Ethnicity, Women and Governance at Local Level: The Case of the Kebena Community in Ethiopian Federalism

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Abstract

The policy promoting multicultural accommodation in Ethiopian federalism made ethnicity the main criteria to get territorial autonomy either at regional or local level though several ethnic minorities, including the Kebena, have not yet achieved this right. To exercise the right to self-determination, elites of the Kebena ethno-cultural community wrote the customary law of the community, which has been preserved for long through oral traditions. The written customary law prioritizes collective ethno-cultural rights both in the public and personal spheres. This contravenes individual citizens' rights, which is vividly seen with regard to women's marital rights. The lived experiences of women in the community show that customary and religious institutions are the main actors in the regulation of marital rights. Since the introduction of ethnic federalism, the role of these institutions is recognized by the state. Both the customary and the state institutions at local level, without undermining the significance of constitutional recognition of women's rights, ignore its implementation considering it primarily as part of collective rights. The article concludes, without the provision of basic standard of living and commitment of the state at local level to protect women's individual human rights, it would be difficult for a woman within identity coffering community to exercise exit and claim marital rights.

Keywords: *ethnicity, Ethiopian federalism, local governance, transformation of customary law, women, marital rights*

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Introduction

The Kebenas are ethno-cultural community located in Guraghe zone of Southern Nations Nationalities and Peoples Region (SNNPR) of Ethiopia. A local government unit is created for the Kebena community at *woreda* (district) level in 2000 following the mobilization of the community demanding ethnic based self-government unit. However, elites of the community are further claiming the right to self-determination, which enables them to have ethno-territorial autonomy at *Liyu woreda* (special district) level based on the constitutional right granted to ethno-territorial communities (Beza 2016; Aalen 2011). In the Ethiopian federalism, ethno-territorial communities are constitutionally guaranteed the rights to self-determination, to establish ethnic based self-government unit either at regional or local level without any substantive pre-conditions.[138]

Two strategies were followed by the political élites of the Kebena community to exercise this constitutionally guaranteed right; these are (1) claiming indigeneity and historic ownership over large territory, and (2) consolidating the identity and culture of the Kebena through transformation or writing down of the customary law. Here, transformation of customary law refers to the writing of orally found customary law with stated or implied objective of making it compatible with rights enshrined in the FDRE Constitution.[139] Taking this into account, in this article, the term transformation is used interchangeably with written customary law.

The stated objective of transformation of customary law of the Kebena community was to exercise the right to self-determination as it has been set in the FDRE (Federal Democratic Republic of Ethiopia) Constitution (Boobane Galtitaa 2007). In addition, transformation of the customary law has an implied objective of making it compatible with rights of women; the written customary law contains clear

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138 See the FDRE Constitution Article 39, 46, 47; and the SNNPR Constitution Article 39 and 45.

139 The writing down of orally found customary laws can also be called restatement, with the objective of increasing the pool of knowledge about the customary law. However, the objective of changing orally found customary law of the Kebena community into written form is not simply to increase the pool of knowledge but also to make it compatible with rights enshrined in the FDRE Constitution. This makes the process "transformation" rather than "restatement". See Kane et.al. (2005); Abdullahi (2002); Ibhawoh (2000)

provisions that prohibit discrimination and harmful practices against women and guarantee equality in all spheres of life (Boobane Galtitaa 2007: Article 17). The main objective of this article is thus to examine the interface between ethno-cultural rights and women's rights in the written customary law of the Kebena. The article also examines state's approach to governance of marital rights and its effectiveness at the local level.

