Ethiopia

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List of Abbreviations

FDRE Constitution	The Federal Democratic Republic of Ethiopia Constitution 1995
PDRE	The Peoples' Democratic Republic of Ethiopia Constitution 1987 Proclamation Act
Woreda Court	District Court
Awraja Court	Provincial Court
CPC	Civil Procedure Code of Ethiopia
Region	State (unit of the Ethiopian federal system as opposed to the central government)
Local Jurisdiction	Venue
Judicial Jurisdiction	International Jurisdiction
Material Jurisdiction	Subject-Matter Jurisdiction
Fetha Negest	Law of Kings

List of Abbreviations

General Introduction

Chapter 1. General Background

1. Ethiopia has a long history of existence. The information about the country's legal system in the distant past is quite meager. The administration of justice was predominantly carried out by a traditional system based on customary rules. The first integrated legal code, the *Fetha Nagast* (Law of Kings), was translated from Arabic in the mid-fifteenth century. Attributed to a thirteenth-century Egyptian Coptic scholar, it was inspired by the Pentateuch (the first five books of the Old Testament), the New Testament, Canons of the Christians' early church councils, and Roman civil law.[1] However, the *Fetha Nagast* applied only to Christians, and Muslims who became subject to Ethiopian rule through conquest continued to be judged in their own courts according to sharia law. It was only in the nineteenth century that a formal system for adjudication emerged. Clan and tribal bodies, especially in lowland areas, exercised unofficial but effective coercive powers, even currently, and people rarely appeal their decisions to regular courts.

1. Abera Jembere, An Introduction to the Legal History of Ethiopia (Munster: Lit, 2000), 1434–1974; see also C. N. James, Paul & Christopher Clapham, Ethiopian Constitutional Development: A Source Book, vol. II (Addis Ababa: Artistic Printer, 1974), 841–842; see also Mohammed Abdo, Civil Procedure, Module I, Ethiopian Civil Service College (Addis Ababa: Berhanena Selam Printing, 2005).

2. For the first time in the history of the country, a written Constitution was drafted with the personal supervision of the Emperor himself, in 1931 during the reign of Emperor Hailesilassie's II, and was decreed as a personal gift from the Emperor to the people.[1] Many of the codes that are in force at the present time are young because they were adopted in the 1950s and 1960s. The enactment of these laws marked the beginning of a new era in the country's administration of justice since it departed from traditional systems and formalized the laws. Almost all the codes were drafted by foreigners, mostly from Europe, and one can envisage the influence of Western countries' values and traditions on the legal system of the country. This is implicitly and explicitly gleaned from the substantive laws and procedural laws used in the country. The continental system is reflected in the substantive laws and that is why Ethiopia is considered to be part of the civil law countries. The Ethiopian procedural laws, both civil and criminal procedural laws, are transplanted from the countries with the common law tradition.

1. Fasil Nahom, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Addis Ababa: The Ethiopian Press, 1999).

3. Ethiopia was a unitary state, and the matters of the government and judicial and legislative issues were organized in a manner reflecting the system until the early 1990s. The demise of the military regime in 1991 marked the beginning of a new era in the system of government, in general, and legislative and judicial activities, in particular.

4. The country embraced a federal arrangement, largely along ethno-linguistic factors, and as a result, the federal courts and regional courts systems were recognized by the *Federal Democratic Republic of Ethiopia Constitution 1995* (FDRE Constitution). Based on the Constitution, the federal courts were established at the federal government level by the Federal Parliament (the *House of Peoples' Representatives*) and the states have also set up their own court system in their respective regions. Apart from the courts, the states have established their legislative and executive organs in their respective territories on matters that they are competent to deal with as per the FDRE Constitution. The FDRE Constitution provides the list of powers of the federal government and leaves the residual powers to the states; thus, the states have competence on all matters that are not specifically entrusted to the federal government. The states have full autonomy on matters falling in their competence.

5. The FDRE Constitution enshrines many fundamental rights and freedoms and provides that its chapter dealing with human rights and freedoms shall be interpreted in line with the international human rights instruments adopted by the country.

6. The Constitution provides many fundamental principles, some of which include the sovereignty of the people, secularism, the accountability for and transparency of government activities, etc. The official working language of the federal government is Amharic, and some states have adopted their own working language (Tigray, Oromia, Somali Regional States have adopted their respective languages; the Southern State is quite unique in this regard because the working language at the state level in the region is Amharic and each province has adopted its own language at the province level).

7. The FDRE Constitution provides that the power to test the constitutionality of laws enacted by Parliament is vested in the *House of Federation*, which is equivalent to the lower chamber of Parliament, in other countries but is devoid of law-making power; thus, the courts of law do not have the power to declare the laws enacted by Parliament unconstitutional. This body is assisted by another organ, which is dominated by lawyers, and known as the *Council of Constitutional Inquiry*. The Council is empowered to advise, to investigate complaints on constitutional cases, and to offer recommendations to the *House of Federation* for its final decision on constitutional disputes.

8. The FDRE Constitution recognizes the setting up of a customary and religious system of adjudication of disputes so long as the parties consent to the settlement of

disputes by such organs. Thus such traditional and religious courts do not have compulsory jurisdiction on individuals. Accordingly, the sharia courts that consider some personal disputes involving Muslims have constitutional backing and was established (the jurisdiction and structure of this court will be the subject of discussion later on).

Chapter 2. Civil Procedure and other Forms of Procedure

9. According to the Constitution, the judicial adjudication is solely vested in the courts of law unlike in some civil law countries, which divide judicial adjudication into the general and administrative ones. The Constitution recognizes the adjudication by other bodies of certain matters but, essentially, the final arbiter of disputes is the courts of law so long as the disputes are justiciable and not excluded specifically from the reach of the courts. The Constitution recognizes the settlement of personal disputes by religious and customary institutions subject to consent of the parties involved and also recognizes the setting up on other bodies that follow the procedures of law, such as the administrative tribunals. There are many administrative tribunals in the country that consider some specific administrative matters falling in their respective jurisdiction and they can make final decisions on issues of facts; however, on questions of law their decisions can be reviewed by the courts of law because the FDRE Constitution has invested judicial functions in the courts. The *House of Federation*, the lower chamber of Parliament, is endowed with the task of investigating and ruling on complaints related to the constitutionality of laws and administrative acts.

10. The regular court has three levels of courts – Supreme, High, and First Instance Courts –both at the federal and state levels, and has jurisdiction over civil, criminal, administrative, commercial matters, etc. The Federal Supreme Court settles conflicts of jurisdiction. Some of its decisions have the force of law, like precedence in common law, as provided by the law enacted recently. Outside the regular court structure, one finds administrative tribunals, social courts, municipality courts, sharia courts, etc.

11. There is no specific legislation on administrative procedure. The draft *Administrative Procedure Law Proclamation* will be promulgated in the near future. Courts follow the Civil Procedure Code in dealing with civil matters. Most organs engaged in settling disputes are also supposed to follow the principles of the civil procedure unless specific procedural rules have been put in place for such purpose. For instance, the sharia courts follow the Civil Procedure Code in entertaining matters they are empowered to consider. Administrative tribunals also follow essentially the rules of the Civil Procedure Code with some introduction of simplicity and informality in the procedures they are supposed to comply with.

Chapter 3. Sources of the Law

12. Rules of civil procedure can be drawn from different sources. International treaties, the FDRE Constitution, the Civil Procedure Code, different statutes, and, to some extent, precedence serve as sources of rules of civil procedure.

§1. International Treaties and the FDRE Constitution

13. Ethiopia has ratified the International Covenant on Civil and Political Rights (ICCPR) in the early 1990s. Because some provisions of the Covenant contain some rules relevant to civil cases, they serve as a source of rules of civil procedure. This is because Article 9(4) of the FDRE Constitution provides that treaties ratified by Ethiopia become an integral part of the law of the land. Thus to the extent that these treaties contain provisions relevant and applicable to civil cases, they can serve as one source of the rules of civil procedure.

14. The ICCPR contains some principles, such as fair and public trial, independence of courts, and so on, that specifically apply to criminal proceedings but are equally applicable to civil cases as well. Article 14 of the ICCPR provides that in the determination of any criminal charge against a person or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Thus pursuant to Article 9(4) of the FDRE Constitution, Article 14 of the ICCPR, which provides the procedural principles governing criminal, civil, and other proceedings, is said to be the source of a treaty outlining procedural principles governing civil proceedings in Ethiopia.

15. The FDRE Constitution does not have explicit provisions on civil procedure but provisions related to fair hearing and impartiality and independence of judges, openness of hearing proceedings, and so on, which are provided in the context of criminal cases under Articles 19 and 20 of the FDRE Constitution, can be taken, *mutatis mutandis*, as a source of rules of civil procedure. One could draw such principles from, among others, Article 9(4), Article 37, and other Articles, of the FDRE Constitution.

16. Different legislations enacted from time to time serve as another source of rules of civil procedure. On the basis of the Federal Constitution, the Federal Court Establishment Proclamation, that is, Proclamation No. 25/96, was enacted to provide the powers and structures of federal courts and some rules of procedure applying to them. This Proclamation contains some rules of civil procedure such as the subject-matter jurisdiction of courts, the openness of hearing, impartiality of judges, transfer of a suit, removal of a judge from the bench, resolution of conflicts of jurisdiction, etc. This proclamation was slightly amended by Proclamation No. 138/98.

17. Apart from this, there is a proclamation that introduced the system of precedence in Ethiopia, which was issued in Ethiopia in 2005. Precedence can also be treated as a source of rules of civil procedure in the otherwise continental system (*The Federal Courts Proclamation Re-amendment Proclamation No. 454/2005*). According to this Proclamation, the interpretation of the laws by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on all courts. To effect this, the Federal Supreme Court is mandated to publish and distribute decisions of its Cassation Division that contain binding interpretation of laws to all its subordinate courts.

§2. The Civil Procedure Code

18. The rules of civil procedure are found mainly in the Civil Procedure Code. Some of the rules on civil cases are found in some proclamations, for instance, Proclamation No. 25/96, Proclamation No. 138/98, and other proclamations enacted from time to time on particular procedural issues.

19. At present, the Civil Procedure Code is being revised. The draft includes the rules in the existing Civil Procedure Code, and the rules in Proclamation No. 25/96 and Proclamation No. 138/98, and other procedural laws relevant to civil cases. Until the adoption of the new procedure, one should see the relationships between the existing rules of civil procedure found in the Civil Procedure Code, Proclamation 25/96, Proclamation No. 138/98, and other laws relevant to civil procedure.

20. The Civil Procedure Code is a comprehensive Code that provides rules relating to all proceedings in a court of law over civil matters. It has rules on jurisdiction of courts, framing of issues, parties and scope of litigation, service of summons, pre-trial and trial proceedings, execution of decisions, revision of decisions, effect of a decision on a subsequent suit, etc. It has incorporated almost all the rules one expects to find in the Civil Procedure Code.

21. The difference between the Civil Procedure Code and Proclamation No. 25/96 is to be found in their scope of application. Proclamation No. 25/96 is of limited scope of application. It deals with the jurisdiction of courts, structure of courts, and administrative aspects of courts only. It does not deal with the framing of suits, parties to a suit and scope of litigation, execution of decision, and other rules applying to proceedings in a court of law. The Civil Procedure Code does not have rules on the administrative and institutional aspects of courts unlike Proclamation No. 25/88. The Proclamation provides, for instance, rules on the division of courts, the powers and function of the President and Vice President of the Supreme Court, the working language of courts, the drawing of budget of courts, employment and administration of personnel necessary for courts, etc. The rules on these issues deal with the administrative and institutional aspects of courts. These rules are not found in the Civil Procedure Code. The rules of the Civil Procedure Code relate to matters of purely judicial function of disposition of cases.

22. Apart from their scope of application, another difference between the Civil Procedure Code and Proclamation 25/96 is that the Proclamation introduced some new rules that are not found in the Civil Procedure Code. For instance, the Proclamation provided for rules on, for example, removal/withdrawal of judges and revision of cases by cassation, which are not incorporated in the Civil Procedure Code.

23. Articles 7 of and 37 of Proclamation No. 25/96 are important provisions that establish the connections between the Civil Procedure Code and the Proclamation.

24. According to Article 7 of the Proclamation, the procedural laws (for our purpose here the Civil Procedure Code) continue to function so far as the matter is not covered by the Proclamation. Thus on the basis of this Article, all the rules of the Civil Procedure Code on the framing of cases, parties to a suit and scope of litigation, pre-trial and trial proceedings, execution, revision of decision, effects of a decision on a subsequent suit, and so on, and other remaining rules relating to proceedings in civil cases are still in force and apply to cases submitted to a court of law.

25. Therefore, Article 7 of the Proclamation makes the Civil Procedure and the Proclamation function side by side. If a certain rule is not found in the Proclamation, the existing Civil Procedure fills the gap; if a rule is not found in the Civil Procedure Code, one needs to make reference to the Proclamation.

26. If the Civil Procedure Code and subsequent legislations try to govern the same issues, this will also give rise to the relationships between the subsequent laws of the Civil Procedure Code of Ethiopia (CPC). Article 37 of the Proclamation resolves this issue. According to this Article, any law providing for rules or matters that are inconsistent with or contradictory to the Proclamation shall not be applicable. If the Civil Procedure Code provides for rules on matters that go against the rules of the Proclamation, particularly relating to the jurisdiction of courts, it is the latter law that prevails. On the basis of Article 37, the rules of the Civil Procedure Code on the jurisdiction of courts, that is, Articles 13–15, are repealed. Hence they cannot apply at present to determine the jurisdiction of courts.

27. Some of the rules of procedural laws (for our purpose here the Civil Procedure) are found also in Proclamation No. 138/98, which amended some Articles of Proclamation No. 25/96. The amendments made by Proclamation No. 138/98 relate mainly to administrative matters of courts, such as the powers of the presidents of the Federal Supreme, High, and First Instance Courts, the number of judges presiding over cases appearing before the Federal High and First Instance Courts, and the relationships among the Supreme, High, and First Instance Courts, etc. Proclamation No. 25/96 provided that, in each division of the High and First Instance Courts, the number of judges should be three, but Proclamation No. 138/98 reduced it to one judge except for cases on appeal, which should be seen by three judges. Proclamation No. 138/98 aims mainly at creating a close working relationship among the three courts.

28. Once the draft of the Civil Procedure Code is finalized and entered into force, the problem associated with establishing relationships between the Civil Procedure Code and Proclamations No. 25/96 and No. 138/90 and other laws providing for procedural rules will be settled, because the draft tries to bring together all rules relating to civil cases in one code.

§3. General Principles

29. It is quite difficult to discern specific principles that are relevant to the rules of civil procedure. They can, however, be gleaned from the FDRE Constitution, the provisions of the Civil Procedure Code itself, the Federal Courts Establishment Proclamation, etc. Some of the fundamental principles include the following: party disposition, public trial, and equality.

30. The Civil Procedure is adversarial in nature, with some major elements of the inquisitorial system as well, and appears to be guided by the principle of party disposition. The principle of party disposition entails that the parties have the right and the duty to present the claims and defences, the legal grounds, and the evidence in a civil trial. It is the parties or their advocates that play the dominant role throughout litigation and control the proceedings in a court of law. They initiate, shape, and fix the scope of litigation. In such system, the judge plays a relatively passive role throughout the litigation process.

31. The Ethiopian Civil Procedure seems to be influenced by the Indian Civil Procedure, which is of an adversary system, and seem to be tilted toward an adversary one. However, one can also find provisions in the Civil Procedure Code that indicate the presence of elements of inquisitorial model that gives much role to the judge. For example, Articles 249, 261(4), 264, 266, and other provisions of the Civil Procedure give power to a court to inquire into a suit by demanding parties to produce documents or witnesses and examining witnesses or naming any person as a witness.

32. Thus one can say that the party disposition, with some modification, is the fundamental principle relevant to the Civil Procedure.

33. The principle of public trial can be taken to be another basic principle relevant to the Civil Procedure. The principle is enshrined in the FDRE under the rubric of transparency and is specifically indicated as a basic principle in the Federal Courts Establishment Proclamation No. 25/1996. It is only in limited civil cases that the proceedings can be held in closed session where the court directs so for the interest of privacy and in some family cases (for the sake of public morality and decency) or issues of public and state safety and security.

34. Another principle is the one enshrined under the FDRE Constitution, which is the principle of equality as enunciated under its Article 25. It is also implied from the different provisions of the Federal Courts Establishment Proclamation and

the Civil Procedure Code. The principle is reflected in Proclamation No. 25/1996 and the Civil Procedure Code in their provisions on the equality of parties as manifested in the requirements that the court treats both parties in an equal manner throughout the proceedings.

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The 1931 Constitution.
The Civil Procedure Code.
The Federal Court Establishments Proclamation No. 25/1996 and its different amendments, and many other relevant proclamations on different issues.

Part I. Judicial Organization

Chapter 1. The Courts and Their Members

§1. COURTS

35. Before delving into the structure and jurisdiction of courts in present-day Ethiopia, it is good to have a cursory glance at the structure and powers of the government.

I. Structure and Powers of the Federal and Regional Governments under the FDRE Constitution

36. A notable feature of the *FDRE Constitution* is that it unequivocally established a federal form of government, introducing a major breakthrough in as far as the form of the government in general and the structure of the courts have been organized in the country. As a result, both the federal government and the state governments are empowered specifically to set up their own executive, legislative, and judicial organs (Article 50(1) of the FDRE Constitution).

37. The respective powers of the federal and the state governments are outlined under the Federal Constitution. Article 51 along with Article 55 of the Constitution provides the powers and functions assigned to the federal government by listing the specific functions and powers falling within its competence. Article 52 provides the powers of the state/regional governments. The regional governments have residual functions and powers in the sense they have powers over matters not specifically given to the federal government and on matters not concurrently given to both the federal and regional governments.

38. The Constitution divides the powers between the two by listing down the specific powers assigned to the federal government alone and by indicating the matters concurrently given to both and saying that the residual powers are left to the regional states. Concurrent powers refer to the powers exercised by both governments, which means that the two governments have competence to exercise the powers – neither the federal nor the regional governments have exclusive powers on the matters concerned, such as matters related to taxation as indicated under Article 98 of the Constitution.

39. As indicated under the FDRE Constitution, each government is supreme within its sphere of competence and as such there is no superior-subordinate relationship between them; hence the regional governments shall respect the powers of the federal government and vice versa (see Article 50(8) of the FDRE Constitution).

II. Structure and Powers of the Federal and Regional Courts

40. Here, attempt is made to discuss first the structure of the federal courts, and then their powers, and finally the structure and powers of the regional courts.

41. The courts in Ethiopia are structured along the federal line. There are two sets of courts, one at the federal level and the other at regional level. The courts are structured in such a way that they are parallel in structure, with each having final judicial authority on matters falling in its respective jurisdiction. This is indicated under Article 80(1), which provides that the Federal Supreme Court shall have the highest and final judicial power over federal matters and the same thing goes with the state courts. Article 80(2) says that the State Supreme Courts shall have the highest and final judicial power over state matters. The structure of the courts in Ethiopia is quite different from other federal systems where some have a unified court system by setting up one Federal Supreme Court at the apex of the judiciary in the country and making state courts independent of the federal courts. In other federal systems such as in the US, the state and federal courts have parallel court structure where state and federal courts act independently of the other and each has its own supreme court. The Ethiopian court structure resembles that of the US, but one significant difference is introduced by the Federal Constitution under Article 80(3). Article 80(3) is put here to make thinks clear:

> Notwithstanding the provisions of sub-Articles 1 and 2 of this Article: (a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law. (b) The State Supreme Court has power of cassation over any final court decision on state matters that contains a basic error of law. Particulars shall be determined by law.

42. Article 80(3) introduces a change to the otherwise parallel structure of courts in the country. The Federal Supreme Court has a power to review by cassation of any final court decision containing a basic error of law. The phrase used here is 'any final decision' and does not say matters under federal jurisdiction, and this extends even to final decisions of state courts on state matters. This is clearer when one looks at the term used under Article 80(3), in which case the cassation of the Regional Supreme Court is confined only to state matters. The cassation of the Federal Supreme Court covers both the final decisions over federal matters decided by federal courts and the final decisions made by regional courts on regional matters. This means that the parallel nature of the courts indicated under Article 80(1) and 80(2) is qualified because the Federal Supreme Court is entitled to exercise cassation power over final decisions rendered by the State Supreme Court. As indicated in the minutes of the

framers of the Constitution, this is intended to achieve the uniformity of interpretation of laws on matters containing fundamental errors of law. Except for this qualification, the two sets of courts are structurally independent of each other.

43. Having said this, let us now see the structure of the federal courts. The federal courts are composed of three courts: the Federal Supreme Court (at the apex), the Federal High Court (in the middle), and the Federal First Instance Court (at the bottom). The establishment of the Federal Supreme Court has been indicated in the Constitution itself and others were established based on the legislation that were enacted later. The details of the jurisdiction of each is provided by the laws enacted subsequent to the adoption of the Federal Constitution, such as Proclamation No. 25/1995, Proclamation No. 138/1998, 454/2005, etc.

III. The Federal Supreme Court

44. The *Federal Supreme Court* is at the apex of the judiciary at the federal level as indicated under Article 80(1) of the Federal Constitution. It has original jurisdiction as indicated under Article 8 of Proclamation No. 25/1995; appellate jurisdiction as provided under Article 9 of the same Proclamation; and cassation jurisdiction as given under Article 80(3) of the Federal Constitution and Article 10 of Proclamation No. 25/1995. The seat of the Court is based in Addis Ababa and has three divisions: a civil, criminal, and labour division. Each division is composed of a presiding judge and two other judges. The President and Vice President reserve the right to preside over any of the divisions. The President of the Supreme Court is empowered to exercise, on his own motion or upon suggestion of a division of the Court, his discretionary power to direct a case to be heard by a division with not less than five judges (Article 21(1)). This division, which is constituted by the President, is best described as a temporary division of the Court. It is established by the initiation of the President himself or by the suggestion of the division of the Court itself when the type of the case necessitates more judges. Such cases are indicated under Article 21 of Proclamation No. 25/1996, which is stated below:

> 21. *Division with not less than Five Judges*
> 1) The President of the Federal Supreme Court may on his own initiative or suggestion by a division of the Federal Supreme Court or where one of the parties so petitions direct a case to be heard by a division with not less than five judges sitting.
> 2) Without prejudice to the provisions of sub-Article (1) of this Article, the following cases shall be heard by a division with not less than five judges sitting:
> (a) cases falling under the first instance jurisdiction of the Federal Supreme Court;
> (b) Cases relating to a provision of law having caused a fundamental difference in interpretation amongst divisions of the Federal Supreme Court;
> (c) Cases referred to under article 10 of this Proclamation, where determined that they be heard in cassation.

