

Law of Civil Procedure I

Teaching Material

Developed By:

- 1) Alem Abraha
- 2) Tafesse Habte

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Chapter One
Introduction to Civil Procedure: Conceptual and Historical
Background

Introduction

Being the first chapter of the course, this introductory part is intended to equip students with the fundamental knowledge of the concepts and historical issues pertaining to procedural rules in general and civil procedure in particular; thereby, laying the foundation for the subsequent discussions.

Against this backdrop, it begins by comparing and contrasting the relations between, on the one hand, substantive and procedural rules and, on the other, between civil and criminal procedures with a view to highlighting the significance and scope of application of civil procedure. This will be followed by a description of the overall purposes of civil procedure as it relates to fundamental procedural rules. Finally, the administration of justice in Ethiopia, in the context of civil matters namely, the historical antecedents of rules of civil procedure in Ethiopia and the salient features of the 1965 Civil Procedure Code, will be briefly reviewed.

Objectives:

Upon completing this chapter, students will, among other things, be able to:

- accurately **point out** the **relations** between procedural and substantive rules;
- **make distinctions** between civil and criminal cases and **identify** the **scope of application** of civil procedure;
- sufficiently **comprehend** the **significance** of rules of civil procedure;
- properly **appreciate the ultimate objectives** that the rules of civil procedure are designed to serve; and, **describe** and **apprehend** the **past** and **present** administration of justice in Ethiopia-from the perspective of civil proceedings.

1.1. Conceptual Underpinnings: Nature and Purpose of Civil Procedure

1.1.1. The Nature of Civil Procedure: Definitional Aspects

Preliminary Remarks

In the process of analyzing the nature of a vital and sensitive social phenomenon like law, it is in order for most academic undertakings to start with an attempt to define key terms and concepts that form the essential part of the subject under consideration. Yet, it has, being in the nature of legal parlance, undeniably been a futile business to strive to come up with a precisely refined description to everybody's satisfaction. But still, it becomes, at times, unavoidably imperative to venture into such a task so as to gain sufficient insight into and arrive at a proper appreciation of the matters being discussed.

Letting the legal wrangling aside, however, the term 'civil procedure' may-for the sake of simplicity, still be defined-in the context of bare technicality. To begin with, composed, it is obviously, of two words: 'civil' and 'procedure'. Separately treated, the former is conventionally employed to denote matters related to 'private' individuals' as opposed to 'public' affairs whereas; the latter refers to 'the manner of carrying out a certain activity'. When combined, thus, 'civil procedure' would viewed from the aspect of court proceedings- mean no more than the 'method of conducting legal actions relating to the issues of private persons'.

And, here comes the potential pitfalls of adopting such a merely literal approach. That is to say in instances such as this, one may run the potentially damaging risk of failing to properly appreciate the prime legal intent ingrained therein. Hence, a metaphorical explanation of the matter would, it is hoped, not only avoid similar shortcomings, it would, incidentally, have a some relative importance. First and foremost, such an approach would enable one to sufficiently appreciate the **significance** of procedural rules vis-à-vis the substantive ones.

Moreover, one would, in the meantime, be properly equipped with adequate information about the **spheres of application** (play ground) of civil procedure as opposed to the criminal one and the **criteria** through which civil cases would be differentiated from the penal ones. Most importantly, one would be well acquainted with the **essential attributive qualities** and the **overall purposes** of rules of civil procedure and would acquire the necessary knowledge so as to rationally attach the **proper weight they deserve**.

In what follows, therefore, instead of starting with the definition of the term ‘civil procedure’ as such, we would, in the first place, make distinctions between procedural and the other bodies of law; and, subsequently, compare and contrast the purposes that these legal rules are meant to serve. Such a teleological explanation would, in the final analysis, enable us to appreciate the most distinguishing features of the law.

1.1.1.1. Substantive Vs Procedural Laws: Significance

With a view to maintaining smooth and healthy societal interactions, all nations exert concerted efforts to minimize (if not to entirely avoid) such social evils as disputes to the extent possible. The adoption and implementation of legal prescriptions, as it has just been mentioned, is one of the prominent mechanisms of achieving such an end. Meanwhile, the laws so enacted have their own specific natures, purposes and systematic arrangements.

Among the various ways of classifying laws, one involves making a broad distinction between **substantive** and **adjective** legal rules. Adjective rules are, in turn, subdivided into **procedural** and **evidence** laws with the former constituting the major portion of it. The law of evidence, which governs **the method of proof of allegations or assertions of parties to a case**, apparently falls beyond the domain of this course; and, we will therefore concentrate be dwelling upon the remaining two species of law: substantive and procedural.

Substantive laws, for the most part, **define rights, duties, privileges and liabilities of persons** and set out **regulatory norms** for their mutual relations in their ordinary course of life.

Functionally expressed, they provide the basic rules governing the day-to-day activities of individuals Vis-à-vis the community they live in and interact with- for the attainment of orderly and smooth societal interactions, and as such, form the substantial portion of the laws in the aggregate. Thus, these chief attributes of the laws and their relative proportion, coupled with the fact that procedural laws are, comparatively speaking, **but means to the end contemplated by substantive laws**; may, presumptively, hasten one to attach more importance to the former than to the latter. Yet, there seem to be a strong teleological foothold to challenge the proposition as a mere foretaste of the functional purpose that the procedural laws are designed to serve and the ultimate objectives they have in view.

As indicated, above substantive laws seek to avoid disputes between and among individuals and groups in a society. They intend to achieve this by carefully **delimiting their respective legal spheres**; by, primarily, **predefining** their **rights** and the corresponding **duties** in an **intelligibly ascertainable** manner- in contemplation to **adjusting human conducts** at various levels of relationships so as to ensure **individual freedom within the context of public order and societal harmony**.

However, the ever renewed exigencies of human life and the correspondingly growing interdependability of social relations do signify the inevitability of real or perceived incompatibility and/ or divergence of interests; thereby, rendering the attempt to potentially avoid disputes practically inconceivable. This phenomenon, in turn, indicates the indispensable need for a formal and principled dispute resolution processes.

What is more, one may concede, to be fair, to the fact that the legal notions of substantive rules are so general and carry with them a bundle of legal effect one of which is the possibility of judicial enforcement. However, it is also tellingly true that even the very

existence of those substantive rules is, more often than not, measured by their objective enforceability essentially through, , the **instrumentality of procedural rules** in the courts of law.

Moreover, it has nowadays been a well established fact that **procedural irregularities affect the ultimate fate of litigation dramatically not less than the substantive problems**. This assertion may well be substantiated by the following hypothetical illustration.

Assume, for instance, that there is a legal rule of substantive nature guaranteeing one of the rights to own/ possess property and make use of any benefit derived therefrom. Also assume that there is a firm legal declaration-stipulating that no one may be deprived of his ownership/ possessory right nor interfered with its enjoyment unlawfully and without due process of law. Let's also imagine that the legal prohibition is illegitimately breached in a given situation. Now, therefore, the point is, if the rightful owner/possessor, who is deprived of his ownership right or possession; or, whose possession is interfered with, is not otherwise provided with effective and efficient legal process through which one would be able to reclaim the restoration of the thing he owned or possessed and/ or the cessation of the interference and require damages for any injury he might have sustained thereby and enforce the judicial remedy as against the wrong-doer or trespasser, **it would be as if there was no such a legal declaration(right)at all**.

Accordingly, one may safely and boldly propound that, law, needless to mention, is not, in its full sense, just prescription, rather, both prescription and application. Indeed, **prescription without application is nothing but pretence**. This means that the rights and duties envisaged by the laws **would mean nothing unless they are fully enforced**; most importantly, when they are breached or violated. In other words, the mere declarations of the rights in a document may not provide sustainable security when they are infringed, unduly suspended or taken away. This means, under the pain of repetition, that the bare statutory stipulations may not yield, for practical purposes, any good **unless**

all the necessary conditions are thereto spell out the manner of their proper enjoyment and/ or exercise.

The existence and proper application of effective and efficient rules of procedure, hence, does not solely avoid the potential evils consequent to such unfortunate events; it would, thereby, enable the legitimate owner to properly enjoy and/ or exercise the right within the bounds of the law. Thus, unless there exists a **normative framework** and an **institutional structure** by and through which a wrongful conduct is peacefully and formally restrained, and the injured victim is proportionally remedied; the latter is likely to “**take the laws into his hands**”, as the saying goes, wherein, he might resort to some kind of self-help measures. Consequently, here comes the **significance** of the rules of procedural laws in general and that of civil procedure in particular. That is to say, it is the **function** of procedural rules, to which civil procedure belongs, to govern as to **how claims of persons are prepared; where and when presented; and, how determined and finally enforced** by a court of law. In a nutshell, one may comfortably conclude that procedural rules, in essence, **give effect (“life”) to the ends sought to be achieved by substantive laws.**

Before winding up the discussion in this section, a brief note has to be made of the issues involving the practical difficulties of determining the categorical features of certain legal rules; i.e., whether they belong to substantive or procedural class, irrespective of the nature of the document embodying them. To start with, in the normal course of things, rules of substantive character are essentially enshrined or found, particularly in the civil law tradition, in such bodies of laws as the ‘civil’, ‘commercial’ and ‘penal’ codes; whereas, that of procedural ones are primarily incorporated in such instruments as the ‘civil’ and ‘criminal’ procedure codes. Yet, as a matter of fact, it is not, more often than one would expect that easy to readily put, with definitive precision, a particular legal rule to either of the categories. Indeed, it becomes, at times, indispensably necessary to draw such a proper distinction -which may otherwise has an observable legal implication Vis-à-vis the issue at hand.

For instance, laws affecting substantive rights are, in principle, construed to be non-retroactive in effect; i.e., such a legislation does not apply or affect as regards facts or events (transactions) which took place before the legislation came into force. The law of procedural rules, on the other hand, is commonly deemed operative from the day of their coming into effect to all cases pending in such very day and there after (See, for instance, Art 1 of the Cv. Pr). Considered from this aspect, it would not be so hard to imagine the legal effect of confusing one strain of rule for the other in a given situation. Two minor instances, illustrative of the foregoing scenarios, are thus in order. For example, Art 1856(2) of the Civil Code prescribes that a court dealing with a given case shall not have regard to period of limitations unless it is pleaded by the parties; which means, it is not legally proper for the court to consider, by its own initiation, the statutory specification of a period within which a law suit should be brought before it; and, hence, withhold or grant the incidental right, unless one is claimed of by the parties themselves.

Nevertheless, in spite of the fact that the rule is embodied in one of the predominant substantive laws, the Civil Code, appearing to warrant its substantive nature, a cursory review of the provision would suggest otherwise. That is, the rule is actually setting forth a guideline for the court as to how it should go about dealing with issues of period of limitation in relation to judicial proceedings. And, as such, it is indeed a rule of adjudication governing the process of litigation in the court-rooms by regulating the relations for instance, between the litigants and the court; and, hence, procedural in nature.

In the same vein, but with a different approach, let us consider the stipulations in Art 1845 of the same Code in relation to the rules of period (statute) of limitations as regards contractual obligations. By virtue of this provision, the right to institute any legal action for the performance; on the non-performance or for the sake of invalidation of the contract, shall be barred, as a rule, unless brought within 10 (ten) years from the time the period started. Thus, apparently, there seem to be some good reasons to conceive the rule, though arguably, as substantive in essence. For one thing, the rule, needless to state, is embodied in the Civil Code, the major constituent body of substantive rules. Besides, it

is prescribing a condition in relation to the contractual right of a party, the exercise of which is made to depend. In other words, the rule is attaching a restrictive requisite for the taking effect of the right of a person who may demand a legal remedy for a contract-based civil injuries.

Nonetheless, in contrast to this position, there still seem to be some room to view the rule from another perspective wherein one may plausibly argue for and regard the rule as one of procedure.

Of course, there is an explicit provision in the Cv Pr Cd (See, Art 244(2) (f)) prescribing that contentions that the suit is barred by limitation-must be raised at the earliest possible opportunity and treated and disposed of as a preliminary objection by the court at the first hearing. Moreover, the rule is so grand that it is counted as one of the only two causes on which a lawsuit could entirely be dismissed, where the objection is sustained, with a far-reaching effect of precluding the reinstatement of a fresh suit as between the parties on the same cause of action.

In short, the rule, unarguably, demarcates the time limit within and before which a contract related action should or could be lodged in a court of law. In so doing it, in essence, determines the time as to when one would not be able to make use of his right, in which sense, plays a procedural role.

➤ **Self-assessment Question**

Evaluate the tenability of each line of argument in the latter case.

Be that as it may, there are some crude **schemes** of help, which are employed in **civil matters** to **differentiate** between rules of procedure and that of the substantive ones.

The **first** general approach is related, as it has already been indicated in the preceding section, to the **material source**; i.e., the constituent document of the rule under

consideration. This means, rules of civil procedure, for instance, are primarily and substantially embodied in the Civil Procedure Code and, to a certain extent, in such other bodies of laws like the ‘Proclamation for the Establishment of Federal Courts’, Proc. No.25/96 (and the amending proclamation thereto). Whereas rules of substantive laws are predominantly incorporated in such substantive codes as the ‘Civil’ and ‘Commercial’ they are secondarily, found in some other laws relating to civil matters.

The **other** broad criterion for distinguishing between the two areas of rules is connected to their respective **contents (purposes)** and the **functional correlations** between them.

As it has already been explained elsewhere in the chapter, the rules of substantive laws envisages to avoid conflicts so as to ensure individual freedom within the framework of public order and societal harmony; by, primarily, predefining the rights and duties of individuals and groups; and, by regulating their interactions at various levels of relations.

Nevertheless, notwithstanding the enactments of stringent substantive laws and the aspirations thereof, conflicts are virtually inherent in human relations; and, they can and do arise for a number of reasons; thereby ,calling for an efficient and effective dispute resolution mechanism if the ultimate objectives that the substantive laws have in view are to be meaningfully attained. Thus, here comes the **indispensable need** to avail **remedial measures** for the **dispensation of justice** through the **instrumentality** of procedural rules; and, there lies the **correlations** between the two classes of laws. In that, the rules of civil procedure are fundamentally meant to deal with **the manners of framing law suits; determining their place of institutions; and, governing the way they are to be considered and finally enforced** by the courts of law. In other words, they are thereto secure the **just, speedy and inexpensive** disposition of civil cases in the administration of justice. Briefly stated, the law of procedure is the means to the end sought to be achieved by substantive laws.

Finally, the **third** parameter is concerned with the actual functions of the two classes of laws vis- a-vis their respective **spheres of applications**. In this respect, the rules of substantive nature determine, in the whole, individual conducts and regulate their interactions within the society at large. That is, they deal with civil matters largely **falling outside the environs of the courtrooms**. Procedural rules, in contrast, govern **the**

process of litigation; regulate the conduct of relations between the litigants and the court with respect to the proceedings; and, as such, is called “**law of action**” reflecting the dynamic aspect of the rules of substantive laws. That is, substantive rules represent ‘**law at rest**’, so to say; while procedural rules denote “**law of motion**”.

To sum up, therefore, the **material source**, the **constituent document**-wherein the rule under consideration is inscribed; the **ultimate objective** the rule is meant to serve and its functional **spheres of application** are the three general, though inconclusive, yardsticks through which a distinction between civil and substantive rules is tested.

➤ **Self-Assessment Question**

Explain in your own words the statement: “Procedural rules are ‘law of action’-reflecting the dynamic aspect of the rules of substantive rules”.

1.1.1.2. Civil Vs Criminal Procedures: Scope of Application

Depending on the **purposes** and the **ultimate objectives** underlying their very establishment the types of **relationships** they chiefly govern; the nature of the **legal interests** that would be affected at their violations and, hence, the **parties** who would have sufficient stake therein so as to invoke a **justiciable controversy**, laws may also be classified into ‘**civil**’ and ‘**criminal**’. Here, a point has to be made of the fact that the very phraseology of the two terms is a purposive employment. That is, the adjective ‘civil’ is used, in this context, in contradistinction to the word ‘criminal’ so as to signify the distinction between their respective **areas of applications since** the former deals with ‘civil’ matters whereas, the latter is concerned with ‘criminal’ cases. Thus, as a natural corollary to this, there comes a need to identify the essential attributes of the two areas of laws; the nature of the legal interests each intend to preserve and the basis of their classification. A brief introductory remark is thus in order.

Legal rules, in the general parlance, have, to reiterate what has already been said herein above, the purpose of adjusting human relations at various levels so as to preserve and ensure the wellbeing of the public at large. In spite of this, however, the ever-growing complexities and interdependability of human relations have made it clear that there are a good number of situations whereby the legal interests of others may adversely be affected and an eventual evil maybe inflicted there upon.

The inevitability of such unfortunate instances, in turn, calls for corresponding remedial measures if the societal harmony is to be meaningfully preserved. Accordingly, the infringements or violations of legal interests which are so recognized and protected by law -are considered to be **legal wrongs** thereby **entailing liabilities** and **incurring legal sanctions** upon the wrongdoer. These wrongs and the attending liabilities are, in turn, considered to have either **private** or **public** nature. The former are breaches of private rights, affecting **individual interests**; and are called **civil injuries**; whereas, the latter are violations of **public interests**, affecting the society as a whole; and, are called **crimes**. Even though both of the wrongs do, in a way, affect the private individual, the nature of certain wrongs are conceived to be so grave enough to affect; and, hence, **involve the public at large in the controversy as an eligible interested party-represented through the state.**

From the preceding discussions, it can be understood that the major distinction between the two lies in the degree of gravity of evils involved in their eventual consequences-wherein the severe ones are placed in the category of crimes. Thus, **crimes are more serious and sufficiently injurious to the public as compared to civil wrongs which affect only the private victim.**

In sum, a crime is **an offence against the community as a whole** for which the offender is held criminally liable and faces **penal sanctions**. A civil wrong, on the other hand, is an infringement of the legal interests of **private individuals** and is redressable, principally, through **reparation of damages**. Moreover, consequential to the nature of the legal interests affected in a civil dispute, the cases are to be **initiated and instituted**

in a court of law **by the aggrieved party himself** (or his legal pleader); wherein law enforcement organs are but to **avail remedies** for those who have valid claims. In other words, in a civil litigation, the judge is there, in the whole, to decide whether any legal right of the plaintiff is affected; and, if so, whether one is entitled to any relief. It thus follows that the main **purpose** of administration of civil justice is primarily to **enforce rights**; and, hence, a civil case may **end up** in an **award of compensation** to the individual victim or **dismissal** of the case.

On the other hand, penal prosecutions, being the concern of the public at large, have the final **aim of ensuring the overall peace and security of the nation as a whole** and, may result into an **acquittal or conviction** of the accused- carrying with it, primarily, an element of **penal liability, namely, punishment**.

At this juncture, it would be of help, or, at least, not out of place, to say few words about the jurisprudential grounds for the establishment of civil or criminal liability. The basis of remedial liability is to be found in the legal maxim "*ubi jus ibi remedium*", which means, **where there is a right, there must be a remedy** –taking into consideration **the bare act irrespective of the intention of the wrongdoer**. On the other hand, the fundamental rule underlying penal liability is contained in the jural dictum "*actus non facit reum, nisi mens sirea*"; which means that **a mere act does not amount to crime unless it is accompanied by guilty mind**. That is, one is held criminally liable only for those wrongful **commissions or omissions for which he does either willfully or negligently**. In other words, criminal liability invariably requires moral guilt (intention or negligence), plus, personal act or forbearance.

Generally speaking, all legal disputes before a court of law are thus either one of **remedial or penal** in nature; and, civil procedure is, needless to mention, **a set of rules employed in the disposition of civil cases** while criminal procedure is, by the same token, meant to **govern the steps to be followed in penal prosecutions**. These specific **areas of implementation** of the two procedural laws, on the one hand, obviates the **scope**

of application of civil procedure; and, on the other, brings into picture the need to draw distinctions between civil and criminal cases.

In this regard, with a view to differentiating civil cases from criminal ones, three parameters, inherently based on the jurisprudential background of the two areas of laws discussed above, are commonly employed.

The **first factor** relates to the **nature of the parties** instituting the legal action. **A civil case is naturally initiated by a private person claiming redress for some wrong alleged to have been committed against him by another.**

Accordingly, parties involved in a civil case can appear in either of the following ways:

- “A physical person against another physical person”; or,
- “A physical person against a legal person “, or,
- “A legal person against another legal person”.

Talking of legal persons, it has to be mentioned that a state is not usually interested and, hence, involved in civil proceedings. Sometimes, however, the government may initiate a legal action and be a party to a civil case. This occurs when it acts in and exercise its **private capacity**. A government is said to have acted in its private capacity when it engages in matters typically undertaken by individuals. Such is the case when, for instance, it **runs business transactions**, essentially for the purposes of deriving profit from such commercial activities. In its **public aspect**, the functions of a government are, predominantly, dispensing justice; defending the state and its population from foreign aggression; maintaining domestic peace and order; regulating social, economic and political activities; and levying and collecting taxes to finance these activities.

But, if the government is engaged in commercial transactions and a dispute arises from such activities, the matter is considered to be a civil case and disposed of as such by the legal tribunals. **In criminal cases**, nonetheless, **the parties are commonly the state** (represented by the public prosecutor, usually, in place of the plaintiff) and an **individual suspect (defendant)** – who has allegedly committed a penal offence. There are, however,

some limited possibilities for a penal prosecution to arise between an individual victim and the alleged offender. These are limited to cases for '**offences upon complaints**' -as the law calls them. That is why, a criminal case is generally considered to be one not between the individual victim (and / or his relatives) and the alleged offender as such, but, a matter between the state and the offender.

The **purpose** of initiating a law suit and the **nature of the relief** sought thereby is the other yardstick used to make a distinction between civil and criminal cases. **The relief demanded in a civil case is mostly the payment of money** or is usually to be assessed in monetary values. This may include, for instance, the **payment of damages** for an alleged injury sustained by the victim (plaintiff).

In some exceptional civil cases, however, a **specific relief (personal performance) or forced performance** of legal obligations, such as, **restitution or delivery of goods or an injunction** could also be demanded. Whatever the case may be, nonetheless, the relief sought in either of such civil litigations has nothing to do with the loss of personal liberty, or deprivation of life of the parties involved therein. Consequently, a court entertaining a civil litigation cannot, in principle, impose a sanction depriving a party of his personal liberty; such as, an order of detention; or, of his life as in the case of death penalty. Nonetheless, one, who either refuses to furnish security for appearance-while the case is pending- (Arts 147-150);or, fails, without good cause, to satisfy a decree(Art 389), may exceptionally be detained in a **civil prison** for a period **not exceeding six months**.

On the other hand, **the over all purposes and aims for initiating a criminal case is the maintenance of peace and order of the general public** by, primarily, **punishing the law breaker**. That is, the **state initiates** a criminal case for the purpose of securing obedience to its laws by inflicting punishment and/ or other measures on the criminal offender. A penal case, thus, aims at punishing an offender- which appears in the form of loss of liberty (as in imprisonment) or deprivation of life (as in capital punishment) and fine.

The **third test** is concerned with the **availability of alternative dispute settling mechanism** in either of the cases. Seen from this perspective, **civil cases are subject to negotiations**; and, hence, a compromise could be reached upon independently between the parties themselves. This, by implication, means that the parties are not under legal obligations to bring their civil disputes before a court of law and have them disposed of. They, rather, bring them to the attention of a legal tribunal if and when they fail to settle their disputes peacefully as between themselves. At this juncture, however, one must take note of the fact that **a certain single act may give rise to both a civil and a criminal case** whereby the parties are at liberty to negotiate over the civil aspect of the matter.

To sum up, a civil case is one instituted primarily by an individual for the purpose of securing redress in monetary terms. Understandably, civil procedure is, thus, **a method employed in the initiation and disposition of such civil disputes**. Moreover, the parties are at liberty to negotiate over their disputes even while the case is still pending; and have it withdrawn from the court any time, but before a final judgment is rendered. In contrast to this, **criminal cases are not subject to such alternative dispute settlement mechanisms**. This means, the matter lies exclusively within and is done under the power of the prosecution officers irrespective of the negotiations and the agreement that may be made between the victim and the offender; unless, of course, the case falls within the category of ‘offences upon complaint’.

➤ **Self-Assessment Question**

Assume that a dispute arises between the Commercial Bank of Ethiopia and an individual who alleges that he was an employee of the Bank but improperly and unlawfully dismissed of his official duty; and, hence, filed a suit in a court of law demanding, among other things, to be reinstated.

Is this a civil or penal case? Why?

1.1.2. The Purpose of Civil Procedure Vis-à-vis Fundamental Procedural Rules

The desire for the betterment and furtherance of legal rules regarding the administration of civil justice, as described in its preambular statement, was, indeed, the prime factor that necessitated the enactment of the 1965 Civil Procedure Code of the Empire of Ethiopia; Otherwise, formally speaking in no other place, does the Code expressly sets forth the purpose it aspires to achieve and/ or the functions it intends to undertake towards the attainment of the goal designed to be served.

However, there are certain fundamental values and legitimate interests that procedural rules, in any legal system, aim to preserve and specific purposes that underlie their establishment. In other words, there are, more often than not, well-articulated ultimate objectives which they indispensably envisage to attain. Thus, in the general parlance, rules of civil procedure aim to ensure that disputes are handled by an **impartial** legal tribunal in a **fair and orderly** manner and as **expeditiously and economically** as possible. They are, in brief, meant to secure the **just, speedy and inexpensive** disposition of cases. More specifically; they aim at **treating the parties to a law suit equally** in enforcing their rights and the corresponding duties and laying down the ground for a smooth and orderly flow of litigation so as to **make the decision within a reasonably fair and quick time.**

Nevertheless, viewed from the mechanical aspect of civil litigations, procedure may be considered as **a means to an end not an end in it self**. As stated, earlier procedure essentially exists to ensure the proper enforcement of rights and duties arising from substantive laws .This, however, cannot be an irrefutable security of the proposition that: procedures are devoid of inbuilt, significant process-values of their own independent of the ultimate outcome they are designed to preserve.

