Halis by divorce, W/ro Kedija sued her husband at the Woreda Court of Alaba-Kolito for the division of common property. On account of this, W/ro Zeineba applied to the Court (which was entertaining the case) to intervene in the court proceeding as the outcome of the decision of the court would be detrimental to her right. She was allowed to intervene and she claimed that she was entitled to take her share from the subject of the litigation- a house. The Woreda Court examined the arguments and evidence presented by both the litigants.[21] Then, it decided that the intervener, W/ro Zeineba, was not entitled to any share as the house was possessed by W/ro Kedija and that the intervener was not able to prove that she contributed anything for the construction of the building. Therefore, the woreda court decided that the house should be equally divided between Haji Mohammed Halis and W/ro Kedja.

Aggrieved by the Decision of the Woreda Court, W/ro Zeineba lodged an appeal to the Zonal High Court of Alaba for the reversal of the decision of the lower court. However, the appellate Court rejected her appeal.[22] She did not stop there; she applied to the Cassation Bench of the Regional Supreme Court although her case was not accepted by the Bench.[23]Owing to the rejection of

[21]See W/ro Zeineba Kelifa v W/ro kedija Siraj(Civil File Number 02464, Alaba-Kolito Woreda Court Court, unpublished, May 18, 2009).
[22]See W/ro Zeineba Kelifa v W/ro Kedija Siraj (Civil File Number 01969, Alaba Zonal High Court, unpublished, June 12, 2009).
[23]See W/ro Zeneba Kelifa v W/ro Kedija Siraj (Civil File Number 29217, SNNP,Federal Supreme Court, Cassation Division, unpublished, October15, 2007).

her case by the regional courts of all levels, W/ro Zeineba filed an application to the Cassation Division (of the Federal Supreme Court) on November 7, 2009. The Cassation Division accepted her application and summoned W/ro Kedija, the respondent. In her defense, the respondent maintained that W/ro Zeineba did not establish any marital tie with Mohammed Hails and did not contribute anything to the construction of the house. The respondent further added that the house was built by her and Haji Mohammed Halis. By examining the arguments presented by both parties and the documents contained in the file, the Cassation Division established that the marriage between W/ro Zeineba and Haji Mohammed Halis was established in 1984 E.C (around 1991/1992). On the other hand, the marriage between Haji Mohammed and W/ro Kedija was established in 1987 E.C (around 1994/95).

Having realized that both the applicant and the respondent were the wives of Haji Mohammed Halis, the Cassation Division moved to the determination of the share of the spouses in the house under discussion. The Cassation Division maintained that both the regional and the Federal Family laws have registered partition of common property of spouses in the case of monogamous marriage since the laws clearly prohibited bigamous marriages. Despite this, the court said, bigamous marriage has been actually practiced by the society and where a dispute in relation of partition of common property between and/or spouses arises, court decisions should be geared towards promoting social values.

After it entertained the arguments of the litigants, the Cassation Division reversed the decisions of the regional courts of all levels. The Cassation Division decided that half of the house building should go to W/ro Kedija Siraji, who possessed the building, and the other half should be divided between Haji Mohammed Halis and W/ro Zeineba Kalifa. From the decision of the Cassation Division, it is possible to realize that one the wives of Ato Haji Mohammed Hails, W/ro Kedja, was entitled to half of the common property while the other wife, w/ro Zeineba was entitled to ¼ of the common property. The husband of the ladies was also entitled to ¼ of the common property. It is also understandable that the Cassation Division of the Federal Supreme Court negated the position it held in the case which arose between Sadiya Ahmed and Rahima Ali. This is because in the case of Sidiya v. Rahima, the Cassation Division decided that the wives take ¼ of the common property while in the latter case, in the case Zeineba v. Kedija, the Cassation Division decided that one of the wives take half of the common

property and the other half should be divided by the husband and the other wife.[24]

3.Analysis

3.1 Analysis on Case One

As I have indicated previously, the first case was decided in November 2008 in which the Cassation Division decided that half of the common property should go to the successor of the deceased husband and the remaining half should be equally apportioned between the surviving wives of the deceased. The question is, however, as to why the Cassation Division adopted this formula. Was the Cassation Division motivated by legal provisions or equity and fairness? As can be understood from the close reading of the decision of the Cassation Division, the court did not provide any reason as to why it declared that half of the property should go to the successor of the deceased. The Cassation Division simply endorsed the decision of the Woreda Court without any analysis and reasoning. The only thing the Cassation Division did was declaring that if it was proved that both ladies were the wives of the deceased, the property, which was the subject of litigation, was a common property.