45. The exact number of judges serving in the Supreme Court is not expressly fixed by the Proclamation, unlike the case, for instance, in US. However, one can pin down the minimum number of judges by considering the fact that each division has three judges, which totals at least nine judges.

IV. The Federal High Court

46. The Federal High Court is supposed to have three divisions: a civil division, criminal division, and labour division. Unlike the Federal Supreme Court, the Federal High Court's seat is found in different places: in Addis Ababa, Dire Dawa (which is under federal jurisdiction), and other places as may be determined on the basis of Article 78(2) of the Federal Constitution, which provides that the *House of Peoples Representatives* may, by two-thirds majority vote, establish the Federal High Court and Federal First Instance Courts that were not established by the framers of the Constitution possibly because of lack of human power or financial resource.

47. The *House of People's Representatives* (Parliament at the federal level) has, using its discretionary power, issued a proclamation to provide for the establishment of Federal High Courts in the units of the federation, including the Afar Regional State, the Gambella Regional State, the Somali Regional State, the Southern Nations, the Nationalities and Peoples Regional State, and the Benishangul Gumuz Regional States. Under Proclamation No. 25/96 the number of High Courts were two, which sit in Addis Ababa and Dire Dawa, both of which are under the federal mandate, but the promulgation of this Proclamation has increased the number of separate Federal High Courts to seven (A Proclamation to Provide for the Establishment of Federal High Courts in Some Regions, Proclamation No. 322/2003, Article 2). The Federal High Courts set up in these units of the federation handle federal matters that arise in the respective states and replace the practice of delegating the power of federal courts to the state courts until they are set up. Prior to the enactment of this Proclamation the jurisdictions of the Federal First Instance and High Court were delegated to the State High Court and Supreme Court, respectively, on the basis of Article 80(4) of the Federal Constitution.

48. The Federal High Court assumes original jurisdiction, as provided under Articles 11 and 12, and appellate jurisdiction as indicated under Article 13 of Proclamation No. 25/96. It has three divisions like the Federal Supreme Court: a civil division, a labour division, and a criminal division (Article 23 of Proclamation No. 25/1996). However, this Proclamation was amended in 1998 in such a way that the High Court could have any number of divisions as is necessary for its functions (see Article 6(1) of Proclamation No. 138/1998). Hence under the new law the exact number of divisions of the High Court is not specified. Under Proclamation No. 25/1996, each division consists of a presiding judge and two other judges, but another proclamation enacted in 1998 changed the number of judges sitting in each division to a single judge (see Article 6(2) of Proclamation No. 138/1998), except some cases whereby there shall be a presiding judge and two other judges. The types of cases that should be seen by three judges, both at the High and First Instance Courts, are specified under Article 6(3) of Proclamation No. 138/1998 and include:

(a) Charges brought by the special Public Prosecutor's Office pursuant to Proclamation No.22/1992; (b) Civil cases heard by the Federal High Court in its appellate jurisdiction; (c) Any criminal case heard by the Federal Court and the Federal First Instance Court; (d) Other cases specified under directives to be issued by the *Federal Judicial Administration Commission*

49. The President and Vice President of the High Court may preside over any division.

V. The Federal First Instance Court

50. The Federal First Instance Court is found at the bottom of the federal court structure. The Court only has original jurisdiction because it is at the bottom of the court structure. It has three divisions in a similar way as the Federal Supreme and High Courts and seats at Addis Ababa and Dire Dawa and other places as may be designated by Parliament. In each division there shall sit one presiding judge and two other judges as per Article 23 of Proclamation No. 25/1996, but this law was amended by Proclamation No. 138/1998 in such a way that there shall sit a single judge in each division of the First Instance Court as well as the High Court and also that the First Instance Court shall have any division as is necessary for its functions. Such change was made because the courts faced severe constraints of manpower at that time and it was, therefore, found difficult to staff each division with three judges.

51. Proclamation No. 25/1996 did not indicate whether or not the President and Vice President of the Federal First Instance Court could preside over any bench, but this was clearly indicated under Article 6(4) of Proclamation No. 138/1998.

VI. Structure and Jurisdiction of State/Regional Courts

52. Ethiopia has adopted two sets of courts – the federal and state court structure. The jurisdiction of state courts is closely connected with the division of power between the federal government and state/regional governments. The Federal Constitution has accorded all powers not expressly or concurrently granted to the federal government to the state/regional governments (Article (52(1)) of the Federal Constitution. Thus the state courts have jurisdiction over residual matters under the Constitution and on matters not covered by the federal courts in the Federal Court Proclamation.

53. All states have established their own court structure, which mostly mirror the federal ones. The primary role of state courts is to enforce laws of the concerned state government, and they have jurisdiction on matters reserved for states under the Federal Constitution. But they are empowered by delegation to consider federal matters. The state courts that can handle federal matters by delegation are the State High and Supreme Courts, and the State First Instance Courts are not entitled to see federal courts because there is no delegation given to them. Nowadays, the Federal High Courts are operational in some states and, hence, it is only the Regional High Courts

that are entertaining federal matters in these regions (see Proclamation No. 321/2003 that established Federal High Courts in five states).

54. In all the states, there is a three-tiered court structure: the State Supreme Court (at the apex), the Zonal Court (High Court) (in the middle), and the Woreda Court (First Instance Court) (at the bottom). The jurisdiction of each level of court is indicated in the court establishment courts in the respective regions and, thus, the jurisdiction of each could vary from state to state.

VII. The Relationships between Federal and Regional Courts

55. Ethiopia adopted the federal form of government. This form of government is reflected in the court structure and form. It resulted in the establishment of two sets of courts, one for federal and the other for regional (state) governments. Each is competent in matters falling in its respective areas and is independent of each other. This does not mean that they do not have any kind of contact at all. There may be some areas of relationships, which indicate that they are not mutually exclusive in all their activities. Some of the major areas of relationships between the two, which otherwise are separate and act independently of each other, is the subject of the next discussion.

A. Review of Decision by Cassation

56. Article 80(1) says that the Federal Supreme Court is the court of last resort and, thus, gives final decisions over federal matters. Likewise, the Regional/State Supreme Court has a final say over state/regional matters. If one looks at these two sub-Articles, the two courts are parallel in structure as far as matters decided by them are concerned. It means that in their respective jurisdiction, each of them is independent and one cannot review the decisions of the other.

57. However, Article 80(3) seems to qualify this parallel structure. According to Article 80(3), the Federal Supreme Court has the power to review any court's final decisions containing a basic/fundamental error of law through cassation. This means that the final decisions given by the regional courts over regional matters can be reviewed by cassation division of the Federal Supreme Court so long as their decisions disclose a basic error of law. This is because the phrase 'any court's final decision' in Article 80(3) can cover final decisions made by the regional courts over regional matters. As discussed earlier, this means that final decisions given by the Regional Supreme Court on regional matters are subject to review by the Federal Supreme Court. Hence through a mechanism of cassation the Federal Supreme Court could look at regional matters, and this makes an exception to the parallel structure of the two courts stated under Article 80(1 and 2).

B. Enforcement of Decisions

58. Another area of relationship between the two courts is found in the enforcement of decisions of one by the other. A decision may be given by a federal court but it needs to be transferred to one of the regional courts for the reason that the property to satisfy a judgment may be found in a certain region. To satisfy a decision and decree issued, the federal courts can order regional courts to execute decisions given by them. This is a rule provided under Article 35(1) of Proclamation 25/96. This Article talks about orders given by the federal courts to the regional courts only and not vice versa. However, there is no reason why the regional courts cannot order the federal courts to execute their decisions if sufficient property to satisfy the decisions of the regional courts is found or located in federal places.

C. Appointment of Judges

59. Still another relationship between the two courts is implied from the procedure on the appointment of some judges of regional courts. Federal organs are responsible for the recruitment and appointment of the federal court judges. Similarly, regional organs are fully in charge of recruitment of the regional court judges. However, the independence in the recruitment of judges is, to some extent, qualified by Article 78 of the Constitution. In as far as the recruitment of the Regional High and Supreme Court judges is concerned, the Regional Judicial Administration Commission, which recruits these judges, should seek the suggestion from the Federal Judicial Administration Commission, which recruits federal nominee judges, before submitting the lists of candidates to the Regional Council. The Regional Judicial Administration Commission submits its opinion together with that of the Federal Judicial Administration to the Regional Council for approval.

60. The suggestion of the Federal Judicial organ is not decisive and binding on the Regional Council. It is the discretion of the Regional Council that determines the final appointment of the judges. The procedure here is to illicit opinion from the *Federal Judicial Administration Commission* on the judges already recruited by the Regional Judicial Administration Commission. In addition, the Federal Judicial Administration Commission gives its opinion on the recruitment of the Regional High and Supreme Court judges only. It does not have a say on the recruitment of Woreda Court judges made by the Regional Judicial Administration Commission. Nowadays, in some regions where the Federal High Courts were set up, the issue of seeking opinion is limited to the recruitment of High Court judges in a region, who entertain cases falling under the jurisdiction of the Federal First Instance Court. In such regions, the opinion need not be sought on the recruitment of judges for the Regional Supreme Court because the power of the Regional Supreme Court to see federal matters by delegation has already been taken over by the Federal High Court established in the region.

61. The reason why obligation is imposed on the Regional Judicial Administration Commission to seek its recommendation from the Federal Judicial Administration Commission in the recruitment of the judges of the High and Supreme Courts is because these judges handle federal matters arising in the regions.

62. A relationship between federal and regional courts can also be found in the exercise of jurisdiction of one court by another court. Article 80 sub-Article 1 and sub-Article 2 seem to indicate that regional courts do not consider federal matters or vice versa. However, the mechanism of delegation gives power to regional courts to see federal matters. Owing to financial, manpower constraints, and other reasons, it was found that the government could not establish federal courts in each region/state. To overcome this problem, the Constitution gives regional courts power to consider federal cases arising in the regions. The delegation empowers the Regional High and Supreme Courts only to see federal matters. Hence Regional Woreda Courts cannot at all see federal matters. The powers of the Federal First Instance and High Courts are delegated to the Regional High and Supreme Courts, respectively. In states where the Federal High Courts have already been established the delegation relates to the matters falling under the jurisdiction of the Federal First Instance Court.

63. The regional courts that consider federal matters will be given a compensatory budget for their work in entertaining federal matters.

D. Participation in Federal Court Activities

64. Further relationship between federal and regional courts can be gathered from Article 32 of Proclamation 25/96, which makes the presidents of the Regional Supreme Courts members of the Plenum of the Federal Supreme Court. This enables the Regional Supreme Courts to participate in the activities of the Federal Supreme Court.

VIII. Administration of Justice: Brief Historical Account

65. In this section attempt is made to briefly touch on the history of the administration of justice in Ethiopia by considering the major attempts made by the regimes that assumed power in the country in dealing with judicial affairs.

66. There are hardly any records of how justice used to be administered in Ethiopia in the distant past because the information in this regard is scant. Most of the available information in Ethiopia focuses on the glory of kings and rulers, their rebellion and violence, and their military campaigns against both internal and external forces. However, the meager and scattered sources reveal that the sense of justice among Ethiopians greatly contributed to the creation and development of manifold legal institutions, mostly informal, whose significant characteristic was their complete fusion with the rest of the lower ranking administrative units. As a result, there was an informal hierarchy of administrative and judicial arbitrators.[1] In the early judicial system of Ethiopia, there were no formalized and institutionalized sets of courts that

used to administer justice.[2] Formal and institutionalized government machinery, in general, and the judicial system, in particular, evolved only during the reign of *Emperor Menelik II*, who waged a successful military campaign and managed to expand his territory and consolidate his power at the centre and then focused on modernizing the country.

1. C.N. James, Paul Clapham, & Christopher Clapham, *supra*, n. 1, at 841; see also Robert Allen Sedler, 'The Development of Legal Systems: The Ethiopian Experience', *Iowa Law Journal 53* (1967, 1968): 567–571.
2. *Ibid.*

67. Prior to the nineteenth century, justice administration was largely the function of the executive, who used to assume both the functions of the administration and dispending of justice and as such there was a complete fusion of the two functions in administrators. There was no demarcation between the administration and judicial business. For instance, the governor of a certain administrative area was the president of the court in that area.[1] This was the case up to the 1931 written Constitution, which was the first written Constitution and the first of its kind in the long history of the country. The institution of government and the courts got developed fully during *Emperor Hailesselasie I*, who further consolidated the power at the centre, and with such consolidation the need for and the binding effects of rules increased and the courts were, therefore, set up.

1. *Ibid.*, 854.

68. It was Emperor Hailesselasie who adopted the 1931 Constitution, which specifically devoted a chapter containing five provisions on matters related to the jurisdiction of courts. This Constitution served as a springboard based on which many subsequent laws relating to the administration of justice by the courts of law were enacted. The first law dealing specifically with the structure and jurisdiction of courts was proclaimed in 1942, immediately after the brief occupation by Italy of the country and following its liberation in 1941 (the *Administration of Justice Proclamation No. 2 1942*). This law defined the composition, jurisdiction, and organization of courts and set up a four-tiered court structure: the Supreme Court, the High Court, the Provincial Court, and the Communal Court. The same law accorded the Emperor (Emperor Hailesselasie) the power to establish other courts having criminal and civil jurisdictions, which would be subordinate to the Provincial Courts and under the Communal Courts. Based on the right reserved to him under the law, two courts, namely the *Wodera Court* and *Mikitil Woreda Court*, were set up but without the law establishing them and outlining their jurisdiction being promulgated. In other words, the courts supposed to be subordinate to the Provincial Courts and under the Communal Courts did not have the legal base because the law that set them up was not officially published, that is, the Emperor's order to establish them was not translated into the proper law. These two courts were abolished when another law was promulgated in 1965, the *Courts Proclamation No. 195/1965*). In 1961, the *Civil Procedure Code* was adopted, which is still in force with some adjustments introduced following the adoption of the federal system in the country in 1990s. Ethiopia began to modernize its legal system and came up with procedural laws in 1960s, which were historically of little emphasis because of the lack of trained lawyers.

69. The *Civil Procedure Code* set up a four-tiered ordinary court structure – the *Supreme Court*, the *High Court*, the *Awraja Court*, and the *Wodera Court* – which provides their respective jurisdictions. The establishment of the Supreme Court by the Civil Procedure Code can be implied from its provisions, for instance, Article 32. However, one cannot find a clear provision dealing with the specific powers of the Supreme Court. The existence of the Supreme Court is derived from the rule under Article 31(2) of the Civil Procedure. This article says that the application for transfer of a suit from the High Court shall be filed to the Supreme Court. This means that the Civil Procedure recognizes the Supreme Court. Thus we could conclude safely that the Civil Procedure established four levels of courts. It can also be implied from Article 321 of the Civil Procedure.

70. The *Supreme Court* had only an appellate jurisdiction on decisions of the High Court (see Article 321(1)(c) of the Civil Procedure Code); the High Court had original jurisdiction on about four cases, and an appellate jurisdiction on decisions of the Awraja Court (see Articles 15 and 321(1)(b) of the Civil Procedure Code); the Awraja Court had original jurisdiction on some matters and had also an appellate jurisdiction on decisions of the Wodera Court (see Articles 14 and 321(1(b)); the Wodera Court had only original jurisdiction on some matters (see Article 13 of the Civil Procedure Code).

71. Apart from these ordinary courts of law, the Civil Procedure Code enshrined a provision that dealt with the power of the Emperor in the administration of justice. It set up the *Zufan Chilot*, in which the presiding judge would be the Emperor himself. This special sort of court was not supposed to be part of the judiciary. It had jurisdiction to see cases that had exhausted all the possible appeals (see Article 322 and Article 361, which outlines the detailed procedures as to how one should file one's petition to the *Zufan Chilot*). This provision was in line with the then perception toward the Emperor. The people used to look to the Emperor as the ultimate guardian and source of justice. As a result, people used to approach the Emperor for review and redress after final decisions were made by the governors of the localities. Even after regular courts were set up in 1942, the practice was extended to the final decisions of courts and the Emperor used to review those decisions. This practice was institutionalized under the Civil Procedure Code and the Emperor continued to exercise his royal prerogatives. It was the long history of fusion between the executive and judicial business that lingered on and empowered the Emperor with such functions of reviewing the final decisions of courts even following the enactment of laws that put courts distinct from the executive organs. However, the Emperor had no power to interfere with the day-to-day functions of courts because they were supposed to render decisions on matters brought to their attention on the bases of the law.

72. As said earlier, the Emperor's *Zufan Chilot* was not part of the regular courts, although it was endowed with reviewing the final decisions of courts and had a role in the administration of justice. It was essentially different from regular courts in at least two major factors. Firstly, the jurisdiction of *Zufan Chilot* was discretionary – it was based on royal prerogatives and as a result a party may not directly file his petition to the *Chilot* and hence there is no right of petition. Secondly, there is a difference in the rules applied in the *Zufan Chilot* and the ones used by the courts. In

the *Zufan Chilot* the Emperor had the power to decide cases on the basis of equity, fairness, and justice and was not bound to follow the provisions of the law, whereas courts of the law are bound by the formally enacted laws relevant to the case at stake.

73. Following the 1974 Revolution, the Emperor was ousted and the military junta took over the power. The military regime of Colonel Mengistu Hailemarian largely maintained the courts of law that were in operation during the Emperor's regime. A significant change in relation to the powers of courts was introduced when the 1987 Constitution was adopted by the military regime and some special tribunals were set up. The *Ethiopian People's Democratic Republic Constitution* of 1987 stipulated that the judicial authority be vested in one Supreme Court and other courts established by law. The Supreme Court had power to review any case from another court at the request of the Prosecutor General or at the request of the President of the Supreme Court. In the *Derg* regime the courts were structured in line with the unitary form of government. The lower courts had a vertical relationship, and they were subordinate to superior courts institutionally because this was the very feature of the unitary system.

74. As provided under Article 63(3) of the 1987 Constitution, the Supreme Court that was set up was different in its jurisdiction from the one during the reign of Emperor Hailesselaise. On the basis of the constitutional stipulation, a law was enacted in 1987 that defined the powers of the Supreme Court. The Supreme Court was accorded, unlike its predecessor, the first instance (original jurisdiction) and the power to review final decisions of courts through cassation where such decisions were alleged to have contained fundamental errors of law or other reasons specified by procedural law (see Article 4 of the Supreme Court Establishment Proclamation No. 9/1987). The military regime had set up special tribunals that took away from the regular courts of the country, which were known for their harshest decisions against persons brought to them, usually military personnel and politicians accused of conspiring against the government and/or intending to make a *coup d'état* (see the Military Courts Establishment Proclamation No. 10/1987 and the Special Courts Establishment Proclamation No. 215/1981). However, the jurisdiction of the special courts was given later on to the Supreme Court and the High Court as indicated under the Supreme Court Establishment Proclamation No. 9/1987(see Article 33 of this Proclamation).

75. Though a protracted military resistance staged against it soon after it assumed power in 1974, the military regime fell in 1991. As soon as it seized the power from the military regime, the incumbent ruling party called upon all the opposition parties for the national conference, which eventually adopted the *Transitional Charter* (which in a way served apparently as an interim – Constitution). The Charter recognized two levels of government, the central and the state/regional, and provided that each have its own government apparatus and autonomous courts independent of each other, indicating the upcoming federal structure in the country. There were fourteen autonomous regional states and one central government, and each state was entitled to have its own government structure and court system (see the National Self-Government Establishment Proclamation No. 2/1992). Hence there were two sets of courts in the country, one at the centre and the other at the state level, each

acting independently of the other. At each level, there was a three-tiered court structure: the Supreme Court, the Zonal Court, and Woreda Court. The jurisdictional competence of the Central government was specified in the law enacted in 1993 (see Proclamation No. 42/1993). The state/regional courts were competent to deal with all matters in their respective areas except those matters that were specifically given to the jurisdiction of the central courts.

76. Later on, the present-day Federal Constitution was proclaimed in 1995, which brought about a radical change in the structure of the state and of courts of law. It officially incepted the federal system in the country, which the transitional system adopted de jure.

IX. Settlement of Disputes by Bodies outside the Regular Courts

77. The FDRE Constitution has recognized the independence of the judiciary and vested judicial functions in courts both at the federal and regional levels (Article 79 of the FDRE Constitution). It expressly prohibits the establishment of *special* or ad hoc courts that usurp judicial power from regular courts or institutions legally empowered to exercise judicial function (Article 78(4) of the FDRE Constitution). The aim of this provision is clear – it is to reverse the past history where such courts were established outside the regular court structure and had caused injustices against the accused persons, who in most cases received harsh decisions that were delivered contrary to all the rules of procedural fairness. It does not mean that courts have the monopoly of judicial functions on all matters that could be brought to the attention of courts. That is why the Constitution recognizes, under its Article 37, the establishment of other bodies that could engage in dispute resolution. On the basis of the constitutional provisions, some bodies that play, to some extent, a judicial function were set up in Ethiopia. They include administrative tribunals, sharia court, and social courts. It is good to have a brief look at them and their relations with the regular courts.

A. Administrative Tribunals

78. There are some administrative tribunals that are set up by different and separate laws relating to different administrative matters. They include the Civil Servant Appeal Tribunal, the Tax Appeal Commission, the Labour Relations Board, the Pension Appeal Tribunal, and others. These tribunals serve as institutions of primary jurisdiction on matters that arise in different administrative affairs before the cases go to the regular courts.

79. Administrative tribunals are not part of the judiciary. They form part of the executive branch and have a quasi-judicial power. They are given the power to decide on some disputes related to administrative activities and functions of the government, with the exception of the Labour Relations Board in which the parties are private individuals but is considered to be an administrative tribunal.