Yet, in spite of the implications of such a contention, where a dispute is brought before a court of law, it is the function of the court to adjudicate the controversy in accordance

with precisely ascertainable legal prescriptions. In order for a court to properly perform those tasks, it must operate under a well-defined and effective procedure. Specifically stated, the claims of both parties must be heard in an orderly manner; the issues for decision must be distinctively presented to the court; and, the court's judgment must timely be enforced. Accordingly, the efficacy of the law of civil procedure is measured against and is considered valuable in so far as it is employed in **such a way as to enable the court to make a fairly prompt dispensation of civil justice**

If, in contrast to this, the application of the rules of civil procedure leads to **costly litigations and excessive delays** in the disposition of the case, the over all objectives of the law for which it has been designed is said to have failed.

Yet, make note of the fact that, though '**justice delayed...**', as the oft-mentioned maxim goes, is said '**justice denied**', it is also equally true that '**justice rushed is justice crushed!**', meaning, **sketchy judgments** rendered at the expense of justice in a manner that obstructs or destroys justice itself would amount to a **miscarriage of justice** potentially jeopardizing the administration of justice. Hence, a reasonable balance has to be struck between the two extremes.

To state the obvious, therefore, they must not become the problem themselves, curtailing the legitimate interests of the parties by being erroneously employed in a manner that destroys justice. Actually, speedy and inexpensive determination of a law suit depends on a number of other factors; such as, the **number and nature (complexity) of filed cases** Vis-à-vis the **number of the courts (benches)** engaged in the business; and, the **number of the judges** (justice officials) operating therein; as well as the **degree of compliance with the governing rules** and **case flow management** techniques.

Be that as it may, the purpose of procedural rules and spirit of the law must in all cases be borne in mind when dealing with procedural issues and their application must always be geared towards the attainment of this end. In case, the application of a given procedural rule gives rise to legal arguments, it should be interpreted and given effect in such a way

that it ensures the purposes and intents contemplated by the law and thereby serve the public interest.

Talking of the practical implementation of the rules of Civil Procedure Code, there have always been irrefutable criticisms and a considerably wide ranging strain of dissatisfaction both in the spheres of the legal profession and the litigating public. In view of this, the generally held belief has been that the **indeterminable number and complexities of the procedural steps followed in the litigation process; lack of procedural transparency;** the great **uncertainty** of the governing rules and the irreconcilably divergent **inconsistencies** in the application of the law, are some of the distinguishing features of our judicial processes. In fact, it is not uncommon to see people voicing of their dissatisfaction with the overall judicial proceedings.

In this regard one can say that, nothing expresses their distress than the usually mentioned statement: **“It is better to be sued and stand as a defendant in our courts than claiming one’s right through them as a plaintiff”**. Victims may, at times, go even to the extent of relinquishing their claims than demanding them through the existing intricate procedures due mostly to the **intolerably sluggish, inefficient, unpredictable and costly litigation processes**.

One the other side of the story, however, there is a parallel argument that the crucial problem of the system does not as such lie with the law itself. This, of course, is without denying the fact that there are certain defects and/or lacuna in the law which are, relatively speaking, tolerable to some extent. Rather, it is actually meant to emphasize and implicate the fact that the chief problem in this regard lies with the **self-imposed, deep -rooted and rampant customary practices which are repugnant to and observably inconsistent with the dictates of the existing law**. In line with this, to raise but few irregularities, the expressive phrase **“ both a torture to write and a torture to read”** , which is usually told of ‘ prolix judgments’ would exactly fit, mutatis – mutandis, to the tiresome **pleading practices**, by and large, employed in our judicial proceedings. Neither the litigants worry themselves of complying with the prescription of

the law in preparing their pleadings; nor, sadly enough, the court officials are seriously engaged in and bother themselves of ensuring the formal sufficiency of the pleadings as they seem comfortable with (and, hence, evidently complicit in) the bad practices.

Moreover, there is no tradition of managing law suits separately Vis-à-vis their specific natures. Cases, which need **summary or accelerated** procedures, for instance, are, more often than not, treated in accordance with the cases requiring ordinary procedures involving going through all the stages of stringent regular proceedings. Most importantly, there does not seem to be sufficiently defined adjournment policy or a strictly consistent implementation of adjournment procedures. Had these not been the case, the cumulative effect of them would have immensely saved, among other things, the time and money of both the litigants and the courts; thereby, serving the very purpose the law is meant to achieve.

In connection, to this for instance, it has been reported that in one old case a suit regarding succession was instituted in the High Court of the place while it ought to have been filed in a court of first instance jurisdiction. The High Court, however, proceeded to adjudicate the merits of the case; and after having dealt with it for an extensively long period, gave its judgment, against which an appeal was lodged to the Supreme Court. However, the Supreme Court, on its part, having dwelt on the appeal for another lengthy period, quashed the proceedings of the rendition court and to the dismay of the parties, the reinstatement and retrial of the case-back to square one- after it had stayed for **eight years** of its stay in both courts, down in the court of the lowest grade where it should have been originally filed.

The reporter of the case, a noted lawyer in the area, however, strongly criticized the decision of the Supreme Court as absurd. That is, even though the order of the Supreme Court was, apparently observed, procedurally correct, it was applied in such a way that defeated the very purpose and spirit of the law; and, disregarded the public interest. Justifying his argument, he further stated that the error that arose from the procedural irregularity of non- compliance with regard to material jurisdiction was neither to affect

the merits of the case (and was unlikely to prejudice the parties) nor the Supreme Court was expressly barred from handling cases of lower courts' material jurisdiction. Thus, he further suggested that the Supreme Court having stated the procedural irregularity that had occurred therein should have gone on to hear the appeal and finally disposed of the case so that justice would properly be served.

However, this view was attacked by another commentator who upheld the order of the Supreme Court and, in his dissenting opinion, argued that, in so far as original jurisdiction is expressly vested in the courts of first instances, there was **no need to deviate from and interpret the clear rules** of the law so as to legitimize the otherwise void judgment of the High Court under the guise of dispensation of justice.

➤ **Self-Assessment Question**

Which line of argument do you support? Why? Or, do you have an alternative way of looking at the problem?

Generally speaking, however, in the modern judicial litigations, there are some procedural principles of fundamental importance that form the foundation of and apply to all sorts of procedural laws ; be it civil, criminal or administrative, so as to ensure the proper dispensation of justice. The rules are well settled; they have received a wide range of application and embraced the whole notion of fair play (procedure) or due process and **failure to comply with them**, in principle, **vitiates a decision and discredit the judgment as lopsided** so as to constitute **a miscarriage of justice**. For instance, Proc. No.2/1942 (Proclamation for the Administration of Justice), declared that "... no court shall give effect to any existing law that is repugnant to the natural justice or humanity or which makes harsh or inequitable differentiation between our subjects and foreigners". Of these cardinal procedural principles the most significant requirements considered to be the essential ingredients of justice are briefly discussed below.

1.1.2.1. Fair Hearing of a Suit/Impartiality of the Courts

There are certain factors against which impartiality of courts is evaluated or through which “fair hearing of a suit” is ensured. The following are the major ones.

A. Neutrality of the Presiding Judge

Any person who sits in judgment over the interests of others must be able to bear an **impartial and objective** mind to the question in the controversy; i.e. he/ she should **impart justice without fear or favor**. That is, the authority empowered to decide dispute between opposing parties must be one **free from bias**-by which is meant an **operative prejudice** ; i.e., **predisposition towards one party or against the other without proper regard to the true merits of the case**. Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result.

In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a particular way which does not leave the judicial mind open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colors judgment and renders a judge unable to exercise his or her functions impartially in a particular way.

There are two attributive features of impartiality. The first feature is **subjective impartiality**, which refers to the impartiality of the **judge** himself and second is **objective impartiality** of the tribunal; i.e., **the tribunal/ court** or bench should provide the public with the guarantee that it operates impartially; i.e., conditions that avoids suspicions of impartiality. In other words, the impartiality of the judge (the subjective one) alone is not sufficient- there must be conditions that warrant the impartiality of the court (the objective one). Of course impartiality is not only about just ends, it also is concerned about just means. Consequently, where a person who is entrusted with discharging such judicial function has, by his conduct, shown that he is interested, or appears to be interested in the case, that **should disentitle** him from acting in that capacity.

In this regard, there are some common sources of bias that should disqualify a person from acting as a judge.

I. Personal Bias

Although with the ever-growing interdependability of human relations, this factor has always been a matter of judicial interpretations; there are, in fact, a number of scenarios that may create a personal bias in the judges' mind. It usually arises from **friendship, relationship** (either personal or professional) or **hostility or animosity** against either of the parties; or, **negativity from personal prejudices; or even political rivalry.**

II. Pecuniary Bias/ Bias as to the Subject- Matter.

[No one should be a judge in his own case!]

The rule against pecuniary bias originates from the legal maxim: “*nemo iudex in causa sua*”, implying that no one should be a judge in his own case; and, it arises from **monetary interests** in the subject matter of the dispute, no matter how small or insignificant it might be. Where the judge himself is a **party** or has **some connection** with the litigation so as to constitute a **legal interest** that should disentitle him from being a ‘judge in his case’. Generally, even if in some cases there may be no real likelihood of bias of any sort, one may still be disqualified from assuming the judicial position for justice should not only be done, but **must appear to be done** to the litigating public . Thus, the requirement of the rule against bias (whose observance is recommended in the name of **impartiality**) goes to the extent of imposing the **duty upon the presiding judges to withdraw themselves from the proceedings** where it causes (or, appears to cause) the violation of the rule (see, for instance, Art 27 of Proc No 25/1996).

B. Right to be Heard: Nobody should be condemned unheard!

Any one against whom an action is taken or whose right or interest is, thereby being affected should be **aware of the information** against him and should also be granted a

reasonable opportunity to defend him self. The governing maxim in this case runs: '*audi alter am par tem*'; meaning '**Hear the other side**'– no body should be condemned unheard. Two of the facets of the maxim are:

- I. **Notice** has to be given to the party before the proceedings start and,
- II. A party has to be given an **adequate and reasonable (effective) opportunity to explain (hearing).**

Moreover, a party should have the opportunity to adduce all relevant evidence on which he relies and opportunity for rebuttal of evidence submitted against him.

C. Equality of Treatment Every one is prima-facie equal before the law

This principle implies equal subjection of all persons to the ordinary laws of the land as administered by the regular courts of law; and, law extends protection to everyone. Hence, each party to a law suit should be treated equally without discrimination of any sort (i.e., sexual, religious, status, ethnic origin, political affiliation, etc). This rule is so grand that it is considered an approximate synonym for and equated with the entire notion of justice.

Moreover, the degree to which procedural rules facilitate equal opportunities of participation for the litigants to influence the judgment may be taken as the most important criterion by which procedural fairness is evaluated. In sum, there are three fundamental pillars used as ultimate test of procedural fairness (equality) i.e., **sine qua non for even, handed dispensation of justice:**

I. Equipage Equality

This implies equality between the litigants in preparing their respective pleadings in getting legal aids (services) in searching for evidence etc, irrespective of their differences in income levels. If a party, for example, is allowed to amend or alter his pleading same

opportunity should be granted, when the circumstance so requires, to the other party (as per Art 91 of the Cv. Pr. Cd.).

II. Rule Equality

Under similar circumstances, each party should be subjected to and protected by, similar rules. Same issues should be resolved through similar legal rules. If, for instance, by virtue of Art 58 (a) of the Cv. Pr. Cd, representation is allowed for a ‘brother’, the same rule should apply for a ‘sister’s’ representation-though not expressly articulated therein.

III. Outcome Equality

Similar issues, under same grounds /circumstances, should have similar outcomes for example instance, in such instances wherein ‘class action’ is allowed-pursuant to Art 38 of the Cv. Pr. Cd. Generally, speaking like cases should be treated alike.

1.1.2.2. Public Hearing of a Suit

Justice must not only be done but must also be seen being done

‘Hearing’, here, refers to the consideration by the court of the allegations and defenses of either side before rendering the final decision. In principle when the court undertakes such a hearing, the public at large, must have access to the litigation process (court-room) without, of course, negating exceptional situations of inherently confidential nature-wherein courts may consider cases in a closed chamber (“in Camera”). Accessibility to the media-which serves as a bridge between the two-is another important aspect of transparency. In this regard, Art 12 Sub-Art 1 of the FDRE Constitution, for instance, expressly stipulates that “the conduct of the government shall be transparent”. Such an open court proceedings ensures **transparency** of judicial activities and secures the **acceptability and reliability** (credibility) of the judiciary. It is in this sense that it is often said that **justice must not only be done, but must also be seen being done!**

1.1.2.3. Independence of the Judiciary and Accountability of the Judges

Under this sub-section, there is an interplay of two distinctive but correlative principles usually employed in juxtaposition with one another: **independence** and **accountability**.

I. Judicial Independence

Judicial independence, as one of the cardinal elements of the rule of law, is commonly elevated to the status of and provided with constitutional protection. Moreover, it is ensured through and possesses dual facets: institutional and personal/functional.

A. Institutional Independence

Institutional or administrative independence which is usually related to the concept of separation of powers-is a mechanism through which, on the one hand, a balanced coordination and cooperation among the three branches of the government is ensured; and, at the same time-signifies the freeing of the judiciary from an **unwarranted encroachment or influence** of any sort, particularly, from the executive wing or official of the government. For practical purposes, however, institutional independence of the judiciary is essentially ensured through the following means.

a. Legal Basis

So as to firmly establish institutional independence of the judiciary, there has to be a legal stipulation to that effect-it has to be legally declared. Such a declaration would not only provide a legal guarantee to the institutional independence, it would also confirm the fact that it is not something to be granted or, at times, withheld, of personal will-but one with a legal foundation.(See, for instance, Arts 78&79 of the FDRE Constitution.)

b. Independence to Administer Internal Affairs

On this regard, it has been commented that the attributive feature of the history of administration of justice in Ethiopia had rampantly been a **fusion of judicial power with executive functions**. A single person had been both a governor (administrative official) and a judge entrusted with judicial power and, hence, there was not a sharp distinction between the executive branch and the judicial organ. Consequently, such blend of judicial and executive functions had not been without implications and far-reaching repercussions.

First and for most, the judiciary has never had a separate existence of its own. Thus, external pressure on and intrusion in the internal affairs of the judiciary has deep-roots; it seemed natural and is not even without some hangover to our very day. Secondly, inherent to such conception and the objective realities, the judiciary never survived the regime it established.

It was thus not surprising or uncommon to see every new regime coming up with its own version of the judiciary- reconstituting and resetting it up in tune with its missions and visions. For all practical purposes and intents, therefore, the judiciary was never designed to be an independent institution as the third branch of the government. Such unfortunate instances had left on the people the impression that the reputation and reliability of the judiciary was associated with all evils of nepotism and corrupt practices, was at its lowest ebb-up until the coming in effect of the federal form of government. Formally speaking, however, it was only Proc.No.323/1975 which marked the ever first move for the institutional independence of the judiciary; at least, in theory.

Such a conception would, not only irreparably erode the credibility of the judicial process, but also may even go to the extent of seriously shaking the entire system of administration of justice and hampering the irreplaceable role the judiciary plays in the economic activities of the country . To substantiate this proposition, for instance, one of the most important conditions that investors require is the existence of a credible and

predictable administration of justice in the country. That is they would confidentially be encouraged to engage themselves in the business transactions if only they believe that they would be provided with reliable legal protection and that commercial disputes would efficiently be resolved through an independent judiciary. Ideally, and most importantly, therefore, the judiciary should be able to win the trust of the general public: as an impartial justice rendering forum. The judiciary can only be considered as a forum wherein litigants would confidentially resort to-with their justiciable matters-and seek justice from-if it constitutes essential qualities that a genuinely independent and efficient judicial organ possesses. The basic distinctive features of such an institution are: independency, accountability, efficiency and accessibility.

Generally speaking, however, institutional independence of the judiciary is, most importantly, ensured when:

- ⇒ Such independence is spelt out in black and white by the law (see, for instance, Art. 79 of the FDRE Constitution);
- ⇒ Courts have full authority over their internal and, financial affairs; such as, the power of drawing up and implementating the administrative budge and management of its personnel (See, Art 79 (6) of the FDRE Constitution and Art 16. of Proc .No.25/96) : and,
- ⇒ Judges are appointed in such a way that guarantees their independence including, enjoyment of a secured tenure of office; i.e., up until the retirement age); and, their removal from their judicial duty is made in due process as sanctioned by law and in restrictive grounds so prescribed. Moreover, there have to be sufficiently clear and unambiguously defined rules on training and promotional opportunities of the judges; their transfers; decisions on disciplinary measures; suspension or removal from their duty etc before reaching the legally mandated term of office, Hence, such crucial issues as merit, experience, integrity and remuneration schemes determine the extent to which judges are independent from all sorts of internal and external influence including of course, of the litigants themselves.

B. Functional/Personal Independence

Complete and meaningful independence of the judiciary, can be guaranteed if only it is **supplemented by a functional or individual independence**-which could either be internal or external. It is axiomatic that, apart from any system of appeal, a judge deciding a case does not act on any order or instruction of a third party- inside or outside the judiciary. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of a judge to pronounce the judgment freely, uninfluenced by extrinsic considerations or influences. This means that, in the process of discharging their judicial tasks, judges should be **free, internally, from their own colleagues and/or from the influence of superior courts; or, externally, from any kind of outside intrusion, fear or influence**; and they should **solely be bound and guided by the law**. Moreover, they should not be subject to and held liable to any administrative measures for the sole fact of their judicial decisions which may be inconsistent with the needs and interests of officials.

II. Accountability of the Judges

However, it is a well established fact that if left **unregulated and unguided power corrupts** and is liable to be abused. This means that it may improperly be employed in a manner and/ or for the purpose not contemplated by the law-eroding the overriding values of human right and freedoms. This would undoubtedly breed an unfortunate consequence of **undermining the cornerstone of the judiciary: acceptability and reliability**. Thus, independence should not be left without restraint, there has to be credible means of safeguarding those cherished human values.

Independence of the judiciary should not be taken as a special privilege of the judge himself. In addition to availing workable **normative and institutional protective measures**, litigants should be offered **reasonably adequate appellate opportunities**; judicial proceedings have to be **transparent and open** to the general public; and, judges should be ready and bold enough to **receive criticisms** on their decisions or analysis of

the issues. Independence **does not mean and should not lead to irresponsibility and arbitrariness**. It should not be **manipulated as an incentive for laziness, corrupt motives, or for a tremendous degree of discretion** so as to end up in the ‘**rule of the judges**’. The judge is thereto interpret and implement the law and the fundamental assumptions that underpin it to the best of his abilities and in accord once with the dictates of the spirits of the law.

Hence, the judiciary has to be **amenable to the law**. Judges are to be held responsible for their decisions. In other words, they are not allowed to act as free riders. There should be no ambiguity in the fact that the principle of independence indispensably presupposes the existence of the burden of accountability; one should not be exercised at the expense of the other i.e. a reasonable compromise has to be struck between the two.

1.1.2.4. Establishment of Courts by Law

In the spectrum of the fundamental principles of administration of justice, an item which may, at first glance, seem to be more of technical and not so much important; but, in reality, no less weighty than others, is the requisite for courts to be established by law. In a sense, the **structures** of the courts; their **hierarchical relations** and their **comparable jurisdictions** have to be explicitly constituted by law; and, only courts so established can assume judicial function.

On the other hand, inherent in this premise is that **special or temporary bodies that take away judicial powers from regular courts; and by and large, do not follow procedures prescribed by law ought not to be set up. Judicial power should principally and solely be vested in the regular courts**. This, of course, is without negating the existence of the so-called ‘**administrative tribunals**’-which are constituted by law and entrusted with some quasi-judicial (delegated) power-as the present day compelling necessity of the proper dispensation of justice so demands. . The causal impetus being the vast proliferation of governmental activities and infinitely varied complexities of an intensive industrialization which gave rise to multifarious social

problems—requiring, in turn, technical and expert knowledge; which, the ordinary courts are less equipped with, if not seriously lack. These bodies are, thus, as a matter of fact, **off-springs of compromise between the executive and the judiciary** and are set up to share the burden of the case loads of the courts which had almost been unbearably heavy—there by warranting their establishment.

The other reason d’etre that led to the creation of these bodies include:

- **Cheaper justice** : In a sense, it is less expensive to get justice through this process; i.e., the total cost that a litigant or an applicant has to incur in getting the disposal of his case than the one available through the mechanism of the ordinary courts
- **Speedy justice**: It abandons the intricate (and stringent) procedures attending the regular court proceedings—thereby immensely saves the time in the determination of the controversy; and,
- **It can be manned** by sharp and well-trained who individuals possessing special experience and sharp, and expertise in a particular field.

In the same vein, the FDRE Constitution, having established, as may normally be expected of a federative constitutional order, dual sets of courts—with their respective jurisdictions—also provides for a three-layered court-structure, at the pinnacle of which sits the Federal and States Supreme Courts. Moreover, the Constitution makes two additional determinations: one is that ‘**ad hoc**’ or ‘**special**’ courts outside the regular court system are prohibited; and, that other **religious or customary** courts—whose power is limited to personal or family matters—may be established or given official recognition. Accordingly, the phrase “... institutions legally empowered to exercise judicial functions...” under Art 78(4) of the FDRE Constitution, is said to have been included to denote and encompass administrative tribunals such as the ‘Labor Relations Board’, ‘Tax Appeal Commission’, ‘Civil Service Tribunals’ and the ‘Board of Privatization Agency’. However, legally speaking, there seem to be ambiguity and imprecision, with regard to ‘Kebele Social Courts’ operating in Addis Ababa, Dire Dawa and in the Regional States. Though these organs are considered as judicial branch of the administrations—within the

meaning of ‘tribunals’ in the just foregoing discussion- they are actually empowered with judicial function; i.e., they have taken the jurisdiction of regular courts to that extent and they do not necessarily follow a legally ascertained procedure in their processes . On that count, therefore, unless a broad interpretation of the provision is made so as to embrace them within the domain of Art 78 (4), they seem to be falling, in the strict sense of the law, within the category of courts whose establishment is categorically outlawed by the Constitution.

◆ **Self-Assessment Question**

With respect to the legitimacy of ‘kebele’ social courts, which line of interpretation do you endorse? Why?

Furthermore, there is a stringent requisite expected of judicial bodies to explicitly forward **justifiable legal grounds** for their decisions. The purpose that such a formal requirement furnishes is two fold. In the first place, it serves as a **practical guarantee** against the possible arbitrariness of the judiciary; and, most importantly, the party against whom the decision is passed; and, hence, affected, would get an **opportunity to know** the legal basis of the court and be able to effectively exercise his right of appeal. What is more, certain legal actions may **embrace varied and diverse subject-matter giving rise to intricate issues of law and fact**. In such instances, it may be practically insurmountable for a lay party to meaningfully defend himself for the sole fact of **lacking the required legal expertise**.

Hence, availing one with **reasonably adequate legal assistance- as a right to legal representation-** is becoming a pressing necessity for an even- handed dispensation of justice- as it ensures one of the requisites of procedural fairness: equipage equality. In the final analysis, no law can ever be meaningfully effective if it fails to reach and win the heart of those whom it intends to serve and does not respond to their essential needs, values and to natural justice. Particularly, if the judiciary is to secure the acceptance of

the litigant public and ensure its reliability, it should satisfy the following ingredients considered as **sine qua non for even handed dispensation of justice**.

Among other things, justice should not only be done, but should manifestly and undoubtedly be seen being done; no one should be condemned unheard; no-one should be a judge in his own case; everybody should be considered prima facie equal before the law; like cases should be treated alike and should produce similar out comes.

Moreover, the judiciary should be both free from an unwarranted encroachment fear or influence of any sort from any source what so ever; and, should equally and correlatively be amenable to the law. A proper and effective restraint has to be put there upon so as to safeguard the rule of law and the overriding values of human rights and freedoms.

Specifically stated, the following can be considered as minimum requirements of a fair trial. The parties should be afforded:

- Adequate notice of the nature and purpose of the proceedings;
- Adequate opportunity (time and space) to prepare their case; the right to present arguments and evidence; and meet opposing arguments and evidence, either in writing, orally or by both means;
- Counsel or other qualified persons of his or her choice during all stages of the proceedings;
- An interpreter; if s/he cannot understand or speak the language used in the courts;
- The right to be tried in his presence; to defend himself in person or through legal assistance of his own choice and to be informed, if he does not have legal assistance, of this right;
- The guarantee that his or her rights or obligations affected only by a decision based solely on evidence known to the parties to the proceedings;
- The opportunity to have a decision rendered without undue delay and to which the parties are provided adequate notice and the reason thereof;
- The right, except in the case of the final appellate court, to appeal or seek leave to appeal, decisions to a higher judicial tribunal;

- The right to have legal assistance assigned to him, in any case where the interests of justice so requires; and, without payment by him in any such case if he does not have sufficient means to pay for it;
- The right to examine, or have examined, the witnesses against him;
- The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

➤ **Self-Assessment Questions**

How much of these fundamental procedural principles are expressly or impliedly incorporated or recognized by our laws; particularly, by the FDRE constitution, the Civil Procedure Code and other relevant laws?

Identify as many specific provisions as you can and explain the legal concepts ingrained therein.

Theoretically speaking, how much are the provisions of the Civil Procedure Code, cognizant of and organized in such a way that they facilitates the implementation of the purposes of fundamental procedural rules in the administration of justice? Discuss.

1.1.3. Rules of Procedure Vis-à-vis Modes of Proceedings

To reiterate what has already been said, rules of procedure are commonly termed as means to an end and not end in themselves. They are thereto ensure that legal disputes are handled as fairly and expeditiously as possible. In the process of arriving at the truth about the relevant facts and the pertinent laws applied thereto, the laws of procedural rules in any country chiefly adopt either the ‘Adversarial’ or the ‘Inquisitorial’ modes of fact-finding to the total, or, partial exclusion of the other; or, at times, an interplay of the two, where, of-course, one may flagrantly take over the upper hand. Given the difference in the degree of the roles played both by the actual parties to a case and the presiding

judge are the distinguishing factors between the two modes of litigations, a brief explanation of their functional outline would be in order.

