BIGAMY AND WOMEN'S LAND RIGHTS: THE CASE OF OROMIA AND SNNP NATIONAL REGIONAL STATES

By Belachew Mekuria Fikre *

Background

While carrying out a research for the Ethiopian Institution of the Ombudsman on women's land rights in selected regions of Ethiopia, I came across some puzzling facts relating to women's rights. They related to multiple marriages, technically called polygamous marriages, which are prohibited by law as a crime of bigamy. Bigamy is an act where more than one marriage is concluded by a person at the same time, whether by a man or a woman.[1] Based on regional family laws as well as the federal law on the matter[2], a person shall not conclude a new marriage as long as s/he is bound by a bond of a preceding marriage.[3] What is affected when there are multiple individuals being married

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*Belachew Mekuria Fikre is a lecturer at Addis Ababa University Centre for Human Rights, East Africa Research Fellow at the British Institute in Eastern Africa and PhD candidate at University of Surrey. He holds LLB, LLM and MA from Addis Ababa University, University of Essex and King's College London, respectively. The author gratefully acknowledges the generous financial support he has received from the British Institute in Eastern Africa. He can be reached via e-mail at belachewmekuria@yahoo.com

[1]Legally speaking, a woman's act of entering into a polygamous marriage is similar to that of the man and as such prohibited. However, unlike the man, multiple marriages by a woman are culturally and religiously impermissible. For example, polyandry – plural marriages by a wife – is strictly forbidden under the Islamic law as can be observed from Surah 4:24. See Johnson, Heather, (2005), 'There are worse things than being alone: Polygamy in Islam, past, present and future,' *William & Mary Journal of Women & Law*, Vol 11, pp 563-596, (563)

[2] When it comes to family law (among others), the federal law issued by the federal parliament is limited to a defined territorial reaches namely to the cities of Addis Ababa and Dire Dawa. See the Revised Family Code, Proclamation No 213/2000, *Federal Negarit Gazeta Extra ordinary issue*, 6th year, No 1, Addis Ababa, 4th July, 2000. Specifically, para 4 of the Preamble states that 'it has become essential that a family law be enacted by the House of Peoples' Representatives to be applicable in administrations that are directly accountable to the Federal Government.' The federal family law (among others) in practice continues to provide some guidance to the exercise of regional family law making.

[3] For instance, the Revised Family Code (ibid) under Article 11 has this prohibition. Moreover, Article 30 of Oromia National Regional State's Family Law (amendment) Proclamation No 83/2003 and Article 21 of the Southern Nations, Nationalities and

to a person is, among others, family property, which understandably is finite. Further division of property with new comers to the family may become a cause for contention amongst spouses and their children. Being one of the resources that know no growth amidst ever-increasing family size attributed to population growth, land becomes the centre of multifaceted conflicts.

The research that inspired this contribution was conducted in six selected Woredas of Oromia and Southern Nations, Nationalities and Peoples (SNNP) regions with the objective of examining rural women's access to land, security of tenure and institutional guarantees as far as their land rights are concerned. The findings are rather mixed in the sense that the remarkable progress of the certification process provides a ground for cautious optimism. For example, the 'low-cost land reform has contributed to increased perception of tenure security for both women and men.'[4] On the negative side, the certification process seems to have victimised women who are the ones sharing a single man in the relationship. This is because the issuance of a certificate of land holding to a person either by listing his wives exhaustively (the practice in Oromia) or by dividing the land in the name of each wife having the husband's name in all (the practice in SNNP) has serious implications on women's access to land.

This article is meant to point out how these institutional practices have indirectly permitted bigamy contrary to a clear prohibition in the family laws. The first part provides a brief introduction on the meaning and effects of marriage to situate the land rights of women in the context of the institution of marriage and its effects. The article then proceeds in its second part to elaborate on the international and regional human rights framework concerning plurality of marriages. Particularly, the UN Human Rights Committee and the Committee on the Elimination of Discrimination against Women (CEDAW) have taken a firm stance while providing authoritative interpretations on the relevant provisions of the ICCPR and CEDAW.

Peoples' Regional State (SNNPRS) Family Law Proclamation No 75/2003 prohibit bigamous marriage.

[4]See Stein Holden and Tewodros Tefera, 'From being property of men to becoming equal owners? Early impacts of land administration and certification on women in Southern Ethiopia' (UNHABITAT-Land Tenure and Property Administration Section 2008) 78; a World Bank sponsored country-wide survey also commended the certification process as 'a very successful start. See Klaus Deininger, Daniel Ayalew, Stein Holden, and JaapZevenbergenrs, 'Rural land certification in Ethiopia: Process, initial impact and implications for other African countries' (2008) 36 (10) World Development 1786, 1806

Moreover, the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa will also be looked at together with some practices of human rights courts to reveal what the selected regional human rights normative frameworks have to say concerning polygamous marriages. By clarifying the country's human rights commitments on the subject, this part aims at informing the research and policy debate that abound the issues of bigamy.

The third part explicates the domestic norms on polygamous marriage. This section will examine the possible justifications that underpin the country's positions on plural marriages. In the final two parts of this article, elaborate discussions are in order concerning women's rights under the current rural land administration laws in Ethiopia, which shall then be followed by specific treatment of plural marriages and their implication on women's right to access and control rural land. The discussions in these two latter sections will bank on the Oromia and SNNPR states rural land administration laws and practices. Drawing from the human rights norms and the domestic laws regulating the subject at hand, the work concludes that the rural land administration practices inadvertently deviate from the spirit of the law and threaten women's rights to access and control rural land equally with their men counterparts.