80. In Ethiopia, some of the main administrative tribunals include: the *Tax Appeal Commission* (established by Income Tax Proclamation); *Civil Service Tribunal* (established by Civil Servants Proclamation); *Labour Relations Board* (established by the Labour Proclamation), etc. They are competent to deal with specific administrative matters only. The Civil Servants Tribunal entertains matters related to civil servants only; the Tax Appeal Commission sees cases related to taxes only, etc. If a case relating to civil servants, taxes, or collective labour issue arises, the primary jurisdiction is given to these tribunals. A party cannot directly file a case to a court of law. Rather, he should first exhaust the remedies available in the administrative branch, including considerations by these administrative tribunals. It is after decisions of these tribunals that a party can approach the regular court. Once final decisions are rendered by these tribunals, there comes access to courts and it is here that Article 79 of the Federal Constitution comes into play. The Article means that there must be some way as to how courts should review the decision of these tribunals to check the legality of their decision. If access to court is denied by the laws that establish these tribunals, the law is said to be against the spirit of the Article. It is for this reason that all the laws that establish these tribunals provide that the decisions of the tribunal are final on questions of facts but their decision can be reviewed on questions on law so long as some procedural requirements are met by the applicant. Thus the relationship between these tribunals and the courts of law is that their final decisions on questions of law are subject to judicial review by the courts of law. Hence on all questions of law the final arbiter of administrative disputes is the regular courts of law.

81. Thus some administrative matters for which administrative tribunals are established fall, to some extent, outside the judicial power of the court. Administrative cases that do not fall in the jurisdiction of one of these administrative tribunals are to be seen by courts directly so long as they are justiciable and that the law does not prohibit courts from considering them in express terms.

B. Sharia Courts

82. Some personal matters involving Muslims may fall outside the jurisdiction of courts. Proclamation No.188/99 establishes the federal sharia courts. They are empowered to see cases involving Muslims. The cases they can see are personal matters such as questions of marriage, divorce, maintenance, gift, succession, guardianship of minors, and family relationships, which are civil matters essentially based on the existence of marriage relationships (see Article 34 of the Federal Constitution and Article 4(1) of the Sharia Court Proclamation (Proclamation No. 188/99). It is not a pre-condition that marriage relationships subject to dispute necessarily be concluded according to the sharia law for a case to appear before sharia courts. Even if marriage is not concluded according to Islamic law, sharia courts can see cases so long as the parties consent to get their cases settled by the sharia courts (Article 4(1)(a) of the Proclamation).

83. Sharia courts have limited jurisdiction on cases specifically listed under this Proclamation. They cannot see all types of disputes among Muslims. Another basic

issue concerning the sharia courts is related to their very power to see cases. The sharia courts entertain cases falling in their jurisdiction only if both parties expressly consent to their jurisdiction (for the purpose of establishing consent a form on declaring consent shall be issued upon the defendant and the defendant should fill in the form and appear before the Registrar of the Court whether or not he consents to the jurisdiction of the sharia court to which the case is lodged, but if he fails to appear before the Registrar for this purpose and if it is believed that he has been duly served with the consent from it is presumed that he consents to the jurisdiction of the court).

84. The express consent of the plaintiff is said to be given if he submits his case to the sharia court and the consent form applies to the defendant only. Thus if the defendant declares, as per the form sent to him, that he wants to get the case considered by the sharia court, there is said to be the express consent of both parties within the meaning of Article 34(5) of the Federal Constitution and Article 4(2) of the Sharia Court Proclamation (Proclamation No. 188/199). Their jurisdiction is, therefore, entirely consensual unlike that of regular courts, which have compulsory jurisdiction once they have jurisdiction over the cases.

85. The relationship between the sharia court and regular court of law is indicated under Article 5(4) of the Sharia Proclamation (Proclamation No. 188/97). Once the parties consent and the hearing of the case is pending in the sharia courts, there is no way the same matter could appear before or transfer to the regular courts and vice versa. For a stronger reason, once a decision has been rendered, there is no appeal from or some form of review of the decisions of sharia courts by regular courts or vice versa. Thus there is no possibility to get the final decisions of the sharia courts reviewed by means of cassation exercised by the Federal Supreme Court either. This may be designed because the substantive law applied by sharia courts is sharia law, and courts cannot and should not review the matter because they are not expected to apply religious laws to see or review cases. Thus final decisions rendered by the Sharia Supreme Court do not fall within the meaning of Article 80(3) of the Federal Constitution, which accords the Federal Supreme Court the power to review the final decisions of any court when they are claimed to have contained fundamental errors of law.

86. The sharia court has a three-tiered court structure: First Instance, High Court, and the Supreme Court. The Supreme Sharia Court has the power to review decisions by cassation.

87. The sharia courts were functioning prior to the adoption of the FDRE Constitution. They were set up in early 1942 and the law providing for their legal framework was adopted in 1944. They were set up to address the concern of the Muslim population in the country given the sizeable number of the Muslims in the country. The Civil Code that was adopted in 1961 destroyed the legal ground based on which their legal framework was built. In spite of the presence of rule in the Civil Code that denied them legal recognition, they continued to operate and by the order issued by the then Ministry of Justice. They operated without any legal backing until the Federal Constitution was adopted in 1995. It was the Federal Constitution that accorded them constitutional backing, and based on this frame the specific legal

instrument that provides their powers, structure, and organizational aspects; their relationships with courts of the law; the enforcement of their decision and so on was enacted in 1999.

C. Social Courts

88. The FDRE Constitution does not explicitly deal with social courts. They are set up both at the federal and state levels as part of the Kebele administration level, and the appointment of judges serving in them are also appointed by the Kebele Councils. Because they operate at the *Kebele* (communal) level and provide indispensable judicial service to the dwellers of each *Kebele*, they are believed to play a role in safeguarding the freedoms and interests of individuals, in efforts to maintain peace and healthy relationships in neighbours at the smallest local level, in promoting the attitude of residents toward respect for law, etc.[1] One may consider social courts as the modified version of the traditional system of justice administration by individuals at the local level. Social courts consider some cases, some of which may have pecuniary values and others not. Generally, they entertain small claims and petty disputes (civil disputes up to Ethiopian Birr (ETB) 5,000 and petty criminal offences). The decisions made by these courts are subject to appeal that is entertained by the First Instance Courts (see the Proclamation of Addis Ababa City Administration 261/2003). It appears that the establishment of these courts introduces modification to the federal courts establishment Proclamation which envisages that the First Instance Court does not have appellate jurisdiction.

1. The Canadian International Development Agency, *Independence, Transparency and Accountability in the Judiciary of Ethiopia* (The National Judicial Institute, 2008); see also The World Bank, *Ethiopia: Legal and Judicial Sector Assessment Report* (2004).

89. The social courts are found both at the federal and state levels. At the federal level, their establishment is indicated under the Proclamation on the Addis Ababa City Administration and Proclamation on Dire Dawa City Administration. It is these laws that outline their powers, organization, and staffing, etc.

90. Apart from social courts, one finds also the municipal courts that handle some cases. These courts are set at the level of the Addis Ababa Administration as a judicial branch of the city government. The types of cases they handle are specified under the City Administration Proclamation. Municipal courts are unique courts in the sense that they have a three-tiered court structure. Their relationships with regular court are also provided in the same Proclamation. It is only for cassation purposes that matters seen by the municipal courts may appear before the Federal Supreme Court.

§2. MEMBERS OF THE JUDICIARY

91. Before dealing with the members of the judiciary, it is good if one has a quick glance at the internal aspects of the courts, such as the budget, administration of personnel, and so on, as well as issues about their judicial functions.

92. With respect to internal matters, courts should have the power to decide on their internal affairs and administer their budget and personnel. The Ethiopian Constitution provides under Article 79(6) that courts are empowered to administer the budget allocated to them. Proclamation 25/96 also provides under Article 16 that the budget of the federal courts is to be drawn by the President of the Supreme Court, obviously in consultation with the presidents of the lower courts, and directly submitted to Parliament for approval and implements the same upon approval. The Federal Supreme Court is also responsible for employment and administration of employees necessary for the activities of courts (see Article 16 of Proclamation No. 25/96). The Federal Supreme Court is, in addition, responsible to come up with directives that improve the practices of courts as provided under Article 33 of Proclamation 25/96.

93. Concerning undertaking their judicial functions, the Ethiopian Constitution provides under Article 79(3) that they are guaranteed full independence in carrying out their functions and that they are guided solely by law. This provision places officials and agencies of the government under obligation to respect the independence of courts in this respect, and also calls up on judges to act in accordance with the laws only and avoid other factors that affect their judicial activities.

I. Competence

A. Judges

94. Apart from taking about the procedures of recruiting some judges, the Federal Constitution does not outline the criteria for recruitment. The criteria are found in the law setting up the Judicial Administration Council. The criteria are set forth in the law setting up the Judicial Administration Council. As per Proclamation No. 24/1996, which established the Commission, the criteria include loyalty to the Constitution, training in law or legal skill gained through experience, integrity of the person (good conduct, reputation for diligence, sense of justice), and age (not less than twenty years of age). No person may simultaneously assume judgeship while serving in the legislative or executive branches of government or while a member of any political organization.

B. Lay Judges

95. Concerning lay judges, the practice is that they serve as assistants to the judges already appointed. They see cases behind the curtain and hand over the files to judges by giving recommendation as to how decisions should be rendered. They serve as lay judges until they get appointed as proper judges.

II. Appointment of the Judges

96. Appointment of judges has to do with the independence of courts. It is by taking note of this fact that the law tries to limit the role of the executive in the appointment of judges. In Ethiopia, the executive branch does not have a decisive role in the appointment of judges. For example, at the federal level, the *Judicial Administration Commission* undertakes the recruitment, transfer, and removal of judges. The Council is an independent body largely composed of judges – six judges and three members of Parliament (see Article 4 of the Judicial Administration Commission Proclamation No. 24/1996). The *Judicial Administration Council* is an independent body that is responsible, among others, for the recruitment of all judges except the President and Vice President of the Federal Supreme Court. The Prime Minister makes the recruitment of the President and Vice President of the Federal Supreme Court and submits a list of candidates to Parliament for approval. The Prime Minister does not, however, have any role in the recruitment of the other judges apart from passing the name of candidates recruited by the Judicial Administration Council to the House of People's Representatives (see Article 81(2) of the Federal Constitution).

III. Term of Office

97. The term of office of judges is a permanent one until one retires. A judge may not, therefore, be removed from his post unless he resigns by his consent; or unless he commits a disciplinary fault that leads to his dismissal; or unless he is proved to be incapable to perform his function owing to gross incompetence or illness, etc. (See Articles 79(3) and 79(4) of the Federal Constitution for the terms of office of judges and their removal.) A judge cannot be dismissed in the absence of one of these reasons. The reasons provided here are exhaustive and, hence, no other reason can be used for the dismissal of judges. The grounds that end the function of judges are largely related to resignation, conviction for breach of the Code of Ethics, personal (incapacity as demonstrated by cases decided by him and illness or disability), and retirement.

98. In as far as lay judges are concerned, there is no specific rule governing how they are recruited. The practice is that the courts themselves hire people and assign them to serve as assistants to judges already appointed. They serve as an assistant and see cases and hand over the files to the judge. They work in this position until they get appointed as a proper judge.

IV. Discipline

99. Matters related to discipline are regulated in different ways. Adoption of the Code of Ethics, which is given to the Judicial Administration Council, the powers granted to the Supreme Court and High Court over the transfer of suit, the powers granted to the President of the Supreme Court, the role of the Judicial Administration

Commission in investigating a case of breach of the Code of Ethics by a judge, and, finally, recommending dismissal, the role of the individual judge, for instance, to remove himself from considering a case should he believe that this affects the outcome of a decision all contribute in enforcing issues of discipline. It is largely the function of the Judicial Administration Commission to deal with issues of discipline and the Code of Ethics – it issues the Code of Ethics and deals with complaints about breach of the Code of Ethics.

V. Supervision

100. Supervision of judges is made mainly by the President of the Supreme Courts and to some extent by the president of each level of courts and the Judicial Administration Commission. In addition, the Supreme Court is supposed to submit an annual report to the Parliament on its activities and performance. This could have some supervisory aspects because the Parliament could make some recommendations on problems encountering the judiciary. This does not mean that the Parliament is entitled to interfere with the internal judicial functions of courts.

Chapter 2. The Bar

§1. Legal Representation in Civil Suits in General

101. Representation is allowed in civil cases and the reason why it is allowed is 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 that it is necessary for the proper determination of the suit.

102. Representation can be categorized generally in two types. One type is in which the representatives act in 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 representation by an attorney/advocate. The other is in which the representatives represent the interest of others as well as their own.

103. A person can also be represented by his pleader/advocate. A pleader or an advocate 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 must produce his license together with the 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 by a written letter to act on behalf of such person.

104. The first rules governing advocates were enacted in the 1940s. Since then many laws were enacted to amend or repeal the rules regulating the activities and the Code of Conduct of advocates. The law currently in force relating specifically to the activities and Code of Conduct of advocates are the Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000 and the Federal Courts Advocates' Code of Conduct Regulation No. 57/1999.

§2. The Bar Association

105. The *Ethiopian Bar Association* does not have any role in the administration of the entrance examination, issuance of the license, and in supervising the Code of Conduct of the advocates unlike the case in many other countries. The administration of the entrance examination, issuance of license, and supervision of advocates are the responsibilities of the Ministry of Justice. The Association is merely an association of people who come together and discuss different issues related to advocacy and other legal matters. The admission to the Association is not, in fact, limited to advocates and anyone with a legal education and/or experience can join it. The Association can discuss problems facing the advocates in general and can propose

recommendations to the Ministry but it does not have direct influence on the outcome of decisions taken by the Ministry of Justice. The lack of the power to supervise and control advocates significantly undermines the independence of the profession. This does not, however, mean that the Association does not have any role at all. Two members of the Association serve in a committee set up under the Ministry in charge of evaluating the application for license and also two members representing the Association serve in a committee, the *Advocate's Disciplinary Committee*, set up under the Ministry to supervise and control advocates.

I. Conditions for Admission

106. To be an advocate and appear before the Federal First Instance Court the minimum requirements are: a diploma in law from a recognized academic institution, knowledge of the basic laws of the country, and five years of relevant experience and professional indemnity insurance. The requirements slightly differ when an advocate wants to appear before the Federal First Instance Court. The requirements are: a degree in law, knowledge of the basic laws of the country, and two years of relevant experience and professional indemnity insurance. In addition to these requirements an applicant is under obligation to take and pass the entrance examination set for advocates. Persons who have taught legal courses at the higher academic institutions at least at an assistant professor position holding a degree in law or persons who have served at least five years as a judge or public prosecutor in the Federal High Court or above or as a legal consultant and attorney in a known government organ and public enterprise and apply for license within one year of the termination of their employment are exempt from taking the entrance examination.

II. Rights and Responsibilities and Code of Conduct

107. The duties and rights are set forth in the Proclamation (Proclamation No. 199/2000) and Regulation (Regulation No. 57/1999). The role of the advocate is to protect the rights of the client and, thus, the advocate's first and foremost duty is to be loyal to the client, and most of the rules on the Code of Conduct aim at preserving the interest of the client. The Proclamation on Advocates and the Regulation on Code of Conduct include rules relating to the Code of Conduct, such as the number and kind of cases that an advocate could handle so that he could render his advocacy service efficiently to his client, rules on conflicts of interests, secrecy, confidentiality, obligations to communicate with his client about the progress of the case, etc.

108. The advocate can run his practice in an individual capacity or in a company only with another advocate by applying to the Ministry of Justice. The use of a company with limited liability in the legal practice is prohibited.

§3. Public Legal Aid

109. The Proclamation as well as the Regulation on advocates provides that advocates should give fifty hours per year of legal aid to those in need of the service free of charge. There is no mechanism to enforce the rule because there is no institution set up dealing with the legal aid offered to the needy people.

Chapter 3. Bailiffs

110. There is no institutionalized system of bailiffs in Ethiopia. There are no civil servants employed under the courts of law for the purpose of serving writ or summons. Thus bailiff is not considered to be a profession in the country.

§1. Writ Servers

111. There is no system of writ in Ethiopia. Summons in civil cases are served on the defendant by the plaintiff himself and the law providing mechanisms as to how to ensure that it is duly served on the defendant. The law provides measures to be taken against the plaintiff who fails to properly serve the summons on the defendant or who has shown negligence in serving summons.

§2. Enforcement Authorities

112. The enforcement of judgments is effected by a department set up for this purpose. Notice for enforcement of judgments is usually publicized in state-owned newspapers and there are no persons employed for this purpose. The persons engaged in sale of property are under the execution department.

Part II. Jurisdiction

Chapter 1. Domestic Jurisdiction of Federal Courts

§1. Subject-Matter Jurisdiction of Federal Courts

113. Jurisdiction has many aspects and one of them is subject-matter jurisdiction. Subject-matters jurisdiction is especially important in states that adopted the federal system particularly when the dual court system is adopted by the system.

114. Subject-matter jurisdiction refers to a court's power to hear and determine cases of general classes or categories to which proceeding in question belongs. It refers to and determines the type of case to be instituted in a given court. Particularly, in a federal court structure, it serves as a factor to apportion jurisdiction between federal and state courts. Thus the determination of whether a court is a proper forum for resolution of a matter to be adjudicated is based on whether the court has subject-matter jurisdiction.[1] Subject-matter jurisdiction is, therefore, the question of whether a particular court has power to decide a kind of controversy involved. In a federal system of government, this aspect of jurisdiction is crucial to identifying whether a matter is under the federal court or state court.

1. *The Encyclopedia of the American Judicial System*, vol. 2 (1987), 825.

115. In the US there are two broad categories that determine the subject-matter jurisdictions of the federal courts: diversity jurisdiction and federal question jurisdiction. The same factors as those in the US seem to be adopted in Ethiopia.

I. Factors to Be Taken into Account

116. The subject-matter jurisdiction of the federal courts is gleaned from the provisions of the FDRE Constitution and the Federal Courts Proclamation. The Constitution provides that subject-matter is a principle of apportionment of jurisdiction between the federal and state governments in general and the courts in particular (see, among others, Articles 51 and 80 of the Federal Constitution) because it tries to provide matters falling under the federal jurisdiction, and dispute over such matters can be treated as involving federal questions. The Federal Courts Proclamation indicate this when it deals with their powers, which relate to questions involving federal laws,

international treaties and the Federal Constitution, and the type of parties and the place where a case relates to.

117. Following the adoption of a federal system of government in Ethiopia, there are two sets of courts in the country: the federal courts on the one hand and the state courts on the other. The jurisdiction falling under the two courts is determined by the powers granted to each government under the Federal Constitution. The power division between the federal and state courts is based on listing the power of the federal government and the residual powers are under the state authority. The federal courts have jurisdiction on matters falling under the federal powers. Thus the federal courts are empowered to hear only such cases as are within the judicial power of the federal government as provided by proclamations relevant to the establishment of federal courts, mainly Proclamation No. 25/1996, and other laws. Cases that do not fall under the competence of federal courts shall fall within the remit of state courts. Federal courts may be said to be courts of limited jurisdiction because their powers are expressly listed under Proclamation No. 25/1996 and other laws that amend this Proclamation and can also be gleaned from the list of powers conferred upon the federal government, whereas state courts may be labelled courts of general jurisdiction because they have competence on residual matters.

118. Proclamation 25/1996 indicates the issues about diversity jurisdiction and federal questions under its provisions. For instance, Article 3 deals with cases that are entertained by the federal courts. These cases depend on laws (federal laws, Federal Constitution, international treaties), places, and parties. These cases indicate the cases giving rise to federal questions as in the case of the US. After listing the three factors that point to federal questions, the Proclamation goes on listing down specific matters, both civil and criminal, that fall under the federal courts in the subsequent provisions, Articles 4–6.

119. The diversity jurisdiction that is used in the US to determine the subject-matter jurisdiction of the federal courts in the country appears to be also used under the Proclamation to determine the subject-matter jurisdiction of the federal courts in Ethiopia. One can, for instance, look at Article 5, which provides, *inter alia*, that suits between persons permanently residing in different regions and cases to which a foreign national is a party fall within the remit of the federal courts.

120. Generally, the powers of the federal government listed under the Federal Constitution, the type of laws, parties, and place involved in a case, which are specified under Proclamation No. 25/1996, determine the subject-matter jurisdiction of the federal courts.

121. The concept exclusive jurisdiction refers to matters that the federal or state court in, especially, a federal system of government is able to exercise to the exclusion of the other. Exclusive jurisdiction is used as opposed to concurrent jurisdiction and, hence, a matter may not be brought to and seen by the other court. Concurrent jurisdiction refers to cases over which both the federal and state courts are equally competent to deal with. That means both federal and state courts are given authorization to enforce claims that arise in a statute so long as the matter is brought

to the attention of each.[1] Hence state courts are empowered to entertain federal matters in addition to their exclusive matter and vice versa. In some federal court structure, for instance, in the US, federal courts have some exclusive jurisdiction and state courts have concurrent jurisdiction on certain federal matters.[2]

1. Marti H. Radish, *Federal Jurisdiction*, 2nd edn (St. Paul, Minn.: West Publishing Co., 1991), 113.
2. Currier P. David, *Federal Jurisdiction*, 3rd edn (St. Paul, Minn.: Est. Publishing Co., 1990), 138.

122. The issue of exclusive and concurrent jurisdiction is in disarray under both the Federal Constitution and the Federal Court Establishment Proclamation No. 25/1996. The Constitution does not deal with exclusive jurisdiction of the federal jurisdiction but deals with issues of concurrent jurisdiction while actually it is talking about delegation of federal court jurisdiction to state courts until federal courts are set up in states. It uses the word 'delegation' interchangeably with 'concurrent jurisdiction', creating confusion as to whether the jurisdiction given to state courts to entertain federal matters until federal courts are established in states is actually made possible by delegation of jurisdiction or concurrent jurisdiction of the state courts. In spite of the interchangeable usage of concurrent jurisdiction and delegation of jurisdiction to state courts and the confusion that may be created by the usage of such word, what the Constitution purports to provide here is about the temporary delegation of the jurisdiction of the federal courts to state courts to see federal matters that arise in the respective states until federal courts are set up in the states, and not concurrent jurisdiction in the sense used to identify *exclusive v. concurrent jurisdiction*. However, the reading of the provisions of Proclamation No; 25/1996 may give a hint on issues of drawing distinction between exclusive and concurrent jurisdiction. Article 3 of Proclamation No. 25/1996 lists the basic factors that determine and establish the jurisdiction of the federal courts – laws (Federal Proclamation, federal laws, international treaties), place, and parties determine the federal subject-matter jurisdiction of federal courts. Article 3 of the Proclamation provides that the federal courts shall have jurisdiction over: (1) cases arising under the Constitution, federal laws and international treaties; (2) parties specified in federal laws; (3) places specified in the Constitution or in federal laws.