Although the Ethiopian family laws have not contained provisions which can regulate the determination of share of spouses in the case of bigamous marriages, courts are duty-bound to resolve the issue by taking into consideration the principle of equality before the law in general and equality of spouses in particular. Judged in light of these constitutional and human rights values which are cherished by national as well as international legal instruments, the decision of the Cassation Division is not acceptable, at least

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[24]See W/ro Sadiya Ahmed v W/ro Rahima Ali (Cassation Civil File Number 50489, Federal Supreme Court, Cassation Division, October 04, 2010).This decision has also be published under Decisions of the Federal Supreme Court, Cassation Division, vol.11, pp 2-5.In relation to the holding of the Cassation Division, one is prompted to ask the following relevant questions: Why did the Cassation Division decide in the first case that the husband was entitled to half of the common property? Couldn't that be against equality before the law and spousal equality which are deeply entrenched under the FDRE Constitution and other international human rights instruments to which the country is a party? Did the Cassation Division have any concrete legal basis to absolutely negate its former stand and decide that one of the wives is entitled to half of the common property and the other wife to ¼ of the common property? Did the Cassation Division have any legitimate ground to decide that the husband is entitled to ¼ of the common property in the second case? Couldn't this decision be contradictory to the equality clause incorporated in the FDRE constitution and international human rights instruments to which Ethiopia is a party?

to this writer. To begin with, the decision has undermined the principle of equality before the law as it did not treat the wives of the deceased on equal footing with the successor. Needless to say, equality before the law is nowadays one of the cardinal constitutional principles. At the same time, it has been embodied in the major international human rights instruments. For example, Art. 7 of the Universal Declaration of Human Rights, the UDHR, [25] (which has become part and parcel of the Ethiopian legal system since 1991[26] and which serves as a guiding principle to interpret the human rights section of the FDRE Constitution,[27]) states that all are equal before the law and are entitled without discrimination to equal protection of the law. By the same token, Art. 2(1) of the International Convention on Civil and Political Rights (the ICCPR hereinafter) also provides that each state party to the covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the covenant without distinction on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. What is more, Art. 3 of the African Human Peoples' Rights Charter declares that every individual shall be equal before the law and shall be entitled to the equal protection of the law.

All the above legal instruments have been part and parcel of the Ethiopia law since Ethiopia is a party to all of them. Accordingly, the provisions of these international legal instruments should be given due consideration by our courts as any other legislation enacted by House of Peoples' Representatives and regional councils. Besides, the values of the afore-mentioned instruments have been incorporated under the FDRE constitution. For instance, Art 25 of the FDRE Constitution provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. This same article adds that the law shall guarantee to all persons equal and effective protection without discrimination on grounds of any sort. In addition to incorporating values of equality before the law, Art.13(2) of the FDRE constitution declares that all human and democratic rights enshrined

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[25]See the full text of the UDHR, cited above at note 1.

[26]See the Transitional Period Charter of Ethiopia, 1991, Art.1 Proc. No.1, Neg.Gaz. Year 50, No.1.The Charter declared in black and white that human rights incorporated in the UDHR were transformed in to the domestic laws of Ethiopia as of the adoption of the Charter in July 1991.

[27]See the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 13(2), Proc.No.1, Federal Negarit Gazeta, Year 1, No.1. See also Assefa Fisseha, '*The Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia*', in Assefa Fiseha and Getachew Assefa,(editors), *Institutionalizing Constitutionalism and the Rule of Law: Towards Constitutional Practice in Ethiopia*, Ethiopian Constitutional Law Series, 2010,Volume 3, pp.7-53.

in the same constitution should be interpreted in a manner conforming to the principles of the UDHR, the ICCPR and other international instruments adopted by Ethiopia.