I. A brief note on the meaning and effects of marriage

Marriage is a social institution created with a firm conviction that it will last for an undetermined future. As a social status, it imposes responsibilities on those who voluntarily decide to enter into it. The effects of marriage, which feature in the form of personal and pecuniary effects, are by far the most difficult elements when one ventures in the tasks of unpacking their exact content and contours. For instance, under the *personal effects of marriage* we find such duties as the duty to assist and cooperate.[5] What may constitute a violation of the duty to assist and cooperate under real life scenarios is very difficult to prove. Moreover, it is usually impossible to enforce this form of duty and the only resort for couples that complain of lack of care, support and cooperation is probably ending the relationship. This is because policing as a means of getting them back on track is implausible. Nothing different could be said with regard to the *pecuniary effects of marriage*. A consideration of common and personal debts as elements of pecuniary effects of marriage is but one intriguing aspect as far as the matrimonial property is concerned. Where a debt is contracted for

[5] For example, these duties are stated in the federal Revised Family Code Proclamation No. 213/200, Article 49.

the interest of the 'livelihood' of the family, it remains to be common debt for which the common property of the spouses shall serve as a pledge for its repayment.[6]

A number of effects that are related to the matrimonial property are provided under the law and they begin by defining what may constitute a personal property of the married couple thereby underscoring the sanctity of private property that even transcends the institution of marriage. Even if two individuals are united by marriage, they can still enjoy private property. However, any of the fruits thereof are deemed to form part of the spouses' common property.[7] What constitutes common property of the spouses is defined as 'all income derived from personal efforts of the spouses and from their common or personal property.'[8]

Contrary to the ethos of the Civil Code on matters related to marriage[9], the Revised Family Code has proclaimed the equality of the spouses in the

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[6] Though an attempt has been made to provide some form of guidance as to what may constitute expenses that are meant 'debts in the interest of the household' it is not that simple to understand what exactly may be regarded as a debt contracted in the interest of the household. Moreover, how these debts are going to be paid is another point that the law tries to address. There is also a divergence in approach among the regional family laws with regard to how a personal debt is supposed to be paid. According to Article 91(1) of the Tigray Family Code, the personal debt of a spouse is primarily payable from the personal assets of the indebted spouse and where his/her personal asset does not suffice to repay all the debt, the creditor could then resort to the common property of the couple but only up to the personal share of the indebted spouse that s/he may have from the common property. This is not similarly treated under the other regional family laws. See for instance the SNNP region's family law counter-part on personal debt, Article 79(1); and Oromia family law, Article 86(1).

[7] See, for instance, Article 62 of the Revised Family Code on which there are no differences in the other family laws.

[8] Ibid

[9] Until the adoption of the FDRE Constitution that entrenched the principle of equality in general and specifically equality of men and women before, during as well as up on dissolution of marriage, there had been a legislatively sanctioned male dominance in marriage relations. The husband was appointed as the head of the family, the custodian and administrator of the household property, and a decision-maker on almost every matter concerning their married lives. A glance look at Articles 562(a), 581(1), 635, 637, 641(1), 644 and 646 of the Civil Code suffices to get the sense of how 'empowering' the law was for the husband. See Civil Code of the Empire of Ethiopia, Proclamation 165/1960, *Negarit Gazeta, Gazette Extraordinary*, 19th Year No 2, Addis Ababa, 5 May 1960 (hereinafter referred as the Civil Code of Ethiopia)

administration of the matrimonial property and thus any decision that concerns the common property is, in principle, to be taken with consensus without either of them enjoying any power of 'vetoing' the other. This position squarely fits with the guarantee of equality under the FDRE Constitution both as embraced by the general equality clause of Article 25 and the specific stipulation of family-related rights under Article 34. Apart from this firm position with regard to equality, the current family law regime has also liberalised the grounds of divorce that could now ditch to the extent of 'no-fault divorce'; it redefined the marriageable age and resized significantly the indispensable role that family arbitrators used to play in spousal disputes. All these changes have critical implications in underwriting the right to equality in marital relations at all levels.

II. Plurality of marriages and human rights

When bigamy exists, the matrimonial property is inevitably going to be shared among those who are involved in the multiple relations. This negative economic implication, together with the moral grounds of equality, provides part of the justification for outlawing multiple marriages. Arguably, it also raises a question of the right to equality since it is usually the man who goes for two wives than the woman going for two husbands.[10] Economists have also argued that polygyny is preferred to polyandry for the reason 'of the preference people have towards raising their own children rather than someone else's.'[11] Samuel further reasoned to strengthen the argument for wider practice of multiple marriages by men than women in the following words:

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[10] Professor Ross, for instance, reviews the equality clauses of the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Elimination of all forms of Discrimination against Women to make a case for a prohibition of polygyny under the international human rights scheme. See Ross, Susan Deller, (2002), 'Polygyny as a violation of women's right to equality in marriage: An historical, comparative and international human rights overview,' *Delhi Law Review*, Vol XXIV, pp 22-40

[11]Samuel Chapman (2001), *Polygamy, Bigamy and Human rights*, (Xlibris Corporation, USA), p 20. It was also found out by Borerhoff Mulder that 'based on a simple regression analysis, an extra wife adds about 6.5 children to a man's fertility, while sharing her husband with an additional co-wife reduces a woman's fertility by about 0.5 children.' Quoted in Theodore C. Bergstrom, 'Economics in a family way', *Journal of Economic Literature*, Vol 34, No 4, pp 1903-1934, (Dec 1996), p 1920

> As the father of a child is not readily known when a mother has several husbands, each husband effectively lowers the productivity of the other husbands by increasing the uncertainty that subsequent children are theirs. This reduces the return on investment from children and so polyandrous systems would not be expected to be able to compete against polygynous systems.[12]

The fact that bigamy is more akin rather unfortunately to men than women has also been emphasized in the United Nations Human Rights Committee's exposition of Article 3 cum 23 of the International Covenant on Civil and Political Rights (ICCPR).[13] While the first provision lays down the general equality clause for men and women, Article 23 of ICCPR is an all-inclusive stipulation on the relevant aspects of the rights of women in relation to the institution of marriage. Except on recognition of religious and customary marriages as well as the possibility to adjudicate family disputes in accordance with religious or customary laws, all the elements under Article 34 of the FDRE constitution are verbatim copies of Article 23 of the ICCPR.[14] The latter provides;

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. 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. In the case of dissolution, provision shall be made for the necessary protection of any children.