123. After indicating these three factors that determine the jurisdiction of the Federal Constitution, the Proclamation went on specifying some criminal and civil matters falling under the federal jurisdiction by giving their specific list. The intention of the lists under Articles 4 and 5 is not clear in the sense that it is not clear whether the intention is to indicate the major types of cases that fall under the jurisdiction of federal courts by way of listing items that explain what Article 3 means. It is not plain whether the list under Articles 4 and 5 means that the cases that do not fall here are under the jurisdiction of the regional courts either. Nor is it clear that it talks about matters that are within the exclusive jurisdiction of federal courts and indicate that the remaining cases not falling under the list are concurrently given to the state courts as well although they can be considered federal matters based on Article 3.

124. One may argue in different ways given the vagueness of the issue. Obviously, there are some cases that may not be found in the list given under Articles 4 and 5 of the Proclamation but which still fall under the federal matters pursuant to Article 3.

Although not clear, it appears that the intention here was to list matters that fall under the exclusive jurisdiction of federal courts (such matters are the ones listed under Articles 4 and 5) and then give the remaining federal matters that do not fall under the list but still are federal matters by virtue of Article 3 to the concurrent jurisdiction of state courts. This is how the issue of *exclusive v. concurrent jurisdiction* applies in the US, and the intention of Articles 4 and 5, although not clear and subject to debate, seems to introduce such notion in Ethiopia. However, one can also argue contrary to this view by alleging that the Federal Constitution has divided and defined the respective powers of the federal and regional governments in general and of the courts in particular, and also that the Federal Court Proclamation No. 25/1996 provides the matters that fall under federal matters and, hence, it is not the business of this Proclamation to provide what is to be given to the jurisdiction of the state/regional courts. The Proclamation is meant to show the jurisdiction of federal courts and this is to the exclusion of the state courts. The same type of proclamation enacted by the respective regions provide for matters falling within their respective jurisdiction to the exclusion of the federal courts. Hence one could say that each court has exclusive jurisdiction on matters falling within its jurisdiction and that there is no recognition given to the notion of concurrent jurisdiction in the Ethiopian case. In other words, it can be held that the jurisdiction of federal and state courts in Ethiopia is mutually exclusive.

125. One sense in which exclusive jurisdiction holds true is in the case of the delegation of powers of the federal courts to the regional courts. The jurisdictions of the Federal High Court and of the Federal First Instance Court are delegated to the Regional Supreme and High Courts, respectively, until these courts are set up in the respective regions. The jurisdiction of the Federal Supreme Court is not delegated, and to this extent one can say that cases falling under the jurisdiction of the Federal Supreme Court are exclusive in nature and may not be seen by any regional court. That appears to be why Article 8 of Proclamation No. 25/1996 expressly uses the word 'exclusive' in describing the first instance (original) jurisdiction of the court.

II. Overview of Subject-Matter Jurisdiction of Each Level of Federal Court

A. Jurisdiction of the Federal Supreme Court

126. The Federal Supreme Court stands at the apex of the federal judicial pyramid and is vested with the original jurisdiction (Article 8, Proclamation No. 25/1996) and appellate jurisdiction (Article 9, Proclamation No. 25/1996). In addition to these two powers, it is endowed with the power to exercise the power of cassation over any final decision alleged to have contained fundamental errors of law (Article 10 of the Proclamation and Article 80(3) of the FDRE Constitution).

127. The original jurisdiction of the Federal Supreme Court is laid down under Article 8 of the Proclamation. See Article 8 below:

> 8. First Instance Jurisdiction of the Federal Supreme Court
> The Federal Supreme Court shall have exclusive first instance jurisdiction over the following:
> 1) Offences for which officials of the Federal Government are held liable in connection with their official responsibility;
> 2) Without prejudice to international diplomatic law and custom, offences for which foreign ambassadors, consuls as well as representatives of international organizations and foreign states are held liable;
> 3) Application for change of venue from one Federal High Court to another or to itself, in accordance with the law.

128. Because these cases relate to the exclusive jurisdiction of the Court and given the fact that it is the Court of limited jurisdiction, the list under Article 8 has to be considered an exhaustive list of cases falling under its jurisdiction.

129. Most of the cases under the original jurisdiction of the Supreme Court relate to criminal matters. There is no civil case that directly falls under the original (first instance) jurisdiction of the Supreme Court. However, as a result of change of venue, which is indicated under Article 8(3), the Court could see a civil case in its original jurisdiction. As indicated under the same Article and Article 31 of the Civil Procedure Code, the Supreme Court may transfer a case to itself when a petition to transfer a case to it is filed from a High Court. When such request is filed to the Supreme Court it may transfer the case to itself, or from a division the transfer is sought to another division within the same High Court, or from one High Court to another High Court (see Article 8(3) of the Proclamation and Article 31 of the Civil Procedure Code). It is, therefore, through transfer only that the Supreme Court has original jurisdiction on civil cases.

130. The Federal Supreme Court also has an appellate jurisdiction over decisions of the Federal High Court as given under Article 9 of Proclamation 25/1996, which is indicated below:

> 9. *Appellate Jurisdiction* of *the Federal Supreme Court*
> The Federal Supreme Court shall have appellate jurisdiction over:
> 1) Decisions of the Federal High Court rendered in its first instance jurisdiction;
> 2) Decisions of the Federal High Court rendered in its appellate jurisdiction in variation of the decision of the Federal First Instance Court.

131. Such decisions of the High Court may be decisions passed on cases entertained by the High Court in its first instance jurisdiction or up on the reversal of the decisions of the Federal First Instance Court in its appellate jurisdiction.

132. In addition to its original and appellate jurisdiction, the Federal Supreme Court is vested with power of cassation over final decisions alleged to contain fundamental errors of law as indicated both under Article 80(3) of the Federal Constitution and Article 10 of Proclamation No. 25/1996. Article 10 of the Proclamation reads as follows:

> 10. Power of Cassation of the Federal Supreme Court
> In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over:
> 1) Final decisions of the Federal High Court rendered in its appellate jurisdiction;
> 2) Final decisions of the regular division of the Federal Supreme Court;
> 3) Final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction.

133. Article 10 clarifies Article 80(3) of the FDRE Constitution that does not indicate the specific types of final decisions to be reviewed by the Supreme Court by cassation. In fact, one should not expect the Constitution to provide the list of such final decisions to be reviewed by the Supreme Court by cassation owing to the nature of the document. The types of final decisions reviewed by the power of cassation include the following:

134. Firstly, the Supreme Court has cassation power to see decisions confirmed by the Federal High Court in its appellate jurisdiction. If on appeal the High Court confirms the decision of the First Instance Court, the decision is said to be final. If, however, the High Court reverses the decision of the First Instance Court on appeal, there is one more appeal and, therefore, the decision is not said to be final and such decision does not qualify for review by cassation.

135. Secondly, it can review its own decisions made by its regular division in their first instance jurisdiction or appellate jurisdiction. It means that the Supreme Court has decided on the case in its first instance jurisdiction or that the case comes to it on appeal from the decision of the High Court and then the Supreme Court decides on it. It is possible that such case could first be instituted in the first instance jurisdiction, and on appeal to the High Court, the decision is reversed by the High Court and then appeal is made to the Supreme Court and the case is finally decided by the Supreme Court after exercising its appellate jurisdiction on the case.

136. Thirdly, it has power to review by cassation decisions of regular divisions of State Supreme Courts, either in their original or appellate jurisdiction. Almost, all the regional states have empowered their respective Supreme Courts to review final decisions on state matters in their respective enabling statute, and the final decision is said to be made where cases exhaust the regional cassation remedy.

137. As it stands now, the application of Article 10(3) is limited only to final decisions on federal matters rendered by the Regional Supreme Court using its regular or appellate jurisdiction on matters delegated to it by the Federal Constitution. Where a final decision is made by the State Supreme Court on federal matters by its first instance or appellate jurisdiction, a party may approach the regional cassation or the Federal Supreme Court for review by either appeal or cassation. Insofar as state matters are concerned, because there is no superior and subordinate relationship between the federal and regional courts, there is no possibility of appeal from the State Supreme Court to the Federal Supreme Court on state matters.

138. There is no way the Federal Supreme Court entertains state matters in its regular or original or appellate jurisdiction. Accordingly, concerning state final decisions made by the Regional Supreme Court on state matters, the Federal Supreme Court reviews the final decision on state matters after the regional cassation remedy is exhausted. This is because almost all states have provided, in their respective enabling legislation, the possibility of review by cassation. The possibility for the application of Article 10(3) concerning review by cassation of the Federal Supreme Court of final state matters is limited to instances where the Regional Supreme Courts have considered the matter and delivered their final decision after cassation power is exercised by the State/Regional Supreme Court.

139. As the practice of the Supreme Court itself shows, if there is a possibility of review by cassation of the Regional Supreme Court of state matters, the Supreme Court does not admit the matter for review. Rather, it requires the party to exhaust the regional remedy of cassation.

140. The granting of cassation power to the Federal Supreme Court over final decisions made by the regional courts is alleged by some people to have contravened the federal system in the country. Regardless of the arguments, the framers clearly indicated, whether right or wrong, that this was designed for the purpose of uniform interpretation of laws in the country.

141. As of 2005, some of the decisions of the Supreme Court in its cassation power is given the status of precedence and is, therefore, binding on future like cases. This is a major change in the otherwise continental system of law followed by the country. The Proclamation provides that once a decision is given unanimously by five Supreme Court judges in reviewing the case by cassation, the interpretation used in the case binds future like cases. As indicated in the preamble of the Proclamation introduction, the sort of precedence is meant to achieve uniformity of interpretation and making the predictability of the decisions of courts in essentially like cases.

B. Jurisdiction of the Federal High Court

142. The material jurisdiction (subject-matter) of a court may depend on the pecuniary amount involved in a case or on the type of the nature/type of the case. The jurisdiction of the Federal Supreme Court depends on the type of case, which has been specified under Article 8 of Proclamation 25/1996 and is not dependent on any amount of money involved in a dispute unlike the case with the Federal High Court. Concerning civil matters, the material (subject-matter) jurisdiction of the Federal High Court is determined by both the nature of the case and the amount of money involved in the case as provided under Article 11 of Proclamation No. 25/1996.

143. Article 11(1) talks about the amount of money that determines its first instance jurisdiction in relation to civil matters as provided below:

> 11. First Instance Civil Jurisdiction of the Federal High Court

> 1) The Federal High Court shall have first instance jurisdiction over the following civil cases involving an amount in excess of Birr five hundred thousand (500,000);
> (a) without prejudice to the jurisdiction of the Federal Supreme Court under Article 8 of this Proclamation, federal civil cases submitted pursuant to Articles 3 and 5 herein.

144. In relation to the types of cases, the Federal High Court has first instance jurisdiction on some cases regardless of the pecuniary amount involved in them. Article 11(2) lists these cases:

> 2) Notwithstanding the provisions of sub-Article I (a) hereof, the Federal High Court shall have first instance jurisdiction over the following civil cases:
> (a) Cases regarding private international law;
> (b) Cases regarding nationality;
> (c) Application regarding the enforcement of foreign judgments or decisions;
> (d) Applications for change of venue from one Federal First Instance Court to another or to itself, in accordance with the law.

145. The Federal High Court in Ethiopia is quite different from high courts in other countries such as the US, where the middle level court is usually endowed with appellate jurisdiction only. It is not entirely an appellate court that considers appeal only. It has original jurisdiction on both civil and criminal matters.

146. Apart from first instance jurisdiction on these civil matters, the High Court has first instance criminal jurisdiction on some cases as indicated under Article 12 of the same Proclamation.

C. Jurisdiction of the Federal First Instance Court

147. The First Instance Court is at the bottom of the judicial structure and has only original jurisdiction (first instance jurisdiction). It has jurisdiction on civil as well as criminal cases. Its original jurisdiction on civil matters are dependent on the amount of money involved in a given case and on the types of cases, which extend to almost all cases not specifically given to the jurisdiction of the Supreme and High Courts. Article 14 of Proclamation No. 25/1996 is included below for the sake of clarifying matters discussed here:

> 14. *Civil Jurisdiction of the Federal First Instance Court*
> The Federal First Instance Court shall have jurisdiction over the following civil cases involving an amount not in excess of Birr five hundred thousand (500,000) or over civil cases the value of which cannot be expressed in money:
> 1) without prejudice to the jurisdictions of the Federal Supreme court and High court under Article 8 and sub-Article (2) of Article 11 hereof, federal civil cases submitted pursuant to articles 3 and 5 of this Proclamation;

2) Without prejudice to judicial power vested in other organs by law, other civil cases arising in Addis Ababa and Dire Dawa.

148. The First Instance Court has general jurisdiction on all cases except the ones specifically granted to the Supreme and High Courts. Its jurisdiction on the basis of pecuniary amount and type of case is established by excluding the ones granted to the Supreme Court and High Court. One can, therefore, presume that any case falls under its jurisdiction unless it is expressly granted to either the Supreme Court or the High Court. Thus any case the amount of which does not exceed ETB 500,000 or all types of cases, the amount of which may not be assessed in monetary terms, that do not fall under the jurisdiction of the Supreme Court or the High Court are within the purview of the First Instance Court.

149. The First Instance Court does not have appellate jurisdiction obviously because it is at the bottom of the judicial hierarchy.

III. Main and Ancillary Claims

150. A court that has a subject-matter jurisdiction has the power to see a case that falls in its jurisdiction so long as the matter does not go beyond the pecuniary amount fixed by law. As per Article 30 of the Civil Procedure Code a court having material jurisdiction to try the principal/main claim has jurisdiction to see an accessory claim related to the principal claim. Thus the court has jurisdiction on all types of claims related to a suit, including accessory and counter-claims.

§2. Venue (Territorial Jurisdiction)

I. Factors to Be Taken into Account

151. The term used under the Civil Procedure Code to identify venue is 'local jurisdiction'. It has to do with an area where a case shall be tried. The rules on local jurisdiction allocate cases among the same type of courts within a given judicial system The rules on local jurisdiction are intended to refer cases to particular courts that are both convenient to parties, especially the defendant, to a suit, and their witnesses. They also aim at limiting the plaintiff's choice of court. Hence the plaintiff cannot bring action against the defendant in any place he prefers.

152. Articles 19–30 of the Civil Procedure Code provide the rules on local jurisdiction. Article 19 of the Civil Procedure Code provides a general rule on local jurisdiction. According to this Article, every suit shall be filed in a court found in the place where the defendant resides or carries on business. If a plaintiff decides to file a suit against a defendant, what the plaintiff shall do is to go to the place where the defendant resides or carries on his business and institute his case to a court found in such place. Unless the law indicates or provides a place different from these optional places, a plaintiff does not have the right to submit his case to any court of his choice.

Thus, as a general rule, a court specified by Article 19 of the Civil Procedure Code shall see any suit. The factors that are taken into account to determine venue are the place of residence of the defendant, which must be a principal one, or where he carries on his business. The term 'residence' here is to be fixed by rules relating to residence found in the Civil Code, Articles 174–182.

II. Overview of the Different Rules

153. For some types of cases, there may be a separate place where a suit shall be filed, which can be different from the general place of suit indicated in Article 19 of the Civil Procedure Code. The Civil Procedure Code prescribes places different from that of Article 19 for different suits under the provisions of Articles 20, 21, 23, 24, 25, 26, etc. Cases on contract, immovable property, succession, and so on have to be made in specific places that could be different from the places indicated by Article 19. For example, a suit regarding contracts is to be filed, as a general rule, in the place where the contract was concluded or where it is to be performed, except suits relating to contracts such as a contract of pledge, carriage, insurance, bailment, or deposit (see Article 24 of the Civil Procedure Code). However, if the parties specify a place for the trial of a suit arising from the contract they concluded, such place shall be the place where the suit shall be filed.

154. Places of suits other than the ones under Article 19 depend on factors like place of location of a property subject to suit (cite the CPR), place of occurrence of an act that gives rise to a suit (cite the CPC), location of a legal person or place chosen by the plaintiff (cite the CPC).

155. Lack of local jurisdiction is an issue governed by the Civil Procedure Code. Article 10 provides that if a court lacks local jurisdiction, it shall reject a case submitted to it:

> Article 10 (1) A statement of claim filed to a court not having local jurisdiction shall be rejected in accordance with Article 231: provided that a court which has jurisdiction under Articles 19-30 may not reject a statement of claim on the ground that another court also has local jurisdiction. (2) Any objection taken under Article 244 to the local jurisdiction of a court shall be finally decided by the said court and no order made, judgment given or decree passed by the said court may be invalidated unless such an objection was taken and the decision thereon has caused a failure of justice.

156. The rejection can be made by the motion of the court itself or upon an objection raised by the defendant. However, paragraph two of Article 10(1) makes a rule relating to local jurisdiction flexible. As per this paragraph, the court to which a case is filed may not reject a suit on the ground that another court has local jurisdiction and can conveniently see the case.

157. If a party who believes that the venue where a suit is filed lacks local jurisdiction he can raise an objection. Such objection does not lead to rejection of a suit. The decision on the objection is made by the same court. If the court rejected the objection of a party and proceeds with the trial of a suit, a decision given by such court is valid as long as it does not result in failure of justice. If a court decided on such case in spite of an objection of the defendant, and the decision made by a court is found to have resulted in miscarriage of justice, the decision is considered to be invalid and can be quashed.

158. Generally, lack of local jurisdiction is a kind of objection that is waived if not raised at the first opening of a suit. The rule on local jurisdiction is particularly for the convenience of defendant and if he fails to raise an objection to the place where a suit is initiated, it means that he is impliedly saying that the forum chosen is convenient for him and that it does not cause him any problem. If a party raises an objection, the objection is to be decided by the court considering a suit, and the ruling given and the decision made by disregarding such objection is appealable if its outcome brings about the failure/defeat of the suit.

III. Main Claims and Ancillary Claims

159. The court that has local jurisdiction should not reject a suit brought before it by alleging that another court has local jurisdiction over the same claim so long as it can set up jurisdiction on the basis of the different rules on the venue. It is only when the forum is found to be inconvenient that the decision rendered by such court may be invalidated. Insofar as the matter does not go beyond the pecuniary value of the court, the court that has local jurisdiction can consider all matters related to the suit; however, when the ancillary claims could make the matter beyond the pecuniary amount over which the court is competent, it shall reject the suit.

§3. Resolving Jurisdiction Conflicts

160. Jurisdiction conflicts may be resolved by different means. The main ones incorporated under the Civil Procedure Code include the rule on priority and rule on consolidation as provided under Articles 7 and 8, respectively, of the Civil Procedure Code.

161. The rule of priority takes into account the time of submission of cases to a court of law. The court in which a suit is filed first has a priority to consider a case, and the second suit filed to another court shall then be dismissed. If a suit is pending in one court and another suit is filed to another over the same case, it amounts to pendency, which serves as one of the grounds of preliminary objections under Article 244(2). Hence a party can use this to object to the second suit. The objection based on pendency is not a kind of objection that cannot be waived, because it prohibits a court from giving a valid decision (see Article 244).

162. If a suit over a single cause of action is filed to two or more courts between the same parties, the concept of consolidation can be used to bring the suit before a single court with a view to preventing conflicting decisions from being given. Consolidation is the process by which different cases involving the same issues of fact or of law are heard and tried together. For consolidation to apply, there are two main elements that should be met. The first is that the case must involve the same question of fact or law, and the second is that the case must be between the same parties. These two elements are provided under Article 11(1) of the Civil Procedure Code.

163. The word 'suit' includes appeal as provided under Articles 32(2) and 79(2) of the Civil Procedure Code. Hence consolidation applies to appeal. This is clearly stated under Article 11(1).

164. Consolidation is made when the two suits are pending in the same court or in two different courts. See Article 11(2). When suits to be consolidated are pending in two different courts, the application for consolidation must be filed before evidence is taken in either suit. See Article 11(2). This means that the application shall be made before the conclusion of the full-scale hearing of suits.

165. For consolidation to apply, the main requirements are that the facts or questions of law involved in a suit arise from a single cause of action, but there is a possibility that consolidation could apply even if the suits arise from different causes of action. This holds true if the two suits are so closely connected that they cannot be properly tried separately. See Article 11(2).

166. The application for consolidation must be made to the High Court if the suits are pending in the First Instance Court and to the Supreme Court if the suits are pending in the High Courts. The application should not be made to the court in which the suits are pending. See Article 11(3) of the Civil Procedure Code.

167. The procedure on application for consolidation mentioned here, that is, under Article 11(2 and 3), applies only if the two suits are pending in two different courts. When the suits are pending in the same court, the procedure under Article 11(3) does not apply. If the two suits are pending in the same court, one of the parties should apply to the same court in which the suits are pending or the court may by its own motion order the consolidation of the two suits. See Article 11(1).

168. After receiving the application made for consolidation under Article 11(3), the court gives direction as to the subordinate court that should hear the cases. See Article 11(4). The same rule applies to an application for consolidation relating to cases being heard by appellate court. See Article 11(5).

169. The procedure on consolidation of suits is similar to one applicable to the transfer of suits from one court to another court under Article 31 of the Civil Procedure Code and Articles 8(3) and 11(2) of Proclamation No. 25/96.

170. Consolidation does not apply if the parties involved in the suits are different. In addition, even if the suits are proper for consolidation, the court may refuse to consolidate them if it is of the opinion that the suits cannot conveniently be tried if consolidated.

171. Another means of resolving jurisdiction conflict is provided under Article 35(2) of Proclamation No. 25/1996. This is where two or more regional courts or two or more federal courts claim or disclaim jurisdiction over a case and the matter falls within the power of the Federal Supreme Court. The Supreme Court decides which court has the jurisdiction or otherwise.

Chapter 2. International Jurisdiction

§1. Rules Applicable in the Absence of Law

172. International jurisdiction, which in Ethiopian case is termed as 'judicial jurisdiction', is not a well-developed notion in the legal system of the country and this is attributed, among others, to the absence of legislation on private international law. The drafter of the Civil Code included some provisions on judicial jurisdiction in his draft of the Civil Code dealing with private international law. However, the then Parliament that approved the draft did not accept the part of the draft Code dealing with private international law and, as a result, the provisions on judicial jurisdiction could not become part of the final Civil Code enacted. However, the draft Code on private international law was recently put in place and it is anticipated that the country will have legislation on matters of conflicts of law in the near future.