1.1.3.1. The Adversarial Procedure

The adversarial method, whose roots are traced to the early Anglo-Saxon court proceedings, is alleged to be the typical feature of English judicial process or the major proponent of the system (other countries as such as the USA, Australia and New Zealand do also belong to this category).

The prominent characteristics of an adversarial court proceeding, seen from the procedural point of view, is that the parties themselves (or represented by their advocates) shoulder the burden of initiating, shaping and fixing the scope of the litigation. The process is termed as the core of what might be called the **'factual methodology'** of the system- in contrast to the other style of adjudication, which employs some purely **theoretical reasoning** to reach at a conclusion. The underlying proposition of the system is that truth is most likely to emerge as a **bi-product of the vigorous combat between intensely partisan advocates**. The advocates are not supposed, at least as a matter of fact; to see the resolution of the case as a question of what might be best for the society as a whole. Rather, their ultimate goal is to see the possible disposition of the controversy in terms of their clients' best interest-taking a "win-at-all-costs" attitude.

Hence, due to such a **'litigant-driven'** fact-finding process, the system has often been likened to a battle or sporting event on which the players and the players alone are responsible for the determination of the (nature and effect) outcome of the contest. Thus, an adversarial court proceedings judges play a relatively **passive role**. Their function is limited to regulating the proper conduct (smooth flow) of process. This restrictive mandate of the courts potentially circumscribes the intervention of the judges in the substance of the litigation. Thus, the judge is merely there as an **impartial umpire** to see to it that the **rules of the game are evenly and properly observed by the players**.

1.1.3.2. The Inquisitorial Procedure

This mode of investigative procedure is originally tied to the traditional function of a strong and absolute government, namely the **maintenance of public order and the suppression of crimes**. It is chiefly employed in the judicial proceedings of the Continent Europe (France and Germany being the representative ones). ‘Inquisitorial’ procedure is self-expressive in that the judges can inquire deep into the merits of the case so as to be able to decide on what the real issues between the parties are. They can, for instance, order the parties to produce further evidence and critically examine the witnesses of either side, if and when they are of the opinion that a fair decision cannot otherwise be reached.

Yet, true to this system, the real parties do have active role to play in initiating, shaping and fixing the scope of the litigation. However, relatively speaking the system envisages, , **a more active role for the judges** to play instead of being a mere ‘pronouncer’ of the bi-product of the activities of fierce partisan advocates-as is the case with the adversarial proceeding. Judges are basically thereto ensure **public control** over the management of the individual cases by enforcing the law. They thus occupy a centerpiece in the ‘fact-finding’ process as opposed in contrast to the neutral umpire of the adversarial judge. Hence, from the above discussions , one may conclude that the prime difference between the two modes of litigations lies mainly on the degree of the roles played by the judge vis-à-vis the actual parties to the case.

Before winding up the brief description of the two modes of litigations, it is be imperative to say few words about the mode of Ethiopian court proceedings. Formally and theoretically speaking, identifying the primary source material of the Code is undoubtedly the determinant element for this purpose. Accordingly, irrespective of certain arguments in the contrary, the basic material source of the Code is observed to be the 1908 Indian Code of Civil Procedure-which itself was taken as a model procedure in some British colonies in Africa-such as the Sudan.

Hence, one may plausibly propound that the Code was extensively influenced by and originated from the Common Law Tradition-to which the UK was (and still is) the typical representative.

◆ **Self-Assessment Question**

Should the fact that our Code of Civil Procedure is highly blended with Common Law Tradition, , in anyway, affect the degree of importance to be attached to (the overall objective of) procedural rules? Discuss.

1.2. Rules of Civil Procedure in Ethiopia: Historical Development

The historical development of rules of civil procedure in Ethiopia could well be studied by dividing it, for the sake of convenience, into two unequal periods taking 1965, the year, when the current Civil Procedure Code of Ethiopia was promulgated, as a point of departure. Accordingly, briefly, in an attempt to provide a comfortable basis for subsequent discussions while the first sub-section explores, the historical scenarios attending procedural rules in Ethiopia; the second sub-section substantially deals with the attributive features of the Civil Procedure Code.

1.2.1. Rules of Civil Procedure in Ethiopia: A Brief Historical Overview

It is a common truism of legal history that the present legal rules and concepts do not stand in isolation from the past legal traditions. Rather they have their roots in and are fruits of long historical precipitations. In view of such premise, it would thus be instructive and beneficial to make preliminary historical considerations of certain customary and informal procedural rules. Hence, tracing back into their historical antecedents; briefly exploring into the nature and application of procedural rules; identifying the key issues attending them; and, assessing the way outs forwarded thereto would supposedly throw some light on the proper appreciation of the distinguishing features of the present procedural order.

Historically speaking, for the substantial portion of its legal tradition, Ethiopia was identified with the absence of a systematically organized judicial process or uniformly applied procedural laws. This was primarily associated, among others, with the absence of competent expertise- which, the implementation of modern procedural laws indispensably demands. Up until the end of the 19th century, there was no adequately articulated and/or formally institutionalized system of administration of justice. Yet, the practice of dispensing justice was widely believed to be the duty of each and every peace-loving citizen as it had aptly been manifested through the voluntary and spontaneous establishment and operation of an informal road side adjudicatory tribunals by any passers- by or family friends-when and wherever a dispute arose.

Moreover, seen from procedural point of view, once engaged in argumentative proceedings, disputants were observed to be notoriously litigious in practice-as could well be illustrated through such customary adversarial contentions as the “*Tattayaq-muget*”.

They would furiously go through, at all costs, interminably repeated appellate procedures so as to have their case determined to the best of their interests. A contention which began, for instance, before the very humblest village elder, would go, more often than not, all along every available avenue, culminating in the royal institution of the emperor: known as the “*Zufan Chilot*” which is literally interpreted as the ‘Crown-Court’.

Sequentially stated, if, for instance, a litigant could not get his case resolved to the best of his satisfaction at the informal village tribunal, or, for that matter, for any reason what-so-ever, he would go to the lowest level official adjudicator- known as the “*Chiqa-Shum*”- wherein, the **taking of an oath** was an important part of the procedure. Besides, those personnel who assumed such adjudicatory status at that position were expected to be **honest, sympathetic with the poor and endowed with the knowledge of the law.**

A grievance by the discontented party could also be petitioned against the decision of the ‘*Chiqa-Shum*’ to the next higher official-the ‘Deputy- Governor’. A further appeal, from the decision of the Deputy-Governor, would go to the Governor of the district whose decision could, in turn, be reviewed upon by other higher officials called “*Womber Rases*” each representing the then provinces in the country-and presiding in the central court situated in Addis Ababa.

The litigation process could also be extended as far and high as the “*Afe-Negus*”, literally translated as the “Mouth” of the king. The marathon appellate procedure would however come to an end only after having reached, the apex of the judicial structure; i.e., a litigant who had exhausted his right of appeal was once more entitled, as a final resort, to request a review by the Imperial Majesty’s Bench which was presided by the Emperor himself. The decision of the Emperor, which would usually be made on the basis of a concise summary report of the ‘*Afe-Negus*’, was, however, final and binding.

Besides, the Emperor was not bound to decide cases on the basis of the provisions of the formal laws. Rather, the authority and legitimacy of the ‘*Zufan- Chilot*’ lied both in the sovereign prerogative of the Emperor- to see to it that justice was done; and in the historically popular conception of the kings as the ‘ultimate source (fountain) of justice’- a thinking which found its way even in the country’s procedural laws (Art 138 of the Cr. Pr. Cd. and Art.322 of the CV. Pr. Cd could well be cited to this effect).

It was thus Proc.No.2/1942 (formally called the ‘Administration of Justice Proclamation’) which attempted to curtail the number of appellate rights to, only, one: whereby each court would hear an appeal from the next lower court. In practice, however, not only were **multiple appeals** taken in each case, the High Court would often hear appeals without even having the proper jurisdiction in that particular instance. Despite the legal prescription and the aspirations ingrained therein, the customary practices persisted with substantial resistance; even worse, the judges themselves showed tendency to cling to them.

In view of the deep rooted practice of repeated appeals, it may have supposedly been found difficult for the judges to accept a single appellate procedure; and, hence, may have believed that they should not refuse to hear the appeals irrespective of the restrictive stipulation of the law. To make matters worse, it was also possible for a defendant to obtain a transfer of his case from the lowest to the High Courts- a legal rule, which was occasionally misused- for the sole fact of entailing unbearable burden on the plaintiff (respondent) who would often have to travel all the way to Addis Ababa. Such improper usage of the legal rule, coupled with the absence of an effective and efficient procedural law, not only had the negative repercussion of substantially increasing **case congestions**, but also precipitated in an **absurdly costly and lengthy litigation processes**.

Be that as it may, it has, in the final analysis, been observed that procedural rules in the country were relatively more developed than their counterpart substantive ones. For all intents and purposes, therefore, Proc No 2/1942 (which primarily was enacted to establish the country's judicial structure) could safely be considered as the law that had laid down the very foundation for the development of procedural laws in Ethiopia.

The Proclamation, in addition to constituting the ever modern court structure in the judicial history of this country, also entrusted the judiciary to issue regulation that would be employed in court proceedings, subject, of course, to the approval of the then Ministry of Justice.

Subsequently, a number of procedural rules were issued. A year later, in 1943, the first ever written procedural law (called, 'Court Procedure Rules') was promulgated as 'Leg. Not. No .33/1943'. Nonetheless, the 'Rule', which encompassed 99 articles of both civil and criminal procedures, was far from being comprehensive. The material source of the law is said to have been the Indian procedural laws, which could be attributed to the then British judges who were working in the judicial structure and rendered assistance in the drafting of the law. Afterwards, a rule relating to appeals to the Imperial Supreme Court was issued as 'Leg. Not. No 155/1951'. It consisted of, 45 articles of both civil and criminal procedures out of which 36 articles were rules of civil procedure. Even though it

is said to have incorporated certain rules of customary practices of the country, the substantial material source was still that of the Indian procedural laws.

Moreover, up until the promulgation of the 1965 Civil Procedure Code, a number of other laws of procedural nature were also made. These include:

- Proc. No. 130/1953 (and the amending Proc. No. 135/1954) for the establishment of judicial power;
- Leg. Not. No. 177/1953, on the enforcement of judicial relief;
- Leg. Not. No. 176/1953 (and the amending Leg. Not. No. 179/1954) on the execution of judicial decrees;
- State Leg. Not. No. 176/1954, on Insolvency and Advocates' fees; and,
- Leg. Not. No. 195/1963, for the Determination of Material Jurisdiction of Courts.

However, these procedural laws were, on the whole, not sufficiently detailed and a number of areas of procedural matters were also left uncovered. Soon, it was found out that the absence of a systematically organized and all encompassing procedural law had potentially jeopardized the administration of justice in general. The critical problem in this regard was the indefinitely extended delays that existed in the resolution of cases. It was not uncommon, for instance, for some litigation to take a number of years to be finally disposed of.

Consequently, with the prime purpose of resolving those procedural irregularities, and for the sake of proper application of the existing rules, the then Ministry of Justice, started working on a comprehensive procedural law. Accordingly, the incumbent Civil Procedural Code, the basic text of which was drafted by the Codification Department of the Ministry of Justice, was issued as a Decree in 1965. Moreover, upon its effectiveness, with a view to encoding every rules relating to civil matters under one and single document, all procedural rules concerning matters now covered by the Code, that were previously in force were totally repealed-irrespective of the inconsistencies with the Code.

With respect to the drafting process, and the material source of the Code, R. A. Seddler, the author of the original credible text of reference on the Ethiopian Civil Procedure, claims that neither a foreign code was incorporated as such, nor it was entirely modeled after one; rather, he argues, it was remarkably of Ethiopian origin.

However, some scholars do not agree with the assertion of the author. They contend that a close scrutiny of the provisions of the Code does indicate that the overwhelming majority of its provisions, if not all, are, in a similar fashion to the earlier procedural laws, were verbatim copies of the 1908 Indian Civil Procedure Code. Hence, they conclude that the latter could safely be considered as the basic material source of our Code of Procedure.

1.2.2. Salient Features of the 1965 Civil Procedure Code

Even though the Code is said to have embodied comprehensive rules that apply to civil litigations of any sort, it is also concise in a sense that it contains only 483 articles—divided into chapters and paragraphs. It encompasses rules on, among others, jurisdiction of courts; framing of issues; parties to and scope of litigation; service of summons; pre-trial and trial proceedings; revision of decisions and modes of executions.

Most importantly, however, the following distinguishing features of the code deserve special attention. To begin with, the four schedules of forms governing pleading process, miscellaneous matters and execution, stipulated at the rear most part of the Code demand distinctive discussion. The point here is that there is a contention as to whether such schedules should strictly be observed during actual litigation processes. There seem to be inconsistent prescriptions between the two versions of the Code. In relation to the pleadings, for instance, Art. 80(2) of the Amharic text make the use of the forms indispensably **mandatory**, while such a strict prescription is missing from the English version. Surprisingly, Art 244(4) of the Amharic Code stipulates that non-observance of formal requirements cannot be a ground for a preliminary objection. This becomes, at times, a source of fierce conflict in the effective application of the provisions of the Code.

Be that as it may, however, it is beyond contention that the consistent application of formal requirements (though a perfect congruity may not be a necessity) is of paramount importance for the expeditious dispensation of justice.

Moreover, there are also blatant mismatches between the Amharic and the English versions. The master texts of the Code, being originally drafted in English, and, then, translated into Amharic, the inconsistencies are supposedly attributed to the Amharic mistranslations. In such instances, some lawyers suggest that it would be profitable to consult the English version the primary source material; and, if accessible, the relevant provisions of the Indian Civil Procedure Code, the original source document of the latter. The problem does not stop there. Our substantive laws are essentially derived from the civil law legal system whereas the procedural law is from sources substantially influenced by the common law tradition.

In the enforcement of the laws, as the provisions of the Civil Procedure Code are to be read in conjunction with and interpreted (when the need arises) in the spirits of the substantive laws, the latter would undoubtedly have an appreciable effect on the former. Consequently, due mostly to such differences in origin between the two laws, practical problems may crop up in the process of litigation.

To cite but an instance, due to terminological differences between the two legal traditions, it may become insurmountably difficult to relate certain procedural concepts to their precise parallels in the relevant substantive law. As a result, the conclusion reached in such instances may sometimes lead to the defeat of the purposes sought to be achieved by the respective law. It has thus been suggested that in such deadlocks, references should preferably be made to materials of common law origin.

Last, but not least, ensuing from the fact that the Code was issued as a “Decree” by the Emperor, there could arise a problem relating to the approach to be taken in the process of interpreting its provisions. The problem here is that, since the Code was not promulgated by the parliament, there are no documents containing legislative debates

(“travox preparatory”) on the drafts of its provisions, there is no thing published, indicating the drafters intent i.e. the background policy explaining the contents of the legal rules and prescribing guidelines for interpretation.

The absence of such basic documents, in effect, makes the “intention” method of interpretation (the most reliable one) of little use, if any, except in so far as such intentions can be inferred from the terms of the pertinent articles of the Code. In such instances, it is suggested that a more practice-oriented mode of interpretation would best facilitate the proceeding and help ensure the general purpose of the rules of procedure.

Even though the Code had empowered the then Ministry of Justice to issue regulations, concerning any matter which under the Code may or shall be prescribed; and, to make rules so as to add or amend the provisions of the Code, nothing was made to that effect up until 1975. In that year, however, two proclamations, Proc No 51/1975 and Proc No 84/1975 were enacted. While the former reduced the number (rights) of appeals to only one; the latter amended Art 31/1 of the Code to the effect that an application for change of venue could only be admitted before the hearing of evidence.

Moreover, if, as per the Proclamation, the other party has incurred expenses as a result of the rejection of the application, the petitioner might be required to compensate same.

Save such instances, therefore, up until the recent enactment of Proc. No. 454/2005, which re-amended (Proc No 25/96 is amended by proc. No138/98) Proc No. 25/1996 (with the prescription that the legal interpretation reached upon by the Cassation Bench of the Federal Supreme Court, shall be binding upon the courts), no single procedural law of civil nature has been made. Proc No 25/96 and its amendment proclamation No.138/98, which preceded Proc No.454/2005 are of civil nature

☞ **Self – Assessment Questions**

Critically analyze the significance of the three laws cited in the just preceding section in relation to the crucial problems persistently attending the litigation process in our courts.

How much are you now appreciative of the significance of tracing back into and appraising historical antecedents of a given legal tradition such as this? Explain.

CHAPTER TWO
JUDICIAL SYSTEMS IN ETHIOPIA AND JURISDICTION OF
COURTS

Introduction

The power of a court to hear and render a binding decision-jurisdiction of courts- is the cardinal point of discussion in this Chapter. Accordingly it deals with the identification of appropriate (level of) courts that should consider justiciable cases of civil nature. So as to be able to pass a legitimately binding decision, courts should first of all, have jurisdiction over the case submitted to them.

This Chapter is thus meant to explain the essential elements that constitute jurisdiction and the effects that the absence of either or all of them entails on court proceedings. Moreover, it also considers some of the matters falling outside the jurisdiction of regular courts; and, touches upon issues related to transfer of suits and removal of judges from benches. Furthermore, attributable to the current dual court structure, the relations between Regional and Federal judicial structures and mechanisms of resolving jurisdictional conflicts between or among courts will also be explored.

Objectives:

By the end of this Chapter, students should be able to:

- take appropriate measures in instances wherein jurisdiction is missing;
- point out the relationship/distinction between Regional and Federal courts
- figure out grounds that could cause the transfer of suits and factors for the removal of judges;
- explain the historical development of Ethiopian judicial system;
- understand the nature of the existing judicial structure in Ethiopia;

- describe the types of cases entertained by Federal courts and State courts;
- define what jurisdiction of courts means;
- identify the basic elements that set-up jurisdiction;
- analyse and determine issues of jurisdictional conflicts;
- develop the skill in raising objection and responses on jurisdiction;
- explain the procedural concepts of pendency, priority and consolidation;

2.1. The Ethiopian Judicial System: Past and Present

2.1.1. The Unitary Court Structure: Historical Background

Despite its long statehood history, up until the end of the 19th century, there was no adequately articulated and/or formally institutionalized system of administration of justice in Ethiopia. Rather, the country had substantially been marked by greatly diversified customary practices and traditional administrative structures. Disputes were handled by time-honored mechanisms wherein respected figures; local leaders, tribal chiefs and community elders resolved controversies amicably through the age-old customary institutions.

As described in the proceeding section, grievances of the discontented parties could further be taken from the informal local institution to the lowest administrative authorities-the governors. The decisions of the governors could also be reviewed upon by ‘Womber-Rasses’ representatives of each provinces in Ethiopia-and presiding over the central court situated in Addis Ababa. Furthermore, appeals from the decisions of the Womber-Rasses would be submitted to the ‘Afe-Negus’; and, as a final resort, the litigation would come to an end after having reached the apex of the judicial structure, i.e.: the Emperor himself.

Briefly stated, thus, before the end of the 19th century, there was no formally established and systematically institutionalized judicial structure in Ethiopia. It was thus only the 1931 ever written Constitution of the country that could safely be considered as marking

the beginning of a new era in the establishment of the modern judicial system. Having constituted the Supreme Imperial Court, the Constitution envisaged for the establishment of such other subordinate courts with their respective powers. Pursuant to the stipulation of the Constitution, hence, Proclamation No 21/1942 (formally called the Administration of Justice Proclamation, Proc., No. 2/1942, Neg., Gaz., Year 1, No. 1) was enacted. Accordingly, , technically speaking, six levels of courts, the first three, namely, the Supreme Imperial Court, the High Court, and the Provincial (Teklay-Gizat) Courts were set up: The remaining subordinate courts; i.e., the Awraja –Gizat Court, Woreda-Gizat Court and the Mikiti-Gizat Court were also subsequently instituted. Nevertheless, as the Mikiti-Woreda Courts and the Teklay-Gizat Courts were later on devoid of their jurisdiction by subsequent laws, they were, for all practical purposes, abolished-thereby, relegating the then judicial structure to the remaining solely four levels. Moreover, in the later days, other laws were also enacted-with a view to strengthening the judicial structure and the administration of justice in general. The most prominent of these was the 1965 Civil Procedure Code-which, in turn, established four levels of courts: the Woreda Guezat Court, Awradja Guezat Court, High Court and Supreme Imperial Court.

2.1.2. The Present Dual Court Structure

As it can be understood from the just preceding section, the Ethiopian judicial system had been strongly unified and firmly centralized. It was thus after the fall of the unitary Dergue regime that the form of the government in general and the system of administration of justice in particular were radically changed. The 1991 Transitional Charter, which was promulgated shortly after the collapse of the PDRE (Peoples' Democratic Republic of Ethiopia) Government, uprooted the trend in the country's constitutional history by marking the establishment of a new system-as a fore-state of the ethno-linguistic federalism. The subsequent 1995 FDRE, (Federal Democratic Republic of Ethiopia) Constitution, thus, constituted a federal state structure whereby powers are divided between the Federal and Regional Governments. Hence, by adopting a federal state structure, one can say that Ethiopia came to have a double layer of sovereignty.

Accordingly, the Constitution not only proclaims that, judicial power, both at the Federal and State levels, is vested in the courts but it also provides for the establishment of two sets of courts: one at the Federal and the other at the State level. That is, both the Federal and the Regional Governments are endowed with their respective structure of courts-tiered along three layers-the supreme, the high and the first instance courts-each having distinctive jurisdictions of their own and different places of sittings.

By virtue of the Constitutional stipulations, while the Federal Supreme Court sits solely in Addis Ababa, the Federal High and First Instance Courts sit in Addis Ababa, Dire-Dawa and in such other places as may be deemed necessary by the HPR (House of Peoples' Representatives). Otherwise, if and when these Courts are not so established, the Constitution declares their jurisdiction are delegated to and exercised by the States' supreme and high courts, respectively.

At this juncture, however, the disparity of nomenclature of the courts found at the bottom of the hierarchy of courts in the States deserves a brief discussion. Here, the inconsistency lies with the naming of the States' courts as between the Federal Constitution and the practices of the States' laws: While the Constitution refers to them as the 'States First Instance Courts' they are yet known by the name 'Woreda Courts' in the States. Thus, some scholars argue that such a naming of the courts at the States' level would render the courts, legally speaking, unconstitutional; and, hence, demanding for a renaming.

Moreover, though the Constitution explicitly recognizes religious and customary courts and envisages their establishment by law, it not only exclusively vests judicial power both at the Federal and States levels on regular courts and institutions so empowered, but also strictly forbids the establishment of special or ad hoc courts-berefting the regular courts of their constitutional power.

Be that as it may, however, there are adjudicative bodies that are constituted to review administrative decisions. Such institutions include tribunals like, the 'Labour Relation

Board’, ‘Tax Appeal Commission’, ‘Civil Service Tribunal’ and the ‘Privatization Agency’ and its ‘Board’. Though such tribunals are not properly so-called courts they may safely fall within the second category of the judiciary-constitutionally coined as “legally empowered institutions”. Lastly, however, the constitutionality of the so-called Kebele-Social Courts Addis Ababa City Courts and the issue of the jurisdiction of the regular courts and the rules of procedure applying to them will be the subject of discussion in the subsequent Charter.

2.2. Jurisdiction of Courts: Essential Elements

Generally speaking, individual disputes, in a given society, may be resolved through different conflict resolution mechanisms-which could take either the contentious court litigation method or the out of court amicable ways. From the discussion, herein above, we have observed that the existing Ethiopian judicial system has a dual court structure: one, at the *Federal*, another, at the *States* level and, that each structure has, in turn, three layers of courts with their distinctive judicial powers.

Now, therefore, once an individual has decided to have his case resolved in a court of law, the important point that he should, first of all, determine is as to where his case is to be brought i.e., as to which of the above described courts are competent enough to handle such a case, and, finally pass a valid and, hence, an enforceable decision. Thus, the appropriate response to this query is that: a person can legitimately institute a law suit only in a court so empowered. As it has already been stated elsewhere in this material, one of the fundamental procedural principles stipulates that courts which entertain disputes must only be the ones constituted by law. Accordingly, the law which establishes the courts grants them the power to handle law suits. Thus, what we call ‘jurisdiction’ of courts, in this respect, refers to the power of courts, to hear and determine a case; thereby, rendering a binding judgement.

This section is thus primarily meant to deal with the selection and determination of appropriate courts possessing the required jurisdiction to entertain law cases. Particularly,

the essential features of jurisdiction and the effects of the absence of the constituting elements will also be explained. Moreover, it explains how jurisdictional conflicts between or among courts should be resolved. It also considers matters that fall outside the jurisdiction of courts. Furthermore, issues with regard to the transfer of suits from one court to the other and removal of judges from benches will be touched upon. Finally, the relations between the Federal and Regional courts and other pertinent matters will be discussed.

As described above, for a given court to consider and pass a binding decision on a case, it must possess the jurisdiction to do so. In this respect, there are three essential elements that establish jurisdiction of courts; namely, judicial jurisdiction, material jurisdiction and local jurisdiction. A thorough discussion of each of these elements is thus in order.

2.2.1. Judicial Jurisdiction

Judicial Jurisdiction refers to the legal competence of the courts of a particular nation or state to exercise a judicial power i.e., to adjudicate a law suit and render a judgment binding an individual, or his property involved therein. The issue of judicial jurisdiction normally arises when there is a ‘foreign element’ in a case appearing before a court of a given state. A case is said to have involved a foreign element, if either of the parties is a foreigner to that state or the transaction or property, which is the subject matter of the suit, is occurs or is situated outside of the territorial boundaries of that state. In this connection, therefore, the primarily question that must be addressed is whether, for instance, Ethiopia, USA or France, etc, as a state, is legitimately competent to subject a particular foreigner or his property to its judicial powers.

In most instances, a court of a state is held to possess judicial jurisdiction if it has sufficient contact with either the defendant or property that is involved in the suit. So much so, judicial jurisdiction has to do with the enforcement of the judgement of a court against a foreign defendant who does not usually possess property in the country where the case is heard and finally determined.