Despite this, however, the Cassation Division did not reflect equality of spouses before the law with respect to their shares when a common property is divided among the spouses. This is because the Cassation Division endorsed a decision of a Woreda court of Amhara Regional State which decided that women spouses should take less than the husband. The decision of the Woreda Court as well that of the Cassation Division have also violated equality of spouses which has gained international as well as national recognition. At the international level, the ICCPR, the International Convention on Economic, Social and Cultural Rights (hereinafter the IESCR), the Convention on the Elimination of any Form of Discrimination against Women and the African Charter on Human and People's Rights. In this regard, Art. 23 (4) of the ICCPR stipulates that states parties to the convention shall take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. To realize this international duty, Ethiopia has taken appropriate legal and institutional a measures. Equality of spouses has been clearly provided in the FDRE Constitution. In this connection, Art 34 (1) of the Constitution declares that men and women have equal rights while entering into, during marriage and at the time of dissolution of marriage. Besides, when we closely examine the family laws of the country, both federal and regional,[28] we can realize that the equal protection of spouses is insured irrespective of the mode of establishment of marriage- whether the marriage is civil, religious or customary.[29]

In addition, Art 35 of the FDRE Constitution is entirely devoted to the protection of the rights of women taking into consideration the fact that women were historically disadvantaged groups of society in Ethiopia as was the case elsewhere in the world. Accordingly,Art. 35(1) of the Constitution states that women shall, in the enjoyment of rights and protections provided for in the constitution, have equal rights with men and sub-article 2 of the same article provides that women have equal rights with men in marriage as prescribed by the constitution. In addition to these constitutional principles,

[28]In Ethiopia, following the Ethiopian Federal experiment in Ethiopia, there are ten family codes, nine those of the regions and the Revised Family Code which is applicable in Addis Ababa and Dire Dawa.

[29] In Ethiopia, both at the federal and regional levels, there are three types of celebration of marriages. These are civil, religious and customary marriage; yet the legal effects attached to all of them are the same.

the family laws of the country, federal and regional, have tried to insure the equality of spouses in entering into marriage, during marriage and after dissolution of marriage.[30] Therefore, it can be safely concluded that Ethiopia has put in place legal instruments to ensure equality of spouses in all respects in general and in division of marital property in particular. In other words, that means the country has worked its best, as far as legislation is concerned, to discharge its international obligation imposed upon it by Art. 23 of the ICCPR.

It can also be said that Ethiopia has enacted laws which can be used as important vehicles to domestically implement the Convention on the Elimination of All Forms of Discrimination against Women which, *inter alia*, requires all state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of elimination of discrimination against women. The Convention also declares that State parties to the Convention undertake to embody the principle of equality of men and women in their national constitutions or other appropriate legislation with a view to eliminate any form of discrimination against women. Moreover, State parties to the convention are also required to establish legal protections of the rights of women on equal basis with men and to insure, through competent tribunals, and other public institutions the effective protection of women against discrimination. As far as institutional protection is concerned, Ethiopia has declared in its constitution that an independent judiciary has been established both at the state[31] and federal levels,[32] which is amenable to the proper implementation of all laws in general and laws dealing with the equality of spouses in particular.

However, it must be borne in mind that, enacting laws and establishing courts do not by themselves suffice to ensure the equal protection of spouses. Equality of spouses is ensured when the courts are active enough to carefully examine national as well as international legal provisions before they arrive at a certain decision. Particularly much is expected from the decision of the Cassation Division since it is empowered to interpret both federal and

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[30]When we closely examine the regional family codes we can easily realize that they are copies of the Revised Family Code of the Federal Government except some minor differences.

[31]The federal Constitution has declared that states shall be required to establish three levels of courts i.e. state Supreme Court, high court and first instance court. See Art.78 (3) of the FDRE Constitution, cited above at note 27. Accordingly, all regions of the Federation have established three tiers of courts.

[32]Id, see Art.78(2).See also Federal Courts Proclamation, 1996, Proc.No25, Federal Neg.Gaz. Year 2, No.13.

regional laws of Ethiopia and whose decision is declared to be binding on all lower courts in Ethiopia, be it federal of regional courts.[33] In the case at hand, it can be concluded that the Cassation Division tried to interpret the law to insure that spouses receive share from the common property since the case presented to Cassation Division was not regulated either by the Amhara Region Family Law or the Federal Family Law. The absence of legal provision which may directly resolve the issue at hand is attributable to the fact that these family laws did not contemplate the appearance of bigamous marriage since this type of marriage was outrightly prohibited by both laws. The question, however, is how should courts of law go about determining the share of spouses where a bigamous marriage is dissolved? The Cassation Division has somehow resolved the problem in its decision. However, the Cassation Division did not give any reason which pushed it to decide the case the way it did, although the Cassation Division, as any other Court, is required by the Ethiopian Civil Procedure Code to give reasons for its decisions.[34] Therefore, the Cassation Division of the Court should have given reason as to why it arrived at such decision which entitled the husband more shares than his two wives. In sum, on the basis of the reading of the decision of the case under consideration, it can be concluded that the decision of the Cassation Division did not address equality of spouses in taking equal shares out of marital property. It can also be argued that the Cassation division did not attach appropriate weight to the protection of rights of women after the dissolution of marriage.