173. Although judicial jurisdiction comes into the picture when the issue before a court involves certain foreign elements, there is also a conflict of law in the federal context. Hence there is a possibility that such aspect of jurisdiction may arise in the federal system provided that the case before a court in one state contains a certain element that is within jurisdiction of another state. Hence the federal system adopted by the country makes it imperative to have legislation on conflicts of laws. Prior to the inception of the federal scheme in Ethiopia, there was no problem of internal conflict of law because the country was a unitary state – the issue of judicial jurisdiction came into the picture only if the forum was obliged to apply the law of another state.

174. In spite of the absence of law relating to judicial jurisdiction, some cases started appearing before the Ethiopian courts immediately after the Civil Code entered into force in the 1960s. The Ethiopian courts entertained cases containing issues of judicial jurisdiction on the basis of foreign laws and decisions of foreign courts relating to judicial jurisdiction because there is no law governing such issues in Ethiopia. The practice of Ethiopian courts shows that the recourse is made, in bolstering their arguments in using foreign experience and decisions of courts, to the provisions of Civil Procedure Code to rule on whether or not to assume judicial jurisdiction. Some of the provisions of the Civil Procedure Code relied upon by courts to assume judicial jurisdiction are Articles 4, 8(2), 19, 20(1), 20(2), and Article 19 (these provisions relate to subject-matter jurisdiction and venue). Although these provisions are on subject-matter jurisdiction and venue they make reference to cases in which foreign elements are involved. The jurist who wrote an excellent textbook that could serve as a commentary on the Civil Procedure Code of Ethiopia held that these provisions can be used by Ethiopian courts to establish judicial jurisdiction.[1] However, these provisions as well as those under Chapter Three of the Civil Procedure Code are all applicable in cases containing foreign element only if Ethiopia *has judicial jurisdiction* over the case in question.[2]

1. Robert Allen Sedler, *The Civil Procedure Code of Ethiopia* (Addis Ababa: Hailesellasie University Printing, 1968).
2. Samuel Teshale, 'Towards Rationalizing Judicial Jurisdiction in Ethiopia', *Tilburg Foreign Law Review 8*, no. 3 (2000): 209.

175. It appears illogical to use, for instance, the provisions on venue to assume judicial jurisdiction.

176. In spite of the absence of the appropriate laws on the matter, from the experience of courts the factors used by the courts in determining judicial jurisdiction are the nationality or domiciliary of the defendant, occurrences of an act giving rise to a suit in Ethiopia, and consent of the defendant and the presence of the subject-matter of the suit in Ethiopia.

177. There are two types of judicial jurisdiction. One is in personam (personal jurisdiction) and the other is in rem jurisdiction (jurisdiction over a thing). In personam (personal) jurisdiction is a jurisdiction against a person (natural or legal) in which case a claim is made against one of the parties in a suit to do or not to do something.

178. Another type of judicial jurisdiction is in rem jurisdiction. It is a jurisdiction over a thing that is the subject of dispute between parties to a case. In in rem jurisdiction, the suit is mainly against a thing and the remedy requested is over a thing itself.

I. Factors to Be Taken into Account

179. According to the Ethiopian courts' practice, an Ethiopian court has in personam jurisdiction if the defendant is an Ethiopian national or domiciliary or if the act that is the subject-matter of the suit occurred in Ethiopia or if the defendant consents to the exercise of jurisdiction by an Ethiopian court. These three factors are optional ones. Hence, if one of them is fulfilled, it is sufficient for Ethiopian courts to exercise personal jurisdiction against parties to a case. Following is a brief explanation of each of these factors.

A. Nationality or Domiciliary of Defendant

180. This is the first factor that establishes judicial jurisdiction of Ethiopian courts. Here the status that is necessary for the establishment of personal jurisdiction in this case is that of the defendant and not that of the plaintiff. The status of the plaintiff is irrelevant for the establishment of personal jurisdiction.

181. The requirement is an optional one: that if the defendant is an Ethiopian national or is domiciled in Ethiopia, it is sufficient to establish personal jurisdiction. If the defendant is not an Ethiopian national, another factor that establishes personal jurisdiction here is domicile.

182. If a company, association, or non-governmental organization (NGO) is registered according to Ethiopian laws, it is subject to the Ethiopian courts' personal jurisdiction, because it obtained personality according to Ethiopian law.

183. Questions of nationality or domicile are governed by the application of the laws relevant to the respective issues. Nationality is determined by the FDRE Constitution and the Proclamation 378/2003 that was enacted in December 2003, which repealed the one promulgated in 1930. According to the FDRE Constitution and the Proclamation on nationality, the main mode of acquiring Ethiopian nationality is by birth. The Ethiopian Constitution deals with the rights of Ethiopian nationals under its Article 33, and according to it, the basic factor that determines an Ethiopian nationality is birth. Thus if a person is born from an Ethiopian mother or Ethiopian father or both his father and mother are Ethiopians, he will automatically acquire Ethiopian nationality. There is no additional factor attached to acquire Ethiopian nationality.

184. Domicile is a concept found in the Civil Code (Articles 183–191). A person is said to be domiciled in Ethiopia if he is not an Ethiopian national or has not acquired Ethiopian nationality but has established the principal seat of his business and of his interests in Ethiopia with the intention to reside here permanently. Hence a foreigner who fulfils these requirements of domicile can be subject to the jurisdiction of Ethiopian courts (personal jurisdiction exists over him) even if he is not an Ethiopian national.

B. Occurrence of an Act

185. This is another factor that establishes judicial jurisdiction of Ethiopian courts. If the first requirement, which is nationality or domiciliary of defendant, is not fulfilled, another factor that Ethiopian courts should look for is the occurrence of an act that is the cause of the suit between the parties. Hence if the subject-matter of a suit between the plaintiff and defendant occurs in Ethiopia, an Ethiopian court has a personal jurisdiction even if the defendant is not an Ethiopian national or is not domiciled in Ethiopia.

C. Consent

186. Consent can be a factor that establishes the personal jurisdiction against parties. If it is not possible to establish personal jurisdiction on the basis of either of the preceding two factors, one could look at the consent of the defendant whether he is willing to be subject to Ethiopian court. Hence consent applies when either of the preceding factors is not available. Consent can be either express or implied. It is said to be express if the parties make it in written form or orally. Consent can also be implied, which is to be inferred from the behaviour of the defendant. It is not expressly stated either in written form or orally.

187. In *rem jurisdiction* is related to the power of a court to pass a valid decision against the property of the parties, not as such against the parties to a suit themselves, and is established where a thing that is a subject of a suit is situated/located in Ethiopia.

188. The federal courts' Proclamation (No. 25/1996) incorporates provisions that provide with the courts that are entitled to see cases in which a foreign element is involved. For instance, cases to which a foreign national is a party are to be adjudicated by the federal courts, in case of civil action, and such cases are to be entertained by the Federal High Court (Articles 5(4) and 11(2)). When the conflict of laws arises in the context of the federal system in Ethiopia, it is the Federal High Court that has jurisdiction to see suits between persons primarily residing in different regions.

Part III. Actions and Claims

Chapter 1. Actions

189. Before venturing into discussing actions and claims, one needs to see some introductory remarks about parties to a civil action brought before a court of law.

190. The parties to a civil suit that is considered by a court that is exercising its first instance jurisdiction are known as plaintiff and defendant. 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. Defendant is a person subject to a claim, that is, a party against whom a claim is filed. The counter names of plaintiff and defendant in criminal cases are the public prosecutor/state and an accused, respectively.

191. There is a requirement that applies to a party plaintiff and party defendant, parties to an appeal, as well as parties who are brought into a pending suit as intervener, third party defendant, etc. All parties participating in a civil action/suit should have capacity. See the following Article 33(1) of the Civil Procedure Code:

> Article 33(1) Any person capable under the law may be a party to a suit.

192. 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 lawsuit without the assistance of another. This rule reflects the 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)).

193. 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 a general source 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. An agent cannot conclude a contract with himself over a subject-matter he is authorized to handle. This aims to avoid conflict of interests.

194. 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 these categories of incapable persons.

195. Incapable persons cannot sue or be sued in their own names. For example, a person below eighteen years of age is incapable and may not sue or be sued in his own name, because 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. See Article 34(2) of the Civil Procedure Code.

196. Per Article 34(2), 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.

197. Incapacity is one of the grounds of preliminary objection specified under Article 244(2) of the Civil Procedure Code. A person under incapacity is unqualified to act in the proceedings. His organs of protection represent him.

§1. Definitions

I. Actions by Summons

198. A civil trial can be instigated either by summons or application. Most of the civil actions are initiated by summons. Thus, as a general rule, actions are instituted by summons and the lodging of actions by application is a matter of exception. The rules on summons regulating its format and contents will be the subject of detailed treatment later on.

II. Actions by Application

199. Although the list of actions initiated by application is not clearly indicated, there are some matters that can be initiated by application without the issuance of summons in its proper sense. There is no general rule outlining these matters that are subject to applications. Registration of company names, trademark, change of name, declaration of absence of a person, and declaration of loss of documents and issuance of new ones are some of the main types of matters initiated by application.

§2. Admissibility of Actions

200. There are many conditions attached to the admissibility of actions. The main ones include but are not limited to:

> (a) whether or not the action indicates that the matter falls within the jurisdiction of the court. Most of actions by applications the amount of which may not be assessed in monetary terms fall under the jurisdiction of the First Instance Court; (b) pre-conditions concerning the parties and their representation, i.e., issues of capacity, which has already been discussed; (c)rules on the filing procedure of the action, i.e., framing of pleading, which will be discussed later in this chapter; (d) the condition on the actionability of the claim, whether or not it is justiciable. Article 37 of the Federal Constitution provides that in order for a court to see and decide on a case, the matter should be a justiciable one; (e) res judicata; (f) action barred by period of limitation.

201. If one of these conditions exists, the action may be either non-reparable or reparable. For example, lack of jurisdiction, especially subject-matter jurisdiction (material jurisdiction), is non-reparable and the action should be dismissed. Some of the pre-conditions on the lodging actions may be corrected and do not lead to the dismissal of the action.

202. Some of the conditions for admissibility of actions are indispositive in the sense that the court has to take action irrespective of a statement from the defendant and these matters include lack of subject-matter jurisdiction, pre-conditions on parties, and justiciability of the matter. Some of them are dispositive in the sense that the court should not take action unless the objection to the actions is invoked by the defendant. These matters include res judicata, period of limitation, etc.

§3. Vexatious Litigation

203. The Civil Procedure Code provides some mechanisms to thwart vexatious litigation. If the court believes that an action is not actionable, or scandalous, or does not show a cause of action as manifest from the allegation in the stamen of claims, and so forth, it may dismiss the action without the need to issue summons to the other party. In some vexatious litigations, the court has a discretionary power to award compensation of legal costs incurred after the summons has been issued and the other party appears but the action is found to be vexatious. Cite Articles from the Civil Procedure Code. Some forms of vexatious actions may amount to crime, for instance, forgery, bribery, etc. See, for instance, Article 445 of the Civil Procedure Code that makes reference to the Criminal Code.

Chapter 2. Claims and Defences

§1. Definitions

I. Claims for Performance

204. Although not put in plain terms under the Civil Procedure Code the nature of claims and, ultimately, the decision sought can fall in three broad categories: claims of performance/obligation, declaratory claims, and constitutive claims.

205. Claims of performance include monetary claims, claims for ownership and possession of the property. In most instances, the claim of performance appears in the positive form, requesting the defendant to perform something in favour of the plaintiff. In some cases, a claim of performance can carry a negative character, for instance, the requirement that the defendant should refrain himself from doing something or acting in some way (prohibition order). The general rule with respect to claim of performance is that the claim must be a mature one; in some cases exceptions to maturity may apply in relation to some claims. Usually, these matters are regulated by the Civil Code and other relevant laws.

II. Declaratory Claims

206. Declaratory actions are actions to confirm a substantial legal relationship or duty without ordering a performance (positive declaratory action) or to confirm that no such relationship exists (negative declaratory action). For example, it is possible to claim that the court confirms a breach of a patent or that a defendant is liable for compensation for a negligent action without claiming the actual payment of compensation. A declaratory action can also confirm ownership. As a negative declaratory action, it is possible to claim that the court confirms that a contract between the parties is invalid.

207. A general rule is, however, that only claims that have a concrete legal effect on the relationship between the parties are allowed. Thus a claim for a statement from the court on an abstract question on legal interpretation is not allowed, nor are claims for a confirmation that an empirical fact exists allowed.

III. Constitutive Claims

208. Constitutive actions are matters in which the judgment is necessary in order to change a legal status or relationships. Constitutive actions are most common in matters concerning personal status, such as absence, divorce, paternity, guardianship and adoption, etc. Some actions concerning the law of obligations and property, such as annulment of a contract or a document, may include a constitutive element. It is

a matter of principle that constitutive actions are only allowed when it is mentioned in a specific provision in the law. In family law, the parties of the suit are also defined in the law. For example, the spouses have the right to action in divorce cases. In most cases, constitutive actions are filed as application matters; that is, they are claimed by initiation of an application as opposed to the ones by summons.

§2. DISTINCTIONS

I. Elements of Actions

209. As stated earlier, a party who initiates actions and claims something must have a capacity. Capacity is one of the pre-conditions attached to claims. The other requirement attached to claims is that the plaintiff who brings action must be the real party with interest regarding that particular claim or allegation he brings to a court of law against another party. It means that the claim made by the plaintiff should indicate that he possesses 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 favour; rather it must be a person who has an immediate stake at a time of filing a case. In other words, at a time of filing a case, he should show that he has a vested interest in the subject-matter of a suit. See Article 33(2), which reads, as follows:

> Article 33(2) No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.

210. The reason why the law attaches this requirement to a party plaintiff is because a civil suit concerns an 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 a 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 the defendant to two suits. In addition, the procedure aims at counteracting vexatious litigation.

211. The determination of whether a person appearing as the plaintiff may have a vested interest depends on cases appearing before a court. There is no rule providing a list of what amounts to a vested interest. 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 the plaintiff's claims that a decision can be made as to whether or not a plaintiff has a vested interest in a case. As an example, a contract of assignment gives rise to issues of a person with a vested interest. A question of vested interest can, for instance, be 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.

212. 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 basis 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. It means that the objection has to be raised by the defendant; in some instances, the court may also invoke it and dismiss it to tackle vexatious litigation.

213. 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 he does not have a vested interest? The Civil Procedure Code does not provide any rule in this respect. The remedy in such case is to dismiss his case and impose penalty on him for creating inconvenience to the defendant, and he could also face criminal liability. This is to be inferred from a rule of Article 445 of the Civil Procedure Code that makes a cross-reference to Article 446 of the Criminal Code. Article 455 of the Criminal Code can extend to a suit made deliberately to obtain benefit without having a vested interest.

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

215. If the defendant fails to raise objection on the ground of lack of vested interest and a decision is made for a party with no vested interest, the defendant cannot object to a second suit made by a real party with interest. What he 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 tort to recover what he has already paid him under the rules of unlawful enrichment.

II. Amendment of Claims and Amendment Grounds

216. The Civil Procedure talks about amendment generally and does not draw distinctions between amendment of claims and defences. However, the reading of the provisions on the amendment, Articles 91 and 251, implies that they refer mainly to amendment of claims.

217. Amendment of claims pre-supposes 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.

218. The question of amendment is raised usually when a party tries to produce evidence on something that 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 earlier, etc.

219. 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.

220. 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.

221. The amendment grounds are not clearly indicated under the relevant rules on amendment. It appears that the permission to introduce amendment to a claim or otherwise is entirely given to the discretion of a court. So long as a court believes that the amendment is necessary for the purpose of determining the real question in dispute, the court may allow an amendment on any ground. In one case decided by a court, the defendant applied to a court to get the statement of defence amended on the ground that she has not annexed some evidences originally with the defence and that she intends to introduce new evidences that could elaborate her defence 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 production of evidences. The court held that the introduction of new evidence could not serve as a ground for the amendment of pleading.

222. The amendment brings into the 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, the amendment protects a party not to get his substantive rights 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 costs 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 the amendment. It means that there is a liberal approach toward the amendment and that the request for the amendment should be taken into account in a liberal manner that permits the amendment.[1] 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.

1. Robert Allen Sedeler, *The Civil Procedure Code of Ethiopia* (Addis Ababa: Hailesellasie University Printing, 1968).

223. A party can request an amendment at any time before a court renders a 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 (see Article 91).

§3. Defences

224. The defence alleged by the defendant 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 defence and the number of the suit. The other part of the statement of defence is the statement showing the points of defence. In this part, the defendant is expected to raise affirmative grounds of defence, 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 counter-claim or set-off against the claim of the plaintiff. See Article 234.

225. In stating his facts of defence, 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 defence under Article 235. Evasive denial is a denial in general terms. For instance, saying that 'I am not responsible or I am not liable', without stating the reasons for saying so is considered to be an evasive denial. There is an exception to the rule on evasive denial. Such defences are not considered to be admission if they are made by persons under disability as provided under Article 235. This shows the protection that the law tries to provide to persons under disability.

226. The format and specific contents of defences is touched on later in the chapter on sanctions on procedural irregularities under which the format of claims and defences is explained.

§4. Joinder of Parties and Claims

I. Principles

227. Joinder of parties and joinder of claims are concerned with the 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.

228. Joinder of parties multiplies the number of parties and widens a scope of litigation. This gives rise to conflicting views toward it, one in favour and another against it. Joining parties and causes of action make parties pool their resources together and enable them to share the 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 possibilities of making conflicting decisions. If suits that can be joined are tried separately, there is a chance of giving contradictory decisions over essentially identical suits. For these and other reasons, the joining of parties is to be favoured and, hence, a claim for joinder should be granted.

229. On the other hand, joinder is disfavoured because 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 properly defend himself. For these two reasons, joinder is discouraged.

230. Thus one interest is in favour 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 plaintiffs or causes of actions in a statement of claim results in delay of proceedings or embarrassment of the 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 the defendant.

II. Joinder of Parties

231. 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).

232. 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, 5) of the Civil Procedure Code.

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

> Article 35 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.

234. 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 the 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.

235. By 'series of transaction' it means a series of acts that cause damage to some person. For instance, a car hit an electric pole, 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 the car because the owner is responsible for hitting the electric pole that caused the burning of houses.

236. 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.

237. It is to be noted that even if plaintiffs fulfil these two requirements, the court may order separate suits as per Article 221 if it believes that the joinder causes delay or embarrassment.

238. The second form of permissive joinder relates to the joinder of defendants, which is found under Article 36(1, 2, 5, 6) 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.

239. 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 the cheque and the bank refuses to pay the money on the ground that 'A' does not have sufficient money in the bank, 'D' can join 'A', 'B', and 'C' together because they are jointly and severally liable as provided under Article 36(2).

240. Article 36(5) provides an instance whereby the plaintiff does not know who caused the damage to him and who is to pay to 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.

241. 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.

242. The action taken by a court in instances where there is misjoinder or non-joinder of parties is given under Article 39 of the Civil Procedure Code:

> 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.

243. Article 39 deals basically with the effects of misjoinder or non-joinder of parties relating to a permissive type of joinder. If the joinder is a permissive type, the misjoinder 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 misjoinder 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.

244. Thus, in as far as permissive joinder is concerned, there is no requirement that all the parties whose right to relief arises 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.

245. 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 implies, parties are under obligation to bring a joint action or defence. There is no choice given to parties other than a joint action or defence.

246. 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 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 belong 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 parties. The absence

of one will necessarily affect one's right. The other category comprises 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.

247. 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?

248. If the mandatory joinder is related to defendant, there is no problem in case there is a non-joinder of indispensable party defendant. In case of non-joinder of a defendant, the case is not dismissed. The court shall order the joinder of such party by issuing summons 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 applies and the court makes him a party.

249. The problem is when it comes to the non-joinder of a party plaintiff. 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 up on 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, because rights of civil matters can be abandoned.

250. An interesting question will emerge if a plaintiff who is indispensable to a suit does not consent to be joined. 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.

251. Two lines of arguments may be offered or are 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, because 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 proceed with the case, protects the parties who present a case before a court, protects such party from paying the court, and also allows him to appeal because 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 properly named defendant. For example: 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. This is because of its advantages mentioned earlier.

252. 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 a similar effect like 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.

III. Joinder of Causes

253. Joinder can also be related to causes of action and not parties as such. 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 the 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:

> Article 217(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.

254. 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.

255. 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.

256. It appears that one of the reasons as to why the splitting of claims is not allowed, as given under Article 216, is to encourage joinder of claims.

Chapter 3. Formality Matters and Sanctions on Irregularities

257. Formality requirements apply to claims, defences, summons, appearance of parties, and other matters. Here, the focus is on claims and defences and the ones applicable to summons and appearance of parties is treated separately under the pre-trial proceedings. The measures taken by the court on irregularities with respect to claims and defences are discussed here.

§1. Formal Requirements

258. There are certain requirements that pleadings shall fulfil in order for a court to admit them (pleading is defined as including claims, defences, appeal, petition, application, and so on that are submitted to a court with a view to initiating proceedings in a court of law). (See Article 81 or 82 of the Civil Procedure Code.) The requirements relate to their preparation, format, and content. They can be divided into technical and legal ones.

I. Technical Requirements

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

260. 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:

> Art. 80(2) 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.

261. Pleadings can be written by using ink or can be typed by typewriter or printed by a computer.

262. The *second* 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 Civil Procedure Code. The Civil Procedure Code has provided sample forms for different types of pleadings, which depend on the types of suits and claims put forward.

The format is annexed to the Civil Procedure Code in the Second Schedule, which is found at the end of the Civil Procedure Code.

263. The *third* 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 defence. When they are prepared in line with the forms given by the Civil Procedure Code, they become definitely concise. By a concise statement of material facts it means 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 defence and this amount 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 defences at a later stage.

264. From this requirement it means that pleadings shall not contain irrelevant issues to the subject-matter of a suit. For example, a party claiming about breach of contract and resulting 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.

265. By a concise statement of material facts, it means also 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 the parties.

266. By a concise statement, it further 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 a trial proceeding. Hence at a pleading stage a party should not include facts on proof in his pleading. The pleading stage is different from the litigation stage.

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

> 92(1) 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.