The methodological frameworks of the study interlace multicultural and feminist perspectives underpinned by human rights norms; what Reitmen (2005) calls multicultural feminist standpoint. This methodological framework focuses on those at the center of conflict between culture and rights (Song 2007; Deveaux 2004). Data for the study were collected using in-depth and key informant interviews, focus group discussions, document analysis, and observation. Interviews were held with *kebele* women association head, randomly selected women members of the Kebena community, leaders of the Kebena customary institutions, the head of the Kebena *woreda* Culture and Tourism Office, the head of Communication and Public Relation, members of *woreda* council, President of the Kebena *woreda* Court, Welkite town Sharia Court Judge as well as expert of Women and Children Affairs of Kebena *woreda* administration. Focus group discussions were held with members of women association of Zebimolla *kebele*, Women and Children affairs expert of Kebena *woreda* administration as well as elder women of the community. Documents have been collected from different offices of the *woreda* administration. Non-participant observation of the community was also conducted. Data were collected from rural *kebeles* of Kebena *woreda* and Welkite town, the administrative seat of Kebena *woreda* as well as Guraghe zone. The data was then analyzed using interpretive and reflexive methods.

The article contains seven sections starting from an introduction in the first section and theoretical frameworks of the research in the second. The third section sets the interface between ethnicity and creation of local government unit in the SNNPR, focusing on the case of the Kebena ethno-cultural minority. In section four, marital rights in the written customary law of the Kebena and its link with maintaining and consolidating ethnic identity and boundary is assessed. Section five examines the role and voices of women in the regulation of marital rights. The approach in governance of marital rights and its limitations are analyzed in the sixth section while the last section draws a conclusion.

Governance of Marital Rights in Multicultural Society: Theoretical Framework

One of the arenas in a multicultural state where ethno-cultural minorities exercise governance is marriage and family. This is mainly due to the role of the family and family law to maintain and perpetuate the distinctive cultural identities of a community (Shachar 2001). There are two main functions of the family integral to the maintenance and perpetuation of collective identity and distribution of power; these are "demarcation function" and "distribution function" (Shachar 2001:52-54). In the demarcation function, customary rules and laws are used to maintain membership boundaries of the ethno-cultural community vis-à-vis the larger society. For this purpose, women are taken as a cultural symbol, one who must pass through strict rule of the community in their marital life. In the distributive function, rules of ethno-cultural communities allocate rights, duties, and power between men and women. In most instances, the distribution function of rules of the community serves to entrench persistent inequalities, which "often perpetuate women's dependence on other family members for survival" (Shachar 2001:54). Moreover, most rules of ethno-cultural communities are set to deter women from demanding their rights even as per the rule of the community; those who claim their rights would be treated unjustly and face condemnation or exclusion.

To solve these injustices against women within ethno-cultural communities, multicultural states design policies that take into account autonomy of the community as well as the responsibility of the state to enforce women's rights. The policies often integrate judicial and political means of protection of rights and transformation of unjust practices of ethno-cultural communities (Deveaux 2004; Spinner-Halev 2004). Using these, states attempt to be non-interventionist in the affairs of autonomous ethno-cultural communities by guaranteeing exit right. Right of exit has three roles in the governance of community and individual relations: basic role, protective role and transformative role (Reitmen 2005).

In its basic role, the right of exit is "an opportunity for member of cultural community to be or become a member of society in an unmediated manner, without going through the group and without become subject to its regulatory power" (Reitmen 2005:190). The basic role exists when there is a direct regulatory link between the individual and the state. In this situation, whether the group practice is unjust

or not, it is believed that any individual can leave the group without obstacle. The justification for this belief is, in liberal democracy, cultural groups have no coercive authority over their members; if they have coercive authority, the community can then construct and change the rules of the group (Spinner-Halev 2004).

The right of exit becomes problematic in a situation where there are oppressive and dominating practices against women. In this situation, right of exit is expected to give protection to women and gradually transform unjust practices of communities (Shachar 2001). Reitmen (2005:192) argues that both the protective and transformative role of right of exit have limited success due to the cost incurred, as well as ethno-cultural communities' strategy of resistance to change, which may result in strengthening value differences rather than narrowing it down.