In some instances, a court's judgement of a given country may be enforced in another country on the basis of bilateral or multilateral treaties. The need for a concession of reciprocity is also the other factor in this respect. By and large, however, the court of a state to which a judgement is sent for execution will consider only whether the court that gave the judgement possessed judicial jurisdiction. Accordingly, if it finds that there was such a jurisdiction, the judgement will thus be recognized forthwith and given effect in that state i.e., the court of the state in which the judgement is sought will not review the merits of the case. Rather it, merely, determines whether the court that rendered the judgement had the competent jurisdiction in that state itself. Thus, if, for instance, a foreigner without any property in Ethiopia is found to be subject to the jurisdiction of Ethiopian courts, the judgement passed against him will be enforced in his home state. Accordingly, the plaintiff (judgement-creditor) is not to file another suit on the merits of the case in that state; but, simply makes a formal application for the enforcement of the Ethiopian judgement and obtain execution against the judgement-debtors property in that country. In the normal course of events, the factors that establish judicial jurisdiction are determined by relevant legislations of states. Accordingly, different countries have got their own standards to be considered in enforcing foreign judgements.

What is more, in spite of the fact that the issue of judicial jurisdiction is, in practice, a procedural matter, it is, in most countries treated as one of private international law, and the rules governing it are found in the latter area. In our case, though the draft document of the 1965 Civil Code had included such provisions in its section that dealt with as issues of private international law, for that portion of the bill was not approved by the then legislature, it could not become part of the finally adopted Code. Hence, one may safely state that there is no, formally speaking, law in Ethiopia that specifically govern the issues of judicial jurisdiction. Moreover, though the conditions for granting permissions to the execution of foreign judgements are put forth by the Civil Code, the existence of judicial jurisdiction with the court that rendered the decision not expressly required as such. Instead, the Ethiopian courts ordered to, principally, identify the presence of any international conventions to that effect, or, ensure reciprocal duties/

commitment from the country in which the judgement was given. But still, further requirements could also be gathered by cumulatively reading the pertinent provisions of the Code (See, Arts 485-61).

In spite of the absence of the relevant legal rules on judicial jurisdiction, cases involving foreign elements have appeared before the court right since the early times of the country's judicial practices. In such instances, unless an objection was raised on grounds of judicial jurisdiction, the courts would assume that the jurisdiction exists and entertained the case in the usual business of the court. Otherwise, the grounds would be determined on the basis of the general legal principles developed by foreign laws and applicable to the case under consideration. Hence, on the basis of the nature of the action brought the type of the relief sought by the plaintiff, the grounds for exercising judicial jurisdiction are distinctively put as 'in Personam' (over a person) and 'in Rem' (over a thing) jurisdiction.

2.2.1.1. Jurisdiction in Personam

An action in Personam, which is the usual kind, is brought against a person, natural or legal, and seeking a relief against the person of the defendant, i.e., the claim is made for an order requiring the defendant to do or refrain from doing an act. A suit filed for damages (demanding for the payment of compensation) or one for an injunction (requesting an order prohibiting the defendant from doing an act) would thus be an in Personam suit; and, the power of the court in this regard, needless to mention, is jurisdiction in Personam. Thus, a judgement in Personam, although it might concern a res (the subject-matter), merely determines the rights of the litigants inter se to the res.

On the grounds of the general legal principles, and the usual court practices, Ethiopian courts are held to assume judicial jurisdiction in Personam where either of the following requirements are fulfilled:

- ☞ the defendant is an Ethiopian national or domiciliary; **or**,
- ☞ the defendant has consented (expressly or impliedly) to the exercise of jurisdiction by the Ethiopian court; **or**,

☞ the act which is the subject matter of the suit occurred or is situated in Ethiopia.

Here, it has to be born in mind that these factors are optional or alternative grounds. Hence, it is considered to be sufficient for Ethiopian courts to exercise personal jurisdiction if one of them is present in a given case. Thus, if, for instance, the act-which is the subject matter of the suit, occurred here, there is judicial jurisdiction even if the defendant is neither an Ethiopian national nor a domiciliary. Let us see these factors in greater detail.

I. Nationality or Domiciliary of Defendant

The first and the most common factor on the basis of which Ethiopian courts will establish judicial jurisdiction concerns whether the defendant is an Ethiopian national or domiciliary. That is, a defendant who possesses either of such status is subject to Ethiopia's judicial jurisdiction even though the transaction which gave rise to the suit occurred outside of Ethiopia.

Here, it has to be noted that it is the defendant's status that matters; i.e., it is irrelevant whether the plaintiff is an Ethiopian national or, is domiciled here. In other words, if the defendant is not an Ethiopian national or domiciliary (and not otherwise subject to the Ethiopian courts), the Ethiopian court cannot assume judicial jurisdiction on him simply because the plaintiff possesses such a status. Evidently, therefore, if both parties are Ethiopian nationals, the issue of judicial jurisdiction would not arise as Ethiopian courts have the jurisdiction over them. Hence, at least, one of the parties, specially the defendant, has to be a foreigner for a question of judicial jurisdiction to arise.

On the other hand, if both parties are foreigners (and, the transaction has also occurred abroad), here comes the relevance of domicile (of the defendant), for an Ethiopian court to exercise judicial jurisdiction Accordingly, Ethiopian courts can only entertain for instance, a case between a Kenyan plaintiff and a Sudanese defendant-provided that the

latter is domiciled here.

Pursuant to the pertinent legislations (both the FDRE Constitution, and the new proclamation that repealed and replaced the 1930 citizenship law), birth is the main mode of acquiring Ethiopian nationality. By virtue of Art 6 of the FDRE Constitution, an Ethiopian national is any person of either sex whose-both or either-parent is an Ethiopian. Thus, a person born of both Ethiopian parents or an Ethiopian mother or father will automatically acquire an Ethiopian nationality without any additional conditions attached therewith. There is, of course, a procedure (known as naturalization) by which foreigners may acquire Ethiopian nationality.

On the other hand, Ethiopian domiciliary is one who, while not an Ethiopian national nor has otherwise acquired its nationality, has established the principal seat of his business and of his interests in Ethiopia with the intention of residing in here permanently; or, more realistically, for an indefinite period of time. Hence, a foreigner who satisfies these conditions of domiciliary can thus be subjected to the jurisdiction of Ethiopian courts. (See Arts 183-191 of the Civil Code for the detailed rules on domicile). Just as physical persons are subject to judicial jurisdiction in the state of their nationality or domicile, legal persons (corporate bodies) are also subject to the courts of the state which created them. Therefore, any association, a company or an NGO that is established, (registered and hence acquired personality), in accordance with the pertinent Ethiopian laws, is subject to the judicial jurisdiction of Ethiopia, even though the transaction on which the suit is brought occurred elsewhere. Nevertheless, a foreign corporate body (created under the law of another state and/or situated elsewhere) would normally be subjected to the Ethiopian judicial jurisdiction with respect to suits arising out of its activities carried out herein Ethiopia.(See, Arts 545-549 of the Civil Code)

II. The Doing of an Act

The second factor that establishes judicial jurisdiction for Ethiopian courts is "the doing of an act". This means that in the absence of the first bases of judicial jurisdiction-nationality or domiciliary of the defendant-the second ground hat the Ethiopian court

should look for is whether the act, which is the cause of the suit, occurred in Ethiopia. In other words, if the subject matter of the suit occurred in Ethiopia, an Ethiopian court will have judicial jurisdiction-even-though the defendant is a foreigner or not an Ethiopian domiciliary. The following hypothetical illustrations will elaborate the matters more clearly. As the issue of judicial jurisdiction arises when nationals of different states are involved in a law suit, a contract concluded with a foreigner or an accident inflicted by or against a foreigner-herein Ethiopia-may exemplify' the doing of an act'. Thus, if two foreigners, in a short meeting herein Addis, concluded a contract, an Ethiopian court will have personal jurisdiction if a case which arose out of the contract is brought before it, even if the contract was intended to be performed elsewhere.

Similarly, an Ethiopian court will have personal jurisdiction over a foreign defendant on a suit that had been concluded outside of Ethiopia but was performed here.

To sum up, Ethiopian courts will have judicial jurisdiction when the defendant is an Ethiopian national or Ethiopian domiciliary. However, judicial jurisdiction may still exist even where the defendant is not an Ethiopian national or domiciliary if either the act which is the subject matter of the suit occurred in Ethiopia; or, although some of the acts occurred outside Ethiopian, the transaction has sufficient contact with Ethiopia, rendering it is reasonable for Ethiopia to hear a suit involving the transaction.

III. Consent of Parties

In cases whereby either of the above mentioned factors can not be established, courts are to secure the consent of the defendant so as to exercise jurisdiction over him. In other words, even though a party is not otherwise subject to the Ethiopian jurisdiction, he can consent to the assumption of such jurisdiction by the courts. In so doing, he undertakes an obligation to submit to the jurisdiction of the courts. Consent may be express or implied. It is said to be express if it is orally (verbally) made or written. The parties may make their consent part and parcel of the terms of the contract between the two or they may reduce it in writing after the conclusion of the main contract. For instance, two Yemeni

businesspersons may conclude a contract in Aden where it is to be performed right there i.e. in Yemen. However, they may, at the same time, agree to the effect that any dispute arising under the contract shall be submitted to the Ethiopian courts. The Ethiopian courts is thus to exercise jurisdiction on the basis of the express agreement of the parties. On the other hand, consent can be gathered, by implication, from the behaviour of the defendant. Suppose that a Kenyan national and domiciliary is sued in Ethiopia for breach of a contract made and performed therein Kenya. If he appears and starts defending himself without raising any objection on the grounds of judicial jurisdiction; he cannot, subsequently, repudiate his consent and challenge the jurisdiction of the court. Such an objection is, as a rule, deemed to have been waived if not raised at the earliest possible opportunity before proceeding with the trial/merits of the suit (See, Art 244(2) & (3) of the Cv Pr Cd)

2.2.1.2. Jurisdiction in Rem

To start with, the Latin term ‘in rem’ in the strict sense of the word means, ‘against the thing/property’; that is, not against the person-as is the case with the concept: ‘in Personam’. An ‘action in rem’ is, thus, one, essentially directed against property and the relief sought pertains to the property itself- without reference to the title of individual claims or specific person as such. . Besides, the plaintiff does not seek such an order as binding the person of the defendant although an individual may be named as a defendant in the proceeding.

Consequently, a judgement in rem is said to be a judgement declaratory of the status of some subject-matter, whether this is a person or a thing. In other words, a judgement in rem settles the destiny of the res (property) itself (or of some interest therein) not merely as between the parties themselves; but, as against all whom it might concern or, briefly put, with reference to ‘the entire world’; and, thus, binds all persons claiming an interest in the property in consistence with the judgement-even though pronounced in their absence

It thus follows that an ‘in rem’ jurisdiction refers to the power of the court to pass a valid judgement against the property (movable or immovable; tangible or intangible) of the parties and not as such against the person of the parties themselves. Moreover, such an action is established in the courts of the place where the thing i.e. the subject matter of the suit-is located. Consequently, it will only be the courts of the state wherein the property is situated that can, more realistically, exercise in rem jurisdiction. Put another way, the ‘situs of property’, has jurisdiction over the case whereby the relief is sought with respect to the property itself.

Activity

What do you think is the nature of a decree establishing or dissolving a marriage (i.e., is it a judgement in rem or in Personam? Explain.

2.2.2. Material /Subject-Matter Jurisdiction

In the process of determining the competent court to adjudicate a case, the question as to whether the Ethiopian courts (i.e., seen country wise) can see the case and enter a binding judgement on a particular defendant or his property (i.e., judicial jurisdiction) is settled or answered in the affirmative the next task is to figure out the level of competent court from among the judicial structure in the hierarchy of courts in the country. The legal provisions dealing with the spheres of ‘Material Jurisdiction’ are, thus, thereto settle issues of similar nature. Material jurisdiction-which is virtually synonymous and equated with the term-‘subject-matter jurisdiction’, hence, refers to the power of a particular court of a state to determine the type or kind of a dispute involved in a case.

In Ethiopia, for instance, during the past regimes where the form of the government was unitary-the issue of determining the material jurisdiction of a court was relatively simpler. The reason here is that-as there was a single, and, vertically structured judicial system, it was just a matter of identifying the competent court from the hierarchy on the basis of the type of the case and/or amount of money involved therein. Currently,

however, with the advent of the federal form of government, the task is somewhat complicated with a further need to make a distinction between the Federal judicial structure and the Regional/State arrangement of courts.

Specifically stated, there are basically three issues that need to be cleared from the outset. To begin with, it has to be primarily determined, though not usual, whether the case is not one falling outside the judicial power of ordinary courts. In other words, this concerns the drawing of a differentiation between cases that are meant to be dealt with by other tribunals or administrative institutions with delegated or quasi-judicial power. In the second place, a distinction has to be made horizontally between the Federal and Regional/States matters (jurisdiction). And, lastly, it has to be decided as to which level of court is competent, i.e., vertically from among a given structure to see a given law-suit. Pursuant to the pertinent legal rules governing the area, there are two broad criteria commonly employed to determine the material jurisdiction of courts in Ethiopia. These are: ‘Subject Matter’ jurisdiction and ‘Pecuniary’ jurisdiction.

2.2.2.1. Subject Matter Jurisdiction

The subject matter jurisdiction, which depends on the ‘type’ of the case, in turn, involves the making of, primarily, an identification of matters/cases falling within and outside the regular court structure, and the drawing of a further distinction between ‘Federal’ subject matter and ‘State’ subject matter.

I. Matters outside the Jurisdiction of Courts

As one branch of the government, courts are given the power to decide cases and settle disputes in accordance with the law. Nevertheless, such a judicial power does not make them competent to see all kinds of cases referred to them. In this regard, limitations are put to judicial power as courts are made to see cases so long as only they are justiciable ones (See, for instance, Art 37 of the FDRE Constitution). Justiciable matters, for this purpose, may broadly be defined as inclusive of all cases unless the law provides

otherwise.

Accordingly, in some instances, regular courts are not to forthrightly rush into adjudicating every law suits brought before them. Rather, primarily such a court has to, make sure that the case instituted therein is not one of the nature made to fall partly or wholly outside the jurisdiction of ordinary courts. This is basically meant to depict the fact that there are certain issues identified by law to be treated by other tribunals entrusted with delegated, quasi-judicial power-so as to decide on some conflicts related to administrative activities and functions of the government. Accordingly, when the power of adjudication of the case brought to the court is one, given (by law) to other agencies-outside the ordinary judicial structure- then such a court will not have material jurisdiction thereupon; and, hence, cannot render a validly enforceable decision.

In this regard, the prominent administrative tribunals established in Ethiopia include: the Tax Appeal Commission-sees cases related to tax complaints; the Civil Service Tribunal-entertains grievances concerning civil servants; and the Labour Relations Board-competent to deal with employee-employer (labour) disputes.

Accordingly, conflicts arising from the respective activities of these institutions will thus be within the primary jurisdiction of these tribunals. As a result, party may not directly file his case to a regular court from the outset-before exhausting all the available remedies in that system. Yet, an appeal is allowed to be taken to the regular court from the decision of these tribunals; particularly on issues of law. Moreover, some personal and family matters involving Muslims (such as issues of marriage; divorce; maintenance; succession, etc.) may also fall outside the jurisdiction of regular courts. Sharia Courts (though their jurisdiction is entirely consensual) are empowered, pursuant to Proc No 11188/99) to see such family matters. Accordingly, when and if both Muslim parties agree to get their case decided by Sharia Courts, and referred it thereto, the Court will pass a final decision which cannot be reviewed and hence falls outside the jurisdiction of the regular courts. In the same manner, disputes settled by arbitration or compromise are also outside the ambit of the regular courts. Certain matters of purely political or administrative nature are also considered to be non-justiciable and can not be entertained

by regular court.

II. Federal Vs Regional Subject-Matter Distinction

There are two conceivable ways of looking at the issue under consideration in order to determine the respective competence of the Federal and Regional courts. The first technique attempts to solve the problem on the basis of the power-sharing method of the Constitution itself. That is to say being in consonant with the theory of 'federalism', the FDRE Constitution, broadly defines the powers and functions of both the Federal and Regional governments. Accordingly, as the organization and structure of courts, more often than not, corresponds with the structure and organization of the state/government as a whole, the power-division between the Federal and Regional governments, simultaneously divides, or, at least, helps in fixing the specific powers of the courts of the two governments.

In this respect, the approach taken by the Constitution is listing down, exhaustively, the powers of the Federal Government; and, then, leaving out all the residual powers that are not expressly granted to the Federal Government-to the Regional Governments.

Thus, once the respective powers of the Federal and Regional governments are demarcated, the spheres, or, within the meaning of sub-Articles (1) & (2) of Art 80 of the FDRE Constitution, the 'matters' on which the respective Supreme Courts of the two governments has 'the final say' can, at least, crudely be identified.

Specifically stated, while, Art 80(1) of the Constitution provides that the Federal Supreme Court has the final say on Federal matters Art 80(2) of same, stipulates that Regional Supreme Courts shall have the final authority, and, hence, gives final decision on regional matters. Though the Constitution purports to lay a clear distinction between the 'Federal matters' and the 'Regional matters', being so broad, it is not, nonetheless, of much significance, in definitively specifying as to what constitutes Federal or Regional matters-so as to enable one in precisely determining the respective powers of the courts.

Hence, this requires resorting to another appropriate alternative way-out appropriate. In this regard, the pertinent choice is looking at the problem on the basis of the more specific subsidiary law: the Federal Courts Establishment Proclamation, Proc, No 25/1996. This legislation, which was adopted pursuant to the Federal Constitution itself, lists down, under its Art 5, the civil subject-matter jurisdiction of the Federal Courts. Moreover, in so listing, the proclamation employed three separate parameters so as to determine the material (subject-matter) jurisdiction of the Federal Courts on a given law-suit. These are: the nature and status of the law on which the case is based; the place where the case arose; and, the nature/type of the suit itself.

The first factor used by the Proclamation is looking at the law on the basis of which the case is instituted. That is, this approach categorises the type of the case on the ground of Federal laws vis-à-vis States' laws distinction. That is, if the case is based on the Federal Constitution, Federal laws, or, international agreements (treaties), then, it falls under the Federal Courts' subject-matter jurisdiction; and is treated as such. Here, it has to be made clear that 'Federal' laws are laws which are enacted by the Federal law-making organs i.e. (the Federal legislature namely the House of Peoples' Representatives and the Federal Government-executive agencies)-on matters that fall within the powers of the Federal Government. Likewise, international agreements-as they are adopted by the Federal legislative organ, (HPR), they, too, are treated as Federal laws. The other factor used by the Proclamation so as to determine the subject-matter jurisdiction of Federal Courts concerns the status of the parties themselves. In other words, if the parties to a suit are those specified or administered by the Federal laws, the power to entertain the case resides in the Federal Courts. To be more specific, if, for instance, either or both of the parties to a law-suit is a federal organ or official (employee); or, if it is between parties permanently residing in different Regional States; or, if one of the parties is a foreign national, then it shall be considered by the Federal Courts.(See, Art 5(1)-(4) of Proc No 25/96), Still another parameter relates to the 'place' where the case arose. In this regard, the two specified areas are Addis Ababa and Dirre-Dawa; that is, disputes arising in either of those places, would be within the competence of the Federal Courts-regardless

of the identity of the parties-as in the earlier case.

The final test considers the nature or type of the case itself. Accordingly, the cases exhaustively specified under this category are: suits involving matters of nationality, or, issues of business organizations registered or established by the Federal Government; or, those regarding negotiable instruments (such as, cheques, letter of credits, etc.), or, which relates to patent or copy rights, or, one based on insurance policy; and, an application for Habeas Corpus. (See, Art 5(5)-(10) of the Proc No 25/96) To sum up, therefore, the laws, parties, the place and type of the suit are general distinguishing factors that determine cases falling within the jurisdiction of the Federal Courts.

State laws, by the same token, are laws that are proclaimed by the legislative bodies of the Regional States-on those so-called 'residual powers' or remaining areas. Thus, a claim which is based on State law, would, needless to mention, be within the subject matter of the State, and under the jurisdiction of its courts. However, this may not necessarily be true all the time. This is because there seem to be conditions and instances whereby cases arising under State Laws be regarded as Federal subject matter. Consider the following disputes arising on the grounds of States laws:

- ✧ where the parties to the litigation are those listed under Art. 5(1)-(4) of Proc No 25/96;
- ✧ in Addis Ababa or Dire Dawa (See, Art 80 of the FDRE Constitution and Arts 11(1) (b) and 14(2) of Proc No 25/96).

Consequently, one may argue that State cases are cases that arise on the cases of State Law and that are not categorized under Federal cases.

What is more, a question may be raised as to how should Sub-Articles (1) and (2) of Art 3 of Proc 25/96 be understood-vis-à-vis Art 5(2) of same. Specifically Article 3(1) of the proclamation provides that if a case is based on federal laws, then it would fall under the federal subject matter and, hence, within the jurisdiction of federal courts. Art. 3(2) of same, stipulates that Federal courts shall have jurisdiction over cases that involve parties specified in Federal Laws. The logical question here would thus be, whether the 'Federal

Laws' (and the parties thereto) under Sub-Art 2 of Art 3 could be included under the 'Federal Laws' mentioned in Sub-Art 1 of Art 3? In this regard, as it can be observed, Art 5 enumerates the types of civil cases that fall under the jurisdiction of Federal Courts. Accordingly, one may come to the conclusion that Federal Courts will have jurisdiction not only when the case involves, Federal Laws but also when specified parties under article 5 are parties to the suit.

Therefore, according to Art 5(2) of the Proclamation, if the case involves parties who are permanent residents of different states, the case will be held under the jurisdiction of Federal Courts. So, the requirement here is, their place of residence, not necessarily the issue that they raise.

To sum up, we can say that there is no contradiction between articles 3(1) & 3(2) of the Federal Court Proclamation. This is because, while in articles 3(1) the base for jurisdiction is the issue of litigation, in articles 3(2), the base for jurisdiction is the identity of the parties, not the issue that they raise. Therefore, what we can conclude here is, Federal Courts will have subject matter jurisdiction over cases arising from Federal Laws as well as on issues (though based on states laws) between parties who have been specified in Federal Laws.

To summarize, material jurisdiction is one of the three basic requirements of jurisdiction and has two aspects. While the first is subject matter jurisdiction; the second is pecuniary jurisdiction. The subject matter aspect defines the type of the case as between Federal or State subject matters. Proclamation No 25/96 provides that Federal Courts have jurisdiction where cases involving a foreign national or where one of the parties to the suit is a permanent residents of different Regional States, or where one of the parties is a Federal Government organ or official.

In principle, State subject matter is a matter that arises on the basis of State Law. However, there are conditions where issues raised on the basis of State Law may be categorized under the jurisdiction of Federal Courts. In such a case, State Courts will

handle the Federal case through delegation. In states where the Federal High Court is not established, the States Supreme Courts are delegated to see Federal High Court cases while the States High Courts are delegated to see Federal First Instance cases.

Therefore, once a case is determined as a Federal or State subject matter, the next step will be the identification of the appropriate level of court say, for instance, from among the Federal, First Instance or High Courts. Alternatively, whether, one will be the State's First Instance or High Court. This query is to be determined on the grounds of the amount of controversy or the pecuniary amount involved in the case. The following sub-section will thus thoroughly discuss such a matter.

2.2.2.2. Jurisdictional Limits of Courts: Pecuniary Amount Vs Types of Cases

Material jurisdiction, as has been described earlier, refers to the power of a court to see the kind of controversy/dispute involved in a law-suit. The jurisdictional division, in this regard, is primarily meant to apportion the judicial business among the various levels of courts in the hierarchy-on the bases of the amount of money involved in the proceeding or the nature/complexity of the case. Actually, both the Civil Procedure Code and the Federal Courts Establishment Proclamation, Proc No 25/96, deal with the division of material jurisdiction among the three levels of courts.

While the rules that are provided under Proc No 25/96 determine the jurisdictional limits of the Federal Courts, the ones stipulated in the Civil Procedure Code establish the jurisdictional limits of the State Courts.

I. Pecuniary Amount: Federal Vs States' Courts Jurisdictional Limits

A. Federal Courts: General Vs Limited Jurisdiction

The civil jurisdiction of the Federal First Instance and High Court are treated, under its Arts 11 and 14 respectively. The two grounds the Proclamation employed to determine

the jurisdictional limit of the Federal Courts are: the amount of money and the type of the case.

Accordingly, with aspect to the amount of money, while civil cases which involve an amount not exceeding Birr 500,000.00, (five hundred thousand birr) are subject to the jurisdiction of Federal First Instance Courts those, which involve an amount in excess of Birr 500,000.00, (five hundred thousand birr) are entrusted to the jurisdiction of Federal High Courts. This, however, is without prejudice to the jurisdictional power exclusively given to the Federal High Court (See Articles 8 & 11 of Proc.No25/96). Here, therefore, the amount of money a case involves-which is to be gathered from the plaintiff's suit-determines where a case should be filed.

On the other hand, there are cases that cannot be valued in monetary terms; and, this is where comes the other ground comes i.e. the 'type' of the case-determining the jurisdictional limits of courts. Consequently, this factor does not, as such, take the amount of money involved in the case into account in determining the jurisdictional limits of the courts. Besides, cases on: nationality, the enforcement of foreign judgements, change of venue, and those regarding international law, thus fall under this category and are within the jurisdiction of the Federal High Court.

B. States Courts: Original Vs Appellate Jurisdiction

Though the rules of the Civil Procedure Code on material jurisdiction are objectively inconsistent with those of the proclamation, and, hence, considered to be inapplicable, the jurisdictional limits of States Courts are determined based on the provisions of Art 13 as follows:

- ✧ The Woreda courts will have first instance Jurisdiction over claims that involve up to 5,000 Birr for movable properties, and up to 10,000 Birr for immovable properties;
- ✧ State High Courts also handle cases that involve claims exceeding 5,000 Birr for movables and exceeding Birr 10,000 for immovable

properties.