268. The verification is made by signature or mark as the case may be. By verification it means that the facts alleged in the pleadings are true and correct. If the facts are found to be false allegations, the party is held responsible. Alleging false statements is a crime punishable pursuant to Article 446 of the Criminal Code.

269. 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 of verification. It has to appear in the following form.

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

> Article 93. 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.

271. 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 defence. The same is true for petitions and applications filed for special proceedings that are to be accompanied by affidavit. The registrar checks all the preceding requirements as to whether or not they are met. If it is prepared in accordance with these requirements it is easy for the registrar to look at the pleading and determine its technical sufficiency.

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

> 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.

273. This article does not indicate what the registrar should do if a statement of claim is not signed. Such irregularities can be rectified at the post by putting the signature on the claim.

274. If the statement of claim has not fulfilled the technical requirement, it can be rejected. The same applies to the 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 registrar shall reject them.

275. The effect of rejection by the registrar is indicated under Article 232. The 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 removes the defects, he submits a fresh pleading on the same cause of action. See Article 232 below:

> Article 232(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;

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

276. The registrar shall provide reasons for which he rejected the 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.

277. If all the technical requirements are fulfilled, the registrar shall hand the pleadings over to a judge after doing certain activities. The judge examines the pleadings to determine whether or not legal requirements are complied with. The activities to be done by the registrar after ensuring that the technical requirements are fulfilled and the legal requirements checked by the judge are discussed later in this section.

278. More formalities applicable to claims and defences follow. In relation to claims, the technical requirements discussed earlier are applicable to it. In addition to these requirements, a claim shall contain certain items that are listed under Article 222 of the Civil Procedure Code:

Article 222(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.

279. 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 he is authorized to act on behalf of the plaintiff.

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

281. 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:

> Article 231(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.

282. The Civil Procedure Code has not defined 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 because it is a legal requirement.

283. 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; for example, 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.

284. Whether or not statements showing cause of action are properly stated by the plaintiff depend on the 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.

285. The third part of the statement of claim is the statement on jurisdiction. Once the court has established that a statement of claim disclosed a sufficient and lawful

cause of action, it then looks for whether or not it has 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 and, in particular, 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 Articles 224–226 of the Civil Procedure Code.

286. If the statement of claim is submitted to a court that lacks jurisdiction, it shall be rejected. But note here that international jurisdiction and venue 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 that the defendant resides outside the local limits of a court, the court should not dismiss a case without taking into account the reaction of the defendant.

287. Cause of action and jurisdictional issues are legal requirements checked by the judge. If the statements included in claims 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 Article 232(2).) Following the rejection, the court fee paid by the plaintiff shall be refunded to him because he has not received the service from a court.

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

> Article 224 (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.

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

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

> Article 230 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.

291. The registrar shall give a number to a suit and register it on the register of civil suit. For example, the first civil suit filed in 1996 is to be registered as Civil Suit No. 1/1996.

292. The registrar examines and compares the original and copy of the 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 currently ETB 25. This is when the type of suit is not assessed in monetary terms. If the value involved in a case cannot be assessed in monetary terms by looking at the title of the suit, the registrar should read the content of the pleadings in order to see whether or not the case may be assessed in monetary terms. Sometimes, plaintiffs claim that their claim cannot be assessed in monetary terms to escape the appropriate court fees that are fixed in percentage depending on the value of the claim.

293. Finally, the registrar shall submit the statement of claim and annexes to the court. The judge examines the statement of claim whether or not it fulfils 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. Summons is discussed in the chapter on pre-trial proceedings. 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 defence is examined by the court.

294. Like claims, defences are subject to some formality requirements. The defence should contain material facts on which the defendant relies for his defence. The statement of defence is subject to the rule under Articles 80(2) and 223. There is a form prescribed by the Civil Procedure Code for the statement of defence. The content of statement of defence is given under Article 234. See Article 234 below:

Article 234 (1) Every statement of defence, 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.

295. The statement of defence 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 defence, and the number of the suit. The other part of the statement of defence is the statement showing the points of defence. In this part, the defendant is expected to raise affirmative grounds of defence, 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 the 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 counter-claim or set-off against the claim of the plaintiff.

296. In stating his facts of defence, 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 defence under Article 235. 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 defences 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:

Article 235(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 defence, 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.

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

Article 238(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 with in accordance with the provisions of the following Chapter notwithstanding such rejection.

298. If the statement of defence 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 is discussed in the chapter on pre-trial proceedings.

299. Another issue is about the failure of parties to making full claims or defences and their consequences. 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 challenge it. If the plaintiff raises a new issue at a trial, the defendant is entitled to object to it.

300. By failure to plead, it 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.

301. Failure to plead produces effect if the defendant raises it. However, if the defendant fails to object 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 new issue. Hence it is considered as if raised by the plaintiff at the time he filed his case to a court.

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

303. Another important issue related to claims is on the possibility of making optional grounds of claims in a single suit and the possibility of further/subsequent pleadings.

304. Alternative pleading is optional grounds of claims or defences relied on by a party. It is a pleading that aims at maximizing the grounds of claim or defence. 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 defence that there is no valid contract or that its performance is prohibited by *force majeure*.

305. The possibility of alternative pleading by the defendant is provided under Article 237. See Article 237 below:

> 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.

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

307. Article 224(1) states the application of alternative pleading to the plaintiff. See Article 224(1) below:

> Article 224(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 if it had been asked for.

308. By alternative pleading, it 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.

309. Subsequent pleading is also known as further pleading. It means pleading again on the same issue on which the pleading has already been made. For example, the plaintiff filed his statement of claim to a court. The court accepted it and issued the summons on the defendant to appear and defend. The defendant presented his defence on the date fixed for the hearing. The issue here is as to 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 because 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.

310. Further pleading is allowed when the statement of defence contains a counter-claim or set-off against the claim of the plaintiff. When the statement of defence contains either counter-claim or set-off that 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 claim, the court should not order further pleading to be made by the plaintiff. Note also that unless the statement of defence contains either set-off or

counter-claim, the court should not allow further pleading for any other defence made by the defendant unless an amendment is allowed by the court.

311. When the defendant raises a counter-claim in his statement of defence, he becomes the 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 the court fee. Article 215(2) says that 'The prescribed court fee shall be paid upon the filing of a statement of defence containing a counter-claim.'

312. The claim raised by way of a counter-claim can be filed as an independent suit. That is also why the defendant shall pay the court fee under Article 215(2).

313. The practice at present is that further pleading is allowed whenever a party requests even for a statement of defences not containing a 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 we discussed in Module I, which is to avoid the delay of proceedings.

314. 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.

§2. Time Limits

315. Some time limits within which actions have to be brought are normally governed by the substantive law related to the suit brought to the attention of the court. Thus rules on time are largely governed by law, and if not, it is fixed by courts having regard to circumstances of the case (Article 192). The Procedure Code provides that the time limit fixed by law may not be shortened nor extended. In the Civil Procedure some rules on different procedural matters already have been fixed, for instance, time to file appeal, time to bring the commission of perjury or bribery by one of the parties to the attention of court, time to file a petition against the decision of the court in rejecting pleading, etc. In some cases, the time limit is set by the court itself. For instance, the date of opening of suits, hearing of witnesses, and so on can be fixed by the court. Failure to do an act within a required time has a consequence depending on the nature of the act required to be done. In some cases, failure to appear may result in default judgment or dismissal of a suit, or in some cases it may bring about preclusion in the sense that claims, grounds, and evidence presented after the time limit has passed may not be taken into account by the court. The consequence of failure to meet deadline fixed are discussed under each heading relevant to this issue.

Part IV. Proceedings in First Instance

Chapter 1. Introduction

316. If a court admits the statement of claim, it proceeds to issue summons on the defendant. In the summons, a date and time for the opening of suits shall be fixed. On this date and time, the court makes sure whether or not the parties appear and take appropriate measures in case of non-appearance of one or both parties, conducts the first hearing of a suit, which is known as a pre-trial proceeding, and then goes to a trial of the suit. One of the activities done by the court at the pre-trial proceedings is to check whether or not the parties appear and this pre-supposes the issuance of summons on the defendant. Thus one needs to see the rules related to the issuance of summons first and then about appearance and non-appearance of parties before discussing pre-trial and trial proceedings.

§1. Service of Summons/Process

317. 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 fulfils 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.

I. Issuance of Summons

318. As said earlier, the plaintiff initiates a suit against the defendant by submitting a statement of claim to the registrar of a court that has jurisdiction to consider that case. If the statement of claim filed by the plaintiff fulfils the legal and technical requirements, the issue that comes next is how to communicate about the suit to the defendant. The communication is made possible by the summons. The summons provides the defendant with an opportunity to be heard and present his version of a suit.

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

320. If the number of defendant 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.

II. Modes of Service

321. 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 the 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 on the date he appears before a court. The things he should produce on the date of appearance are: statement of defence, list of his witnesses, documentary evidences in his possession, and a list of documents that are not in his possession. In addition, it shall disclose 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 defence.

322. After the summons is issued, it is collected from a court and served on the 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), which deals with the serving officer:

> Article 95(1) 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.

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

> Article 70(d) 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.

324. This provision makes the plaintiff to properly serve the summons on the defendant. If he is proved to be negligent in serving the 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).

325. There are different modes of service of summons on the defendant, which we will discuss next. 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 because 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.

326. 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 a personal mode if it is received by the defendant himself from the hands of serving office. This mode amounts the general rule on service of summons. See Article 95(3), which reads as follows:

> Article 95(3) Without prejudice to the provisions of the following Articles, the summons shall as far as possible be served on the defendant in person.

327. This means that as far as possible, the summons shall be served on the defendant by this mode in all cases. Personal mode of service is the best mode of service because the summons is actually handed over to the defendant himself.

328. It is when practically impossible to use personal service that another 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 the ordinary way. 'Ordinary way' refers to personal service. Thus, other modes of service are not applicable unless personal service is impossible.

329. Another mode of service is one that is similar to personal service. In this mode, the 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 the defendant in person. In this mode of service the following are some examples:

– When the summons is served on the defendant's agent who is authorized to accept service, the service on the agent shall be as effectual as the service on the defendant in person. This is the rule under Article 96(1).
– When the summons 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).

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

331. 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 the summons unlike in the mode of service we explained previously. The reason why the service is made on such an agent is because the defendant is not available in the local limits of the court that issued the summons and he does not have an agent specifically authorized to receive the summons (Article 99).

332. Another type of constructive mode of service is when the summons is served on an agent in charge of immovable property. This service is possible if the defendant cannot be served personally and 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.

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

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

335. 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 it should enable the defendant to receive information about the suit filed against him.

III. Obligations of Serving Officer and Person Served

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

> Article 102(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 acknowledgment 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).

337. The effects of refusal to sign an acknowledgement 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.

§2. Appearance of Parties

338. If the statement of claim filed to a court by the plaintiff is found to be sufficient in terms of fulfilling all technical as well as legal requirements, the court proceeds to issue the summons to the defendant. The reasons why the court issues the summons to the defendant are to notify him of a suit lodged against him and to provide an opportunity to him so that he appears and answers the allegation made against him. The serving officer, a person who is authorized to serve the summons on the defendant by the court, will serve the summons on the defendant. One of the items to be included in the summons is date for the first hearing of the case. On this date, both the plaintiff and defendant are expected to appear before the court. This is the rule under Article 69(1). See Article 69(1) below:

Article 69(1) 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.

339. On the first day of the opening of a suit, the parties need not appear in person for the hearing of the case unless the court demands it. This is the rule provided by Article 65(1). It means that his advocate, legal representative, or agent, as the case may be, may represent a party and appear before the court:

Article 65(1) Any appearance, application, or act in or to any court need not be made or done by the party in person but may be made or done in accordance with the provisions of the preceding Chapter: Provided that any such appearance, application or act shall, if the court so directs, be made by the party in person, and provided further that the court shall not so direct unless it is essential for the proper determination of the suit that the party should apply or act in person.

340. If the court orders the appearance to be in person, but a party fails to appear in person, it is treated that such party makes no appearance, even if someone appears on his behalf as provided under Article 77 of the Civil Procedure Code. Appearance in person is ordered at the discretion of the court whenever the court believes that it is necessary for the determination of the case as Article 65(1) provides. Appearance

in person is, therefore, not a general rule. The general rule is that parties need not appear in person. Appearance in person is limited to certain types of cases that the courts consider to be heard in the presence of the parties in person.

341. The rules governing the appearance of parties in case the suit involves multiple parties are provided under Articles 66–68 of the Civil Procedure Code.

342. If several plaintiffs bring action, or if several defendants are sued, two or more of them may be authorized, in writing, to act on behalf of others as provided under Article 66. All of them are not obliged to appear at a time before a court. Two or more of them can act on behalf of all others if authorization is conferred upon them by others who are involved in the case as parties.

343. The rule as regards the appearance of cases involving a legal person is briefly the following. When legal persons are involved in a case, the rules relating to their appearance are provided under Articles 67 and 68.

344. 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 and on whether or not the case is brought before the court in its first instance jurisdiction or appellate jurisdiction.

I. Non-appearance of Both Plaintiff and Defendant

345. 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 or dismiss the case as provided under Article 69(2) of the Civil Procedure Code. See Article 69(2) below:

> Article 69(2) 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.

346. The court strikes out a case if it is the case that appears before the court in its first instance jurisdiction. This means that the case is considered by the first instance jurisdiction of a court. The court dismisses a case where it is one that appears before the court as appeal.

347. It is important to take note of the fact that 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.

II. Non-appearance of the Defendants

348. If the defendant fails to appear, the court must examine first as to whether or not the summons has been duly served on the defendant. If the court believes, following the examination, that the summons has been duly served on the defendant, the court shall start to consider the case in the absence of the defendant. This is the rule under Article 70(a). See Article 70(a) below:

> Article 70(a) if it is proved that summon was duly served, the suit shall be heard ex parte.

349. If summons has been duly served on the defendant, it means that he has been provided with an opportunity to appear before the court to reply to an allegation made against him. It does not affect the concept of hearing, which demands the participation of both parties to a suit. The defendant has received summons that notifies him of a suit and invites him to appear before a court but he fails to appear. This means that an opportunity to appear before a court has been given to him. Thus, if he does not appear, the court should proceed to consider and hear a claim filed by the plaintiff. If he fails to appear, there is, therefore, nothing that prohibits the court from considering the case in his absence. The hearing conducted in the absence of the defendant is known as *ex-parte* hearing. It is a one-sided hearing of a case.

350. Under Article 70(a), there is no discretion given to the court to take measure other than conducting an *ex-parte* hearing. Hence, the court cannot decide the case in favour of the plaintiff for the sole reason that the defendant fails to appear before the court. The failure of the defendant to appear does not mean an admission of the case. In addition, the court cannot order to adjourn the hearing of the case for the mere fact that the defendant fails to appear. In a similar way as the rule under Article 69(2), the rule under Article 70(a) is a mandatory one. The court may not derogate from this rule and take other measures.

351. If the court comes to the conclusion that the summons has not been properly served on the defendant, the court shall issue a fresh summons to the defendant. It means that the defendant has not been notified properly of the fact that a suit has been lodged against him. It is because of this fact that he could not appear. Hence, the proper remedy to be taken by the court in such instance is to cause issuance of a fresh summons. That is why the rule under Article 70(b) prescribes issuance of a fresh summons on the defendant in such cases.

352. If the court finds out that the reason why a summons has not been served on the defendant was because of the negligence of the plaintiff who acted as serving officer, the court has three options. It might adjourn the case, strike it out, or may dismiss it as provided under Article 70(d). The measure that the court takes under Article 70(d) is left to the discretion of the court. The court cannot, however, pass a decision against the plaintiff, if he is proved to have not served the summons on the

defendant owing to his negligence. Hence, for the sole negligence committed by the plaintiff, there is no decision that may be made against him.

353. 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 any respondent not served.

354. Provided that no order for 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.

355. Usually, courts authorize plaintiffs to act as serving officer. The rule under Article 70 is very important in the sense that it places plaintiffs who act as serving officers under obligation to consider serving the summons properly on defendants. This is because if they carelessly fail to serve the summons on defendants, they are going to get their cases dismissed or struck out. This decision is made when the plaintiffs fail to serve the summons and return it to the court. The court then investigates the reason why they failed to serve the summons on the defendants and takes one of the measures stated under Article 70(d).

III. Non-appearance of the Plaintiffs

356. When the defendant appears but the plaintiff fails to appear on the date fixed for the opening of the suit, the court shall dismiss a case (Article 73).

357. 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.

358. In case of non-appearance of the plaintiff, the only question to be put to the defendant is whether or not he admits the claim of plaintiff. If he admits wholly, the court makes a decision for the plaintiff on the basis of such admission. If he partly admits and partly denies, the court makes a decision on the part admitted and dismisses the case as regards the portion denied. If he denies wholly, the court shall dismiss the case. There is no further investigation to be made by the court. See Article 73, which provides the rule in this respect.

359. 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. The rule under Article 73 is a mandatory one, which does not give any discretion to a court except

to dismiss the case nor does it give power to the court to examine the defendant as to why he denies the claim of the plaintiff wholly or partly.

IV. Non-appearance of Third Party Defendants

360. 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 the 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.

361. Article 76(1) Where a third party duly summoned to appear under Article 43(2) fails without good cause to appear for the purpose of disputing the plaintiff's claim as against the defendant on whose behalf the summons was issued, or his own liability to the defendant, he shall be deemed to admit the validity of the decree passed against such defendant and his own liability to contribute or indemnify, as the case may be, to the extent claimed by the defendant.

362. It is possible that parties appear during the first hearing of the case but may fail to appear in due course of hearing of the case. What measure a court can take if the defendant who cannot appear on the first day of hearing of suit appears on the day fixed for next hearing of a suit?

363. For example, in an *ex-parte* hearing, the court starts to see the case in the absence of the defendant. It may adjourn the case to further consider the claim. On the next day fixed for the further consideration of a case, the defendant who could not appear 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:

> Article (72) 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.

364. The fate of the defendant who could not appear on the opening of the suit depends on 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?

365. 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. This means that the proceedings would not be set aside. The proceedings already made should have been set aside. Hence,

the proceedings already undertaken by a court shall be set aside. Because this causes delay of proceedings, the court can impose costs on the defendant for causing delay of proceedings.

366. 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 one 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.

367. 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 is and poses an interesting question.

368. 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 because 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 because objection is to be raised during the first hearing of a suit.

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

370. The first option does not favour the consideration of the side of the defendant. The second option ensures it. There seems to be no problem if the defendant is permitted to defend himself from where proceedings stopped in the previous hearing. He is punished because he could not make the defences he could have made during the first hearing of a suit. Hence, permitting him to defend does not cause delay nor does it affect the right of the plaintiff in any way.

371. The rules on non-appearance of the parties apply to any proceedings, be it at 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), which provides that the provisions of this book shall apply in any proceedings under this Code.

372. Issues related to non-appearance could also arise if the suit involves two or more parties. For example, two or more plaintiffs might file a suit, or a suit is brought against two or more defendants. Article 75 tries to address issues emanating from non-appearance in a case where one of the several plaintiffs or defendants fails to appear. Read Article 75. It is important to note that the rules under Articles 69, 70,

and 73 do not apply in a case where two or more plaintiffs or defendants are involved in a case and one of them fails to appear.

V. Consequence of Non-appearance of Parties

373. 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 the third party defendant. The court is not also entitled to adjourn the hearing of the case except under Article 70(d). The measure taken by the court can either be dismissal or striking out of a suit.

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

375. Striking out 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 the 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 court fee if he shows the court that he was not able to appear because of sufficient cause.

376. Generally, striking out does not avoid the submission of a fresh suit, upon payment of the court fee, to a court on the same cause of action. Good cause is important not to pay the 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.

377. A suit is dismissed when the plaintiff fails to appear but the defendant appears; when both parties fail to show up on appeal; and when an appellant is proved to be in default in serving the summons on the 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 the court fee and proceed with a suit. The dismissal leads to loss of right to bring action on the same cause of action (Article 74(1)).

378. However, if a plaintiff is prohibited to appear before a court owing to a 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 of the date the order was made by a court to dismiss the case. If there is 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.

379. The period provided under Article 74(2) starts to run from the date the order to dismiss the case is given by a court.

380. 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 the *ex-parte* decision or default judgment and consider the case as new.

381. The period specified under Article 78(1) is different from the one given under Article 74(2). Under Article 78(1) the period starts to be effective from the moment the defendant has become aware of the *ex-parte* decision or default judgment. Actually, there is no specific period as to when the defendant is expected to know such decision. He may be aware about such decision at any time. The period runs from the moment he is aware of such decision. It is to be admitted that it is difficult to know and prove the exact time as to when the defendant becomes aware of such decision. The period of limitation under Article 74(2) is an exact one and does not open room for dispute as to when it begins to be effective.

382. If the defendant fails to apply to get the decision set aside within the time fixed under Article 78(2), he cannot get the chance to challenge the enforcement of the decision passed against him.

383. 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 the effects of striking out of suits and dismissal of suits. The Amharic draft of the Civil Procedure Code gives, however, a different meaning to them to solve this problem.

384. The term 'sufficient cause' is provided under Articles 71, 72, 74, 77, 78, etc. There is no definition of what it means by 'sufficient cause'. The determination of what amounts to good cause is subjective and depends on a case-by-case consideration of circumstances.

385. The term 'sufficient 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 and allows for the reopening of the case. Sufficient cause, if accepted by the court, has a potential to bring about delay in the trial of a suit. It has to be, therefore, construed narrowly. The determination of 'sufficient cause' depends on a case-by-case consideration of the application of an applicant.

Chapter 2. Pre-trial Proceedings

§1. Activities Done at Pre-trial Proceedings

386. If a suit is not dismissed or struck out on the date fixed for the opening of a suit, the court undertakes activities to be done with respect to the hearing of case. The proceedings in a court are of two types. The first is the pre-trial proceeding and the second is a full-scale proceeding (trial).

387. As the name itself implies, pre-trial proceeding is a proceeding conducted prior to a full-scale hearing of a suit. It is the first phase of a trial proceeding and as such serves as a preparatory stage.

388. Pre-trial proceedings serve some functions. It, firstly, aims mainly at framing issues for the trial stage. This is because the activities done by a court at this stage enable it to draw a full picture of the suit and points of controversy between the parties. Secondly, it tries to avoid complications in the hearing of a case because preliminary objections raised by a party get decided at a pre-trial stage. This makes a court focus on the essence of the litigation between the parties that needs the decision of the court. Thirdly, it assists the court to identify undisputed facts from disputed facts and then frame issues that need the resolution of the court.