The obstacles to exercise the right of exit that hinders it from playing its protective role can be categorized into material and socio-psychological (Reitmen 2005:192). One of the material obstacles is women's relegation to the private sphere, which has no or little economic return and as a result makes women economically subordinate to men. Reitmen (2005:196) argues that material obstacles to exit are remediable to some degree through state policy. However, the socio-psychological obstacles are not readily addressable by the state and makes women support patriarchal traditions in their group (Weinstock 2004). The socio-psychological obstacles are "born of belief and psychological make-up, of fear of ostracism by family, friends, associations and community" (Reitmen 2005:193). One may simply fear change and the unknown; fear the loss of moral support and sense of belongingness and rootedness. In this situation, the protective role of exit is restricted and has little use for women facing unjust practices. The transformative role of rights of exit can also be challenged by community leaders, who can influence the course of events so as to take away the need for exit of members.

The transformative role of rights of exit advocates the creation of cooperative and competitive division of jurisdiction between the state and autonomous communities that transform unjust practices due to "fear of losing their members to state jurisdiction" (Schachar 2001:124). However, Reitmen (2005:197) argues that this designing of rights of exit can be seen as a threat by community leaders to the perpetuation and consolidation of their identity. Mitnick (2003) also

criticizes transformative design of exit for its overly facile treatment of individual consent. The presence of options for individuals is a necessary but insufficient pre-condition for jurisdictional competition; for jurisdictional competition to be effective, individuals must not only have rights of exit but also the capacity to exercise such options (Mitnick 2003:1659). However, in multicultural context, agency of individuals can be limited due to socialization of members into ethno-cultural communities that create constitutive attachment difficult to abandon (Mitnick 2003). Mitnick concludes that guaranteeing rights of exit in diverse society could neither make women leave the unjust rules of their community nor lead to transformation.

Ethnicity and Creation of Local Government

In the post 1991 Ethiopia, there were two phases of decentralization, which took into account varying degree of ethnic criteria as a factor in the creation of local governments,[140] particularly in multi-ethnic regional states such as the SNNPR (Ayenew 2017). In both phases of decentralization, two types of local governments were created in the SNNPR: ethnic level local government units (zones and *Liyu woreda*) and regular local government unit (*woreda*).[141] Ethnic local governments are mainly established based on the principle of self-determination with the purpose of accommodating diversity[142] while regular local government units (*woredas*) are created throughout the country with the purpose of enhancing administrative efficiency and public participation. In the first phase of decentralization, in SNNPR, budgets were allocated to ethnic based local governments (*Liyu woredas)* while zones have the responsibility to allocate and administer budget of the regular local governments (*woredas*). This resulted in an increased demand for ethnic based local governments, ethnic fragmentation and secessionist tendencies (Ayenew 2017:106).

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140 The first phase of decentralization was from 1992 to early 2000 while the second phase was since 2000s.

141 The difference between zones and *Liyu woreda* is the geographical size: zones are geographically wider and composed of several *woredas* while *Liyu woredas* have relatively smaller geographical size. A regular local government (*woreda*) is created in all zones of regional states to bring administrative convenience and effective administration.

142 These do not mean that all zones are composed of only one ethnic community. There are also multi-ethnic zones and *Liyu woredas* containing more than one ethno-territorial community.

In the second phase of decentralization, since 2000s, the federal government introduced District Level Decentralization Program (DLDP) that attempted to detach ethnic criteria in the creation of local government by avoiding budgetary incentive to ethnic unit and introducing block grant from the regional government to regular local government (*woredas*) (Ayenew 2017:107). This guaranteed *woredas* to have political, administrative and financial autonomy similar to *Liyu woredas* (Zemelak 2014). However, *Liyu woredas* remain to have a special status and have a direct relation with the regional government while *woredas* are accountable to the zones they belong to. For these reasons, the Kebena elites demanded the status of *Liyu woreda* and ethno-territorial autonomy.

This resulted in ethnic mobilization and demand for self-determination, which led to the creation of the Kebena *woreda* in 2000, within the Guraghe zone of SNNPR.[143] In 2016, however, the Kebena demanded the status of *Liyu woreda* taking into account the constitutionality of this demand and the need to resolve lack of good governance in the zonal administration.[144] To achieve this, the Kebena elite are using two main strategies: (i) claim of indigeneity and historic ownership over large territory, and (ii) maintaining and reconstructing the custom of the community by writing down the customary law.