The Committee under its general comment number 28 dwells on explicating what may be pointed out as factors that impose hurdles to the exercise of the equal right of women to marry, and states how polygamy is incompatible with the right to equality of treatment:

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[12]Ibid.

[13] See Article 23 of the *International Covenant on Civil and Political Rights* (1976)

[14] These two additions exist under Article 34(4) and (5) of the FDRE constitution. See Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, *Federal Negarit Gazeta*, 1st Year No 1, Addis Ababa, 21 August 1995 (hereinafter referred to as the FDRE constitution)

> 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. Consequently, it should be definitely abolished wherever it continues to exist.[15]

This unequivocal stance is thus a rejection of the nuances that permeate many marriage acts in Member States and is an express endorsement of monogamy as a form of marital relation. The statement specifically deems polygamy as an act which is contrary to the dignity of women and also considers it discriminatory. It was the CEDAW Committee that forwarded reasons that described this form of marital relation as undignifying to and discriminatory against women in the following words:

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.[16]

It is important to note that no international or regional human rights instrument definitively bars bigamy; nor does there exist a normative prescription of monogamy as the only rightful form of marital relations. The provision alluded to in the above quoted CEDAW Recommendation only imposes a duty on member states to take appropriate measures:

> To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the

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[15] See UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, adopted at the sixty-eighth session of the Human Rights Committee 29 March 2000, CCPR/C/21/Rev.1/Add.10, Para 24

[16] See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, adopted at the thirteenth session of the Committee on the Elimination of Discrimination against Women, in 1994 (contained in Document A/49/38), para 14

superiority of either of the sexes or on stereotyped roles for men and women.[17]

Thus the Committee, in propounding monogamy, regards its opposite – polygamous marriage – to be in violation of equality of the sexes having serious emotional and financial repercussions on women and their children. This understanding strongly corroborates our assertion that bigamy, where it is legalised under the pretext of custom or religion, is exclusively a practice by men and that deepens the power play between the sexes. In turn, the negative emotional and financial consequences flowing from this unequal relation, which the Human Rights Committee regarded as affecting the dignity of women, is discriminatory in character.

Close to Article 5(a) of CEDAW, the African Charter on Human and Peoples' Rights has a stipulation that says, 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions**.'**[18] A more concrete stipulation exists under the Protocol to the African Charter on Human and Peoples' Rights on the rights of women. This Protocol, which also replicates most of the provisions of the CEDAW, generally enunciates those rights as they relate to marriage. And specifically the Protocol imposes an obligation on member states to enact appropriate laws to guarantee 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.[19]

Here, too, the authors of the Protocol are not cocksure enough to proscribe polygamy and declare monogamy as the exclusive norm. What the provision does is to set a norm of aspiration for states parties which must do their best to

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[17] See Article 5(a) of the *Convention on the Elimination of All forms of Discrimination Against Women*, adopted by the United Nations General Assembly Resolution 34/180 of 18 Dec 1979, Entered into force 3 Sept 1981

[18] See Article 18(3) of African Charter on Human and People's Rights ('Banjul Charter'), adopted 27 June 1981

[19] See Article 6(d) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, the Assembly of the African Union at the 2nd summit of the African Union in Maputo, Mozambique, 21 July 2003, entered into force on 25 Nov 2005. It is important to mention that Ethiopia, though a signatory, is yet to ratify this Protocol.

encourage monogamy and at any rate to promote and protect women's right in any form of marital relations, polygamous marriages included. This is, therefore, an area where national legislation will have to take precedence in determining the right path, adequate regard, however, being given to ensuring gender equality.

Some practices of African countries also address the issue of polygamy from the angles of equality between men and women as most of the time the laws provide express recognition to polygyny and not polyandry. For instance, Article 143 of the Code of Individuals and Family of Benin allows a man to marry more than one woman and not vice versa. Accordingly, the Constitutional Court of Benin reviewed the legislation on the basis of Article 26(1) & (2) of the country's constitution that declares 'the state ensures for all equality before the law without distinction…of gender…Men and women have equal rights…'[20] The position of the court, therefore, confirms the Protocol to the African Charter on women's rights statement in that without express negation of polygamy, it regarded the act of recognising polygyny to be in violation of the right to equality of women and men.[21]

In the case of *Bhe and Others v Magistrate, Khayelitsha and others*, the Constitutional Court of South Africa had also considered, albeit tangentially, the issue of polygyny where it had extensively elaborated on the Intestate Succession Act of 1986.[22] The court had been seized of the matter of polygyny for purposes of protecting a woman's right to succeed a man in intestacy with whom she had been related in a polygynous marriage. It had made cautiously coined statements on the propriety of excluding spouses in polygynous unions from intestate succession that merely talks of 'surviving spouse' without, however, alluding to this spouse as being in a monogamous or polygamous union.[23] The court, under para 124 of its decision, stated as follows:

> An appropriate order will, therefore, be one that protects partners to monogamous and polygynous customary marriages as well as unmarried women and their respective children. This will ensure that their interests are protected until Parliament enacts a comprehensive

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[20] See Benin Constitutional Court, Decision DCC 02-144, 23 Dec 2002, reported in the *African Human Rights Law Review*, Vol. 127, [2004]

[21] See Para 7 of the decision, *op.cit*

[22] See *Bhe and Others v Magistrate, Khayelitsha and Others*, Constitutional Court of South Africa, CCT 49/03, decided on 15 Oct 2004

[23] See Section 1(1)(a)(i) of the Intestate Succession Act of South Africa, (Act no 81 of 1987)

> scheme that will reflect the necessary development of the customary law of succession. It must, however, be clear that no pronouncement is made in this judgment on the constitutional validity of polygynous unions. In order to avoid possible inequality between the houses in such unions, the estate should devolve in such a way that persons in the same class or category should receive an equal share…[para 125]… However, as has been pointed out, the section provides for only one surviving spouse and would need to be tailored to accommodate situations where there is more than one surviving spouse because the deceased was party to a polygynous union.[24]

What we can observe here too is the apex court of South Africa desisting from an explicit acknowledgement of multiple marriages as a proper conduct of behaviour though it has given protection in matters of succession for a woman who would have otherwise been excluded as being in an illegitimate relationship. It is clear in circumstances like this that the polygynous husband is no more alive and for the same reason the 'faulty' marriage does not exist anymore. Thus, in this situation denying the woman a share in the estate of the deceased [in countries where the law allows a spouse to inherit her deceased husband][25] would only amount to penalising her for, strictly speaking, the fault of the deceased polygynous husband.