389. The activities to be done during pre-trial proceedings include verification of parties, reading of pleading, examination of parties, ruling on preliminary objection, if any, and framing of issues. Most of these activities are listed under Article 241:

> Article 241(1). At the first hearing of the suit, the court shall, after verifying the identity of parties if they appear in person, read the pleadings and ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the statement of the other party and as are not expressly or by necessary implication admitted or denied by the other party against whom they are made.

I. Verification of Parties

390. At a pre-trial stage, a court first ensures the identity of the parties or their representatives. It means that the court verifies whether or not the parties appear in person or whether or not proper representatives appear before it. This is because anybody cannot appear before a court on behalf of a party. A party must appear in person if the court orders to that effect or be represented by an appropriate representative specified by the Civil Procedure Code. As you remember our discussion under the topic on appearance and non-appearance of parties, a party need not appear in person unless the court demands it. Verification here means that the court confirms whether or not a party appears in person in case the court orders to that effect or

ensures that a proper representative appears. In case a party is represented by his representative, the court demands the representative to produce a letter of authorization.

II. Reading of Pleading

391. After verification, the next is reading of pleadings. The pleadings to be read are the statement of claim and statement of defence. The Amharic version says that it is the statement of defence only that is to be read here. The English version is not clear as to the pleading that is to be read by the court. It merely says that the court reads pleadings. For the definition of pleadings, read Article 80(1).

III. Examination of Parties

392. After the reading of pleadings, the court proceeds to examine the parties as to what they expressly or impliedly admit or deny. This examination is an oral one and does not involve the examination of witnesses of the parties nor does it include the investigation of documentary evidences. It enables the court to separate the disputed matter from the undisputed matter. It also enables a court to get relevant information that elaborates the case further, which makes a court able to frame issues that are to be decided at a trial.

393. It is actually the responsibility of the parties to plead in precise and clear terms as given under Articles 80(1), 82, 83, 222, 234, 235, etc. The examination under Article 241 gives power to the court to examine the defendant if it is of the opinion that the defendant has not expressly or impliedly denied claims made by the plaintiff. This gives the defendant a second chance to deny what he might not expressly or impliedly deny in his statement of defence. Thus, the defendant may deny or admit the allegations in his statement of defence or at the examination under Article 421.

394. The examination under Article 241 applies also to the plaintiff. In his statement of defence the defendant might raise affirmation defences against the allegation of the plaintiff. By the examination under Article 241, the court determines whether he admits or denies any affirmative defence invoked by the defendant. For example, the defendant might raise illness as constituting *force majeure* to justify non-performance of the contract. The plaintiff might deny that the illness does not amount to *force majeure* that could prohibit the defendant from not performing the contract during the examination under Article 241. Hence, by looking at the outcome of the examination, the court frames points of controversy between the parties or make decision on points admitted subject to the rule under Article 242. The court shall write down and record all admissions and denials obtained as a result of examination under Article 241. See Article 241(4).

395. If there is whole admission as a result of oral examination, the court shall make a decision without demanding the plaintiff to prove the case. The whole admission by the defendant brings an end to the litigation between the parties. In

criminal cases, the admission by an accused, however, is considered to be one evidence and does not bring an end to the litigation.

396. If there is a partial admission, the party in whose favour the admission is made can apply to get a decision on the part admitted. (see Article 242.) If there is total denial, then the court proceeds to frame issues and proceed to try them at the trial stage, which we will discuss later on. Generally, the examination is simply to determine what admission and denial a party wishes to make and to assist the court in framing the issues.

397. In practice, courts do not usually take the examination of parties seriously and apply it during the pre-trial proceedings.

IV. Resolving Preliminary Objections

398. During the oral examination, a party may raise an objection to a case. Preliminary objections can be stated in the pleadings or can be invoked during oral examination.

399. Preliminary objections are objections raised with a view not to go into the merit of a case. They aim at attacking a suit and get it rejected at an early stage. Preliminary objection is an incidental issue related to a case, because it is made for the purpose of making the court not to consider the merit of a case.

400. When a preliminary objection is raised, the court shall proceed as per Article 245 which provides that the court shall decide any objection taken under Article 244 after hearing the opposite party and ordering the production of such evidence as may be necessary for the decision to be made.

401. It means that the court shall give an opportunity to an opposite party to respond to the objection made by a party. The response of the other party enables the court to make a proper decision. For example, if the defendant raises an objection on the ground that a suit is barred by period of limitation, the court shall give an opportunity to the plaintiff so that he responds to such objection. The plaintiff might say that the period of limitation is interrupted. Hence, the court should give a chance to a party before making a ruling on the preliminary objection.

402. Article 244(3) fixes the time within which a party is supposed to raise a preliminary objection, which is at an earliest possible opportunity.

403. According to Article 244(3), any ground of preliminary objection shall be raised at the earliest possible opportunity. There is no clear indication as to what the earliest possible opportunity means. It means, however, any time before framing of issues. This is because once issues are framed, the case is referred to a trial stage and a party loses the chance to raise a preliminary objection. If he fails to raise them at the earliest possible opportunity, it means that the opportunity to raise an objection is waived. This does not mean that all objections are waived ones. There are certain

preliminary objections that cannot be waived. These types of objections include lack of material jurisdiction, lack of capacity, prior permission to sue, and pendency. Next you will find the explanation of some of these grounds. A court itself can even raise these grounds of objection at any time. They are grounds that prevent a court from giving a valid decision.

404. For example, if a case involving nationality is brought to the First Instance Court, the silence of the defendant cannot grant the power to this court to see a case of nationality. The defendant or the court can raise it any time. It cannot be waived even if the defendant fails to invoke it at the earliest possible opportunity because it relates to the power/competence of the court to give a valid decision. That is why Article 9(2) says that the objection based on lack of material jurisdiction can be raised at any time.

405. The other types of objections are those that can be waived if not raised by a party at the earliest possible opportunity. This is because they are made for the interest of a party. If he fails to raise them at the proper time, it means that a party is not willing to benefit from them. They include period of limitation, res judicata, arbitration/compromise, etc. Unless the party raises these objections, the court is not entitled to make a ruling on them.

406. Some of the grounds of preliminary objections stated under Article 244 of the Civil Procedure Code are the following:

A. Lack of Jurisdiction

407. A court must have jurisdiction to try cases appearing before it. There are three elements of jurisdiction, namely, international jurisdiction (judicial jurisdiction), subject-matter jurisdiction (material jurisdiction), and venue (local jurisdiction). If one of these elements is missing, the court may not see the case. Thus, if a case is submitted to a court that lacks jurisdiction, the court may itself reject the statement of claim filed to it based on Article 9 of the Civil Procedure Code, or the other party may raise an objection on the basis of Article 244(2)(a). However, the court may not raise lack of judicial jurisdiction as an objection by itself and reject the statement of claim. This is because the defendant may appear and defend himself without raising such objection or may appear and raise the objection. Hence, unless ascertaining the reaction of the defendant, the court should not reject the statement of claim filed to it even if it is aware that it does not have judicial jurisdiction. This is because judicial jurisdiction is a type of objection that may be waived if not raised at the earliest possible opportunity. Judicial jurisdiction can be established if there is implied consent of the defendant, which can be formed if the defendant appeared and defended himself without raising any objection.

408. If the court lacks material jurisdiction, it cannot entertain a case. Material jurisdiction has to do with competence of courts to look at particular types of cases. Hence, objection based on it can be raised at any time (Article 9 of the Civil Procedure Code). It is a type of objection that may not be waived even if not raised at the earliest

possible opportunity. Hence, it can be raised by the court and one of the parties at any time.

409. If the objection relating to jurisdiction concerns local jurisdiction, the court should proceed according to Article 10 of the Civil Procedure Code.

B. Res Judicata

410. Res judicata is another ground of preliminary objection. It means that once a matter has been litigated and resolved, it may not be subject to re-litigation.

C. Lack of Qualification to Act in the Proceedings

411. Absence of qualification to act in the proceedings is another ground of preliminary objection. Lack of qualification to act in the proceedings means that a party does not have capacity to be a party to a suit. As you have seen in your discussion on issues related to capacity under Article 33, to be a party to a suit, a party needs to have capacity. Capacity here refers to capacity to perform juridical acts. The general rule regarding capacity is that everyone is presumed to have capacity unless the law provides otherwise (Article 192 of the Civil Code).

412. Capacity applies to all parties taking part in litigation as plaintiff, defendant, intervener, etc. Incapable persons may not be parties to suits in their own names. Hence, they shall be represented by their organs of protection.

413. If an incapable party is found to have brought action, the other party may raise an objection on this ground, or the court may itself raise this issue if it suspects that a party lacks capacity. The objection based on lack of incapacity is a type of objection that may not be waived even if not raised at the earliest possible opportunity. This is because if a party lacks capacity, the likelihood is that the party may not properly defend his interest owing to his incapacity and this affects the validity of the decision given by the court. This is because the party may not fairly participate in the litigation and the concept of fair hearing may be defeated.

414. If the objection based on lack of capacity is raised, the court shall suspend the proceedings until proper representation is made as per Article 34 of the Civil Procedure Code.

415. Lack of qualification to act in the proceedings may also mean that a party does not have a vested interest in the subject-matter of a suit. It means that the plaintiff is not one who is entitled to bring a suit.

D. Settlement of Disputes by Arbitration or Compromise or That They Are Subject to Arbitration or Compromise

416. Arbitration and compromise are peaceful mechanisms of settling disputes outside the courts. They do not involve adjudication, which necessarily involves a loser or a winner. If the parties have entered into a valid agreement to submit a dispute to arbitration or compromise scheme or have their case settled by either of these mechanisms, in accordance with the provisions of the Civil Code, the parties cannot bring the matter to the court for consideration.

417. The grounds of preliminary objections are listed under Article 244. However, the grounds of objection are not these ones only. This is because Article 244(1) says 'such as', which means that other grounds can be used as preliminary objections.

418. Article 244(1) Before proceeding with the trial of the suit, the court shall decide such preliminary as may be taken by the parties.

419. If the preliminary objection invoked by a party is well established, it might lead to either the striking out of a suit or its dismissal. Objections on the basis of res judicata and lapse of period of limitation lead to dismissals of suits and others bring about the striking out of suits.

420. The effect of striking out of a suit is that it does not prevent a party from filing a fresh suit on the same cause of action, whereas if it is dismissed, a party cannot bring a fresh action on the same subject matter.

421. A court should make the ruling on preliminary objection during the first hearing of a suit and this makes the court concentrate on the subject-matter of disputes between the parties. With a view to avoiding delay of proceeding, the court shall decide on preliminary objection during the first hearing of a suit.

§2. Framing of Issues

422. After examination of parties and ruling on preliminary objection, if any, the court proceeds to sort out the main points of controversy between the parties, which need a decision of the court at a trial stage. All the activities we have so far considered, beginning with verification of parties up to preliminary objection, aim at framing issues. This is to be found under Article 246:

> Article 246(1) After preliminary objections, if any, have been decided, the court shall ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

423. The procedure tries to accord definition to what it means by 'issue' under Article 247. Issues arise when a material proposition of fact or of law is affirmed by one party and denied by the other. It also goes on defining material proposition. Material propositions are those propositions of fact or of law that a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

424. Issues are, according to Article 247, points of controversy or disagreement over which the parties fail to agree. There is said to be an issue where the occurrence of one fact alleged by one party is denied by another. For example: 'A' brings action against 'B', alleging that there is a breach of contract, the breach of which causes damage. If 'B' alleges that the contract is an illegal one then there is an issue between 'A' and 'B' as to the existence of a valid contract between them. Thus, whether or not there is a valid contract between the parties is to be framed and decided during the trial proceedings in the light of the requirements for a valid contract.

425. It does not, however, mean that there is an issue between parties if they disagree on all matters. To be an issue, the disagreement should be relevant to a case and that it must be material one. That is why Article 246(1) says 'issues on which the right decision of the case appears to depend and Article 247(1) uses the phrase "material proposition"'.

426. For example, if 'X' and 'Y' disputed over the existence of a valid contract, the disagreement over where the contract was concluded is not relevant and as such is not important for the decision on the case. One party alleges that it was concluded in the house of 'X' and the other says it was in the house of 'Y'. Such controversy may not create the issue between them, because it is not relevant for the final decision over the case.

427. There are two types of issues: issues of law and issues of facts. One cannot make a clear demarcation between the two issues. Issues of fact deal with what happened between the parties. For example, the fact that a car accident took place and caused an injury to a person is a factual issue.

428. Issues of law inquire as to the facts relevant to a case, the evidence relevant to prove the facts, the rules applicable to the facts of a suit, etc. They relate to rules pertaining to evidences to be used and provisions of substantive law to be applied to given facts of a case. For example, claims for compensation from an advocate by alleging that he committed negligence in representing him before a court as a result of which he lost the case. The advocate contended that there was no negligence committed by him and that he represented the interest of a party to the best of his capacity. Determining whether or not there was negligence on the side of the advocate involves issues of law. This is because fault in this case is provided under Article 1795 of the Civil Code. Whether or not there is negligence here is to be determined by the application of this provision.

429. Sometimes, issues of facts and of laws may appear together. Issues, be it of law or of facts, shall be framed during the first hearing of a suit, that is, at a pre-trial

stage. This enables the court to focus on considering the main issues between the parties at a trial stage. Thus, at the trial of the case, the court limits itself to and considers evidences if it frames issues during the pre-trial stage.

430. Issues are to be framed by using different sources. The sources from which issues are to be framed are listed under Article 248 of the Civil Procedure Code. The court may frame the issues from: (a) allegations made in the pleadings; (b) the contents of documents produced by either party; or (c) allegations made by the parties, or by any persons present on their behalf, or made by the pleaders of such parties in the course of the examination held under Article 241.

431. The first source is the pleadings submitted to a court by the parties. This amounts to the main source of issues. The plaintiff submits the statement of claim and the defendant also submits the statement of defence. By comparing the contents of the two pleadings, the court frames the points of controversy between the two parties.

432. The second source is the admission or denials made during the oral examination under Article 241. During this examination, the court investigates the parties as to what they expressly admit or deny. Parties may raise new facts that were not included in their pleadings. This helps the court in clearly determining the real issues between the parties.

433. The third source is documents produced by either party. Parties are expected to produce all the documents on which they rely on during the pre-trial stage. We will discuss about production of evidences in this unit under the topic on trial proceedings. This source is mostly used when a court is not in a position to frame the issues between the parties. This is because pre-trial is not a stage to consult the evidences produced by the parties. The evidences consulted here are the ones annexed to pleadings under Articles 223 and 234.

434. One can also consider Article 249 to be a source from which issues can be framed. It is used when a court faces difficulty in properly grasping the issues between the parties. In such instance, the court may demand the appearance of witness or any person and examine them as to the suit between the parties, or the court may also require the production of further documents that elaborate a case:

> Article 249 Where the court considers that the issues cannot be correctly framed without the examination of some person not before the court or without the inspection of some document of a kind other than that mentioned in Article 137(1) but which the court deems relevant, it may adjourn the framing of the issues to a future day, and may compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

435. If a party failed by his fault to produce the evidence or witness required under Article 249, the court has the discretion to render judgment against him. This power

entitles the court to have all the necessary information and documents before framing issues.

436. These four sources enable a court to frame issues between the parties. According to Article 246(1), the court is under obligation to frame issues. However, Article 246(2) makes an exception to this obligation. In certain instances, a court is not compelled to frame issue. This is true when the defendant makes no defence. See Article 246(2) below:

> Article 246(2). Nothing in Article 246(1) shall compel the court to frame and record issues where the defendant at the first hearing of the suit makes no defense.

437. There is a difference between the Amharic and English versions of Article 246(2). According to the Amharic version, if the defendant does not bring with himself the statement of defence, the court is not bound to frame issue. However, as per the English version, it is when the defendant does not make a defence that the court is not compelled to frame issues. Making no defence means where there is whole admission by the defendant, which means that there is no point of controversy between the two parties. It can also mean that the defendant could not make a legally sustainable defence, for instance, if the defendant makes evasive denial. According to the Amharic version, the mere fact that the defendant does not bring with himself a statement of defence relieves a court from framing issues. However, if a defendant does not produce his statement of defence, there is a possibility to proceed with a case if the defendant can defend himself during the oral examination successfully. Hence, the Amharic version of Article 246(2) seems to be misleading.

438. Issues are not framed by a court only. Parties to a suit can themselves frame issues and refer them for trial. But this right of parties to frame issues is limited to certain questions between them (see Article 252). In addition, the parties are obliged to make their agreement on framed issues in writing.

439. If there is a mistake committed by a court in framing issues during the first hearing, the court has a full power to amend the issues it framed or frame new and additional issues. This is provided under Article 251(1):

> Article 251(1) The court may at any time before judgment amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

440. This power is to be exercised if the amendment of issues framed or framing of additional issues is necessary for clarifying the issues between the parties and determining the disputes between parties more properly. However, except where a court frames new issues, the trial is basically limited to those issues framed during a pre-trial proceeding. Thus issues framed during pre-trial stage limits the scope of litigation between parties and the evidences to be used by parties.

§3. Judgment at Pre-trial Stage

441. As a rule, judgment shall be made after conducting a full-scale trial of a suit (see Article 273). That means judgment is given after hearing the testimony of witnesses and considering evidences produced by the parties. Judgment on a pre-trial is an exception to this rule because it is made without a trial of a suit. The instances in which pre-trial judgments are given make trial proceedings unnecessary. If it is possible to make a decision at a pre-trial stage, the court should not proceed to investigate evidences and examine witnesses. Rather, it shall make judgment. This is because one of the purposes of the Civil Procedure is to achieve speedy trial of cases. Hence, if circumstances allow, the court can render decision.

442. It is important to note that judgment at a pre-trial stage pre-supposes that the pleadings submitted to a court are sufficient ones. For example, if the statement of claim filed to a court is not sufficient, there is no issue of a pre-trial judgment. This is because the registrar and judge are instructed to take immediate measure if it is found to be not sufficient in terms of technical and legal requirements.

443. The following are instances in which judgments can be rendered at a pre-trial stage.

I. Judgment on Admission

444. If a party makes an admission in his pleadings or during the oral examination under Article 241, the court can make a decision. The admission can either be whole or partial. If the party makes a whole admission, a court should give a decision without the need to conduct trial proceedings. In civil cases whole admission is conclusive and brings an end to the litigation between the parties. If there is, however, partial admission, a party may apply for a decision on the part admitted at a pre-trail stage or may wait until the part denied is decided upon by a court during a trial stage.

445. The admission can mainly be made in the pleadings or during oral examination under Article 241.

446. Article 242 deals with the procedure in case when there is whole or partial admission. It subjects whole admission to application of the party if the party in whose favour it is made wants to get decision. It seems unreasonable to expect the party to apply to the court to get a decision if there is whole admission. This is because the reason a party brings his a case to a court is to obtain a decision, and if there is whole admission, there is no need to make further proceedings. It should, therefore, be the court that should make a decision by itself.

II. Parties Not at Issue

447. If the parties are not at issue on both questions of law or of fact, the court may make a decision as provided under Article 254. This is because there is no controversy between the parties that needs the decision of the court. See Article 254:

> Article 254(1) where after preliminary objections, if any, have been decided, it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment.

448. Some of the examples of instances whereby one could say that the parties are not at issue include the following:

449. The first example is when there is whole admission. In case of whole admission, there is no point that is subject to litigation between the parties. Thus parties are said to be not at issue. This is because admission in civil cases is conclusive and brings an end to the litigation between the parties. However, in criminal cases, a confession made by the accused is not conclusive. It can be used as one of the evidences. Even if the accused alleges that he has committed the crime for which he is being prosecuted, the public prosecutor is still expected to prove beyond any shadow of doubt that he has actually committed the crime. This is because of the burden of proof in criminal cases. The public prosecutor must prove beyond any shadow of doubt that the accused has committed the crime for which he is prosecuted.

450. The second example is when a party admits but raises a defence not sustainable at law. This means that a party is not alleging facts that constitute a defence. The party is putting forward a defence but it is found to be not a sufficient one. This means that the defendant is not alleging a material proposition that constitutes a defence. This demands the consideration of the statement of defence produced by the defendant.

451. The phrase 'at once pronounce judgment' under Article 254(1) indicates a judgment that can be given at a pre-trial stage.

452. One should note that in deciding on whether or not there is an issue between the parties, the court shall assume that there is an issue between parties in case there is doubt as to the existence of issue. That means the benefit of doubt must be made in favour of finding and establishing issues between parties. This is because litigation should not be terminated at pre-trial stage unless it is established in clear terms that there is no issue between parties. In addition, judgment at pre-trail stage is an exception to the rule on making decision and, thus, exceptional rules should be construed narrowly.

III. Failure to Produce Evidence

453. When a court is not in a position to frame issues during a pre-trial stage, the court may order parties to produce further evidences or call their witnesses under Article 249. If a party ordered to do this fails to do so by his fault, the court may make a decision at once. The making of the decision here is subject to the discretionary power exercised by the court. The phrase 'at once pronounce judgment' in Article 249 shows that a judgment may be given at a pre-trial stage. This can be considered to be a judgment based on the default of a party because a party has not complied with what he is ordered to do at the opening of a suit. It is a sort of penalty imposed on a party for not undertaking what he was instructed to do by a court. This is a rule under Article 256(1):

> Article 256(1). Where evidence which should have been produced in accordance with Article 137 or 249 is not so produced due to the default of either party, the court may at once pronounce judgment or may, for good cause to be recorded, adjourn the hearing on such terms as to costs or otherwise as it thinks fit.

454. Under Article 256, the court has discretion to either make a decision at once or to adjourn the hearing of a suit. If a party presents a good reason for not complying with the order of a court to produce evidence or call his witness, a court may adjourn the consideration of a case rather than making a decision at once.

IV. Judgment while Parties are at Issue

455. When parties are at issue, the rule is that the court should refer the case to trial proceedings. But sometimes the issues may be such that they can be decided upon at a pre-trial stage and that it is not necessary to order a full-scale trial of a case. This is governed under Article 255. This procedure is in line with the purpose of the Civil Procedure, which is to achieve inexpensive and economic resolution of cases:

> Article 255 Where the parties are at issue on some question of law or of fact, and issues have been framed by the court as herein before provided, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues.