3.2 Analysis on Case two

As I have indicated above, the second case arose in SNNP Regional State and it was litigated again by two women who were the wives of a man called Haji Mohammed Halis. In this case, the Cassation Division took a position squarely in contradiction to the one it took in the case one above. The Cassation Division held that ½ of the house (that was the subject of litigation) should be given to one of the wives who was in possession of the house and the remaining half of the house be divided between the husband and the wife who was not in possession of the house.

First of all, why did the court negate its previous stance (position) and come to its current position? If that is the case, how can the court claim that the

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[33]See Federal Courts Proclamation Re-amendment Proclamation, 2005, Art.2 (1), Proc.454, Federal Neg.Gaz., Year 11, No.42.

[34]The Civil Procedure Code of the Empire of Ethiopia ,1965, Art.182(2), Dcree No 52, Year 25, No.3.See also Robert Allen Sedler, Ethiopian Civil Procedure,(1968),pp.208-211, Serkaddis Zegeye, *'Judgment Writing: An Overview of the Ethiopian Context'*, Ethiopian Journal of Legal Education, Volume 4,No.1,(2011), pp.27-49.

interpretation of laws by the Cassation Division is instrumental to ensure predictability of decision of courts in Ethiopia? Because the decision of the Cassation Division did not contain any thing which hints at the alteration of the stance of the Cassation Division, we cannot understand the reason that pushed the Cassation Division to depart from its previous position.[35]

Let us now come to the analysis of the case. In this case, too, the holding of the Cassation Division is wrong in the opinion of this writer. This is because, as we have analyzed in relation to the previous case, the decision of the Cassation Division jeopardized the interests of one of the wives, W/ro Zeineba and the husband Haji Mohammed Halis while it unduly favored W/ro Kedija who was in possession of the house. Why was W/ro Kedija entitled to half of the spousal property? Did the fact that she was in possession of the building give the impression to the Cassation Division that she was entitled to take much more share than the other spouses?

When we closely read the relevant part of the decision, we can realize that the Cassation Division was cognizant that proof was adduced at the woreda court that she/W.ro Kedija/ had direct contribution in the construction of the house. Nonetheless, from the decision of the Cassation Division, we cannot understand whether or not the contribution of W/ro Kedija was exactly 50% of the house. This is so because the Cassation Division in its decision did not sufficiently summarize the facts of the case. Nor did it present and analyze the type of evidence adduced at the Woreda Court which convinced it to decide that W/ro Kedjia contributed 50% and hence she was entitled to half of the property (the house).

Because the court did not adequately analyze and support its findings with adequate legal reasoning, we cannot clearly grasp the rationale behind the decision of the Cassation Division in this regard. Apparently, we can make a wild guess that the Cassation Division was convinced that the evidence produced by W/ro Kedija was sufficiently demonstrated that she expended half for the construction of the house. Yet, on reading of the decision of the Cassation Division, one can wonder as to how she proved to this effect and what types of evidence were produced. These worries are legitimate worries because without the proper analysis of this point, the Cassation Division could not reach any concrete decision that would serve as a precedent for the resolution of the same cases that will inevitably arise in the future. However,

[35]However, we know for sure that the law which amended the Federal Courts establishment proclamation has empowered the Cassation Division to take any positions as it wishes though the facts of the cases and the questions of law are similar.

the decision of the Cassation Division under consideration will remain to be a source of confusion and uncertainty unless it is totally altered or amended with adequate reasons.

Nevertheless, one can imagine that the Cassation Division might be satisfied (for the purpose of rendering the decision) that the evidence produced at the woreda court might be weighty to show that W/ro Kedija contributed half towards the construction of the house. Despite that, however, we cannot appreciate the true intention of the Cassation Division as its decision has failed to speak for itself. Therefore, we are still obliged to maintain that the decision of the court was contrary to equality of spouses. As we have mentioned previously, equality of spouses is an accepted international norm. Side by side with the international norms, national laws of various countries are also adapted to suit the requirements of international conventions which require member states to take adequate legal and institutional measures regarding ensuring the equality of spouses. As we have said previously, Ethiopia has put in place legal and institutional frameworks for the purpose of insuring spousal equality in all respects.