The claim for self-government, at *Liyu woreda* level, came with the narration of historic ownership and status of indigeneity over Welkite town, the Zonal capital, and part of the Guraghe land as per ethno-territorial demarcation in the Ethiopian federalism.[145] According to this narration by the Kebena elite, the town of Welkite was primarily settled by the Kebena and Oromos rather than the Guraghes. The evidence given is the current residence pattern of the Kebena community

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143 The Kebena has been recognized as distinct ethnic community from the Bete-Guraghe category in the early 1990s. However, they were not candidates for ethnic autonomy during the first phase of decentralization due to socio-political, demographic and geographical reasons. The socio-political factors are mainly related to the level of ethnic mobilization and capacity of the community to self-governance along with the policies of the ruling party. Geographically, the community live relatively dispersed within and surrounding Welkite town, the capital of Guraghe zone (Interview with different members of Kebena and Guraghe ethnic community, Welkite, February 2016); See also Markakis (1998)

144 Interview with Ato Ahmed Sultan and Ato Kazile Haji, Kebena *woreda* Council members and Officials, Welkite, February 16 2016.

145 The ethno-territorial logic of Ethiopian federalism assumes a given territory is inhibited by single ethnic community.

surrounding the town[146] and the translation of the name Welkite in Afan Oromo, meaning equal.[147] However, such historical narrations do not indicate the original settlers of the area; rather an argument is made that the Kebena are the legitimate successors of the Oromo in the area.

It is, however, argued historical ownership to land and indigeneity is controversial and complex (Merlan 2009; Pelican 2009). The origin of the term indigenous is political and contextual (Pelican 2009:53). In Ethiopian federal political system, the significance of the term 'indigenous' emanates from the Federal Constitution primordial definition of ethnicity (nations, nationalities and peoples). The bases for exercising right to self-rule or governance under the constitution is mainly based on ethnicity. In doing so, it assumes that every ethnic community inhabits easily distinguishable territory.[148] However, this disregards the Ethiopian society's long history of intermarriage, migration, (re) conquest and expansion.

The second strategy advanced by the community as a means to get ethno-territorial autonomy or *Liyu woreda* is writing down the customary law. The Kebena Development Association (KDA),[149] community based civil society organization, has led the process of writing down the customary law, Boobane Galtitaa. The draft of customary law has been deliberated by members of the KDA, political elites and clan leaders of the community. The general assembly of clan leaders, a semi-legislative body locally referred as the *Oguet*, ratified the written customary law of the community, which has been printed in 2007 (Boobane Galtitaa 2007). All members of the assembly who deliberated and ratified the customary law were men since women are not allowed to participate in public affairs.[150] In addition, there were

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146 Five rural *kebele*s of Kebena *woreda* are bordered with the town of Welkite while only one Guraghe dominated *kebele* of Abeshighe *woreda* borders the town (Interview with different residents of Welkite town, Welkite, February 2016). *Kebele* is the lowest administrative unit in Ethiopia.

147 Interview with Emmam Jemmal Mohammed, Welkite, February 12 2016; Interview with Ato Musema Bediru, welkite, February 13 2016

148 See the FDRE Constitution (1995) Article 39(3)

149 Following the establishment of Kebena People Democratic Front (KPDF), the KDA was established in 1994 to promote the history, culture and language of the Kebena people. The association is mainly led by urban elite members of the community who mainly live in Addis Ababa. See www.peopleofkebena.org/index.php/kda

150 Interview with Emmam Jemmal Mohammed, Welkite, February 12 2016; Interview with Ato Musema Bediru, welkite, February 13 2016; Focus Group Discussion, Zebimolla *kebele*, February 19 2016

no demands from female members of the community to participate in this process, mainly due to internalized patriarchy. The exclusion of women from the public forum resulted in the failure to transform all forms of unjust practices against women. It further maintained some discriminatory practices, such as customary marriage and prohibited exit right in marital affairs as will be discussed below.