However, State Supreme Courts do not have first instance or original jurisdiction. That is all cases in State Courts must start either in the Woreda Court or High Court.

C. Determination of Amount in Controversy

Basically, the amount of money a case involves is gathered from the statement of claim of the plaintiff. As a rule, the plaintiff is expected to specifically describe the monetary value or type of the case with a view to describing that the court has jurisdiction over the case. Art. 16(2) of the 1965 Civil Procedure Code provide that, in deciding whether it has pecuniary jurisdiction, the court shall have regard to the amount of claim stated in the statement of claim. (Arts. 226-228 of the Civil Procedure Code governs the amount to be stated in the statement of claim). Pursuant to Art 226 of the Civil Procedure Code, a plaintiff seeking for a recovery of money should indicate the precise amount in his statement of claim; or the estimated amount of the case.

Besides, if a plaintiff is seeking the recovery of a specific thing, he has to indicate the actual value of the thing in the statement of claim. The plaintiff is required to estimate the value of the thing he is claiming to identify the court that has material jurisdiction.

II. Type of Cases: Exclusive Jurisdiction

As described above, the jurisdictional limits of courts are determined either on the monetary value or the nature of the case. However, there are instances whereby jurisdiction is vested in a court irrespective those parameters on the basis of the sensitivity or complexity of cases.

Exclusive jurisdiction means that a jurisdiction given to the court irrespective of the pecuniary amount involved therein. According to Art 11 (2) of the Proclamation, the Federal High Court shall have exclusive First Instance Jurisdiction over issues related

with:

- Cases whose subject matter regarding private international law, or
- Nationality, or
- Application regarding the enforcements of foreign judgment, or
- Applications for change of venue, from one first instance court to another or to itself, in accordance with the law.

In other words, the Federal High Court has exclusive jurisdiction in all cases mentioned under Art 11(2) of Proclamation No 25/96.

2.2.3. Local Jurisdiction

So far, we have discussed the two basic elements of jurisdiction, i.e. judicial jurisdiction and material jurisdiction. In the process of determining the competent court that can adjudicate a case and render a binding decision, the identification of both the judicial jurisdiction and the level of court within the material jurisdiction of which the case falls does not conclusively resolve the issue all together; because, there still remains an indispensable point to be settled. Assume, for instance, it has been established that the Ethiopian Courts have judicial jurisdiction over the parties, and, consider further that the case is found to fall within the material jurisdiction of the Federal First Instance Court.

Now, therefore, noting the fact that there are First Instance Courts both in Addis Ababa and Dirre Dawa; and that there are several of them in each sub-cities of both main cities, identifying the specific Federal First Instance Court from among these will thus, be the task to be accomplished by the rules on 'Local Jurisdiction'.

Hence, the rules on Local Jurisdiction have to do with an area where a case shall be tried, or, in other words, take us to the specific court to which a law-suit is to be submitted; and, in effect allocate cases among the same level of courts (say, the Federal First Instance Courts) within a given court structure. Moreover, the rules on local jurisdiction are framed in such a way as to primarily enable one to refer the case to a particular court

convenient for the parties and their witnesses, particularly, the defendant. Incidentally, inherent to the nature of the process, the rules also accomplish another significant task of curbing inconveniences which may arise from certain purposely calculated ‘forum-shopping’ tendencies of some litigants.

2.2.3.1. The Basic Place of Local Jurisdiction

There are certain factors that determine the place where a law-suit shall be instituted. For the purposes of local jurisdiction, the most relevant place, what might also be called the ‘basic place’, is, in simple and pure terms, the place where local jurisdiction lies unless it is prohibited by law or a court sitting in another place is authorized to assume the jurisdiction. This being the general rule of the provisions of the Civil Procedure Code that sets forth the guiding principles in this respect, Art 19(1) of the Code stipulates that the basic place of local jurisdiction lies with “...the court of the place where the defendant actually resides or carries on business or personally works for gain.” Nevertheless, in defining the limitation of the stipulation, it has further been noted that the rule is non-applicable to cases for which a different place of local jurisdiction is adopted by subsequent provisions of the Code or by any other law. This being the case, however, in precisely determining the principal place of local jurisdiction, those terms purposely employed by the article need detailed discussion.

A. “...actually resides...”

In the process of establishing local jurisdiction of a defendant with several residents, the Indian Civil Procedure Code, from which our Civil Procedure Code is said to have been substantially adopted, is not as such concerned with the legal residence of the defendant; but, it merely requires his voluntary and actual residence. In such circumstances, thus, the fact of having, for instance, ancestral home at a place and paying an occasional visit to it, may not suffice to endow it the status of an ‘actual and voluntary’ residence.

In a similar fashion, in our law, the issue of residence is treated very flexibly.

Accordingly, every individual is considered to have a residence-even if it has to finally be the place-where he is at a specific moment. However, as a matter of fact, a person may happen to be at different places at different times; wherein there might arise a need to determine as to which of these places should be taken for the purpose and within the meaning of Art 19. One way of looking at the point would be observing the length of time one might stay at a place. And, if it is observed that one spends almost equal amount of time at all the places; then, all of them may reasonably be considered as the residence of the person concerned. Though such interpretation of the issue may justifiably be considered sound, in reality, however, the matter does not commonly happen that way.

Cognizant of those instances, our Civil Code has envisioned resolving the matter by characterizing one of those places as a ‘principal’ residence, and considering all the remaining as ‘secondary’ ones. In the classification, thus, it might be considered that the primary residence is one in which someone stays more normally or more frequently, or for the longest period. Accordingly, a person’s primary residence would, thus, be the place where he actually resides for purposes of local jurisdiction-which probably is the place where it is convenient for one to defend a suit brought against him. So, on the bases of such interpretation, if, for instance, one has a house in Addis Ababa, where he spends most of his time, but, regularly goes to Adama to visit his parents every weekend, the former would, thus, be deemed, within the meaning of Art 19, the place where he resides.

B. “...carries on business...”

In spite of the fact in most cases that a person may run, his business at the same place where he resides, it may also happen that both of his matters could be located at different places. That is to say, one may reside within the jurisdiction of a State’s First Instance Court, and owns a business in another-whereby one would be subjected to both jurisdictions. The test of “...carrying on business...”, is determined neither on the bases of the continuity or intermittence of the business, nor on the physical appearance or effort of the individual concerned. Rather, it is the fact of owning interest in the business and enjoying profits therefrom, which matters most. This means, more specifically, having a

share in the profit or the loss and a voice (some control) over the business is an important factor. This would practically be apparent where, for instance, a person, while living in a place, conducts business in a different place through an agent. And, in such a case, he is subject to suits at the place where the agent runs the business on his behalf. (See Art.58 (b) of C.P.C)

In a case involving joint defendants, suits may be instituted in the court of any of the places where any of the defendants resides or carries on business or personally works for gain.

The other issue which could be raised in relation to local jurisdiction is a situation where the defendant does not reside, or, carry on business or work for gain in Ethiopia. In such instances, Art 20(1) provides that the suit may be instituted in any court in Ethiopia where the plaintiff prefers; unless, of course, the suit relates to an immovable property of the defendant; in which case it is the court of the place where the property is located.

In a similar fashion to the rules regarding the local jurisdiction of suits against individuals, the Civil Procedure Code states the basic place of local jurisdiction of suits against legal persons. Accordingly, it provides that suits against a business organization are to be instituted at the place where the head office or the branch office against which the suit is made is situated.

The Ethiopian Civil Code uses the term ‘body corporate’ to refer to all kinds of legal persons including associations and business organizations.

Nevertheless, the ‘legal persons’, mentioned under Art 22(2) are somewhat different from those described under Art 22(1). Their difference lies in the fact that, while the body corporate or legal persons, which are stated under Art 22(1), are basically established to make profits; the ones under Art 22(2) are formed for non-profit purposes. So, when a suit is instituted against such legal persons, it may be brought at the place where the legal person was formed or where at the place where the law requires it to be registered.

However, the place of formation and registration would usually be one and the same.

Article 21 of the Code applies a different approach in defining local jurisdiction for cases instituted against the Government. Unlike the previous one, here, regard is given to the plaintiff's convenience. The plaintiff's residence or work place is taken as a base for determining local jurisdiction. The rationale behind such stipulation could supposedly be the fact that the Government, as a defendant, can suitably defend itself everywhere in the country.

2.2.3.2. Suits Regarding Contracts

Article 24 provides four mutually exclusive rules on suits regarding contracts. Generally, there are four types of contracts, which are categorized for the purpose of determining local jurisdiction. These are:

- Contracts generally,
- Contracts of carriage,
- Contracts of Insurance,
- Contracts of pledge, deposit, or bailment.

☆ Suits Regarding Contracts in General

Pursuant to Art 24(1), suits arising from contracts, in general, may be instituted at the place where the contract was made or executed unless some other place is mentioned in the contract-in the discretion of the plaintiff. This indicates that the place of local jurisdiction of contracts of any type (other than the remaining three namely, contracts of carriage, insurance, pledge, deposit or bailment) would, thus, be the place where the contract was made or was to be executed.

In addition, the plaintiff could also institute his case in a place where the defendant resides, works for gain or carries on business, according to Art 19 of the Code. However, if the contracting parties have agreed in the contract that, law-suits arising therefrom will

be brought in another place, then the plaintiff has to institute the action in such specified place.

✧ **Suits regarding contracts of carriage**

Possibly, there are two types of suits regarding contracts of carriage. These are *carriage by sea* and *carriage by air*. In each case, suits will be instituted in accordance with their respective laws. Accordingly, while suits regarding contracts of carriage by sea are instituted based on the provisions of the Maritime Code, the Commercial Code will determine suits regarding contracts of carriage by air.

According to Art.208 of the Maritime Code, suits involving contracts of carriage by sea are to be instituted at the court sitting at the port of arrival of the good whereas, suits concerning contracts of carriage by air are to be instituted according to Art 647 of the Commercial Code.

✧ **Suits regarding Contract of Insurance**

Suits regarding a contract of insurance may be instituted in the court of the place where the head office of the insurance company is situated or registered or where the object insured is situated. (See to Art. 24(3) of the Civil Procedure Code).

✧ **Suits Regarding Pledge, Deposit or Bailment**

Suits concerning pledges, deposits and bailment are instituted in the court of the place where the property is located.

✧ **Suits Involving Immovable Property**

An issue of local jurisdiction whereby suit related with immovable property is treated under Art 25 of the Civil Procedure Code. The Article provides that suits involving

immovable property must be instituted at the place where the immovable property exists. This, on the other hand, indicates that, once it is proved that the issue is an issue of immovable property, the provisions of all other articles are inapplicable.

Hence, the following suits should only be instituted in the court of the place where the immovable property is situated.

- Suits for the recovery of immovable property with or without rent or mense profits;
- Suits for partition;
- Suits for determination of any right to or interest in immovable property; and
- Suits for compensation for wrong to immovable property.

The reasons for the rule are:

- a) Such property cannot be transferred from place to place; it will be difficult for a court other than the court where the property is situated to view if it finds it necessary.
- b) In cases where dispute is on boundary matters, that may necessitate measurement of the boundary, or essential document about the property are found in the place where the property exists.
- c) Where the case is defendant upon the testimony of witnesses, such witnesses probably reside at the place where the immovable is situated. Therefore, such suits must be instituted at the situs and not elsewhere.

Suits regarding pledge, deposit or bailment may be instituted in the court of the place where the property is situated.

✧ **Suits for Wrong Done to Persons or Movable Property**

Article 27 of the Civil Procedure Code specifically talks about suits for wrong done to persons or movable property. It is the question of local jurisdiction in case of extra

contractual liability. According to Art 27(1), such suits may be instituted in the court of the place where the wrong was done or in accordance with the provisions of art 19.

☆ **Suits Regarding Successions**

According to Art 23 of the Cv. Pr. Co., suits regarding succession, which is being liquidated, shall be instituted in the court of the place where the succession was opened.

☆ **Suits upon Several Causes of Action**

Where a suit is based upon several causes of action arising in different places, the suit may be instituted in any court that has jurisdiction over one of the causes of action. However, it is important to make note of the fact that the rule on joinder of causes of action is subject to the provision of Article 25. That is, the plaintiff is not allowed to join suits involving immovable property where the property is situated within the local jurisdiction of different court.

2.2.3.3. Change of Venue (Transfer of Suit) and Removal of Judges

So far, we have discussed rules on the determination of the basic place of local jurisdiction in various circumstances. However, there could be conditions whereby the place stated here above, as a place of local jurisdictions, may not be convenient for either or all of the litigating parties for certain reasonable grounds. The Civil Procedure Code has provided, under its Art 31, way outs to such problem. In this regard, there are two closely related legal practices: transfer of suits, or, change of forum, and removal of judges. Let us first see transfer of suits and then look at removal of judges.

As it has already been stated in the preceding section that a case, as a general rule, should be instituted in a court that has jurisdiction over it. Accordingly, a case which is filed in a court that lacks jurisdiction shall be rejected; however, the rule on 'transfer of a suit' from one court to another thus makes a modification to it as the case is to be transferred

from a court that has jurisdiction over it to a court that does not possess one. In the ordinary course of the law, the transfer is to be ordered where there exists a problem with the proceedings in the court where the case is originally instituted. In accordance with Art 31 of the Code, there are three grounds that justify such transfer.

The first factor is when there is an allegation that a fair and impartial trial cannot be made in the court where the suit was instituted. As it has been elucidated earlier, impartiality of a court is one of the fundamental procedural principles; and, hence, a court considering a case must be impartial in the process. Reasonably, therefore, where the impartiality of a court is in question, that would warrant the concerned party to request for the transfer of the case. The other reason mentioned by the article relates to a situation where a party contends that the court in which the case is pending cannot properly handle the proceeding since the case involves some question of law of unusual difficulty. That is to say the case is very problematic and it may give rise to some complicated issues of law which cannot be resolved by the court treating it. Still, the third rationale which makes possible the transfer of a suit from one court to the other is where the court seized of the case is found to be inconvenient to the party so demanding.

Generally speaking, the rules on local jurisdiction are primarily designed to achieve handiness for the parties. Consequently, transfer of suits from a court to another is basically meant for the suitability of the parties; particularly, the defendant. At this juncture, it has to be underscored that the court wherein the suit is filed may have local jurisdiction over the case; yet, it is also likely that the plaintiff might have trickily chosen it with a view to making it painstakingly intractable and unreasonably expensive for the defendant to defend himself properly. In practice such inconvenient court is commonly known as 'forum non-convenient'-inconvenient forum. A court which is holding a case is considered to be 'forum non-convenient' if it is found to be insurmountable for, particularly, the defendant to gather relevant evidences so as to sufficiently defend himself; and, exposes him to incur unreasonably high costs to pursue the case and to bring his witnesses to the court.

In the final analyses, however, it has to be dearly noted that since the rule on the transfer of suits is an exception to the general principle, narrow interpretation should be adopted when the need arises. This means, a transfer should not haphazardly be permitted for the sole fact that a party preferred to have his case tried somewhere else. If it is broadly interpreted, a party may raise every bit of conceivable reasons thereby making judicial proceedings intolerably tedious and too costly. Finally, though not articulated under Art 31, there is also another ground which could cause the transfer of suits. This could be implied from Art 91 of the Code. In view of this article, when a pleading submitted to a court is amended and this makes the case to fall under the jurisdiction of a higher court, the court that was holding the case shall transfer it to the higher competent court.

On the other hand, a judge may withdraw or be removed from a bench essentially to achieve impartiality of the court. Unlike the transfer of suits, reasons that may lead to the removal or withdrawal of judges from a bench are listed down by Proc No 25/96. Pursuant to Art 27 of the Proclamation, if the judge:

- has some relations to a party or an advocate; or,
- was a tutor or legal representative of a party; or,
- has some prior connection with the case; or,
- has a pending case somewhere else with a party or advocate thereof; he shall withdraw as soon as he aware of those issues. Moreover, the reasons mentioned there are not exhaustive and any other sufficient reasons may be added to the list.

2.2.3.4. Conflicts of Jurisdiction: Priority, Pendency and Consolidation of Cases

Overview

There is a possibility for conflicts of jurisdiction to emerge between courts, for instance, the Federal and State Courts; or, within a single judicial structure between courts of the Federal or States' judicial structure-where a court alleges that the matter falls within its jurisdiction while the other contends that it has the competence over the same case. The power to determine on such conflict of jurisdiction is conferred upon the Federal

Supreme Court.

The same rule applies in instances where two or more courts dismiss a case on the ground that it does not fall within their respective jurisdiction.

As a rule, a suit arising from a single cause of action may not be instituted and/or tried by more than one court at a time. This is basically meant to avoid the possibility of inconsistent judgements that may be rendered on a single case; thereby, making its enforceability practically impossible.

However, this may sometimes happen where, for instance, parties might have filed separate suits that actually involve the same claim. Moreover, it may arise due to the fact that there could be a possibility for two or more courts to assume jurisdiction over the same cause of action. It would thus be such instances that could give rise to the problem of conflict of jurisdiction. With a view to resolving problems resulting from such circumstances, the Civil Procedure Code treats the matter through the rules of priority, pendency and consolidation.

A. Priority

The question of priority arises when a plaintiff institutes two or more suits on the same cause of action in different courts.

Let us assume that A is claiming certain amount of Birr from a defendant on a contract that was made in Addis Ababa and to be performed in BahirDar. In this case, depending on the amount of claim, the plaintiff has the possibility to institute his case both in Addis Ababa and BahirDar. If the amount does not exceed 500,000.00 Birr, the Federal First Instance Court in Addis Ababa or the High Court of the Amhara Regional Government in BahirDar will have jurisdiction to see the suit. But, if it exceeds 500,000.00 Birr, the High Court of Federal High Court or the Supreme Court of the State will have the jurisdiction over the case.

In such a situation, if the plaintiff institutes a case in both courts, it will result in the harassment of the defendant to defend his case in both areas.

Moreover; the two courts could give inconsistent judgments. This means, if the case is to be seen in the two courts, the court in Addis Ababa may decide in favour of the plaintiff and the court in BahirDar may decide against him. In such instances, it will be difficult to execute the inconsistent judgments. To avoid this problem, the rule of priority is provided under Article 7 of the civil Procedure Code.

Article 7 Priority

- 1) *One and the same civil suit may not be instituted in more than one civil court.*
- 2) *Where a suit may be instituted in anyone of several courts, the court in which the statement of claim was first filed should have jurisdiction and the suit shall be pending in such court.*

As it can readily be observed from the provisions of the Article, the rule of priority takes into account the time of submission of the case to a court of law-whereby, the court in which the suit is filed first will have priority to consider the case; and, consequently, the second file in the other court shall thus be dismissed. So, in the above example, if the same suit has been instituted against the same defendant on the same issue, first in Addis Ababa and then in BahirDar, then, pursuant to Art 7(1), the suit that was instituted first i.e. the one in Addis Ababa, shall have priority over the one instituted in BahirDar; and, the latter will thus be dismissed.

B. Pendency

On the other hand, Article 8 covers the problem of pendency. As a matter of rule, no court shall try any suit in which the matter in issue is also directly and substantially in

issue in a previously instituted suit between the same parties in another court in Ethiopia having jurisdiction. Thus, if, while a suit is pending in a court, another suit is also filed in another court over the same cause, that would give rise to the problem of pendency, and serve as one of the grounds for preliminary objection as per Art 244(2) of the Code, whereby a party may oppose the second suit. To avoid this problem, the Civil Procedure Code has provided a rule on pendency. When the court is aware that another similar case is already instituted in another court between the same parties, it will dismiss the suit or it may direct the parties to apply for consolidation. Remember, however, that Ethiopian court is not prevented from entertaining a case that is already pending in a foreign court. (See, Art. 7 of the Cv. Pr. Cd)

C. Consolidation of Suits

The last issue in this section-consolidation of suits-is a situation where the claims of both parties are separate while the matter in issue in one suit is closely related to a suit pending in another court. Such instance may happen, for instance, in a suit for recovery of a property by one claiming a right to possession and a suit by the possessor claiming that the plaintiff in the other action has committed a trespass to the same property. In both cases, the issue is the same: who is entitled to the property? In such a situation, either party can make an application to a higher court that the cases be consolidated for trial under Art 11-whereby the higher court will direct one of the subordinate courts to try the case. Consolidation is thus a procedure that is applied when two or more suits pending in different courts or the same court and between the same parties give rise to similar issues and are to be decided in different courts. In other words, where two or more suits which involve the same parties and similar issues in different courts or where there is a question of pendency, then, both suits will be consolidated under the procedure of consolidation.

Summary

We can say that in the hasty of Ethiopian legal system, there was not giving the required attention to develop comprehensive civil procedure law. Even when the legal system of Ethiopia has begun to modernize during the regime of Emperor Hailesilassie, there was no procedural law at all. However, the need for having comprehensive civil procedure law was recognized following the practical problems that had been faced on our courts during the regime of Hailesilassie

The existing civil procedure code of Ethiopia has big inconsistencies with the supreme law of the land i.e. Federal Constitution. According to the FDRE constitution, there are two court structures established at federal and state level. In each court structure there are Supreme, High & First Instance Courts. Currently all States have established woreda (first instance) Courts, High Courts and Supreme Court. Besides, some states have establish additional court structures; namely, the Social Courts and City Courts.

To sum up, there are two means by which we can prove the existence of judicial jurisdiction. These are known as jurisdiction in Personam and jurisdiction in rem. The former is jurisdiction to bind the person of the defendant; that is, to order him to pay the plaintiff a sum of money, to do or refrain from doing an act. It exists in Ethiopia if either the:

1. Defendant is an Ethiopian national or domiciliary;
2. Act which is the subject matter of the suit occurred in Ethiopia; or
3. Defendant has consented (expressly or impliedly) to the exercise of jurisdiction by the Ethiopian court.

Judicial jurisdiction in rem is jurisdiction to grant relief with respect to a certain property itself. It exists only in the courts of the place where the property is situated.

➤ **Review Questions**

1. Define what jurisdiction of courts is.
2. Explain the elements of jurisdiction and point out the differences that you observe among them.
3. Analyse the types of problems faced in determining jurisdiction.
4. What are the basic criteria one needs to ascertain before instituting a suit in a court of law?
5. Discuss the two types of subject matter jurisdictions
6. Explain the way outs for problems that may arise from situations whereby the same suit is instituted between same parties in different courts, possessing all the requirements of jurisdiction?

CHAPTER THREE

PARTIES TO AND DIMENSION OF SUITS

Introduction

This unit is about the parties to and dimension of civil suits. It provides you with the discussion of how persons can be considered as parties to a suit and on how many issues they can make subject to the litigation between them.

In a civil suit, one party initiates the proceeding against another if they are not in a position to resolve their disputes by the mechanisms at their disposal. Civil suits mostly involve two parties on both sides over a single cause. There is a possibility that more than two parties engage in a suit and that more than one cause of action may be subject to litigation. The unit deals with the parties to a civil suit and causes of action that can be litigated between or among parties to a suit. The section on the Requirements to be Parties to a Civil Suit, deals with conditions on becoming parties to civil suits. It identifies requirements that enable a party to sue or be sued.

It enables you to apply these requirements to cases appearing before a court. The section party plaintiff and Party Defendant discusses parties appearing on either side of litigation. The section on Representation in Civil Suits considers the type of representations applicable to civil cases. It helps you to decide on whether or not representation made is appropriate. You will see the number of parties and how many causes of action can be joined in a single suit in the section on Joinder of Parties. It enables you to control the scope of litigation. The section on Intervention explains how intervention is allowed and conditions for intervention. It enables you to decide on request for intervention. The section on the Third Party Practice is devoted to mechanisms of bringing into a suit of a third party. It enables you to determine the request for such mechanism by the defendant. The last section is on the concept of Change of Parties, which explains the possibility of replacement of original party by others.

3.1. Parties to a Civil Suit: General Requirements

The parties to a civil suit which is being considered by a court that is exercising its first instance jurisdiction are known as plaintiff and defendant. Moreover, parties to a suit considered by appellate court using its appellate jurisdiction are called appellant and respondent. Plaintiff is a party who makes an allegation and initiates proceedings in a court of law; whereas, defendant is a person subject to a claim, i.e., a party against whom a claim is filed.

There is a requirement that applies to a party plaintiff and party defendant as well as to parties that are brought into a pending suit as intervener, third party defendant, etc. In the first place, all parties participating in a civil suit should have capacity.

Article 33(1) of the Civil Procedure Code, reads:

“Any person capable under the law may be a party to a suit”.

Capacity is the power or ability to perform juridical act. Being a party to a suit is one of the juridical acts. Hence, capacity to sue or be sued refers to an individual’s ability to represent his interest in a law- suit without the assistance of another. This rule reflects rules concerning certain categories of persons who are deemed to lack the personal qualifications necessary to litigate. Hence, incapable persons cannot be parties to a suit, and, thus, they cannot sue or be sued in their own names (see Article 33(1)).

The rule with respect to capacity to be a party to a civil suit is derived from the rule on capacity to perform juridical acts in general. Every person is presumed to have capacity to perform all juridical acts unless provided otherwise by law. This is the rule provided under Article 192 of the Civil Code. Incapacity is divided into two. One is based on physio-psychological condition, which is referred to as general sources of incapacity under article 193 of the Civil Code. Those who lack capacity because of their physical or psychological condition include minors, insane and infirm persons and persons subject to

criminal sentence and deprived of some of their civil rights. Another type of incapacity is due to the status or special function of a person. Those who lack capacity because of this, include, for instance, agents. Unless the law declares persons as incapable, every person is presumed to possess capacity to perform juridical acts. Thus, every person can be a party to a civil suit unless he falls in either of the categories of incapable persons.

Incapable persons cannot sue or be sued in their own names. For example, a person below 18 years of age is incapable and may not sue or be sued in his own name, since he is considered to be not mature enough to handle his case and pursue his right. Their legal representatives shall represent them. If one of the parties is found to be an incapable person, the court can, by its own motion or by the application of another party, suspend the litigation until a proper representation is made in accordance with the provision of the relevant law.