In Ethiopia, one cannot imagine that courts of law are not unaware of the national as well as international commitment of the country towards insuring gender equality in general and spousal equality in particular. Courts of law are one of the most important organs of government which are expected to play irreplaceable roles for the protection of fundamental rights in general and equality of spouses in particular.[36] To our dismay, however, studies conducted so far have demonstrated that judges at the federal and state level think that they have little or no role in interpreting the human rights provisions of the constitution.[37]However, the belief of the judges is not acceptable because their belief is contrary to Art. 13(1) of the FDRE Constitution which provides that all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of chapter three of the constitution which is entirely devoted to the protection of fundamental rights and freedoms.

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[36]In our modern world, courts of law are expected to play irreplaceable roles in protection and enforcement of fundamental human rights recognized both under international human rights instruments as well as domestic laws. This is also true in Ethiopia at least legally speaking. In this regard, refer to the following works: Menberetsehay Taddesse, *የኢትዮጵያ ህግና ፍትህ ገጽታዎች*, (1999 E.C), Tsegaye Regassa, '*Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia,*' (2009) Mizan Law Review 3(2), pp. 288-330. John Hatchard, Muna Ndulo and Peter Slinn, Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective, (2004), pp. 150-183.

[37]See Assefa Fisseha, cited above at note 27, pp.24-32.

When we come to the case at hand, the stance taken by the regional courts was very much astounding as we can understand from the decision of the Cassation Division. The Woreda courts denied the right of one of the wives to take her share although it was clear for them that the husband was married to two wives. Since the stance of the Woreda Courts is very much dangerous in the future (given the fact that similar cases will definitely arise in the future), the Cassation Division of the Federal Supreme Court should guide them by handing down critically analyzed and well reasoned decisions with respect to the issue under discussion. The Cassation Division is expected to live up to the powers conferred upon it and the expectations of the stakeholders. However, if the decision of the Cassation Division is very much shallow and is not well reasoned (as it is the case in the decision under consideration), the problem of determining the share of spouses in bigamous marriage shall remain as perplexing as it has been so far.

The Cassation Division of the Federal Supreme Court should be aware that the issue of determining the share of a spouse in bigamous marriage has remained to be a bothersome issue among the legal practitioners and legal scholars and other stakeholders alike. In this regard, when I set out to analyze and comment these cases, I held discussions with some legal experts both from the bar and the academic circle who unreservedly forwarded different opinions on the issue under consideration. The professionals whom I discussed with believe that the issue under discussion is worthy of critical examination and analysis. They maintained that the problem can finally be alleviated by amending the family codes of the country. According to these professionals, the problem can be resolved by the courts until the law maker amends the law.[38]

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[38]The first legal professional I discussed with was Ato Solomon Immiru, who was a judge before he became an attorney and consultant at law. Ato solomon told to this writer that the problem under consideration is a serious problem worthy of close examination and discussion. He recounted to this writer that he encountered such problem when he was working as a judge. He said that a case was brought to his bench where a man had two wives, one in the rural area of Gurage Zone and the other in the city of Addis Ababa. A dispute arose among the spouses regarding division of common properties. He gave a verdict to the effect that the common property located in the rural areas should be divided between the husband and the wife residing in the rural area. On the other hand, the common property located in the urban area was to be equally divided between the husband and the wife residing in Addis Ababa. None the less, the decision of Ato Solomon is still questionable because his decision seems to be detrimental to the interest of the wife who was residing in the rural area as it can be understood that common properties located in rural areas may not be equivalent to the properties and assets existed in urban areas.

4. Conclusions and Recommendations

The Cassation Division of the Federal Supreme Court of Ethiopia has been entrusted with a grand duty of interpreting both federal and regional laws so as to achieve the purpose of uniform application of laws and insuring predictability of decisions in Ethiopia. Accordingly, decisions rendered by the Cassation Division, with not less than five judges, are taken as precedents which are binding on federal as well regional courts of all levels.