Marital Rights in the Written Customary Law

In the written customary law of the Kebena, there are provisions that incorporate marital and family rights and prohibit discriminatory and harmful practices against women. Article 17(2) of the Kebena customary law declares equality of men and women in all spheres of life and states "anything that undermines this is considered as harmful practice". This is in line with rights of women in the FDRE Constitution. Harmful and discriminatory customary practices against women and children have been outlawed in the written customary law; these includes non-consensual marriage, refraining women from eating nutritious foods such as meat and butter, sleeping in uncomfortable situations, abandon washing one's clothes, and not taking care of oneself properly after the death of a spouse (Boobane Galtitaa 2007: Article 17(1)). Further, Article 70(4) of the customary law prohibits any kind of violence against women and children. In relation to marriage, Article 19(1) of the customary law makes consent mandatory for the conclusion of marriage; it states that "the full consent of the male and the female is required before marriage contract/*nicah*". Article 90(3) further notes, "for the sake of marriage, interrupting a girl without her consent from education is forbidden". However, contrary to these provisions, there are customary marriage practices included in the written customary law, which contradicts with some of the basic principles of marriage under the Ethiopian law.

The types of customary marriage recognized in the written customary law are *Wuchequ*, *Xaaxequ Ayu*,[151] *Rega'u*,[152] *Murut Geyeni Asu*,[153]

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151 *Xaaxequ Ayu* is marriage in which the woman's parents are culturally compelled to give their daughter to any man who comes to their house to request her hand in marriage.

152 *Rega'uu* (inheritance marriage) is when a widow marries the brother or close relative of her deceased husband. The main objective of this kind of marriage was/is to maintain the land of the spouse within the family and clan of the late husband.

153 *Murut Geyeni Asu* is concluded by the initiation of the female's parents to give their daughter to a man with admirable traits such as hard work, good behavior, with or without the consent of the spouses.

Dortuta,[154] and *Wagetutaa* (Boobane Galtita 2007: Article 23). Except for *Wuchequ* and *Wagetuta,* which requires consent from the spouses,[155] other types of marriage violate the rule of consent and disregard the right of women to own property.[156] These types of marriage contradict Article 17(2) and Article 19(1) of the customary law that states equality of men and women in all aspects of life and makes consent a pre-condition for marriage. Above all, they are in clear contradiction with women's rights enshrined in the SNNPR and FDRE Constitutions.[157]

As stated in the written customary law, customary marriage and wedding ceremonies are mandatory for all members of the community (Boobane Galtita 2007: Article 26). Article 83(1) of the customary law document states that "though in Ethiopia there are three forms of marriage (cultural, religious, and civil), it is not advisable for the Kebena community to carry out marriage other than the cultural one". In Article 83(2), it is also stated, "concluding marriage, wedding and divorce other than through the Kebena nationality culture would be punishable from five hundred up to two thousand Ethiopian *Birr* (eighteen up to seventy-four USD)". This mainly hinders women from claiming their marital rights such as divorce due to the material and socio-psychological costs of exit (Reitmen 2005). Through such provisions, the customary law denies individuals exit from intra-communal institutions, which is against federal and regional family laws. This shows that the customary law of the Kebena is written to maintain, perpetuate, and consolidate ethnic identity and boundary, which was made available by the opportunity to establish ethnic based local government, but at the cost of women's rights. In this regard, Shachar (2001:94) argues that in many ethno-cultural communities, family law is the main arena where injustices against women co-exist,

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154 *Dortuta* (substitute marriage) is a type of marriage in which the sister or close female relative of the deceased fiancée is required to marry the deceased woman's fiancé.

155 *Wuchequ* is type of marriage concluded mainly with the consent of the spouses while *Wagetuta* is type of marriage between a widow and a man of her choice.

156 Informant told the author that there are eight ways of entering into marriage according to the custom of the community. However, some customs such as abduction are considered or accepted by traditional leaders as harmful practices, and hence are excluded from the document.