In this regard, Article 34(2) of the Civil Procedure Code states:

Where a person under disability is not represented by his legal representative, the proceedings shall be stayed until a legal representative is appointed in accordance with the relevant provisions of the Civil Code.

Incapacity is one of the grounds of preliminary objection specified under Article 244(2) of the Civil Procedure Code. A person under incapacity does not qualify to act in the proceedings. His organs of protection represent him. Capacity applies to all parties taking part in a suit, plaintiff, defendant, intervener, etc.

3.2. Party Plaintiff and Party Defendant

3.2.1. Party Plaintiff

3.2.1.1. Vested Interest

Plaintiff is a party who brings action. To be plaintiff, the first requirement is to possess capacity to perform juridical acts in general. The other requirement is that a person must be the real party interest with regard to the particular claim or allegation he brings to a court of law against another party. It means that the name plaintiff should possess the right required to be enforced under the governing substantive law. Only someone with legal title to the right affected by the defendant's conduct could sue at law. The requirement is not that the person is the one who will ultimately benefit from the successful decision made in his favor. It must be a person who has an immediate stake at a time of filing a case. At a time of filing a case, he should show that he has a vested interest in the subject matter of a suit.

Article 33(2), reads as follows:

No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.

The reason why the law attaches this requirement to party plaintiff is because a civil suit concerns individual interest/ right. It is up to a concerned party only to either litigate or abandon a claim. Hence, no other person could decide to bring action for a real party with interest in a suit. Another reason may also be to avoid defendant facing two suits over a single cause of action. The person who has an original interest and another person pursuing his right could bring two suits at different times and this exposes defendant to two suits.

The determination of whether a person appearing as plaintiff may have a vested interest depends on cases appearing before a court. One cannot provide an exhaustive list of cases containing a vested interest here. However, in all cases plaintiffs are expected to indicate a cause of action in their statement of claim as provided under Articles 222 and 231 of the Civil Procedure Code. It is from what is stated in plaintiff's claims that whether or not a plaintiff has a vested interest in a case can be decided. As an example, a contract of assignment gives rise to issues of a person with a vested interest. Consider the following activity to make this clear.

A question of vested interest is also raised in suits based on loss of support as a result of the death of a person. For example, if a car belonging to “B” knocks down “A”, persons who are entitled to claim compensation from “B” are listed under Article 2095 of the Civil Code. The claim for compensation is limited to some relatives of a deceased person. Hence, a claim for compensation made by any person other than those specifically named makes such person to lack a vested interest in a subject matter of a suit, which is loss of support here.

3.2.1.2. Effects of Lack of Vested Interest

What will happen if a plaintiff who does not have a vested interest/ makes a suit?

If an action is brought by a plaintiff who does not have a vested interest, an opposite party should raise this as an objection on the grounds that a party bringing action is unqualified to act in the proceedings. Absence of a vested interest in a suit is a ground of preliminary objection under Article 244(2) of the Civil Procedure Code. On the basis of the objection of the other party, the court may order the substitution or addition of a party as a plaintiff.

The court makes the substitution or addition if a suit is made by such plaintiff through a genuine mistake as per the rule under Article (40) 1 of the Civil Procedure Code. What if a suit is made by a plaintiff deliberately to benefit from a claim in which he knows that he does not have a vested interest? The Civil Procedure Code does not provide any rule in this respect. The remedy in such a case is to dismiss his case and impose penalty on him for creating inconvenience to defendant, and he could also face criminal liability. This is to be inferred from a rule of Art 481 of the Civil Procedure Code and Art 452 of the Penal Code-which can extend to a suit made deliberately to obtain benefit without having a vested interest.

The substitution or addition can also be made by a court's own initiative. Without relying on the objection of a defendant, the court may order the substitution or addition of party plaintiff by looking at a claim made by wrong plaintiff.

If the defendant fails to raise objection on the ground of lack of vested interest and a decision is made for a party without vested interest, the defendant cannot object to a second suit made by a real party with interest. What he or she should do in such case is to satisfy the claim of the real party with a vested interest and bring a suit against the other party on the basis of the provisions of the law of unlawful enrichment to recover what he has already paid for him.

3.3 Party Defendant: Allegations

To be considered as a defendant, there must be an allegation made against a person.

Article 33(3) says:

“No person may be a defendant unless the plaintiff alleges some claim against him”.

A person sued must be the one responsible for the wrongs committed and claims arising therefrom. Thus, a plaintiff should state the claim he is demanding against defendant. This is because courts are there to settle real disputes and, hence, if no claim is made against the defendant, he cannot be made a defendant in a suit. That is why article 224 of the Civil Procedure Code says that the statement of claim shall state specific relief that the plaintiff claims.

The claim made against plaintiff can be in the form of payment of money or a request that a defendant should do or not do something, etc. The suit must show relations between parties and wrongs done to plaintiff and claims made by him.

3.4. Representation in Civil Suits: Types and Requirements

Representative suit is a suit in which others represent real parties to a suit. Representation is allowed in civil cases and the reason why it is allowed is to be found in Article 65 of the Civil Procedure Code. According to this Article, parties to a civil case need not appear in person to undertake activities in a court of law unless a court orders appearance in person. This means representation is a rule in most civil cases, and appearance in person is an exception. Appearance in person is limited to some cases where a court believes it is necessary for the proper determination of the suit.

The types of representation can be categorized generally into two. One type involves a situation in which the representatives act for the interest of the real parties to a suit. They act on behalf of real parties and do not have their interest at stake in a suit. This category includes the representations specified under Articles 34, 57-64. The second one relates to a situation where the representatives represent the interest of others as well their own interest. They serve two interests here. This category applies to the representation under Article 38 of the Civil Procedure Code.

3.4.1. Legal Representation: Types and Requirements

The representation under Article 34 is known as legal representation. A legal representative represents persons under incapacity. Since incapable persons cannot be parties to civil suits, their legal representatives should represent them. Their legal representatives are their organs of protection. The reason why representation is made here is merely the incapacity of persons concerned to be parties to a suit.

3.4.2. Representative Class Suits: Requirements

Another kind of representation is provided under Article 38 of the Civil Procedure Code, which reads as follows.

(1) Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-art (1) may apply to the court to be made a party to such suit.

This kind of representation is known as representative class suit. The reason why this representation is allowed is because a suit involves several persons and that it is inconvenient for all concerned to be parties. It is inconvenient for such a group of persons to proceed with a case individually.

The requirements for this representation to apply are that the parties should have the same interest in a suit; that they agree to be represented; and that the number of parties is more than two since the provision demands the number of parties to be several.

What does the phrase “same interest” mean here?

No definition is given to it. It is interpreted to mean that all the members of a group to be represented have a common interest, that all have a common grievance, and that the relief they demand is beneficial to them all. By the same interest it does not mean that the claim of parties has a single cause or that it arises from the same transaction only. By the same interest, it means that as plaintiffs, they must demand the same relief against the defendant for the same wrong committed against all of them; as defendants they must be invoking the same defense against the plaintiff on the same cause of action. Thus, same interest means some thing more than same cause of action (same transaction) under Article 35, which we will discuss in this unit.

An example where a representative class suit is allowed is where a local administrative body decides to give a residential area for investor and persons living there are to be

transferred to another place. If persons claim that a decision is unlawful and challenges the decision itself, they are considered to have the same interest.

Another requirement under Article 38 is that the parties should consent to be represented. A person not willing to be represented can bring his own separate suit. After representation is agreed upon by all concerned, any person on whose behalf a suit is filed or defended may apply to a court to be made a party. It means that he can intervene. We will discuss intervention later in this unit.

Once proper representation is made and the court accepts it, the parties represented are bound by a decision of a court. They are considered to have litigated through their representatives and, hence, they cannot bring a suit or be sued after a decision is made. The decision is *res judicata* against them.

3.4.3. Agents and Pleaders

Still another kind of representation is provided under Article 57 of the Civil Procedure Code. According to this Article, a legal representative, agent or pleader of a person may make any appearance, application or act in or to any court. The requirement is that such representatives are able to answer all the material questions relating to a suit.

A legal representative, according to Article 57, is a person authorized by operation of law to act on behalf of a party to a suit. This refers, for example, to representation to be made by organ of protection of an incapable person. Representation by agent is one where a person is authorized to act on behalf of a party to a suit. Family members of a person (spouse, brother sister, son, father, or grandfather or mother can be agents if they appear in a suit without receiving remuneration or reward from a person to be represented. This is provided under Article 58(a).

If the government is a party to a civil suit, the agent for the government is a person authorized to act for the government with respect to judicial proceedings (See Article 59).

However, if the government is to act as a defendant for its public servant, the government pleader must appear and present to the court his authority to answer the statement of defense (see Article 60(1)). Article 61 and 62 of The Civil Procedure Code provided agents for members of the Armed Forces and for prisoners. Any person can serve as their agent if they produce a written authorization to that effect.

A person can also be represented by his pleader/advocate. A pleader is a person who holds an advocate's license, and no person may appear in this capacity unless he holds such a license. A pleader has to produce his license together with a letter of authorization from a person who authorized him. The mere fact that a person has an advocate's license does not entitle him to represent any person unless he is authorized in writing to act on behalf of such person. (See, Art 63 of the Cv. Pr. C)

3.5. Joinder of Parties and Causes of Action

Here, the concern is multiplication of parties and causes of action. The issue here is how two or more plaintiffs bring action against a single or more defendants, and how many causes of actions can be made subject to a single suit.

3.5.1. Joinder of Parties

3.5.1.1. Purpose and Significance

Joining or joinder of parties multiplies the number of parties and widens the scope of litigation. This gives rise to conflicting views about it, one in favor and another against it. Joining parties and causes of action makes parties to pool their resources together and enables them to share costs of pursuing a suit. It also relieves a burden of court in a sense that a court resolves cases involving many persons or causes of action by a single suit. Rather than treating related cases separately, the court considers a case of many persons or a case involving many causes of action in one file. Further, it avoids the possibility of making conflicting decisions. If suits that can be joined are tried separately, there is a

chance of giving contradictory decision over essentially identical suits. For these and other reasons, the joining of parties is to be favored and, hence, a claim for joinder should be granted.

On the other hand, joinder is disfavored since it expands the scope of litigation and consequently causes delay of proceedings. In addition, it results in embarrassment of the defendant and makes him not to be able to properly defend himself. For these two reasons, joinder should not be granted.

Thus, one interest is in favor and the other is against joinder of parties and causes of action. The rule under Article 221 of the Civil Procedure Code tries to strike a balance between these two conflicting interests toward joinder. If joinder of causes of actions in a statement of claim results in a delay of proceedings or embarrassment of defendant, the court may order separate suits. In all other cases, joinder is, therefore, allowed so long as it does not bring about delay of proceedings or embarrassment to a defendant.

3.5.1.2.. Forms and Types of Joinder of Parties

Joinder of parties appears in different forms. Two or more plaintiffs (which is known as joinder of plaintiffs) bring action against a single defendant; or a single plaintiff brings action against two or more defendants (which is joinder of defendants); or two or more plaintiffs file a suit against two or more defendants (which is joinder of plaintiffs and joinder of defendants). There are two types of joinder of parties. One is permissive joinder of parties. Here the motion of parties makes the joinder. The parties entitled to join can choose between joint actions or separate suits. They are not obliged to bring a joint action or defence. This joinder is provided under Articles 35, and 36(1,2,3,4,5,6) of the Civil Procedure Code.

The first permissive joinder is provided under Article 35 of the Civil Procedure Code, which reads as follows:

All persons in whom any right to relief in respect of or arising from the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may be joined in one action as plaintiffs where, if such persons brought separate actions any common question of law or fact would arise.

This joinder applies to plaintiffs. It deals with how two or more plaintiffs bring a single suit. Plaintiffs could bring a joint action if two requirements are met. The first requirement is that the right to relief must arise from the same transaction whether jointly, severally or in the alternative, and the second is that there is a common question of law or fact that would arise if such persons made separate suits. The first requirement, which demands the existence of same transaction or series of transactions, indicates that the claims of persons to join must be related in the sense that they should arise from the same source. Here, by the 'same transaction' it does not mean that the parties to join should have the same interest unlike the requirement under Article 38. The parties may claim different remedies. What matters here is the source of claim.

The phrase 'series of transaction' means a series of acts that cause damage to some person. For instance, a car hit electric poll which caused fire, which in turn, resulted in the burning of houses. The owners of the houses burnt can bring a joint action against the owner of a car since the owner is responsible for hitting the electric poll that caused the burning of houses.

Common question of law or fact means that all the parties share at least one common litigation interest in the form of an issue of law or fact. It refers to those questions of law or fact arising out of the claims in a particular case before the court.

The second form of permissive joinder relates to the joinder of defendants, which is found under Art 36 of the Civil Procedure Code. Joinder of defendants refers to a situation where two or more persons are jointly sued by a single or more plaintiffs. There is one requirement that applies to the joinder of defendants, unlike that of joinder of

plaintiffs. There must be a common question of law or fact, if separate suits were filed against the defendants. There is no requirement that the reason why the persons sued together arises from the same transaction. However, it is less likely that there will be a common question of law or fact if the suits arise from separate transactions. The question is that the two suits must involve the same issues of law or of fact.

Article 36(2) makes an exception to Article 36(1) in the sense that there is no requirement of common question of law or fact. It applies where a cause of action emanates from a contract, including parties to a negotiable instrument. For example, if “A” issues a cheque to “B”. “B” endorses it to “C”, who also endorses it to “D”. If “D” goes to a bank and presents a cheque to the bank and that the bank refused to pay the money on the ground that “A” does not have a sufficient amount of money in the Bank, (informed him that there is no money that covers the amount stated on the cheque) “D” can join all “A”, “B”, and “C”, together since they are jointly and severally liable as provided under Article 36(2).

Article 36(5) provides an instance whereby the plaintiff does not know who caused the damage to him-from among several persons-and who is to pay him. In such instance, he can join them. One of the defendants is liable to him, but he does not know who is to be ultimately held liable.

Article 36(5) is also applicable to cases where the plaintiff does not know who caused damage to him. For instance, if three cars collided and caused a body injury to a person, he could join all the owners of a car for compensation if he is not sure as to who caused damage to him.

3.5.1.3. Effect of Misjoinder and Non-Joinder of Parties

What will happen if there is a mis joinder or non-joinder of parties?

Suppose that the plaintiffs that could have joined are not joined? For example, there were ten persons that could join in a suit, but only eight of them brought an action. What measure can be taken by a court in such a case?

Suppose that plaintiffs who are not entitled to join, joined and brought a joint action or that defendants who should not be joined are joined together. What measure can be taken by a court?

This is an issue to be decided on the basis of Article 39 of the Civil Procedure Code, which reads:

- 1. No suit shall be defeated by reason only of the misjoinder and nonjoinder of parties and the court may in every case deal with the matter in dispute so far as regards the rights and interests of the parties actually before it.*
- 2. Any objection on the ground of misjoinder or nonjoinder of parties shall be raised at the earliest possible opportunity and any objection not so raised shall be deemed to have been waived.*

Article 39 deals basically with the effects of mis-joinder or non-joinder of parties relating to a permissive type of joinder. If the joinder is a permissive type, the mis-joinder or non-joinder does not result in the defeat of a suit. It means that a court does not dismiss a case for the reason that there is mis-joinder or non-joinder of parties. If a party is not joined or is improperly joined, the appropriate measure is not to dismiss a case but to drop a party improperly joined and demand substitution, and proceed with the parties before a court. If there is non-joinder, the court shall proceed with the case irrespective of such non-joinder. If there is improper joinder of defendants, the plaintiff should be given the option to drop the defendants improperly joined or to proceed with separate suits.

Thus, in as far as permissive joinder is concerned, there is no requirement that all the parties whose right to relief arise from the same transaction should join as plaintiffs or that the plaintiff should join all defendants as to whom his right to relief is alleged to exist where there would be common questions of law or fact.

Another type of joinder of parties is a mandatory one, which is usually known as joinder of indispensable parties. In mandatory joinder, as its name itself implies, parties are under obligation to bring a joint action or defense. There is no choice given to parties other than a joint action or defense.

Mandatory joinder applies to both plaintiff and defendant. Except for Article 36(3) and (4), which applies to joinder of defendants, the Civil Procedure Code does not have an explicit rule on mandatory joinder of plaintiff. This may be because mandatory joinder is a question of substantive law than procedural rules. It is the rules of substantive law that require that a right should not be exercised otherwise than by or against all persons concerned. Mandatory joinder applies to certain categories of persons. The first category consists of persons required by substantive law to exercise their rights jointly at a time. For example, joint owners, joint creditors or debtors, husband and wife over common property, etc. In all of these cases, the interest and claim belongs to all of them and not to one of them only. All of them are concerned. That is why they are considered to be indispensable party. The absence of one will necessarily affect one's right. The other category comprises of those who can be affected by a decision given in their absence. If a decision affects persons who are not made a party to a suit, such persons are considered to be important for making a decision and should be made a party from the very beginning. This includes, for example, persons who are entitled to oppose the judgment under Article 358.

What will be the consequence if there is non-joinder of an indispensable party? Does it lead to failure of a suit? Does the rule under Article 39 apply in this case?

If the mandatory joinder is related to a defendant, there is no problem in case there is a non-joinder of indispensable party defendant. In case of non-joinder of defendant, the case is not dismissed. The court shall order the joinder of such party, by issuing summon on him. He cannot refuse to be a named defendant. Thus, in case of non-joinder of a party defendant, the rule under Article 39 40(2) applies and the court makes him a party.

However, when it comes to the non-joinder of a party plaintiff there is a problem. There is no clear provision dealing with a non-joinder of a party plaintiff and its effect. Article 40(2) can be considered to have an application to the non-joinder of an indispensable party plaintiff. This is because it says that a court may order joinder of a party as plaintiff or defendant if it believes that such party is necessary for the proper determination of a case. On the basis of this Article, if there is a non-joinder of a party plaintiff, the court may, by its own motion or upon application of one party, add him a party to a suit subject to his consent. It means that if there is non-joinder of a party plaintiff, the court should first secure his consent before adding him as a party plaintiff as per the rule of Article 40(2), which says: *"No person shall be added as plaintiff without his consent"*. This is because it is the right of a person to sue and, thus, one should not be compelled to appear as a party plaintiff. It is up to a party to file a suit or abandon it, since rights of civil matters can be abandoned.

What will happen if a plaintiff who is an indispensable party does not consent to be a party to a particular suit? Can the rule of Article 39 be of help here? Is the court entitled to proceed with the case in the absence of such party? Mind you that it is an indispensable party that is not joined and that the rule under article 39 is not applicable to such cases because parties are supposed to be joined as a matter of obligation.

There are two options available to a court if an indispensable party plaintiff is not willing to join a suit as a named party plaintiff. One is to proceed with the case regardless of the absence of such party, since it is unfair to deny the parties who brought action the remedies they are seeking from a court for the sole reason that a party refuses to become a party. Hence, rather than dismissing a case, the court shall make such party a defendant. This makes the court to proceed with the case, protects the parties who present a case before a court, and allow him to appeal, since he is appearing as a party defendant. As a defendant, he is merely on a record of court and does not have any responsibility to defend unlike a proper named defendant. Suppose that "A" and "B" are joint owners. "C" caused damage to their property. "B" alone brought action. Upon the objection of "C" on

the ground that there is non-joinder of an indispensable party plaintiff “A” or by its own motion; the court may require the addition of “A”. If “A” appears before a court and refuses to be added as a party plaintiff, the court may simply make him defendant. .

Another option available is to dismiss a case if a party plaintiff refuses to be added as a party plaintiff. This is because it is an indispensable party that is not joined and hence non-joinder in such instance should not produce similar effect as in the case of non-joinder of permissive party plaintiff. Thus, according to this option, the parties are not under obligation to exercise their rights jointly, and if one does not join or refuses to be joined, the case shall be dismissed.

3.5.2. Joinder of Causes of Action: Definition

Joinder can also be related to causes of action and not parties as such. Below we will consider the joinder of causes of action. The Civil Procedure Code failed to define what a cause of action is. The provision of Article 231 says that a statement of claim shall be rejected if it does not indicate a cause of action. The existence of a cause of action in the pleading is to be examined by the judge since it is a legal requirement.

Actually the term “cause of action” is too ambiguous to provide a meaningful guide. It can be equated with the right of action or legal right forwarded by facts relied upon by the plaintiff. It means that it is related to the nature of the injury alleged to have been suffered. Here, the focus is on the harm against a person than the acts that caused the harm; such as, breach of contract, body injury, etc. It can, on the other hand, be defined by the facts or occurrences that give rise to a claim for relief without particular reference to the substantive law to be applied, or the nature of relief sought.

Parties are allowed to join as many causes of action as possible so long as joining of causes does not bring about delay of proceeding or embarrassment to a defendant. Parties are allowed to join even unrelated claims. For instance, a plaintiff could join cases over contract with tort and bring a single action against a defendant. The same applies to

parties entitled to join. This is the rule recognized under Article 217 of the Civil Procedure Code. See Article 217 below.

(1) Unless otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly.

(2) Any plaintiff having causes of action in which they are jointly interested against the same defendant or the same defendants jointly, may unite such causes of action in the same suit.

The exception to this rule is provided under Article 218, which provides that claims for the recovery of immovable property may not be joined with other kinds of claims except those involving such property.

Another exception is provided under Article 219. A claim by or against an executor, administrator, or heir in his representative capacity cannot be joined with a claim by or against him in his personal capacity. With the exceptions of these cases, a single plaintiff or plaintiffs with a joint interest may unite any number of claims against the same defendant or the same defendants jointly, so far as such joinder does not result in delay of considering a case or an embarrassment to defendant. (See, Art 221 of Cv. Pr. C)

3. 6. Interventions: Conditions and Types

Intervention is a mechanism by which a party is brought into a pending case to present a claim or defense. It is different from joinder of parties. Joinder is an issue that comes at the beginning of a suit, while intervention is a question that comes into picture after a suit undergoes some steps.

There are two types of intervention. One is made by an application of a third party himself, which is provided under Article 41 of the Civil Procedure Code. It is a party himself who approaches a court to intervene in a suit.

Another type of intervention is as of obligation. This is provided under Article 42. The Public Prosecutor is under obligation to intervene in some civil cases. We will consider these two types of intervention.

According to Article 41, a party who wants to intervene shall file a written application in which he is expected to state reasons justifying his intervention. The application shall be filed at any time before a decision is given. To intervene, a party must be interested in suit between other parties. It is this requirement that justifies a person's intervention in a suit. Hence, the phrase "interested in a suit between other parties" under Article 41(1) is crucial in determining intervention. This phrase has to be interpreted in a way that maintains the purposes of civil procedure. This is because intervention widens the dimension of a dispute and causes delay of proceedings. The court should also take into account the need to settle a case involving many persons by a single decision. Intervention makes a court to rule on cases involving many persons concerned by a single decision rather than entertaining separate suits on essentially one cause of action.

The phrase "interested in a suit between other parties" means a party's interest that is to be affected. It determines whether an intervener gains or loses by the direct legal operation of the judgment to be rendered in a suit between other parties. Unless a party gains or loses something, he may not intervene. Hence, intervention is allowed if it is requested by an indispensable party.

For example, if "A" makes a suit against "B", "C" could intervene if the subject matter of a suit is related to the property under a joint ownership of "C" and "A". Intervention may also be allowed to persons likely to be affected by a decision given in their absence. For example, "A" has a car that is subject to insurance by company "X". If the car causes damage to C, and C filed a suit against "A", the company may intervene; because it is supposed to indemnify "A", if a decision is made against him. Another example, if a suit is made by "A" against "B", who is an agent of "C", "C" may intervene, since an agent will be indemnified by principal for damages he causes to third party in carrying out his

function as stipulated in agency contract where the action relates to the matter that has been done by the agent on behalf of the principal.

If an application for intervention is granted, the proceedings are suspended until the original parties have been served with a copy of the statement of a party who is allowed to intervene. The effect intervention produces is that a decision given on a case also binds the intervener.

What remedy is available to a party whose application for intervention is rejected?

Article 41 does not provide a remedy in case a third party's application for intervention is rejected. In one case decided by the Federal Supreme Court, the Court admitted the appeal of a party whose application for intervention was dismissed by the High Court, and ordered the High Court to allow the intervention requested by him. The Supreme Court said that his non-intervention causes another suit to be filed by him after a decision is made by the High Court. It stressed that this would cause multiplication of lawsuits and would amount to wasting the precious time of a court on a single cause of action.

Another type of intervention is made by the Public Prosecutor. This kind of intervention places the Public Prosecutor under obligation to intervene in some civil suits. The Public Prosecutor is under obligation to intervene, if parties concerned in such types of suit have initiated a suit. Substantive law prescribes all of the cases demanding the intervention of the Public Prosecutor. Cases related to civil status, incapacity, marriage and bankruptcy are cases that give rise to the intervention of the Public Prosecutor under Article 42.

The draft Civil Procedure Code made a modification to Article 42 of the existing Civil Procedure Code. The draft says that the public prosecutor shall intervene in cases where his intervention is prescribed by law. Rather than listing cases in which the Public Prosecutor intervenes, it makes the intervention subject to rules of substantive law.

3.7. Third-Party Practice [Impleader]: Purposes, Requirements and Consequences

Third party practice, which is also known as impleader, is the procedural device enabling the defendant in a lawsuit to bring into a suit an additional party who may be liable for all or part of the original plaintiff's claim against the defendant. It is a mechanism by which a defendant brings into a suit a third party on the ground that such third party covers or shares the whole or part of claim of plaintiff. It is initiated by a defendant. For example, "A" brings action against "B" only. "B" could demand the intervention of "C" who is not sued by "A", if there is a relation between "B" and "C".

The purpose of third party practice is to settle claims involving the same cause of action/transaction in a single suit. It aims at avoiding separate suits over the same cause of action/transaction. Thus, a defendant who has a claim against a third party does not need to bring a subsequent suit against him. The defendant's claim against third party can be seen in the same suit where the plaintiff's claim against the defendant is being considered. However, the defendant is not under obligation to bring a third party into a suit. It is entirely optional and that the defendant may claim against the third party in a separate suit. That is why Article 43(1) says "may".