Coming directly to the cases I have analyzed, the Cassation Division has tried to determine the share of the spouses out of the common property in both cases. In case one, the Cassation Division merely approved the decision of Debarq Woreda Court which (the latter) decided that half of the house should go to the successor of the deceased who was the husband of W/ro Sadiya and W/ro Rahima. On the other hand, the wives were compelled to

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At any rate, how can we say that the wife residing in rural area is not entitled to share from the properties located in urban areas? Besides, I conferred with Ato Yoseph Aemero, who was formerly a judge, currently an attorney and consultant at law. Ato Yosph believes that when courts of law are confronted with the issue of determining the share of spouses in a bigamous marriage, they should give decision to the effect that all spouses should get equal share from the common property. He maintained that we have to be cautious not jeopardize the interest of the first wife. The problem is, however, sometimes the first wife may not know that her husband has a second wife for that matter, even the second wife may not know that her husband is tied to another wife by marriage. In those situations, it may not be possible to avoid the merger of common properties of the spouses. The other legal professional who gave me his opinion in connection to the problem I am dealing with was Professor Tilahun Teshuma of Addis Ababa University. Professor Tilahun maintained that the problem of hand should be resolve by amending the family lows of the country. However, he warned that when we amend the law to alleviate this problem we should not undermine the importance of polygamous marriage which is recognized by the federal family code and the codes of the reigns. At any rate according to Ato Tilahun, where a lady married to a man with full knowledge that the man has another wife the second wife should not be entitled to equal share from the common property since one should not benefit from one's illegal out. She should take a share from the share of the husband, according to Professor Tilahun. However, professor Tilahun said that if the common properties are acquired by the industry and labor of all the spouses, the spouses can have equal share of the common property. Can the stances taken by professor Tilahun alleviate the problem at hand? Should a woman who married a man knowing that he was married to another wife be denied the right to share from the common property? What if her contribution towards the common property was more substantial than the contribution made by the first wife and the husband?

share only half of the property. Nonetheless, the Cassation Division did not put forward any reason as to why it affirmed the decision of the Woreda Court.

In the second case, the Cassation Division took a different stance and decided that one of the wives, who allegedly contributed half of the house, should take that half and the other wife and the husband should divide the remaining half between themselves which means that each would receive one fourth of the property. In this case, too, the decision of the Cassation Division is not true to life. Rather it is susceptible to serious criticisms as it failed to contain reasonably satisfactory justifications which led the Cassation Division to arrive at such conclusion. On the basis of the bare reading of the decisions of both the woreda courts and that of the Cassation Division, one cannot help but conclude that the decisions are contrary to equality before the law and equality of spouses which have gained relevant places both under national laws and international human rights instruments.

One may, however, positively think that the courts could not give such outrageous decisions without having a concrete factual background. But unless we can read this factual background particularly from the decision of the Cassation Division, it cannot be good to put forward mere conjectures that will be detrimental to the development of the jurisprudence in this regard. Instead, our courts should be criticized and at the same time encouraged to write well reasoned and critically analyzed decisions. In other words, the Cassation Division of the Federal Supreme Court of Ethiopia should be gently informed that it is its constitutional duty to give well-thought decisions with sufficient analysis and reasons. This is so because its decisions are important tools for the uniformity and predictability of decisions in Ethiopia which was the intention and aspiration of the Ethiopian law-maker when it (the law-maker) conferred the power on the Cassation Division to lay down precedents.

If neither the law nor the decision of the Cassation Division is sufficient to deal with the problem of determining the share of spouses in bigamous marriage, what is the way out? Should we leave the lower courts to decide the share of the spouses on case by case basis? Should we expect the Cassation Division to come up with a better formula than it has provided so far? Or will it be better if we amend our family laws, both regional and federal, with a view to incorporating legal provisions which will clearly and sufficiently regulate the share of spouses in bigamous marriages? This writer recommends two alternatives. The first one is that the Cassation Division of the Federal Supreme Court, which has been empowered to give decisions binding on all courts of Ethiopia, should give a well analyzed decision on

how to determine the share of spouses in the case of bigamous marriages. To this end, the Cassation Division may conduct a legal research which helps it deal with the issue as satisfactorily as possible. In any case, the decision of the Cassation Division should be well- thought, detailed and critically reasoned so that it will serve as an accurate precedent for the proper decision of similar cases that will arise in the future. The other alternative is to amend the family codes so that the problem can adequately be resolved. When we amend the law, we have to bear in mind that we must not lose sight of the values of monogamous marriage and that we have to be careful to balance the equality of spouse during the distribution of the common property. To be more specific, unless there is a contrary proof which unequivocally shows that one of the spouses is entitled to more shares from the common property, all spouses should take equal share from the common property.