157 Article 34(1) of the SNNPR Constitution states that "men and women, without any distinction to race, nation, nationality or religion, who have attained marriageable age as defined by law, have the right to marry and found a family. They have equal rights while entering into, during marriage and at the time of divorce". Article 34(2) also states "[m]arriage shall be entered into only with the free and full consent of the intending spouses".

having the "risk of promoting rigidification and fundamentalization of sub-unit's identity in ethnic based federation". That is why ethno-territorial autonomy for minority ethno-cultural communities is widely criticized for perpetuating injustice against female members.

With regard to consequences and dissolution of marriage, the Kebena customary law contains articles, which are similar to the Family Code of the SNNPR.[158] However, provisions on dissolution of marriage, both in the SNNPR Family Code and Kebena customary law, were written with the assumption of only monogamous marriage. Polygamous marriage is clearly prohibited in Article 21 of the SNNPR Family Code. It is also a crime under the FDRE Criminal Code Article 650(1), though it is practiced in the shadow of law as discussed below.

Women's Voices in the Customary Marriage

The findings show that women of the Kebena community have no opportunities of being heard in customary institutions in general and in the regulation of marriage in particular. As per the custom, in polygamous marriage, women do not have voice before, during, and dissolution of marriage.[159]

As per the Kebena culture, marriage is not only the affair of the intended spouse but also of parents and the extended family. While consent is mandatory from the father of the intended spouse, the consent of the mother is not requested due to entrenched patriarchal tradition. Often the father and elders engage in advising a woman to enter into polygamous marriage, rationalizing it based on their custom and religion and the 'good behaviour and wealth' of the supposed husband.[160] The girl/woman often has no courage to say 'no' to the advice of her father or elders at the time of marriage as well as in her marital life owing to limited choice and resources she has in her life/community.[161] In this regard, a thirty-eight years old informant said the following:

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158 See the SNNPR Family Code Article 28 and 29; and *Boobane Galtita* Article 28, 30 and 33

159 Focus Group Discussion, Zebimolla *kebele*, February 19 2016.

160 Focus Group Discussion, Zebimolla *kebele*, February 19 2016

161 Absence of minimum standards of living such as basic education for women in the community is one factor for the absence of choice while patriarchal social norms and customary institutions makes women submissive to patriarchal appeals.

> *When I was given to a husband, I was a grade five student. I knew that the man proposed for me was already married. But my father informed me that he has good social standing and is wealthy; our religion allows such a man to marry more than one wife. I tried to say "no" but my father promised that if I face any problem, he will stand by me and blessed me to be a good religious woman, without waiting to hear my consent. I married the man then after interrupting my education.*[162]

Other informants told the author that custom and religion of the community allow a man to marry more than one wife as long as he is wealthy and morally capable of treating his co-wives equally in every aspect of their marital life. But all women informants concur that the religious requirements are too difficult to fulfil in their community, and have not come across any man who met these requirements.[163] The women also agree to the physical, psychological, economic and social 'harmfulness' of polygamy. However, there are situations in which older women become complacent in polygamous marriage, and condemn others who challenge these kinds of marriage. The consideration of having more than one wife as good social standing of parents of a man as well as the dependence of older women on their son(s) makes some women complacent to polygamous marriage even if they know it is against the rights and interests of women. In this regard, a forty-three year old woman informant said the following:

> *I am the first wife of my husband. When I gave birth to my third child, my husband was preparing to take his second wife. When I knew this, I got angry and became sick. My husband's mother was the one who prepared his wedding. I begged her to abandon the plan, but she refused to back down. Later on, I became seriously ill. She associated my illness with my refusal to respect the culture. She told me the cause of my illness was the disrespect I showed to our culture and religion by refusing to calm down and accepts the situation. Gradually, I started to calm myself.*[164]

Another area of concern for women's rights in relation to marriage is divorce. A Kebena woman, whether she is first or second wife, often does not ask for divorce; only the husband has the right to divorce

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162 Interview with W/ro Rahimute Mohammed, Jejibona Gaso *kebele*, February 20 2016

163 Focus Group Discussion, Zebimolla *kebele*, February 19 2016

164 Interview with W/ro Lubaba Bisir, Zebimolla *kebele*, February 19 2016

his wife as per the culture.[165] Moreover, the custom and religion of the Kebena dictates, during divorce, women are not entitled to share matrimonial property except from taking the *Beher* (wedding gift given in kind or money to the wife by the husband), if it has not been used up already.[166] For women to take up such cases to the customary or formal courts is also problematic.