There are certain requirements for the application of the third party practice under Article 43. Article 43 reads as follows.

(1) Where a defendant claims to be entitled to contribution or indemnity from any person not a party to the suit, he may in his statement of defense show cause why the third party is liable to make contribution or indemnity and the extent of such liability and apply to the court for an order that such person be made a party to the suit

(2) Where the application is allowed, the third party shall be served with a copy of the statement of claim and defense and, upon being summoned to appear on such day as the court shall fix, shall be deemed to be in the same position as a defendant.

(3) The claim as between the defendant and the third party shall be tried in such manner as the court shall direct.

(4) The provisions of this Article shall apply by analogy where a defendant claims to be entitled to contribution or indemnity from any other defendant in the suit provided that nothing in this sub-article shall prejudice the plaintiff against any defendant in the suit.

The first requirement is that the defendant shall demand a court for the third party practice in his statement of defense. In his application, the defendant is supposed to indicate the reasons why he demands the intervention of the third party. The reasons provided by defendant must indicate that he is entitled to contribution or indemnity from such third party. It is either of these two relationships only that could cause the intervention of third party.

Another requirement is that the defendant should mention the extent of contribution or indemnity to be made or covered by such third party. It means that the defendant shall state the amount of indemnity or contribution of the third party.

If these requirements are fulfilled, the court issues summon on the third party together with a copy of the statement of claim and the statement of defense and require him to appear at a fixed date. On such a day, the third party should appear and raise any objection he may make to his intervention demanded by the defendant. If he raises objection, the court considers and decides on it. If the court believes that the objection made by the third party is not well found, it orders his intervention and this makes him third party defendant.

Once he is ordered to be a party, he proceeds like a defendant in a normal action. He can make a counter claim or set-off against the original defendant (called third party plaintiff. If the third party fails to appear on the date he is supposed to appear, he is deemed to have admitted the existence of contribution or indemnity between him and the defendant.

His mere absence amounts to admission of such relation. This is a rule provided under article 76.

The application for third party practice is subject to a time limit. The defendant should raise it as soon as he appears before a court to make a defense against a claim of the plaintiff. It means that he should file an application during the first hearing of a suit. If he fails to demand the third party practice at this time, he is precluded from doing so at a later stage of the proceedings.

What does indemnity or contribution mean?

The substantive law determines indemnity or contribution to which a defendant is entitled. The defendant must establish that he is entitled to indemnity or contribution from the third party at a time he seeks to join the third party. Contribution refers to the situation where more than one person has committed the same wrong against the plaintiff or has the same obligation to him. For example, "A" and "B" are joint owners of a car which caused damage to "C". If "C" sued "B" only, "B" can demand the intervention of "A". Since they have a joint interest, "B" is entitled to contribution from "A".

Joint creditors, joint debtors, joint owners, etc. share liability and, hence, there is a contribution relationship between/among them. Indemnity refers to the situation whereby a party who is to pay a claim is entitled to recover the amount to be paid from another party or wholly. Contract of insurance against liability, agency and principal relation, are some of the main relations that give rise to indemnity. For example, assume that "A" insured his car for liability caused by his car. If "C" is injured by a car and brings action against the owner of the car, the owner can demand the intervention of the insurance company. The company is responsible for indemnifying the liability arising from the damage caused by the car.

Indemnity involves the transfer of whole or part of a defendant's liability to a third party.

The following two activities provide you with some instances that will help you to decide whether or not the request for the third party practice is allowed.

It is to be noted that even if the requirements for the third party practice are fulfilled, it does not follow that the third party practice is allowed since it may unduly complicate the original suit or result in delaying its resolution.

3. 8. Change of Parties

In civil suits, there is a possibility that others can replace the original parties upon death of one of them. This is not the case with criminal suits. If an accused dies in criminal suit, the proceedings shall automatically come to an end. Criminal suits cannot be transferred to the heirs or members of the family of an accused. Thus, upon the death of an accused, the Public Prosecutor shall close the file he made against the accused. However, in civil cases death of one of the parties does not automatically cause the termination of a suit. There is a possibility that others can replace the deceased party and the suit continues. This is possible if the right to sue survives. Article 48(1) reads as follows.

The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives

Whether or not the right to sue survives depends on the provisions of substantive law. Unless the subject of a suit is related to a personal obligation of the deceased person, a suit is said to have survived a person's death. For example; "X" brought a suit against "Y" to claim compensation for the material damage caused by his act. While a case is pending, if "A" dies, his heirs may claim compensation and proceed with the case already filed by "X". The mere fact of the death of "X" does not terminate the suit which was pending between him and "Y". The heirs of "X" can replace "X" and pursue the suit against "Y", particularly, if the damage is one to property.

There is no change of parties if the court concludes the hearing of a case and adjourns the case to make a decision even if one of the parties dies as provided under Article 53 of the

Civil Procedure Code. This means that if one of the parties dies after the hearing of the case is concluded and what remains is giving a decision. In such case, the court is not prohibited from making a decision. This is because the only thing that remains after the conclusion of hearing of cases is to pass decision.

According to the draft Civil Procedure Code, the change of parties may take place if one of the parties to a pending suit assigns the subject matter of the suit to another person. The court orders the change of parties if it accepts the application of the assignee. The draft civil procedure also says that when a court concludes the consideration of a case and adjourns it for making a judgment, there is no change of parties if one of them dies. It does not matter whether or not the right to sue survives in that case. This is because the hearing of a suit is finalized and what remains is making of a decision only.

CHAPTER FOUR

PLEADINGS AND PRE-TRIAL PROCEEDINGS

Introduction

This unit deals with issues to do with how parties to a suit are supposed to reduce their claims, defenses, petitions, applications, etc. and bring them to the attention of a court. Without pleadings, courts are not in a position to see cases and decide on them.

The first section deals with defining pleadings. It tries to give a meaning to pleadings in a brief manner. This will enable you to understand what is meant by pleadings. In the second section, you will find the title Sufficiency of Pleadings. It lays down certain requirements to be met by pleadings in order for them to be accepted by both the registrar and judge. It puts you in a better position to identify these requirements and make you take appropriate measures on insufficient pleadings. It also enables you to prepare proper pleadings. The topic on “Types of Pleadings” is found in the third section. It explains some common types of pleadings. It enables you to distinguish between different types of pleading from another. The fourth section is on Failure to Plead and Their Consequences. It deals with items to be incorporated in pleadings and the effects of failure to include them in the pleadings. It will help you to ascertain the content of pleadings submitted to a court. Understanding Alternative and Subsequent Pleadings is the fifth section. It addresses issues related to the possible ways of further pleading and alternative pleadings. It enables you to control the pleading stages and issues pleaded by parties, and decide on what to be framed as issues by a court. The last section is on Amendment of Pleadings. It deals with how to make an adjustment to pleadings already filed to a court of law. It is intended to help you to make a decision on an instance in which amendment is permitted.

4.1. Pleadings

4. 1. 1. Definition and Purposes

The proceedings in a court of law are set in motion when a court accepts the pleadings filed by a plaintiff and orders the defendant to appear and defend. Generally defined, Pleadings mean all formally written statements filed to a court of law by parties to a suit with respect to their respective claims and/or defenses.

The Ethiopian Civil Procedure Code does not define pleadings in a direct way. However, it contains, under Article 80(1) formally written statements that constitute them, such as statement of claim, statement of defense, memorandum of claim, appeal, etc; and provides that these documents must be the ones that initiate proceedings in a court of law and make replies thereto. Thus, any document that does not set in motion proceedings in a court of law or that does not make a reply thereto does not amount to pleadings. In order to be considered as pleadings, a document filed to a court must be one that originated proceedings in a court. That means, those that do not make a response thereto are not pleadings.

For example, an application filed by a party to demand a copy of decision rendered by a court does not amount to pleading. This is because it does not set in motion proceedings in a court of law; nor does it create litigation between parties. A document is said to originate proceedings in a court of law if it is made with a view to getting enforcement of right or claim. Statement of claim and memorandum of appeal are some examples of pleadings that originate proceedings in a court of law; and statement of defense is one that makes a reply to a statement of claim.

Art 80(1) describes pleadings as follows:

Pleadings shall mean a statement of claim, statement of defense, counter claim, memorandum of appeal, application, or petition, and any other document originating proceedings or filed in reply thereto.

This definition by way of listing what falls in the category of pleadings is not an exhaustive one. So long as it is related to the subject matter of a suit, any formally written statement submitted to a court is considered to be pleadings.

According to Article 80(1), there is, therefore, no limit as regards the types of formally written statements that are considered to be pleadings. This, however, does not mean that any written document submitted to a court amounts to pleadings. For example, documentary evidences produced by parties are not considered to be pleadings. Pleadings are different from evidences.

What do you think are the purposes of pleadings?

Pleadings serve various purposes. The following are the main ones.

- A: They provide the defendant with notice of the suit and enable him to prepare his defenses accordingly. This is because a copy of the statement of claim filed by the plaintiff will be served to the defendant together with summons.
- B: They provide a summary of the claims and defenses of parties to a court, which enables a court to frame the appropriate and relevant issues that need decision. The court looks into the content of both the statement of claim and statement of defense; and, then, frame appropriate issues that need to be resolved by the court at the trial of the case.
- C: They fix the issues to be decided, and in a way, limit the scope of litigation between parties and determine the evidences to be used by the parties. The court cannot create issues of its own and then pass decision. It is based mainly on pleadings of parties that the court tries to frame issues. The main source for the framing of issues is the pleadings submitted to a court by parties, as indicated under Article 248 of the Civil Procedure Code.

D: They guide the parties and the court in the conduct of cases. A litigant cannot prepare for trial unless he has been informed adequately of the opponent's contentions. There is no way that a court can control a suit unless it knows the nature of the parties' allegations.

E: They try to expedite litigation. This is particularly realized when the rules on them are employed properly by parties and the court. Hence, all the rules on pleadings shall be used to achieve this purpose. Note also that the substantive rights of parties should also be taken into account when there is an improper pleading. We will discuss this issue in the section on amendment of pleadings.

4.1.2 General Pleading Rules: Requirements and Effects of Non-Compliance

There are certain requirements that pleadings should fulfill in order that a court admits them. The requirements relate to their preparation, format, and content. They can be divided into technical and legal ones.

Technical requirements relate mainly to the preparation and format of pleadings. The registrar of a court examines these requirements. We will discuss later in the unit the measure to be taken by the registrar if one of these requirements is not fulfilled. The technical requirements are provided under Articles 80(2), 222, 223, 234, 327-330, etc.

The technical requirements include the following. The first is that they shall be handwritten in ink, printed, or typewritten on the prescribed paper. See Article 80(2) below.

Every pleading shall be written in ink, printed or typewritten on the prescribed paper and shall contain and contain only a statement in a concise form of the material facts on which the party relies for his claim or defense and shall be in a form as near as may be to the appropriate Form in the First Schedule to this Code.

Pleadings can be written by using ink or can be type written or printed by a computer.

The second requirement is that they shall be prepared in accordance with the form prescribed by the Civil Procedure Code. The forms of pleadings are found at the back of the Civil Procedure Code. The Civil Procedure Code contains sample forms for different types of pleadings, depending on the types of suits. You can see some of the sample forms of pleadings in the Second Schedule found at the end of the Civil Procedure Code.

The third requirement is that they shall be made as concise as possible and contain a statement of material facts on which a party relies for his claim or defense. When they are prepared inline with the forms given by the Civil Procedure Code, they become definitely concise. By a concise statement of material facts is it mean that they shall state what is demanded in clear, precise and plain language. This is because a party is claiming his right or is putting forward his defense and this amounts to a legal writing which is different from ordinary writing of things. Secondly, it is because pleadings are read by a court as they stand, and a party is not allowed to add claims or defenses at a later stage. From this requirement one can understand that pleadings shall not contain irrelevant issues to the subject matter of a suit.

For example, a party claiming breach of contract resulting in damage should not include in his pleading his life or occupation history or his contribution to his country. He should rather briefly state the object of the contract, the obligation to be performed by a party, the time the contract was supposed to be performed, and the relief demanded by him as a result of the breach of the contract.

By a concise statement of material facts, it is mean that legal provisions and arguments shall not be incorporated in pleadings. This is because the purpose of pleadings is to furnish the court and the party with information as regards the facts of a case. Hence, it is the business of a court to look for the relevant provisions of the law applying to facts stated by parties. A concise statement, also means that the parties should not include issues of evidences in pleadings. Facts as regards evidences are to be raised at a separate stage, which is the trial. Hence, at a pleading stage a party should not include facts on proof in his pleading. A pleading stage is different from a litigation stage.

The fourth requirement is that they shall be verified. See Article 92(1) below.

Unless otherwise expressly provided by law, every pleading shall be verified at the foot by the party or by one of the parties pleading or by someone other than the pleader, directly acquainted with the facts of the case.

The verification is made by signature or mark as the case may be. By verification it is meant that facts alleged in the pleadings are true and correct. If the facts are found out to be false allegations, the party is held responsible. Alleging false statements is a crime punishable pursuant to Article 452 of the Criminal Code. Verification can be made by a party himself or by anybody else as can be seen from the sub-articles under Article 92. The Civil Procedure Code provides the model form for verification. It has to appear in the following form.

I, -----, hereby declare that the facts stated in this claim/defense are true to the best of my knowledge and belief.

Date----- (Signature and description of the person verifying the pleading).

The fifth condition is that they shall be signed by the party or person authorized to verify the pleading. See Article 93 below.

“Every pleading shall be signed by the party or his pleader, if any, or where a party is for good cause unable to sign, by any other person duly authorized by him to sign the same or to sue or defend on his behalf.”

The sixth requirement is that annexes must accompany some pleadings. Annexes as provided under Articles 223 and 234 shall accompany, for instance, a statement of claim and statement of defense. The same is true for petitions and applications filed for special proceedings that are to be accompanied by affidavit. The registrar checks whether or not all the above requirements are met. If it is prepared in accordance with these requirements it will be easy for the registrar to look at the pleading and determine its technical sufficiency.

What measure can the registrar take if one of these requirements is not complied with?

The measures taken by the register are found under different provisions of the Civil Procedure Code. For instance, the registrar can reject a statement of claim as provided under Article 229.

The statement of claim shall be rejected by the registrar where:

- a) it is not in the form provided for by Article 222;*
- b) it is not accompanied by the annexes provided for by Article 223; or,*
- c) it is not verified in the manner provided for by Article 92.*

This Article does not indicate what the registrar should do if a statement of claim is not signed.

If the statement of claim has not fulfilled the technical requirement, it can be rejected. The same applies to memorandum of appeal. If it has not fulfilled the requirements that are checked by the registrar, it can be rejected. Similarly, if pleadings presented at special proceedings are not, for example, accompanied by affidavit, the register shall reject them. What will be the effect/consequence of rejection of pleadings by the registrar?

Rejection by the registrar does not prohibit a party from bringing a fresh pleading. The rejection by the registrar means that there is an error in the technical requirements of pleadings, and if the party corrects the defects, he can submit fresh pleading on the same cause of action. See Article 232 below.

(1) Where a statement of claim is rejected, the registrar shall:

- (a) in cases of rejection under Article 229, return the statement of claim and annexes to the plaintiff and give him the reason for such rejection: Provided that, where the plaintiff is dissatisfied with the reason given for the rejection, he may apply within five days to the court for a revision of the registrar's decision; in cases of rejection under Article 231, refund the plaintiff with the prescribed portion of the court fee paid on filling the statement of*

claim and enter a note of the rejection in the register of civil suits.

(b) The rejection of a statement of claim under Article 229 or 231 shall not of its own force preclude the plaintiff from filing a new statement of claim with respect to the same cause of action.

The registrar shall provide reasons for which he rejected pleadings. A party unsatisfied by such reasons can apply to the court (judge) to review the decision of the registrar. The application shall be filed within five days after the registrar made a decision.

If all the technical requirements are fulfilled, the registrar shall hand the pleadings over to a judge. The judge examines the pleadings to determine whether or not legal requirements are complied with. We will discuss below the activities to be done by the registrar, once he has made sure that the technical requirements are fulfilled, and the legal requirements checked by the judge on the types of pleadings.

4.1.3. Major Types of Pleadings

4.1.3.1. Statement of Claim: Requirements and Contents

Statement of claim is a pleading submitted to a court by plaintiff. It is also known as a complaint. The technical requirements we discussed earlier are applicable to a statement of claim. In addition to these requirements, a statement of claim shall contain certain items that are listed under Article 222 of the Civil Procedure Code.

(1) Every statement of claim shall contain:

- (a) the name and place of court in which the action is brought;*
- (b) the title of the action;*
- (c) the name, description, place of residence and address for service of the plaintiff and defendant;*
- (d) where the plaintiff or defendant is a person under disability, a statement to this effect;*

- (e) where the plaintiff is suing in representative capacity, a statement showing the capacity in which he is suing;*
- (f) the facts constituting the cause of action, and when and where it arose;*
- (g) the facts showing that the court has jurisdiction;*
- (h) the facts showing that the defendant is or claims to be interested in the subject-matter and is liable to be called upon to answer the claim;*
- (i) where appropriate, a statement of the value of the subject matter of the action*

(2) In suits by or against the Government, instead of inserting the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name of the administrative authority concerned.

By looking at these items, one can divide the parts of the statement of claim into four. The first is caption. In the caption, the plaintiff must state the name of the court in which the suit is filed, the title of the suit, and the names of the parties including their description and address. If the plaintiff is under disability, this shall be stated; if the plaintiff is bringing action in a representative capacity, this shall also be stated. It means that the capacity in which the plaintiff is suing shall be indicated. For instance, if he is an agent or advocate, this shall be mentioned. If a person files it as an agent or advocate, the relevant documents shall be produced by such person to show that they are authorized to act on behalf of the plaintiff.

The mentioning of title of suit and address of the parties determine, among others, whether or not the court has jurisdiction.

The second part of the statement of claim is the statement disclosing a cause of action. The statement of claim shall state the facts constituting a cause of action and when and where it arose. The presence of statements showing cause of action is considered to be

the legal requirement to be met by the statement of claim, as provided under Article 231 of the Civil Procedure Code. See Article 231 below.

(1) The court shall reject any statement of claim submitted under Article 230 where:

(a) it does not disclose any cause of action; or

(b) the suit appears from the particulars in the statement of claim to be outside the jurisdiction of the court.

(2) A claim for recovery shall be rejected where the plaintiff fails to produce the securities required by Article 1403 of the Civil Code.

(3) On rejecting a statement of claim under sub-article (1), the court shall record a reasoned order to that effect.

Whether or not statements showing cause of action are properly stated by the plaintiff depend on statement of claims filed to a court. Thus, the court should examine the contents of the statement of claim filed to it. It is not necessary to consider evidences in order to determine whether or not the statement of claim discloses a cause of action.

The third part of the statement of claim is the jurisdiction. Once the court has established that a statement of claim disclosed a sufficient and lawful cause of action, it then examines whether or not it has a jurisdiction over a case. The plaintiff must allege facts showing that the court has jurisdiction as provided under Article 231. The fact that a court has jurisdiction is to be dependent on the content of the statement of claim, particularly on the cause of action stated by the plaintiff. A party shall state the value of the subject matter of a suit. If, however, it cannot be stated in monetary terms, he shall state the nature of the suit. By looking at the cause of action, value of the subject matter of a suit or the type of a suit, a court can determine that it has jurisdiction. The amount of money stated in the statement of claims is to be confirmed on the basis of the rules under Article 224-226 of the Civil Procedure Code.

If the statement of claim is submitted to a court that lacks jurisdiction, it shall be rejected as we discussed before. But note that judicial and local jurisdiction can be waived and

thus, the court shall not reject the statement of claim without considering how the defendant reacts to it. For example, if the statement of claim discloses the address of the defendant that resides outside the local limits of a court, the court should not dismiss a case without taking into account the reaction of the defendant.

What will be the effect if a statement of claim that does not contain facts showing a cause of action or jurisdiction? Cause of action and jurisdictional issues are legal requirements checked by the judge. If the statements included in the statement of claim do not disclose them, it shall be rejected under Article 231. The effect of rejection is that it does not preclude the plaintiff from filing a fresh statement of claim later on. [See, Art 232 (2). Following the rejection, the court fee paid by the plaintiff shall be refunded to him since he has not received the service from a court.

The fourth part of statement of a claim is relief. The statement of claim shall state the demand for the relief to which the pleader believes he or she is entitled to. See Article 224 below.

(1) The statement of claim shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as it had been asked for.

(2) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far may be separately and distinctly.

The plaintiff shall state specifically the relief that the he or she claims. For example, if a party demands damages or compensation, he shall state the amount of the damages and compensation he claims. It is on the basis of the relief claimed by a party that the court issues summons.

If the statement of claim fulfils all the technical requirements, and that there is no reason for rejecting it, the registrar shall proceed as per Article 230. See Article 230 below.

Where there are no reasons for rejecting the statement of claim under Article 229, the registrar shall:

- (a) make the entry required by Article 214;*
- (b) examine and compare the original and copy of any document attached to the statement of claim and, on finding the copy to be correct, shall certify it to be so and file it and shall return the original to the plaintiff after making it for the purposes of identification; and*
- (c) submit the statement of claim and annexes to the court.*

The registrar shall give number to a suit and register it on the register of civil suit. For example, the first civil suit filed in 2001, is to be registered as Civil Suit No. 1/2001.

The registrar examines and compares the original and copy of document attached to the statement of claim and gives the original to the plaintiff. Then, the registrar shall order the party to pay the court fee. The court fee to be paid depends on the value stated in the statement of claim. If the value of money is stated, a certain fixed percentage is imposed. If the value of money is not stated, the court fee to be paid is 25 birr. This occurs when the type of suit is not assessed in monetary terms.

Finally, the registrar shall submit the statement of claim and annexes to the court. The judge examines the statement of claim to establish whether or not it fulfills the legal requirements that we discussed earlier. If it is found to be sufficient in terms of fulfilling legal requirements, the court issues summons on the defendant. On the date fixed in the summons, both the plaintiff and defendant are supposed to appear before a court for the opening of the hearing of the suit. It is on this date that the statement of defense is examined by the court. Let us now discuss the requirements to be fulfilled by the statement of defense.

4.1.3.2. Statement of Defense: Purposes and Contents

Statement of defense is a pleading produced by the defendant. It is the pleading that contains material facts on which the defendant relies for his defense. The statement of defense is subject to the rule under Article 80(2) and 223. There is a form prescribed by the Civil Procedure Code for the statement of defense. The content of statement of defense is given under Article 234. See Article 234 as follows:

(1) Every statement of defense, to which there shall be attached the annexes mentioned in Article 223, shall contain:

- (a) the name and place of the court in which the defense is filed;*
- (b) the number of the suit;*
- (c) the facts, if any, showing that the claim is inadmissible on grounds of want of capacity or jurisdiction, or limitation;*
- (d) a concise statement of the material facts on which the defendant relies for his defense and generally of any ground of defense which, if not raised, would be likely to take the opposite party by surprise or, to raise issues of fact not arising out of the statement of claim;*
- (e) a specific denial of any fact stated in the statement of claim which is not admitted;*
- (f) precise details of the counter-claim, if any, in which case the provisions of Article 224 shall apply by analogy.*

(2) The provisions of Article 223(3) shall apply by analogy in appropriate cases.

The statement of defense has mainly two parts. One is caption in which the defendant is supposed to state the name of the court to which he submits his defense, and the number of the suit. The other part of the statement of defense is the statement showing the points of defense. In this part, the defendant is expected to raise affirmative grounds of defense, which include facts showing that the claim of the plaintiff is inadmissible on the ground that he is incapable, or that the court lacks jurisdiction or that the action is barred by period of limitation, etc. Apart from these grounds, the defendant can raise any ground of

objections to a suit. In addition, the defendant can raise a counterclaim or set off against the claim of the plaintiff.

In stating his facts of defense, the defendant must respond to each allegation of the facts made in the statement of claim whether he admits or denies them. The denial he makes must be put in a direct manner. Evasive denial does not amount to a defense under Article 235 rather it amounts to admittance. See Article 235 below. Evasive denial is a denial in general terms. For instance, saying that, “I am not responsible or I am not liable” is considered to be an evasive denial. However, such defenses are not considered to be admission if they are made by persons under disability as provided under Article 235. This shows the protection the law tries to provide to persons under disability.

(1) Where a defendant denies an allegation of fact in the statement of claim, he shall not do so evasively, but answer the point of substance and if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

(2) Every allegation of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, shall be taken to be admitted except as against a person under disability: provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

For example, a defendant saying that “I am not responsible to the claim of the plaintiff” is not considered to have made a defense.

It is actually difficult to determine the degree of specificity of denials to be incorporated in the statement of defense. The court can reject the statement of defense if it does not sufficiently fulfill the requirements it is supposed to comply with. The same rule under Article 229 shall apply to the rejection of statement of defense. See Article 238 below.

(1) On the day fixed under Article 233, the court shall examine the statement of defense and the provisions of Article 229 shall apply by analogy in appropriate cases.

(2) Where the statement of defense is not rejected under sub-article(1), the court examine whether it contains a counter-claim or claim of set-off and the provisions of Article 231 shall apply by analogy in appropriate cases so far as concerns such counter-claim or claim of set-off.

(3) Where a statement of defense is rejected under this Article, the case shall be proceeded within accordance with the provisions of the following Chapter notwithstanding such rejection.

If the statement of defense is rejected, the court shall proceed with the trial of the case. The rejection does not mean that the case is to be decided for the plaintiff. This is because even if it is rejected, the defendant could defend himself orally under Article 241, which will be discussed later on.

What will be the consequence if the defendant does not appear on the date fixed for the opening of a suit, or if he appears without statement of defense? If he appears with no statement of defense, the court shall proceed with the case. This is because he may defend himself orally or the plaintiff may fail to prove his allegation.

4.1.4. Effects of Failure to Plead

A party pleading is supposed to plead all the claims arising from a single cause of action. Issues are framed on the basis of allegations made in the statement of claim. If a claim is not included in the pleading, it is not put in issue by a court. Hence, the plaintiff is not entitled to raise this at a trial stage and produce evidence to prove it. This is because the other party is not aware of such issue and cannot get the chance to challenge it. If the plaintiff raises a new issue at a trial, the defendant is entitled to object to it.