A more or less similar approach has been followed in one crucial Cassation Court decision of the Federal Supreme Court in Ethiopia. The facts of the case indicate that a man, who had been married to two women, had ended by divorce the marriage he had with one of the women. During post-divorce property division, the other woman wanted to intervene into the proceeding claiming that she has vested interest in matters of division of a house built on 1,250 square metres because of her existing marriage relation with the defendant. Her claim was rejected by the various levels of courts in the SNNP region which had stated that the house was built by the husband's money and should only be divided between the claimant and the defendant.[26] The Federal

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[24]The case of *Bhe and others v Magistrate, Khayelitsha and others*, *op.cit.*para 124 & 125

[25] This is important because in countries like Ethiopia husband and wife cannot succeed each other, except in testate succession. See Articles 842-851 of the Civil Code of Ethiopia that discuss the orders of the degrees of relationship that will have to be called in cases of intestate succession that clearly excludes spousal relationship from those persons to be called to succeed.

[26] W/roZeynebaKelifa and W/roKedijaSiraj, Federal Supreme Court of Ethiopia, Cassation file no 50489, decided on 24 Meskerem 2003 (EC)

Supreme Court Cassation division discussed the heart of the matter that was not addressed by any of the lower courts by stating as follows:

> Except the divorce decision on one of the marriages and the ensuing property division, no mention had been made of the presence of polygamous marriage in the lower courts' decisions. In circumstances where one of the marriages in polygamous marriage has been dissolved by divorce, the question of how we approach the property division becomes very crucial.
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> Both the federal and the region's family laws have anticipated only the conclusion and dissolution of monogamous marriages which is partly because they both have expressly outlawed polygamy. However, because of the widespread practices of polygamous marriages, it is the judiciary's responsibility to cautiously adjudicate the consequent disputes in such circumstances even if not foreseen by the law so as to reduce the undesirable social ramifications.[27]

The Cassation court then reversed the lower courts' decision which had divided the property into two halves for the husband and the divorcee wife by bringing in the second wife to partake in the half of the husband's share. This is pertinent and arguably cautious in the sense that it does not necessarily condone polygamy while at the same time has provided economic protection to the most vulnerable party in the relationship.

This measured articulation of the judiciary, though accorded economic protection to the weaker party, may be regarded as an implicit acknowledgement of the practice of polygamy. By attaching a legal consequence to the polygamous relationship, the court has travelled a long way towards providing a judicial legalisation of an act which the legislature has prohibited. Even though the immediate outcome of the decision had accorded protection to the weaker party, the precedence it has set would ultimately undermine the legal position on polygamy. The Court did not even slightly show interest to condemn the act and rather went at length to describe the discordance between the law and the practice. Therefore, one may say either the particular woman's condition in this case had 'overshadowed the court's judgement' or it simply is a start of an emerging moral shift on the matter. How this implicates on property allocation where both of the marriages

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[27] See ibid, para 6-8

exist is the other point that we consider while dealing with certification of land holdings in polygamous situations.

III. Plurality of marriage under Ethiopian law

> *A man shall not have two wives, for this pleasure and the contracting of many marriages serve to gratify concupiscence and not to begat offspring as God ordered…It is not right for a man to have concubine…since our Lord Jesus Christ has established a law of freedom. If you say that David, Solomon, and others had concubines, and if you want to know the reason, listen; it is because men were scarce at that time on earth. It has therefore been permitted to them to marry and have concubines, so that men might multiply on the earth. (The FethaNagast, Part II, Chapter XXIV, Section V, NIQYA 27 and Chapter XXV, BAS 7)*

> *If you fear that you shall not be able to deal justly with the orphans[28], marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly with them, then (marry) only one…(Qur'an 4:3) You are never able to be fair and just as between women even if it is your ardent desire. (Qur'an 4:129)*

In part II, we have made some observations on the foundations of the prohibition on polygamous marriage as reflected in the various human rights instruments together with some practices of African states. In this part, we proceed to further examine the relevant norms within the Ethiopian context.

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[28] It is believed that polygyny is justified for many reasons and one among all stands out supreme. In the time Surah 4:3 was revealed to the Prophet after the Battle of Uhud, females outnumbered males in the community, and thus the reference in Surah 4:3 to 'orphans' to describe those women who had lost their husbands in the Battle. It was said:

> In most human societies, [also] females outnumber males. Because women depend upon men for protection, the Shari'ah…does not tolerate any woman seeking refuge under the roof of any man unless she is married to him or he is within the prohibited degrees of relationship to her. Because Islam does not encourage female infanticide or celibacy, allowing a man to be lawfully wedded to multiple wives seems the only reasonable alternative to meet the needs of women for protection and care.