Customary courts or village elders resolve all marital disputes among the Kebena. The customary court of the Kebena community is exclusively composed of men. In such court, as per the custom, women are not allowed to present their cases by themselves on any issue; rather their cases are presented by male relatives with or without the women's physical presence.[167] Informants confirmed that these rules are still respected, and the women go to customary court when the dispute reaches its climax or goes beyond her control.[168] Often, however, marital disputes are resolved by reconciliation. Nonetheless, in some cases of polygamous marriage, the customary court judges may decide to divide the property between the husband and the wife without granting divorce. In this situation, the woman gets some share of her matrimonial property as maintenance, and lives with the husband without dissolving the marriage; the woman is not allowed to remarry, neither does she engage in sexual relationship with her husband.[169] This indicates, as per the custom of the Kebena, women have not been given any opportunity to exit the rules of the community.

Access to formal and Sharia courts is also limited among Kebena women. This is partly due to limited knowledge about its functioning, fear of cost of exit from intra-communal institution (both material and socio-psychological) and the trend of returning cases to customary courts first.[170]

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165 Interview with Ato Musema Bediru, Welkite, February 13 2016; Focus Group Discussion, Zebimolla *kebele*, February 19 2016

166 Interview with Ato Musema Bediru, Welkite, February 13 2016; Focus Group Discussion, Zebimolla *kebele*, February 19 2016

167 Focus Group Discussion, Zebimolla *kebele*, February 19 2016

168 Focus Group Discussion, Zebimolla *kebele*, February 19 2016

169 See Jetu (2014)

170 One of the procedures set in the Family Code of SNNPR to resolve marital disputes, particularly when divorce is requested or division of matrimonial property is needed, is to send the case to customary courts first. See the SNNPR Family Code, Article 86-87 and Article 91-93

However, since the establishment of women's associations at *kebele* level, in collaboration with Kebena *woreda* Women, Children and Youth Affairs Office (WCYAO), women have been trying to make their voices heard against oppression and injustice in marital affairs. The main objective of the associations is ensuring empowerment of women, and become instruments to implement state policies. However, they have been limited due to the entrenched cultural rights and norms. In this regard, the chair of Zebimolla *kebele* women association said the following:

> *If one member of our association faces violation of marital rights, we report to the woreda WCYAO and they advise us and gives a resolution unless the source of the problem is the woman herself. If the wife signs a paper that allows the husband to take a second wife, the women's associations at kebele and woreda level as well as the woreda WCYAO experts will do nothing since our religion allows that.*[171]

Due to limited empowerment of women in the community, all forms of injustices against women are given a blind-eye. Some harmful practices such as polygamous marriage are even accepted and rationalized by women themselves. This is related with the women's economic dependence on men and women's prioritization of peaceful co-existence within the family.

Approach to Governance of Marital Rights and Its Limitations

Governance of marital rights in Ethiopia requires the interaction of informal and formal institutions since ethnic communities are given the rights to regulate marital, personal and family rights using their customary institution (FDRE Constitution 1995: Article 34). The right to self-determination gives ethnic communities the autonomy to transform their customary laws and create their own ethnic homeland. Taking this into account, the Kebena have engaged in the process of transformation of the customary law. In this process, the focus is on the relation of the community with the state rather than weighing and balancing the values and rights of individuals, the community, and the state (Shachar 2001). In Ethiopian federalism, there is no direct relation between the individual and the state; rather the individual must pass through institutions of ethnic communities in order to get service from

171 Interview with W/ro Sito Asefa, chairwoman of Zebimolla *kebele* Women's Association, Zebimolla *kebele*, February 18 2016

the state. Individuals are considered as primarily citizens of ethnic community than citizens of the FDRE state.[172] The absence of direct relation between the state and the individual citizen, unlike liberal democratic multination states, prevents exit; i.e. giving protection for individual free will in the regulation of personal and family matters. It also strengthened the role of customary institutions in the regulation of marital rights and the need to have ethnic homeland among the Kebena.