Failure to plead means that the plaintiff omits some facts he could have alleged. The remedy for failure to plead at the beginning is to request an amendment of pleading. In the absence of permission to amend the pleading, the plaintiff is not allowed to raise new

issues at a trial and introduce evidence unless the court frames issues by its own motion using the power given to it under Article 252.

Failure to plead produces effect if the defendant raises it. However, if the defendant fails to object to a new issue raised by the plaintiff at a trial, it means that he consents to the trial of that issue. In other words, it means that the defendant is not prejudiced by the trial of such a new issue. Hence, it is considered as if raised by the plaintiff at the time he filed his case to a court.

Failure to deny means that the defendant is not replying to some points of defense against the claim of the plaintiff. Denial should be specific. If the defendant fails to respond to every allegation contained in the statement of defense, it means that he is indirectly admitting it. Hence, if certain points of defense are not raised by the defendant in the statement of defense, he cannot raise them at a trial.

4. 1.5. Alternative and Subsequent Pleadings

An alternative pleading is optional grounds of claims or defenses relied on by a party. It is a pleading that aims at maximizing the grounds of claim or defense. For instance, the plaintiff could plead that there is breach of contract and that he demands damage or that there is unlawful /unjust enrichment if no contract is found to exist. Similarly, the defendant could put forward a defense saying that there is no valid contract or that its performance is prohibited by force majeure.

The possibility of alternative pleading by the defendant is provided under Article 237.

Where the defendant relies upon several distinct grounds of defense or set off founded upon separate and distinct facts they shall be stated, as far as may be, separately and distinctly.

As per Article 237, the defendant may state different and separate grounds of defense in a single statement of defense. There is no limitation as to the ground of defense that is invoked by the defendant.

Article 224(1) states the application of alternative pleading to the plaintiff.

The statement of claim shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for.

Alternative pleading does not mean, for example, that the plaintiff is entitled to double recovery for the same harm. He is merely basing his claim on optional grounds in order to maximize such claims.

Subsequent pleading is also known as further pleading. It means pleading again on the same issue on which the pleading already been made. For example, imagine that the plaintiff filed his statement of claim to a court. The court accepted it and issued summon on the defendant to appear and defend. The defendant presented his defense on the date fixed for the hearing. The issue here is whether or not to allow the parties to reply on the same cause again. The procedure is that once the court fixed a date for the hearing of a suit and conducted a pre-trial proceeding, it shall proceed to a full-scale hearing of a suit since the pleading stage is completed. However, further pleading is allowed in certain instances before the trial of a case. This is provided under Article 239.

Further pleading is allowed when the statement of defense contains counter-claim or set-off against the claim of the plaintiff. When the statement of defense contains either counter claim or set off, which is not dismissed by a court, the court shall ask the plaintiff whether he wants to reply to such counter claim or set off claimed by the defendant. The obligation imposed on a court is to ask the plaintiff as to whether he wants to reply to the defendant's claim. If the plaintiff does not want to respond to such counter claim or set off, the court should not order further pleading to be made by the plaintiff. Also note that

unless the statement of defense contains either set off or counter claim, the court should not allow further pleading for any other defense made by the defendant unless an amendment is allowed by the court.

When the defendant raises counter claim in his statement of defense, he becomes plaintiff. This is because he is raising a new claim against the claim made by the plaintiff. That is why the rule under Article 215(2) says that the defendant shall pay court fee. Article 215(2) says that “*The prescribed court fee shall be paid upon the filing of a statement of defense containing a counter claim.*”

The claim raised by way of counter claim can be filed as an independent suit. That is also why the defendant shall pay court fee under Article 215(2). The practice at present is that further pleading is allowed whenever a party requests even for a statement of defenses not containing counter claim or set off. It has become the practice that adjournment is made by courts so that parties are able to file a reply or a counter-reply for pleadings.

This practice affects the purposes of civil procedure, which is to avoid the delay of proceedings. The meaning of set off or counter claim is found in the Civil Code. See the provisions of contracts in general on set off and counter claim.

4.1.6. Amendment of Pleadings

4.1.6.1. Nature and Purpose

Amendment of pleading presupposes that a technically and legally sufficient pleading has already been filed and that it is found to be defective in terms of what has been claimed or stated. The amendment is allowed to rectify defects in pleadings. If allowed, an amendment introduces a modification to the content of the pleading already submitted to a court. The question of amendment is raised when a party tries to produce evidence on something which is not included in the pleading or that the evidences produced do not prove the contents of pleading or that a party comes across new facts that he should have

included in his pleadings, etc. The provisions of Article 91 and 252 deal with amendment of pleadings.

4.1.6.2. Grounds and the Process

The amendment is ordered by the motion of a court or by the application of a party. The amendment to be ordered by the motion of a court should be limited to exceptional cases where the error in pleading is likely to affect the substantive rights of a party. In other cases, the court should order amendment on the basis of the application of a party.

According to Articles 91 and 252, the amendment is made when it is necessary for the purpose of determining the real issues in dispute between the parties. This means that the amendment has a bearing on deciding the issues between the parties.

4.1.6.3. Effects and Related Issues

Amendment brings into picture the consideration of two interests. One is that it causes delay of proceedings. This is because if it is permitted, the proceedings will start as a fresh one. On the other hand, amendment protects a party from losing his substantive rights or being affected as a result of pleading error. The phrase in Articles 91 and 252, which says "necessary for the purpose of determining the real question in dispute" aims at striking a balance between these two interests. Another factor for striking such a balance is the imposition of damage on a party who requested the amendment of pleadings. In trying to strike a balance between these two interests the tendency in most legal systems is toward allowing amendment. It means that there is a liberal approach toward amendment and that the request for amendment should be taken into account in liberal manner that permits amendment. Thus, it can be held that it is an abuse of discretion for the court to deny leave to amend unless there is a demonstrable indication of prejudice to an opposing party.

Is an amendment allowed to produce new evidence that was not originally annexed to a pleading?

In one case decided by a court, the defendant applied to a court to get the statement of claim amended on the grounds that she has not included some evidences originally and that she intends to introduce new evidences that could elaborate her defense as well as the suit between her and the plaintiff. The court dismissed her application and denied an amendment for the reason that the introduction of new evidences does not fall under Article 91(1) and that there is a separate procedure on the production of evidences. Hence, the court said that the introduction of new evidence could not serve as a ground for the amendment of pleading.

A party can request amendment at any time before a court renders decision. So long as it is necessary to determine the real dispute between the parties, it can be demanded and allowed by the court at any time.

4.2. Pre-Trial Proceedings

4.2.1. Service of Process

A statement of claim filed to a court is to be examined by the registrar as well as the judge. If it passes the scrutiny of the Registrar and judge, which means that it fulfills both technical and legal requirements, the court proceeds to notify the opposite party of the fact that a suit is made against him. This notice is made possible by issuing and serving summons or notice on him. In this section, we discuss issues pertaining to summons.

4.2.1.1. Issuance of Summons

As we discussed earlier, the plaintiff initiates a suit against defendant by submitting a statement of claim to the registrar of a court that has jurisdiction to consider case. If the statement of claim filed by the plaintiff fulfills the legal and technical requirements, the

issue that comes next is how to communicate the suit to the defendant. The communication is made possible by summon.

Summons, literally speaking, means to call someone to come. In the context of proceedings in a court of law, it refers to a formal mechanism by which a defendant is notified of a suit made against him and called upon to appear on a fixed time and date before a designated court to answer a complaint/allegation made by the plaintiff against him.

From this definition, you can derive the purposes of summon. It informs the defendant that a suit is made against him. It also provides the defendant with an opportunity to be heard and present his version of a suit.

The authority to issue summons is invested in either the judge or the registrar of a court. Either the Registrar or judge can sign on it and cause it to be sent to a defendant. This is the rule provided under Article 94(3).

Every summons shall be in the form prescribed by the second schedule to this code and shall be signed by a judge or the Registrar and sealed with the seal of the court.

If the number of defendants is more than one, the summons shall be issued and served on each defendant. It is not sufficient to serve on one of the defendants. Here, service of summons on one of them does not mean service on the remaining defendants. It means that summons should be served on each of them.

4.2.1.2. Modes of Service

In order to provide the defendant with sufficient information about a suit made against him, summons shall contain some items. The items to be included in summons are the following: the name of plaintiff and what he is claiming against the defendant, the name of defendant and his address, the time, date, and court before which the defendant is supposed to appear. It shall also inform the defendant what he should bring with himself

on the date he appears before a court. The things he should produce on the date of appearance are statement of defense, list of his witnesses, and documentary evidences in his possession, and list of documents that are not in his possession. In addition, it shall disclose to the defendant that a case will be considered even if he fails to appear on the fixed date, or even if he fails to bring his statement of defense. For items to be incorporated in summons and its form, look at summons prescribed by the Civil Procedure Code. (See, at the back of Cv. Pr. C second schedule form No.5)

Summons for appearance of defendant (Art. 94)

To ... "A" (Name, description and residence)

Whereas ... "B"has instituted a suit against you for ... "C"you are hereby summoned to appear in this court in person or by a pleader duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on theday of19.....You must be prepared to produce on that day your statement of defense a list of all the witnesses you intend to call, stating their address and the purpose for which you intend to call them a list of all the documents on which you intend to rely.

Take notice, which, in default of your appearance on the day before mentioned or of your producing your statement of defense or any evidence, the suit will be heard and determined notwithstanding your default.

Given under my hand and the seal of the court, thisday of19.....Judge.

"A"--- name "B"---name of plaintiff "C"---Cause of action i.e. the source of claim of plaintiff

After summons is issued, it is collected from a court and served on defendant by the serving officer. To be a serving officer, the only requirement is the authorization of a court. Any person authorized to serve summons can be a serving officer. At present, the practice of courts shows that the serving officers are usually plaintiffs. Courts authorize the plaintiffs themselves to serve summons on defendants. See below Article 95(1) that deals with serving officer.

The summons may be served on the defendant by any person, hereinafter referred to as the serving officer, authorized in that behalf by the court.

The Civil Procedure Code places the plaintiff who acts as a serving officer under obligation to serve summon on defendant properly, or otherwise faces a serious consequence. See Article 70(d) of the Civil Procedure Code.

Article 70(d) if it is proved that the summons was not served on the defendant or any one of several defendants through the plaintiff's negligence or default, the court may adjourn the hearing or order that the suit be struck out as against any defendant not served, or in cases of appeal, that the appeal be dismissed as against respondent not served. Provided that no order for the striking out of the suit or the dismissal of the appeal under sub-article (d) shall be made where, although the summons has not been served on the defendant or respondent, the defendant or respondent appears in person or by agent or pleader when the suit or appeal is called on for hearing.

This provision makes the plaintiff to properly serve summons on the defendant. If he is proved to be negligent in serving summons on the defendant, he faces a consequence, which is the striking out of his suit. For example, if the plaintiff served the summons on a child in the house of the defendant while he could have easily served the summons on the defendant, the plaintiff is said to be negligent in serving the summons on the defendant. Hence, the plaintiff may face the consequence stated under Article 70[d].

There are different modes of service of summons to the defendant, which we will discuss below. If the service of summons is in line with these modes, it is said to be reasonable. The mode of service of summons used determines its legal sufficiency. Service is legally sufficient if the mode of service used is reasonable under a given circumstance. If the mode employed is, however, not deemed to be sufficient, the court cannot proceed with the case and make a valid decision since it affects the opportunity to be heard that is available to the defendant. Thus, the mode of service to be used should be reasonable in a given circumstance.

As said earlier, there are different modes of service of summons. The first mode is known as personal service. Summons is said to be served in personal mode if it is received by the defendant himself from the hands of a serving office. This mode amounts to the general rule on service of summons. Article 95(3) reads as follows:

Without prejudice to the provisions of the following articles, the summons shall as far as possible be served on the defendant in person.

This means that so far as possible, summons shall be served on a defendant by this mode in all cases. Personal mode of service is the best mode of service since the summons is actually handed over to the defendant himself. It is when it is practically impossible to use personal service that other mode of service is to be used. This can also be gathered from the rule under Article 105(1). According to this Article, another mode of service is to be used if service cannot be made in an ordinary way. Ordinary way, refers to personal service. Thus, other modes of service are not applicable unless personal service is impossible.

Another mode of service is one that is similar to personal service. In this mode, summons is not actually served on the defendant in person. Somebody else receives it but the law treats it as if service is made on defendant in person.

The followings can be examples of this mode of service:

- When summon is served on the defendant's agent who is authorized to accept service, the service on agent shall be as effectual as service on the defendant in person. This is the rule under Article 96(1).
- When summon is served on the defendant's pleader / advocate, the service is considered to be duly served on the defendant himself. This is the rule under Article 96(2).

In these two examples, the service is considered to be personal one even if the defendant has not actually received summon from the hands of serving officer.

Another mode of service is known as constructive mode of service. This mode includes the following types of service. When the defendant does not reside within the local limits of a court's jurisdiction but has an agent who carries business on his behalf, service can be made on the agent. The agent referred to here is not authorized to receive summons unlike in the mode of service we explained above. The reason why the service is made on such agent is because the defendant is not available in the local limits of the court that issued the summons and that he does not have an agent specifically authorized to receive summons. For example, "A" resides in Assosa. A suit is filed against him since his car caused a body injury to "B" in Addis Ababa. If he does not have an agent expressly authorized to receive summons, the summons can be served on an agent who is authorized to manage his car. This is because he resides outside the place where a case is filed against him. This is the rule under Article 99.

Another type of constructive mode of service is when summons is served on an agent in charge of immovable property. This service is possible if the defendant cannot be served personally and that he does not have agent empowered to accept service. This service is applicable only if the suit relates to immovable property. This is the rule provided under Article 100.

Still another mode of constructive mode of service is service on the adult member of defendant's family. This type of service is used when the defendant cannot be found for the service of summon and that he does not have agent to receive summon. This is the rule under Article 101.

Wherein any suit the defendant cannot be found and has no agent empowered to accept service, service may be made on any adult member of the family of the defendant who is residing with him.

Still another mode of service is the substituted mode of service. This mode of service is considered to be the least effective mode of service. It is the final mode of service used when all other modes of service are not applicable. This mode of service includes service

by affixing a copy of summons in public areas, publication in newspaper, etc. It is a mode used where all other modes cannot be applicable. This is implied in the rule under Articles 103 and 105. If the serving officer cannot serve, he shall return it to a court. Then the court orders a substituted mode of service.

These modes of service have to do with the legal sufficiency of service of summons. Hence, the mode to be used for service must be reasonable, and that it should enable the defendant to receive information about the suit filed against him.

The serving officer is under obligation to request the person served to sign an acknowledgment that he received the summons. The person served must, in his part, sign an acknowledgement of service. See Article 102 (1) and (2) that dealing with this issue.

(1) Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the person to whom the copy is so delivered or tendered to sign an acknowledgement of service on the original summons.

(2) Where such person refuses to sign the acknowledgment the provisions of Article 103 shall apply but the court may, if it thinks fit, rule that such person has been duly served and dispense with the requirement of article 105(2),

What if a person served refuses to sign an acknowledgment?

The effects of refusal to sign acknowledgment are provided under articles 103 and 105(2). The court orders a fresh summons or substituted service or the court may consider that the person is properly served and proceeds with the case. This is when the serving officer returned the summons to the court and produced an affidavit as to the facts that prevented him from serving the summons.

4.2.2 Effects of Non- Appearance of Parties

One of the items to be included in summons is the time and date on which parties should appear before a court. On this date, both the plaintiff and defendant are expected to appear since this is the first date of the opening of a suit. This is the rule under Article 69(1). See Article 69(1) below.

On the day fixed for the hearing of the suit, the parties shall be in attendance in the court in person or by their respective agents or pleaders and the suit shall then be heard.

On the first day of the opening of a suit, parties need not appear in person unless the court demands it. If the court orders appearance to be in person, but a party fails to appear in person, it is treated that such party makes no appearance, even if some one appears on his behalf.

What if a party fails to appear? The effects of non-appearance depend on a party who fails to appear and on whether or not the summons is duly served on the defendant. If both parties (plaintiff and defendant) fail to appear on the date fixed for the first hearing of a suit, the court shall strike out a suit. This rule is modified if there is non-appearance of both parties on appeal. If the appellant and respondent fail to appear on the first date of hearing of appeal, the appeal shall be dismissed. See Article 69(2) below. If the defendant failed to appear, the court may issue fresh summons or proceed to hear the case in his absence. The effect of non-appearance of plaintiff is different from that of the defendant.

Where neither party appears when the suit is called on for the hearing, the court shall make an order that the suit be struck out, or, in cases of appeal, that the appeal be dismissed.

It is important to take note of the fact the rule under article 69(2) is a mandatory provision. Hence, the court does not have any discretion to make an order other than striking or dismissing a case if both parties fail to appear. For example, the court cannot

order an adjournment of a case if both parties fail to show up before a court. Rather, it shall either dismiss or strike out a suit for non-appearance of parties on appeal and fresh suits respectively. We will discuss the effects of striking out and dismissal of a suit later on.

When the defendant appears but the plaintiff fails to appear the court shall dismiss a case. The only question put to the defendant in case of non-appearance of plaintiff is whether or not he admits the claim of plaintiff. If he admits, the court makes a decision for plaintiff on the basis of such admission. If he denies, the court shall dismiss the case. See Article 73 that provides the rule in this respect.

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit as it relates to the remainder.

The defendant should not be expected to defend himself on a claim of plaintiff in the absence of the complainant. The court does not have any discretionary power to exercise if the plaintiff fails to show up before a court when the suit is called on for hearing. It cannot fix another date for the hearing of a suit either.

When the plaintiff appears but the defendant fails to appear, the measure to be taken by the court depends on whether or not the summons has been properly served on the defendant.

Thus, the court should examine whether or not summons is properly served on the defendant, if the defendant fails to appear. If upon examination the court finds, out that the summons has been duly served on the defendant, the suit shall be heard in the absence of the defendant. See Article 73(a) below.

if it is proved that summon was duly served, the suit shall be heard ex parte.

The court does not have any measure to take other than considering the case in the absence of a defendant, if the summons was duly served on the defendant. If the defendant failed to appear, the court cannot decide the case for plaintiff for the sole reason that he failed to appear, nor can it adjourn the hearing of a suit. What the court should do is to proceed to look at a case in the absence of the defendant. The hearing of a suit in the absence of the defendant is known as ex parte hearing. The counter name of exparte hearing in criminal cases is hearing in absentia. Ex parte hearing involves one party only which is the plaintiff. It does not affect the concept of hearing, which demands the participation of both parties to a suit. The defendant has received summons which notifies him of a suit and invites him to appear before a court but he failed to appear. This means that an opportunity to appear before a court has been given to him. Thus, if he did not appear, the court could proceed to consider and hear a claim filed by plaintiff.

If the court proves that summons was not duly served on the defendant, the court orders the issuance of second summon on him. But if the summons is not served on the defendant owing to the plaintiff's negligence in serving summons, the court may adjourn the hearing of a suit or may strike out if it is a fresh suit or dismiss it if it is a case on appeal. See Article 70(d).

if it is proved that the summons was not duly served, the suit shall be heard ex parte.

In ex parte hearing, it does not necessarily mean that a case is to be decided in favors of the plaintiff and against the defendant. The court considers his claim and looks at his evidence. If he has a valid claim, it is decided for him; if he does not have a valid claim, it is decided against him.

When a third party defendant (under Article 43) does not appear, the rule under article 70(a) does not apply. In case of non-appearance of third party defendant, the court decides that he has admitted the claim of defendant. The mere non-appearance of such party amounts to an admission of the existence of contribution or indemnity relations

alleged by plaintiff. This kind of judgment is known as default judgment. It is a decision based on the sole reason of absence of third party defendant. It is provided under Article 76.

What measure can a court take if the defendant who cannot appear on the first day of hearing of suit appears on the day fixed for the next hearing of a suit?

In ex-parte hearing, the court starts to see the case in the absence of the defendant. It may adjourn the case for further consideration of the claim. On the next day fixed for the further consideration of a case, the defendant who had not appeared on the first day could appear. His fate is governed by the rule under Article 72 of the Civil Procedure Code. See article 72 below.

Where the court has adjourned the hearing of the suit ex parte, and the defendant at or before such hearing, appears and shows good cause for his previous non appearance, he may, upon such terms as to costs or otherwise as the court may direct, be heard in answer to the suit as if he appeared on the day fixed for his appearance.

The fate of the defendant who could not appear on the opening of the suit depends on the presentation of good cause by him. If he shows good cause, he is permitted to defend himself. What would be the fate of the proceedings already made?

The English version of the Civil Procedure Code is not clear as to whether or not the proceedings undertaken by a court on the first day would be set aside if good cause is shown. This is because it says that the defendant is heard as if he appeared on the day fixed for his appearance. Since this causes delay of proceedings, the court can impose costs on the defendant for causing delay of proceedings.

If the defendant convinces the court that he is prevented from appearing before a court for good reason, the case will be heard as a fresh and for this reason costs can be imposed on him for becoming a cause of delay of trial of a suit. This is the rule clearly provided by

the draft Civil Procedure Code prepared by the Justice and Legal system Research Institute. We will discuss good cause later on.

What will be the fate of the defendant who could not show good cause to a court for his non-appearance on the day fixed for the first hearing of a suit?

The Civil Procedure Code does not have an express rule on this. The court has two options to decide on this issue. The first is to prohibit him from participating in a suit at all since he does not have good cause for his previous non-appearance, which means that he is indifferent to defend himself. This is implied from Article 72 itself. The second option is to allow him to defend himself from where the proceedings begin on the next hearing of a suit. It means that he is considered to be present during the first hearing of a suit. He is not entitled to do what he could have done on the first hearing of a suit. For example, he cannot raise any objection to a suit since objection is to be raised during the first hearing of a suit.

It is actually true that Article 72 does not have room for the defendant who cannot manage to show good cause for his previous non-appearance.

Which option is preferable? Which one ensures the hearing of a party?

The rules on non-appearance of parties apply to any proceedings, be it first hearing, full-scale hearing, review, execution, etc. For instance, if there is non-appearance of parties to appeal, the rule we discussed earlier shall apply. This means, that if an appellant does not appear on the first day fixed for considering the appeal, the rule under Article 73 applies. This is provided under Article 32(1).

The provisions of this Book shall apply in any proceedings under this code.

See the effect of non-appearance on the next adjournment in the light of the rule under Article 32(1).

What are the effects of non- appearance of parties?

The court is not entitled to make a decision for any party for the sole reason that another party fails to appear except the non-appearance of third party defendant. The measure taken by the court can either be dismissal or striking out of a suit.

A suit is struck out when both parties fail to appear (Art. 69), and when the plaintiff committed default in serving summons on the defendant (Article 70(d)). The effect of striking out of a suit is governed by a rule under Article 71. See Article 71 below:

(1). where a suit is struck out under Article 69(2) or 70(d) the plaintiff may bring fresh suit on payment of full court fee.

(2). Where he satisfies the court that there was sufficient cause for his non-appearance, the court may make an order dispensing from payment of court fees and shall appoint a day for proceeding with the suit.

Striking of a suit does not prevent a party from filing a fresh suit on the same cause. The consequence it entails is payment of another court fee. By paying a court fee, a plaintiff may initiate a suit on the same cause of action and pursue his claim. A plaintiff can even be relieved from paying a court fee if he shows the court that he was not able to appear because of sufficient good cause.

Generally, striking out does not avoid the submission of a fresh suit, upon payment of court fee, to a court on the same cause of action. Good cause is important not to pay a court fee, but not for initiation of a fresh suit. Without showing good cause, he can bring a fresh suit, but he is subject to pay a court fee. If a case is struck out, it is considered as if it were not filed at all to a court.

A suit is dismissed when the plaintiff fails to appear but defendant appears; when both parties fail to show upon appeal; and when an appellant is proved to be in default in serving summon on respondent (see Articles 69(2), 70(d), 73). If a suit is dismissed, the plaintiff is prevented from bringing a fresh suit on the same cause of action. He cannot

pay a court fee and proceed with a suit. The dismissal leads to a loss of right to bring action.

See Article 74(1) below.

Where a suit is wholly or partly dismissed under Article 73, or an appeal is dismissed under Article 69(2), 70 (d), or 73 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

However, if a plaintiff is prohibited to appear before a court owing to good/sufficient cause, he can apply to the court to get the dismissal set aside. Unless the dismissal is lifted by a court of law, following the showing of good cause, a plaintiff cannot bring a fresh suit. The plaintiff shall apply for the setting aside of the dismissal within one month from the date an order is made by a court to dismiss the case. If there is a good cause, the court may set aside the dismissal if the application is made to it within one month of the making of such order.

The defendant in whose absence a case is heard and decided can also request the setting aside of ex parte decision or default judgment. He could apply within one month of the day he became aware of such decision. If he is proved to be prevented from appearing because of good cause, the court may set aside ex parte decision or default judgment, and consider the case as a new one. See Article 78(1) below.

Any defendant against whom a decree is passed or order made ex parte or in default of pleading may, within one month of the day when he became aware of such decree or order, apply to the court by which the decree was passed or order made for an order to set it aside.

Note that the Amharic version gives the same meaning to striking out of a suit and dismissal of a suit. As you have seen, there is a difference between striking out of suits and dismissal of suits. However, The draft Amharic Civil Procedure Code gives, a different meaning to them to solve this problem.

What does it mean by good / sufficient cause?

There is no definition of what is mean by 'good cause'. The determination of what amounts to good cause is subjective and depends on a case-by-case consideration of circumstances.

The term "good cause" needs to be interpreted narrowly. This is because if it is interpreted broadly, any reason put forward by an applicant amounts to good cause. "Good cause," if allowed, has a potential to bring about delay in the trial of a suit. It has to, therefore, be construed narrowly. The determination of "good cause" depends on a case-by-case consideration of the application of an applicant.

REFERENCE MATERIALS