See Johnson, Heather, *op.cit*. pp 566-67; and also see Abdulah Yusuf 'Ali, (2004), *The meaning of the Holy Qur'an*, cited in Rodgers-Miller, Brooke D., (2005), 'Out of Jahiliyya: Historic and modern incarnations of polygamy in the Islamic world,' *Wm. & Mary J. Women & L.*, Vol 11, pp 541-562, (544)

Even if the various laws of the regions have taken a firm position in prohibiting multiple marriages, the practice in many parts of rural Ethiopia has defied the legal proscription and bigamy is rather widely practiced. For example, in the research by Stein Holden and his colleague in the Southern region of Ethiopia, from the total sample size of 600 households, more than 12% of them are found to be living in polygamous relations.[29] And the practice continues to marginalise women, disempowering them economically and has also curtailed their voices from being heard. The situation is, as is argued in this article, aggravated where the practice gets support from other institutions of the law that condone or indirectly encourage the conclusion of polygamous marriages.

What makes matters more problematic is the stipulation that the Criminal Code has made with regard to the exemption from criminal liability of culprits of bigamous acts. According to the Criminal Code, the act of bigamy is punishable with imprisonment that could go up to five years.[30] The Code, however, makes an exception from this general prohibition under Article 651 stating, 'the preceding Article shall not apply where bigamy is committed in conformity with religious or traditional practices recognised by law.' Therefore, for a bigamous act to be condoned under this provision, the existence of a law acknowledging the particular religious or traditional practice must be proved. This had been likewise stipulated under the 1957 Penal Code that criminalised the act of bigamy in principle. The Civil Code had also provided bigamy as one of the prohibitive conditions to marriage.[31] Now that we moved from the unified Civil Code to a period where we have multiple family law regimes under the federal set up, whether an act of bigamy could be punishable or exempted from punishment depends on the particular region's family legislation. Therefore, when a bigamous marriage is concluded in regions where the family laws expressly prohibit that form of behaviour, the offenders will be criminally liable.

The recognition or proscription of polygamy continually occupied centre place in discussions of family law revision in Ethiopia. Moreover, there was an instance where express permission was given to bigamy in a regional family

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[29] See Stein Holden, supra note 4, pp 16 & 60

[30] See Article 650 of the Federal Criminal Code Proclamation No 414/2004, *Federal NegaritGazeta*, Addis Ababa, 9th May 2005

[31] See Articles 616 & 617 of the Penal Code of the Empire of Ethiopia, Proclamation 157/1957, *NegaritGazeta, Extraordinary issue*, 16th Year, No 1, Addis Ababa, 23rd July 1957; See also the Article 585 of the Civil Code of Ethiopia

law which was later on amended.[32] It is, however, difficult to establish a convincing justification for a statutory recognition of polygamy in present day Ethiopia. Even the above religious verses from the two major religious books hardly support polygamy as a proper fit to our modern social order because both speak about pre-modern conditions of 'scarcity of males' that rendered polygyny a matter of necessity. While the secular laws have introduced significant changes by way of entrenching gender equality upon entering into marriage, during marriage and upon its dissolution, legalisation of polygamous marriage would undermine the international human rights commitments and it also poses difficulties in ensuring gender equality.

One may even put on task those legislative bodies that could be tempted to allow bigamy exceptionally because of culture or religion of the spouses for a case of unconstitutionality. Article 35(4) of the FDRE constitution imposes a duty on the state to enforce the rights of women to eliminate influences of harmful customs and it declares that 'laws, customs and practices that oppress…women are prohibited.' No doubt that bigamy obtains validity from cultural practices and religious doctrines that have obtained their way through the social order thereby disproportionately hampering the exercise by women of their equal rights with men. Such custom and practice is what the Constitution astutely urges the state to prohibit and a direct acknowledgement of bigamy in the family laws contradicts head-on with this constitutional statement. That also is true to the criminal code that provides for an exemption from criminal liability with regard to persons who have committed the crime of bigamy in accordance with a legally recognised traditional or religious practice. One must, in other words, be accorded exemption neither from civil nor criminal liabilities under the guise of religion or tradition where that act militates against women's rights enshrined in the FDRE Constitution.

When Article 34 of the Constitution on the 'marital, personal and family rights' was discussed, the Constituent Assembly had been overwhelmed with a number of questions that particularly raised the religious and customary law implications of the provision. Among the topics of concern that underpinned the prolonged discussions equality of men and women in marriage, the status of bigamy and its implications on marital property, whether or not the jurisdiction of religious courts be conditioned on 'the consent of the parties to

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[32] See Article 32 of the repealed Tigray Family Law Proclamation 33/1998, 10 November 1998

the dispute', and issues of abduction stood out to be the main ones.[33] Interestingly, a certain participant spoke on the implications of bigamy on women's right to equality in light of Islam's teachings. When plural marriage was permitted for men under strict conditions, people had questioned the Prophet as to why it was not similarly allowed for women, the participant was recorded to have described the Prophet's response:

> The Prophet asked each of his interlocutors to bring milk of various animals (of sheep, goat, camel and cow) and to mix them all together. Then they were again asked to abstract each one of their own milk from the mix which they could not. They were then told the rationale for not allowing women to get married to more than one man at the same time.[34]

The overall spirit of the discussion had been on the one hand to acknowledge and provide protection to spousal equality and on the other to leave wider space for religious and customary norms in family relations. There was, however, no concrete position taken on specific matters such as outlawing or permitting plural marriages.

At the final stages of the discussions, the Chairperson of the Women's Affairs Committee had been quoted to have made the following remarks:

> Concerning bigamy, Article 34 recognises the right to get married in accordance with religion, custom or law. Therefore, where a man wants to get married to more than one woman based on his religious teachings and believing that he has the economic capability to administer a family with more than one wife it must not be regarded as an interference in the rights of women so long as the second marriage is concluded with the knowledge and consent of the other wife. Moreover, if she does not consent, it is her right, irrespective of her being Christian or Muslim, to resort to divorce proceedings.[35]

This remark by the then Chairperson of Women's Affairs Committee appeared to have taken rather simplistically the complex gender relations and dynamics of the country. It unduly presumes that Ethiopian women freely consent or object to their husband's decision to double on their marriage relationship by

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[33] See The Ethiopian Constituent Assembly Minutes, Hidar 8-13, 1987 (E.C.), Sections 000023-000044, Addis Ababa.