Following, even when women's rights are violated, the state and local government institutions such as WCYAO cooperate with customary local institutions on issues, which are considered as part of custom and religion of the community. This is against the responsibilities given to local government institutions, which indicates the limited commitment and capacity of state institutions at local level to protect women's rights. Polygamous marriage is still common in the Kebena community regardless of its criminality. Until the collection of data (September 2016), there was no case related with polygamous marriage in the Kebena *woreda* court.[173] As observed by the author, among the community and leaders of local government institutions, family and marital life is viewed as an institution that needs to be protected from state intervention even if violation of rights has been vividly visible.

In these regards, it is worth mentioning the conditions male members of the Kebena community use to conclude polygamous marriage and bypass state law. The first condition is making the father of the woman support the marriage and restrict the woman from making decision or claim her rights. The second condition is getting the signature of the existing wife that gives permission to the husband to marry another wife.[174] As per informants, a man who wants to enter into polygamous marriage uses different tactic to get the signature since there is no woman who can sign for her husband to marry another woman unless "she is infertile or mad".[175] Once the husband secure a signed

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172 See Berihun (2019)

173 Interview with Ato Tariku from Kebena *woreda* Court, Welkite, February 16 2016

174 Focus Group Discussion, Zebimolla *kebele*, February 19 2016, Interview with W/ro Fetiya Sulixan Kebena *woreda* WCYAO expert, February 18 2016

175 Infertility is one of the rationales that justify polygamous marriage as per the culture of the community, which is often considered as the problem of women only. (Focus Group Discussion, Zebimolla *kebele*, February 19 2016)

paper obtained deceitfully, the *woreda* WCYAO experts do nothing but inform the woman that she has been deceived and advise her to accept the situation.

Here, it is important to mention that the majority of Kebena women have limited knowledge of the law or court processes. These hinders women from claiming their rights directly from the *woreda* court. In addition, in the adjudication of marital disputes, the SNNPR family law prioritizes the use of customary institutions rather than formal courts by demanding disputants to exhaust customary dispute resolution mechanisms (SNNP Family Code Article 86-87 and Article 91-93). These has created an understanding among Kebena women that even if they claim their rights, the formal court returns their case to customary courts, disregarding their choice. These may lead to question why ethnic rights have not been recognized in Ethiopian federalism to protect individual/woman/citizens' rights as it has been set in human rights instruments or collective rights. This requires further studies to have the institutional mechanism that does not compromise protection of individuals/women's rights.

Conclusion

The guarantee of the right to self-determination to create ethnic homeland for minority ethnic communities in Ethiopian federalism led to the revival of customary institutions, which used constitutional and unconstitutional mechanisms to maintain and develop identity of the community. Such steps led to the transformation of customary law among the Kebena. Though the written customary law of the Kebena stated and implied its objective to make customary laws compatible with rights enshrined in the FDRE Constitution, including women's rights, the lived experience shows that the written codes contained contradictory provisions violating women's marital rights. Women of the community are not as such in a position to claim their rights and exercise agency due to absence of minimum standard of living, limited capacity and will of local government institutions to enforce women's marital rights. Legal procedure that makes customary marital dispute resolution mechanisms pre-condition for resolution of marital dispute is another key problem identified and presented in this paper. In sum, the failure of the state to safeguard individual women's rights against autonomy of ethno-cultural community is related to the very design of Ethiopian federalism that makes membership/citizenship to ethnic communities a mandatory pre-condition to get protection. Hence, to resolve the structural challenges for the protection of women's marital

rights, the design that attaches protection of individual rights to membership to ethnic community needs to be reversed in a way that makes protection of individual woman's rights a priority.

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