[34] See Section 000040 of the Minutes (the writer's translation), ibid

[35] See section 000043 of the minutes (the writer's translation), ibid

wedding to another woman or women. Moreover, it covertly undermines the institution of marriage from which spouses could easily walk out and does not consider the dire consequences of divorce on society in general and women in particular. The overall outcome of the discussion, therefore, had left the constitutional provision as neutral on matters of monogamy or polygamy and emphasise on the need to protect the rights of women before, during and after marriage.

IV. Rural land administration and women's rights

Land administration for the purpose of rural land holdings is described as a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural land holders are enforced, and information on farm plots and grazing land holders are gathered, analysed and made available to users.[36] Accordingly guaranteeing security, formulating and implementing land use plans and policies, resolving land-related disputes and above all collecting, storing and availing information relating to land are tasks that need to be carried on the basis of the laws to be issued both at the federal and regional levels.

The administration of rural land has taken substantial strides forward in recent periods largely owing to the certification process by which rural land holding certificates are being issued as proof of rural land use right. Particularly its contribution towards making holding rights secure is commended as one of the achievements of the certification exercise.[37] The certificate is expected to indicate to the minimum 'the size of the land, land use type and cover, level of fertility and borders, as well as the obligations and rights of the holder.'[38] This process of certifying possession of land has been underway in Ethiopia for the last few years with a bid to grant possessory title, secure possessory rights and reduce land-related conflicts among the predominantly agricultural society.

Even though the purposes of granting possessory title are clear, relevant and timely, the process primarily benefits those who already have land holdings based on the previous regime's land distribution measures carried out in the

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[36] This is a comprehensive definition provided under Art 2(2) of the Federal Rural Land Administration and Land Use Proclamation No 456/2005, *Federal NegaritGazeta*, 11th Year, No 44, Addis Ababa, 15th July 2005 (hereinafter referred to as Proclamation 456/2005).
[37] See Stein Holden, supra note 4
[38] See Article 6(3) Proclamation 456/2005, *op.cit*.

late 1970s after the promulgation of the ground-breaking law to nationalise all urban and rural land.[39] The then distribution was done based on household units as beneficiaries and thus individuals *per se* had not obtained land use rights, rather households had.[40] That automatically excludes women from obtaining land because for one thing the head of the family/household being the husband they were left out from being called to get the title. Secondly, because of the fact that they could not by themselves plough the land, female headed families would not have had the opportunity to obtain title. Therefore, these two factors – the patriarchal laws making the husband alone head of the family[41] and the tradition undermining female's agency in agriculture – continually interlace to exclude women from accessing land. And in consequence, the certification process that is underway is only meant measuring, certifying and granting land possession certificates to those persons who already have land holdings provable by and to the members of the land administration committee members established at the lowest administrative levels of the respective regions.

The framework legislation issued by the federal government has specific provisions that acknowledge the equal access to and control on rural land of women and men. For instance, the provision that lays down the core guiding principles on acquisition and use of rural land declares 'women who want to engage in agriculture shall have the right to get and use rural land.'[42] This stipulation evokes an impression and a dilemma that agriculture is primarily an area for men to engage in. In a sense, it is a legislative acknowledgement of the reality that prevails in our rural society in which women do not normally

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[39] See generally Svein Ege, *The promised land: The Amhara land redistribution of 1997* SMU-Rapport 5/97 (Dragvoll Norwegian University of Science and Technology, Centre for Environment and Development 1997)

[40] Article 4 of proclamation 31/1975 provided for important principles on distribution of privately owned rural lands. It had stipulated the principle of equality and non-discrimination, the maximum size of land to be allotted to a particular family and a prohibition on the use of hired labour to cultivate one's holding. Particularly, Article 4(3) stated, 'the size of land to be allotted to any farming family shall at no time exceed 10 hectares.' Therefore, it was a 'farming family' rather than an individual that was taken as a beneficiary of holding right.

[41] A simple look at Article 635 shows the long-standing gender-biasedness of the Civil Code provisions on the personal effects of marriage that had appointed the husband to be the head of the family and this had been in full operation until it was set aside by the 2000 Revised Family Code.

[42] See Article 5(1)(c) of Proclamation 456/2005

plough; and in cases where they have land holdings, the rule is to contract the land out for those male farmers under share-cropping or other schemes.[43]

That being a guarantee for access to agricultural land by women, with regard to control too the Proclamation ascribes to a conjoint certification of possession rights over a land that belongs to husband and wife. The provision states that 'where land is jointly held by husband and wife…the holding certificate shall be prepared in the name of all the joint owners.'[44] This also underpins the practice that the said regions flaunt in their bid of implementing the certification process. This piece of legislation, however, omitted what its predecessor had inaugurated as one important principle of land administration under its Article 5(4) that read:

> The land administration law of a region shall confirm the equal rights of women in respect of the use, administration and control of land as well as in respect of transferring and bequeathing holding rights.[45]

It is hardly possible to decipher any rationale for the regression as finding a niche for this form of comprehensive equality framework within the new legislation would have served a noble purpose than its absence. One area where this general equality clause would have served is, for instance, in guiding the regional laws to ensure gender balance in constituting the various land administration institutions, particularly the Kebele-level land administration committees.[46]

The regional laws have also stipulated various equality clauses with regard to rural women's access, control and use of land. The SNNP region has for

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[43] Under Proclamation 31/1975 too, the use of hired labour to cultivate land was exceptionally permitted for 'a woman with no other adequate means of livelihood.'

[44] See Article 6(4) of Proclamation 456/2005

[45] See Article 5(4) of proclamation 89/1997 which has been expressly repealed by Article 20(1) of Proclamation 456/2005.

[46] It is particularly a common practice in patriarchal societies to impose legal minimums of female membership in various institutions that are empowered to make crucial decisions on matters as vital as land. For instance in neighboring country Uganda the Land Act requires land management bodies and institutions to have women representation. 'The Uganda Land Commission must include at least one female among its five members, one-third of the membership of the District Land Boards must be female, and Land Committees at the parish level must have at least one female among their four members.' See Asiimwe, Jacqueline, (2001), 'Making women's land rights a reality in Uganda: Advocacy for co-ownership by spouses,' *Yale Human rights & Development L.J.*, Vol. 4, pp 171-188, (pp 177-78)

instance a number of provisions on the matter. Some of these are women's right to get and use land if they want to engage in agriculture;[47] equal rights of husband and wife on their common land holdings;[48] female headed households have full use right to their landholdings and the right to be given a landholding certificate in their name;[49] where a husband is engaged in government services the wife continues to enjoy the right to use rural land and to obtain a landholding certificate in her name;[50] and the issuance of a joint landholding certificate in the name of the husband and wife in relation to a land jointly held in marriage.[51]

The first provision is a direct endorsement of the federal land rural land proclamation mentioned above. It hardly adds any value in the efforts of tackling women's problems as they relate to rural land rights except acknowledging the unfounded categorisation of agriculture in principle to be men's engagement. This is because it unnecessarily submits as law a presumption that there are rural women who do not want to engage in agriculture. The next provision has two important guarantees: first, spouses shall have equal use right on their commonly held rural land; secondly, neither spouse would lose the rural landholding that existed before the conclusion of the marriage. While the first is self-evident, the second bit of the provision that stipulates the continuation of pre-marriage private holding rights requires closer examination in light of the customary practices that prevail in the country. When a woman gets married it is customary that she leaves her family's locality to join her spouse and accordingly she leaves behind all the belongings she had except her personal items. Therefore, the provision in a way perpetuates the landless women's condition by stating that the spouses shall maintain landholdings they had before the conclusion of the marriage. Landholding being a unique type of property on which the family's livelihood is to be established, the preferred approach would have been to exempt the application of this family law principle by which spouses may exclude each other from their pre-marriage properties. This nuanced approach would also have empowered the woman to have a legitimate say on her husband's decision to bring in a new wife. And because as he would no more single-

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[47] See Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilisation Proclamation No 110/2007, *DebubNegaritGazeta*, 13th Year No 10, Awassa, 19th Feb 2007, art 5(3)

[48] See ibid, art 5(5)

[49] See ibid, arts 5(6)& 6(5)

[50] See ibid, art 5(7)& 6(6)

[51] See ibid, art 6(4)

handedly decide on the pre-marriage landholding, it might even have reduced incidences of polygamous marriages.

Articles 5(6) and 6(5) of the SNNP region rural land administration law particularly aim at dispelling the longstanding legal and traditional presumption that regarded the husband as the head of the family and that accordingly marginalised female-headed household for distributional purposes such as land allocation. These provisions emphasise the entitlement of women to get landholding as heads of family without any distinction from men-headed household and their entitlement to have a certificate of holding to be issued in their name. Articles 5(7) and 6(6) of this region's law are also in recognition of real life where a husband of a rural woman might be engaged in non-agricultural means of livelihood. It states that her right to engage in agriculture and obtain rural land right may not be impaired by her husband's non-agrarian profession. Therefore, there can be spouses where the wife has a rural landholding for purposes of agriculture and the husband working elsewhere in government or non-governmental services. The absence of a similar stipulation for a rural husband whose wife is carrying out a non-agrarian profession could simply be explained as because to provide so would be stating the obvious. When looked at from gender perspective, however, it provides a clear picture of the deeply entrenched patriarchy that presumes only a husband living in rural areas may rise to a government or other non-agrarian way of life. A balanced statement of the law would have been neutrally worded by referring to both spouses. Thus, it should have stated the principle that where either spouse has opted for a non-agrarian profession that must not bar the other to have a rural landholding for purposes of agriculture.

Article 6(4) of this law speaks about the issuance of a certificate for a jointly held land by husband and wife or any other persons. Here, a simple reading of the provision reveals that spousal land is to be represented by a certificate that proves its being a joint property of the couple. However, there may be situations where a person has more than one wives and also has landholding for which a certificate will have to be issued. In this situation, the manner of issuing the certificate as a proof of landholding of a person and its numerous wives poses a problem particularly considering the diverse practices as discussed below. The following discussion will be informed by the laws and practices in SNNP region in comparison with the Oromia region that reveal a remarkable difference.

V. Rural land administration, bigamy and women's rights: The experience of SNNP and Oromia regional states

In this article, as has been mentioned, two regions' land administration laws, that of Oromia and SNNPR, are to be considered to show how bigamous marriages are treated both in the law and practice. These two regions have promulgated rural land administration laws titled Oromia Rural Land Administration and Use Proclamation 130/2007 and SNNPR Rural Land Administration and Use Proclamation 110/2007. Lists of guarantees have been provided under these two proclamations that even touch upon matters that are not directly referred to in the framework legislation of the federal parliament.

The certification process in the Oromia and SNNPR states is done in a slightly different manner when it comes to certifying possessions of a person who is living within a marriage. The Oromia Land Administration, Use and Environmental Protection Bureau, similar to its SNNPR's counterpart, has the mandate, *inter alia*, of issuing land possession certificates to individuals. They both have adopted a standard certificate in a slightly different way with regard to the holder's particular entries, photographs and the manner of registering a title holder married to more than one person at the same time.

As can be observed from the Oromia region's standard certificate, a person's holding is entered in his own name as 'holder's name.'[52] The second name to be entered into the certificate will be the wife's or wives' name(s).[53] In this regard, the certificate provides numbers 1, 2, 3, 4 downwards.[54] At the back of the document is a space to post the picture of the holder.[55] Accordingly, the registration is done in such a way that a man will have his name mentioned as holder and then his wife's/wives' names is/are listed, and finally his picture alone is posted at the back of the book.

The certification in Oromia provides distinctly, from the other region, a unique Parcel Identifier (PI) by which every parcel in the region will have at the end of

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[52]Maqqa Aba Qabiyyee is the term used in the certificate, which means 'holder's name.'
[53]'Maqqahadda manna/mannotta' is the phrase in the certificate meaning 'wife/wives' name/names.
[54] Whether that cups the maximum wives one may have or just describes the Share'alaw's maximum number of wives that one may enter into is unclear. One may even say that it just is meant to be economical in the use of the paper space and more may also be welcomed.
[55] Having one's picture at the back, from a lay person's perspective, symbolises exclusivity, security and sense of superiority, to name few. Thus, the practice, unmatched by other regional laws and practices, has empowered the man and at the same time left the woman excluded, unsecure and as inferior to the man within the household, by implication also beyond the household.

the process a unique number.[56] Accordingly, all wives in a polygamous relationship will have a joint use title which is identifiable by a unique number. As all information is recorded on the title book manually, updating of changes to both the land and the right holders is very precarious. It is also important to reiterate the fact that the Oromia family law is among those regions which have prohibited polygamy and accordingly endorsed monogamy as the only form of lawful marital relationship.

When we look into the SNNP region's approach to the matter, there are slight differences from what is observed in the Oromia region. As can be seen from the standard certificate in the region, the title holders will be two where the holder is in a marital relation. And the entry is to be done in the order of holder no 1 and holder number 2. By default the husband's name is to be written first and then follows the wife's. However, legally speaking that has no effect whatsoever, unless one sees some form of superior-inferior order to be drawn from that structure as it appears. The picture is to be posted at the front page of the certificate just above the names' list and here lies the second difference where the certificate has to carry the picture of both the husband and the wife.[57] Where bigamous marriage exists, here too the land administration bureau is not in a position to refuse certification. However, it does it in a slightly different way, which is distinct from the country-wide practices of certification. The husband will have to decide which one of the wives to be the first in his married life and get her registered as second to his possession. For the remaining wives, parcels will be allocated and each one of them will be registered in a separate certificate. In the separate certificate(s), the wife's name is to be written as first and husband as second holders on the list. In this manner, therefore, the person remains married to multiple wives and in cases where division of the property is tabled, each one of them goes with half of the land for which her name has been registered as first holder. No matter how awkward and at the same time novel this may appear, it is intrinsically unfair and militates against women's right to property.

The undesirable end

These two approaches of rural land certification just summarised exhibit one circumstance where the practice has utterly defied the legal position. Even if

[56] See note 4, p 29

[57] Even in one of the Woredas, the spouses should appear together in a single photo and that obviates the strict desire on the part of the custodians of the certification process to put the two at bar as far as the right to their land is concerned.

the desired end, which is reducing family and land related disputes, and even if that purpose has been arguably realised, the means used is irreconcilably flawed. Primarily, the law of bigamy and the land certification practice collide heads-on because the former's prohibition has been disregarded by the latter. And well established rules on legal construction have it that where two rules on the same topic conflict, the one having higher authority must be given precedence over the other. In this specific situation, the land certification process is conducted based on some form of administrative decision or directive.[58]

What the land administration bureau personnel had stated was that in the registration process they are not permitting bigamy; neither are they refusing to register a person's land in his own name and then in the name of his 'wife/wives'.[59] The joint certification's benefits in terms of enhancing the sense of tenure security as argued by Stein Holden and TewodrosTeferacannot be matched with the fall outs from indirectly encouraging polygamous relations.

Similar trends underpin both the Cassation Division's decision in the case of *W/roZeineba and W/roKedija* and this land administration practice. They both neither explicitly condemn nor condone polygamous relationships. What they simply do is at least is effectuate them, by enabling to share from matrimonial property as legitimate wives do in the court's case and providing a rural landholding certificate with a clear knowledge that they come under polygamous relationships in the case of the rural land practices of these two regions. No doubt that these practices would ultimately erode the foundations for the prohibition of polygamy in the country's laws.

The criminal law's exceptional exoneration from liability of a person who has committed an act of bigamy is also one area that must be revisited on the basis

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[58] An attempt to find any authoritative legal instrument that stipulates this form of registration process has not been successful except the model certificate that can at least be considered as an administrative directive of the respective regional councils.

[59] When it comes to the SNNPR, things are straight forward because the certificate doesn't say husband or wife, rather only has two places in which are to be written the name of holder number I and holder number II. In the Oromia national regional state, though not as objective as the SNNPR, it states wife/wives without entering into the issue of whether the marriages co-exist or not. When asked officials state that if the marriage is declared as bigamous and illegal, courts' decisions and the parties' request for partition settle the matter. Until then officials of land administration seem to have no right to refuse registration of a parcel/parcels in the name of a person and his wife/wives.

of the constitutional provisions on equality. Apart from the equality doctrine, one may also look at polygamy from its demographic implications as it correlates with fertility rates. A fairly recent study made in twelve Sub-Sahara African countries has shown a strong positive relation between polygamy and fertility.[60] Apart from its human rights implication in terms of disenfranchising women, it is imperative, therefore, to approach polygamy rather broadly as it affects socio-economic and demographic fabrics of communities. A consistent and principled approach on the matter should guide both policy and action. Accordingly, a strict observance of the prohibition enshrined in these two regions' family laws must be used to correct the wrongs committed by certifying holding rights of polygamous spouses. As the process graduates from first level to second level certification, it may not be still too late to right the wrongs.

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[60] See Paul Cahu, Falilou Fall and Roland Pongou, 'Demographic transition in Africa: The polygamy and fertility nexus' institute national d'estudesdemographiques J12, J13 15 March 2011 <http://www.ined.fr/fichier/t_telechargement/38577/telechargement_fichier_fr_d3_fall.pdf> accessed 27 October 2012; this confirms with previous studies in the area that similarly established this direct correlation. See for example Helena Chojnacka, 'Polygyny and the rate of population growth' (1980) 34(1) Population Studies: A Journal of Demography 91-107