456. The making of a decision at a pre-trial stage while parties are at issue depends on the fulfilment of certain requirements. The requirements include: (a) that the court should be convinced that no further evidence or argument than the parties have already presented is required; (b) that the argument and evidences already submitted to court are sufficient to make a judgment at pre-trial stage; (c) and that the court believes

that no injustice will result from making a decision without conducting a full-scale hearing of a case.

457. All these requirements must be met at a time to make a decision at a pre-trial stage. The missing of one of them deprives the court of the power to make a decision at a pre-trial stage, if the parties are at issue.

458. The phrase 'may proceed to determine such issue' under Article 255 indicates that the court may make a decision at a pre-trial stage. The court is not under obligation here to make a decision. It has a discretionary power to refer the case to a trial stage or make a decision at a pre-trial stage.

459. One should be aware of the fact that the court is not entitled to resolve issues at a pre-trial stage for the reason that it believes that one of the parties is likely to get the decision in his favour at the trial under Article 255. This is because if the parties are at issue, they are entitled to present their evidence at trial. It is only where the issue can necessarily be settled by the evidence that the parties can produce at the first hearing that the court should proceed as per the procedure under Article 255. The procedure under Article 255 is not a substitute of a full-scale hearing. Rather, it is the mechanism that avoids the conducting of a full-scale hearing even if the parties are at issue when the requirements mentioned are fulfilled.

V. Decision on Issues of Law

460. In most cases, issues of law and of fact appear together. Sometimes issues involved in a case may be resolved by decision on issues of law only. In such cases, the decision on issues of law may altogether determine the dispute between the parties. Hence if the court is of the opinion that the decision on issue of law first may bring an end to the litigation wholly or partly, the court may try them first without setting a trial because no evidence needs to be introduced. This is the procedure under Article 247(4). If the consideration of issues of law resolves the suit, it can be considered a judgment on a pre-trial stage.

461. For example, 'A' brought action against 'B' for breach of contract and 'B' said that the reason he did not perform his obligation was because of force measure, or, as an alternative ground, that there was no contractual relation between him and 'A'. The *force majeure* alleged by 'B' is an issue of law. If the court believes that its trial resolves the suit, it may try it and the decision on it may finally bring an end to the litigation.

VI. Agreement on Issue

462. As we said earlier, parties may agree in written form as to the issues between them and demand a decision of a court on them under Article 252. If the court is satisfied that the agreement is made on the issues between them and that the issues

are fit to be decided, the court is obliged to try the issues framed by the parties as if the issues have been framed by it.

463. For example, if both the plaintiff and defendant do not dispute the fact that they made a contract, that the defendant breached it, that the plaintiff has suffered as a result of such breach, but they disagree on the amount that the plaintiff is entitled to, they can agree in written form to frame issues on the amount of damage to be awarded to the plaintiff and refer it to a court. This is given under Article 253.

464. This Article applies when parties agree on issues between them and brings to a court for decision on them only. Without undergoing a trial stage, the parties can get an immediate decision in such instance. The procedure under Article 253 avoids the expense of conducting a full-scale hearing of cases.

465. The above-mentioned are the main instances in which the court is empowered to make a decision without a trial stage. These instances help in making speedy trial of suits, avoid parties from incurring more expenses, and save their time. Thus, if the cases can be disposed of at a pre-trial stage and fall under one of these circumstances, the court shall make a decision without the need to refer cases to a trial stage.

Chapter 3. Trial Proceedings

466. If there is no possibility to give a decision at pre-trial proceedings after or before framing issues, the court shall carry out trial proceedings, which is known as a full-scale hearing of suits. Trial stage amounts to the last phase in hearing a case, because a decision is given at its end. At trial proceedings, the court goes into considering the merit or substance of litigation between the parties.

467. During a pre-trial stage, the court limits itself to some incidental issues related to a case and does not touch the subject-matter of litigation between the parties. However, at a trial stage, the court tries to resolve the issues framed at a pre-trial proceeding. Hence, the main task of the court is to consider evidences produced by parties, material objects, if any, and look at the testimony of their witnesses with a view to deciding on issues framed and issuing decree.

468. At the trial of the case, the main activity to be done by the court is to consider documentary evidences produced by the parties, examination of witnesses of the parties, and rendering of a decision and issuance of a decree.

§1. The Main Hearing (Trial) Stage and Its Procedure

469. At the trial, the parties are expected to introduce their evidences to show their respective sides. We consider the procedure on the introduction of evidences next.

470. Because the claim/allegation is made by the plaintiff, it is he who is entitled to begin. This is in line with the principle that he who claims something shall prove its existence first. It also reflects the rule that the party who has burden of proof has the right to begin production of evidences first. Thus the right to begin follows the burden of proof. This is the rule under Article 258(1). See Article 258(1).

471. Article 258(1). On the day fixed for the hearing of the suit, the plaintiff shall be entitled to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant shall be entitled to begin.

472. For example, if the plaintiff alleges that he has been defamed by the defendant, he shall prove that the requirements for defamation are fulfilled and that he suffered damage as a result of the defamation.

473. The exception to this rule is when the defendant admits the claims alleged by the plaintiff but raises affirmative defences to such claim. If the defendant raises affirmative defences to the claim filed by the plaintiff, it is the defendant who shall begin the proceedings. For example, if the plaintiff claims the breach of contract and

compensations resulting from such breach, and the defendant admits that he could not perform the contract because he was prohibited by the occurrence beyond his control, it is the defendant who is entitled to begin the production of evidences to show the existence of *force majeure* that prohibited him from performing the contract.

474. If a party who is entitled to begin fails to establish his claim or defence by the evidence he produced, the court can terminate a suit without demanding the opposite party to produce his evidence. For example, if a plaintiff is claiming compensation as a result of breach of contract but fails to show the existence of contract after producing his evidence, the court should not demand the defendant to produce evidences showing the absence of valid contract. Hence the court shall terminate a suit automatically by dismissing the claim of the plaintiff.

475. If a party entitled to begin introduces sufficient evidence showing his claim, the other party states his case, produces his evidences, and addresses the court to challenge the claim of the other party. Then the party that is entitled to begin replies. It means that the party entitled to begin is entitled to have the last word on the case.

476. The main hearing is divided into three stages: the opening statement, the presentation of evidence, and the closing argument.

477. After considering the evidence presented by the parties, examination of witnesses, and oral arguments of the parties, the court fixes a date for the delivery of judgment. Production of documentary evidence, testimony of witnesses, and so on are treated under a separate section on these issues.

§2. Judgment and Decree

I. Judgment

478. As a general rule, judgment is given after evidences are concluded and the parties have presented their final argument (Article 273). The judgment made by a court at a pre-trial stage is an exception to this rule because it is given without the trial of a case.

479. Judgment is the outcome of the proceedings in a court. It is defined under Article 3 of the Civil Procedure Code as the statement given by a court of the grounds of a decree or order.

480. Judgment can be made at a trial or at some date to be fixed by a court after a hearing and shall be pronounced in an open court (Article 180). Usually, judges inform the parties of the date the judgment is to be delivered. It is not common to pronounce decision in an open court in civil cases and parties are told to get the copy from the registrar.

A. Deliberation

481. The deliberations for the judgment are held in a closed session after the hearing. Fixing the date of deliberation is left to the discretion of the judges. There is a possibility of participation of lay judges in the deliberation. Normally, judges are not expected to disclose what has been discussed during the deliberation. If the judges fail to agree on what the judgment should be, it is expected that the dissenting judge should write his opinion separately and his dissenting opinion is annexed to the final decision and is not binding. The binding decision is that made by the majority vote.

B. Formal Aspects of Judgment

482. So far as its form is concerned, the judgment shall be reduced to writing and signed by the judge(s) considering a suit. The binding decision is that given by the majority if more than one judge sees a case. The judge dissenting from the majority shall state in writing the decision that he thinks should be made together with his reasons for such. See Article 181:

> Article 181(1). The judgment shall be reduced to writing, signed by the member or members of the court and pronounced by the judge or presiding judge. (2). Where a case has been heard by more than one judge, the decision of the majority shall be the judgment of the court: Provided that any judge dissenting from the decision of the majority shall state in writing the decision which he thinks should have been made together with the reasons thereof.

483. The judgment delivered by a court shall contain a concise statement of facts, the points for determination (i.e., the issues framed), and the reasons for that decision. It means that the judgment should briefly touch the material facts of the case between the parties, the issues identified and framed by the court from these facts, and the way the court decided on the case and the reasons for it.

484. The court is not entitled to give a decision on issues not raised by the parties. This is in line with the concept of party autonomy. It is the parties who fix the scope of litigation and determine issues to be decided by a court. Thus, the court is not entitled to add issues to a case and decide on their basis. However, the court can frame new and additional issues under Article 251, as we have seen earlier, but on the new or additional issues framed by it, it shall order the parties to litigate and produce evidence.

C. Kinds of Judgment

485. The type of decisions made depends on the claims of the parties. The Civil Procedure Code does not outline the specific types of judgments to be rendered by a

court. It seems to leave the issue subject to claims and the discretion of court in making the appropriate decision given the facts and issues involved in a case.

II. Decree

486. Judgment brings an end to the litigation between the parties. The judgment alone cannot be enforced. After judgment is made, the court shall issue a decree. The decree is an operative part of a judgment. Without it, a judgment given by a court is nothing. It is by issuance of decree that judgment is executed. See Article 183. Decree deals with the relief to be awarded to a party in whose favour a decision is made. It, for example, orders the party to pay a sum of money to another, do or not do something; it also deals with issues of costs.

487. The decree shall be signed and dated by a judge or judges who issued it. A judge with the dissenting opinion is not supposed to sign it. This implies that the decree is to be written separately from the judgment. However, the practice of the Ethiopian courts shows that judgment and decree are mixed and written together. As the practice shows, it is the last paragraph of the judgment that is considered to be the decree.

488. A party who wants to obtain a copy of the judgment shall apply to the registry of a court that passed it. When it is given to a party, a date on which it was given to him shall be mentioned (Article 184).

III. Res Judicata

489. Once a case is disposed of by the decision of a court, the parties are not allowed to re-litigate over the same cause of action. This is made possible by the doctrine of res judicata. Res judicata deals with the effect of decision on subsequent litigation. It means, in other words, that once a matter has been litigated and decided by a court, parties to that suit are not allowed to re-litigate over the same cause of action that has already been determined. Hence res judicata deals with the effect of a decision on subsequent suits/litigations. The first decision given precludes a future action. Hence res judicata is different from the concept of pendency. Pendency applies when a second suit is filed over the same cause of action in another court while the same case is pending in one court but res judicata applies when a second suit is filed to a court over the same cause of action that has already been decided by another court.

490. It is applicable to both the plaintiff and defendant. As regards the plaintiff, it prevents him from suing on a claim that already has been decided. Concerning the defendant, it prohibits him from raising any new defence to defeat the enforcement of an earlier decision.

491. The Ethiopian Civil Procedure does not define what res judicata is. It rather provides, under Article 5, the requirements that need to be fulfilled in order for

res judicata to apply. The first is that there must be two suits, one that has already been determined, and a new suit filed to a court. It is the second suit that gives rise to issues of res judicata. Note that res judicata is one of the grounds of preliminary objection that may be waived if not raised at the earliest possible opportunity See Article 244. It is made particularly for the benefit of the party in whose favour the former suit or issue was decided be it the plaintiff or the defendant. A party who wishes to assert an objection on the basis of res judicata must do so by way of preliminary objection at the first hearing of the suit. If he fails to raise it as an objection at the first hearing of a suit, the objection will be deemed to have been waived. It means that he is not intending to benefit from it. It is not the type of objection that prohibits a court from giving a valid decision. This is because it is not related to the power of the court to hear the case.

492. The 'former suit that was decided' here includes ex parte decision as well as default decision. This is because ex parte decision and default judgment have a binding effect on the parties even if the defendant failed to participate in them. Thus, 'former suit' does not only refer to decisions in which both parties have appeared before the court and litigated.

493. 'Former suit' also means foreign decision. This is because a foreign decision that meets certain requirements is treated as if passed by Ethiopian courts and can be enforced by Ethiopian courts.

494. The word 'former suit' does not include a suit that was withdrawn with the permission of the court. This is because the effect of withdrawal with the permission of the court is that the suit is considered as if not filed to the court. Withdrawal of a suit with the permission of the court entitles the party to bring a fresh suit. See Article 278. However, withdrawal does not have the effect of interrupting the period of limitation applying to such claim that was withdrawn. That is why Article 278(3) provides that the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been filed.

495. 'Former suit' does not extend to criminal suit that was heard and decided if a civil suit is filed over the same cause of action. It is possible that an act may give rise to both civil and criminal actions. If a criminal suit is heard and decided it does not prevent the filing of civil suit. The outcome of criminal litigation does not have an effect of civil suit. The acquittal or discharge in a criminal hearing does not have a bearing on determining whether or not fault was committed for the purpose of establishing extra-contractual liability. Thus, 'former suit' does not extend to a decision made on criminal cases.

496. The requirement here is that the issue raised in the second suit must be identical to the issue that has been framed and decided in the earlier suit. This is because Article 5 says that the issues in the second suit must be directly and substantially in issue in the former suit that was decided. The question revolves around what issues were raised in the first suit. Issues are points of controversy between parties that were raised by the pleadings of parties and framed by the court for the trial at the first hearing.

497. The similarity between issues raised in the first and second suits depends on a case-by-case consideration of action. The important issue is that the suit is over the same cause of action. The issues in the case depend on the relief sought by the plaintiff and the defences asserted by the defendant.

498. Sometimes, there is a possibility that issues not raised in earlier suit may be considered to be raised and framed. Hence, res judicata can cover issues not subject to litigation in the earlier suit. The Article on res judicata indicates that the scope of res judicata is very broad.

499. A plaintiff may not split his claim and, thus, he must include the whole of his claim in the suit. See Article 216. Hence, the plaintiff must allege all grounds that would strengthen his claim and the defendant must also assert all grounds of defences he could put forward. For the purpose of res judicata, the parties are deemed to have asserted all such grounds. Thus res judicata applies not only to the issues that were expressly decided but also the issues that should have been decided if raised by the parties. The failure to raise them in a former suit means that they cannot be raised in any subsequent suit.

500. The question of what matters are directly and substantially in issue is related to the question of counter-claim and set-off. The defendant has the option of asserting any claim he may have against the plaintiff by way of counter-claim or set-off but is not under obligation to do so. Thus, if he fails to put forward counter-claim or set-off as a defence, this does not bar subsequent suit on either of these claims. Therefore, a claim of counter-claim or set-off does not constitute a 'matter which ought to have been made a ground of attack or defence' under Article 5(2).

501. The reason why the parties are prohibited from raising matters under Article 5(2) is because the parties have an opportunity to raise them in the first suit, and if they fail to do so it means that they are not willing to use them as a ground of claim or defence.

502. However, if an issue is raised in the first suit, but not decided, that issue is not res judicata if raised in the second suit. If an issue is raised in the suit and a party claimed relief but the court said nothing about it in the final decision and decree, it is considered as if the court refused it. For instance, a party claimed the principal debt and interest, but the court awarded the principal and said nothing as regards the claim for interest. This means that the court has refused to grant the interest claimed. The silence of the court amounts to refusal here. See Article 5(3). This Article deals with the situation where relief was in fact requested by the party but was not expressly awarded or expressly denied. It means that the decree issued by the court is silent as to the relief requested. In such cases the relief is deemed to have been refused regardless of the fact that there is no express ruling on it.

503. The second requirement for res judicata to apply is that parties in both the former and subsequent suits must be the same. The requirement is that the parties to the former suit and second suit must be the same or must be litigating under the same parties. In order for a decision to have a res judicata effect, the former suit must have

involved the same parties or parties under whom the parties in the subsequent claim. In both the former suit and the subsequent suit, all parties must be litigating under the same title.

504. 'Parties' mean persons whose names are in the record as plaintiff, defendant, intervener, or third party defendant. Thus, res judicata applies to these parties. This is because any party who is on the record will have had the opportunity to raise any question concerning his right. Having such opportunity, he should be bound by the result of the litigation. A party who withdraws or whose name is struck off is not bound by the judgment and, thus, res judicata does not apply to such parties.

505. A party who is not named in the suit is not a party. For example, if a third party files an opposition to a case, the party to a suit cannot say that it is res judicata against him. This is because the third party who opposes a decision is not a party in the first suit. However, if a third party has already litigated through the original parties, a suit made by him can be considered to be res judicata. For example, in a representative class suit, if a certain group agrees to be represented by some member of the group and that the case is decided, the second suit filed by any member of the group is res judicata. This is because each member of the group has already litigated through the representatives of the group.

506. Similarly, a minor who is represented by his organ of protection cannot bring action after he attains majority over the same cause of action in which the organ of protection has participated.

507. The phrase 'claiming under and litigating under the same title' means that the party claiming the benefit of the former suit or sought to be bound by it must be one who acquired an interest in the subject-matter of the suit by inheritance, succession, or purchase subsequently to the former suit or must hold the interest subordinately in the sense that his interest is entirely dependent on the interest of the superior holder and automatically comes to an end after that interest is extinguished. For example, the heir is bound by any decision involving the property in a suit by or against the ancestor. The purchaser is bound by any decision involving the property in a suit by or against the seller prior to the time of purchase.

508. 'The parties must be litigating under the same title in both suits' means, for instance, that 'A' brought action to claim compensation against the owner of a car but the suit was dismissed. Later on, 'A' brought action on behalf of 'C' who was also another victim in the car accident. The suit filed by 'A' is not barred by res judicata because he is now acting in a representative capacity. 'A' is now acting under 'C''s title rather than his own.

509. The third requirement is that the issues framed in the earlier suit must be heard and finally decided. This requirement emanates from the fact that application of res judicata needs to have an already decided suit. Res judicata then arises in the second suit.

510. If an issue has been raised, but has not been decided, the issue is not res judicata. For example, 'X' brought action but 'Y' raised an objection that the matter has already been settled by arbitration. The court then accepted the objection and dismissed the case. Res judicata does not apply. This is because even if the issue subject to the suit was brought to the attention of the court, no decision was made on its merit. Because res judicata operates only as to the issues decided in the first suit, it follows that where a suit is dismissed on a ground not going to be the merits of the plaintiff's claim, a subsequent suit on the same claim is not barred by res judicata. Some of the examples of non-merit dispositions that do not prevent a subsequent suit would be a dismissal of the suit for want of jurisdiction, for failure to state a cause of action, etc.

511. Under the third requirement, the decision should be made by a competent court. It means that the court must have jurisdiction over the case at the moment it rendered the decision. For example, if the decision is made by the court that lacks material jurisdiction, the other party against whom the decision is made cannot be barred from raising it in the subsequent suit. For example, if the plaintiff brought action and the court that lacks material jurisdiction decides on it, the plaintiff is not precluded from raising the objection. Read part I of your material on this course for discussion on jurisdiction.

512. Another issue associated to the phrase 'heard and finally decided' is related to the effect of decision on an issue of law where the rule of law on which the decision was based has subsequently been changed. The change may be brought about as a result of newly enacted law, or a later decision of a higher court contrary to the prior decision of a lower court. The issue here is whether or not the former decision on the question of law is res judicata in a subsequent suit. The general rule is that once an issue has been decided, it cannot be re-litigated in a subsequent suit by parties bound by the prior decision regardless of the fact that the law is changed or the prior decision is found to be erroneous. When the law is changed by subsequent law, the former judgment operates as res judicata because legal situations and rights existing prior to the enactment of the new law are not generally affected by such judgment. This principle is in line with the purpose of res judicata, which aims at prohibiting repeated suits.

Chapter 4. Review Proceedings

§1. Principles

513. Review of decision means a reconsideration of judgments already made with a view to rectifying errors in decisions. It is requested mostly by a party dissatisfied with the decision rendered. However, a revision by the way of cassation may be initiated, in addition to parties, by other persons. It can be made by the court that made a decision, by appellate court, or by the court of last resort.

514. Revision of decision aims at rectifying the mistake/error committed by a court that considered and passed a judgment. The court might have made erroneous assessment of facts, or applied inappropriate law to the facts, or interpreted the law in an erroneous way or framed wrong issues and then applied a wrong law, etc. All these and others are removed by revising a decision of a court. Review also serves as a means to control the acts of courts. Courts are independent and, as such, the executive and parliament cannot scrutinize their decisions with a view to modifying or setting them aside. It is through revision that one court reconsiders its own decisions or one court controls the decisions of another court. To effect this, there is a hierarchical relationship between courts, when revision is made, particularly, through appeal and cassation.

§2. Review upon Appeal

515. The review on appeal may be made possible by filling an ordinary appeal to the appellate court or it is effected by filing appeal to the Supreme Court, which is different from an ordinary appeal, which is known as review by cassation in Ethiopia.

I. Review by Appellate Court

516. The Ethiopian Civil Procedure Code has not defined what an appeal is. However, it is the resort to a superior court for the purpose of reviewing the decision of an inferior court with a view to getting an alleged error or injustice corrected or reversed.

517. It is the most common method available to review a decision made by lower courts. It is made by a higher court. Hence, an appeal implies that there is superior-subordinate relationship among courts. Thus, according to Proclamation No. 25/96, the power to review judgments by appeal is given to the High and Supreme Courts. The First Instance Court does not have an appellate jurisdiction, because there is no court below it. It has first instance jurisdiction over many civil cases. When regional courts entertain federal matters by delegation, an appeal can be filed to federal courts. For instance, if a federal matter is seen by the Regional High Court,

an appeal can be made to either the Regional Supreme Court or to the Federal High Court. If a case is decided by the Regional Supreme Court, an appeal is to be filed to the Federal Supreme Court or the party may request the Regional Supreme Court to see it by way of cassation. Regional High Court and Supreme Court entertaining federal matters are equivalent to the Federal High Court and Supreme Court, respectively.

518. Appeal means an application by a party to request an appellate court to review and set aside or reverse the decision of the lower court. This does not mean that an appellate court makes a rehearing of a case after accepting the application for appeal. Appeal is a mere revision of a case and not a retrial of the case decided by the lower court. That is why an appellate court does not, as a matter of general rule, receive new and additional evidence and that parties are prohibited from raising new issues, facts, and arguments before the appellate court as given under Articles 328 and 329, and 345 of the Civil Procedure Code. The appellate court limits itself to the records of the lower court and issues raised there. We will discuss exceptions to this rule later on in this unit.

519. Challenging decisions of the lower courts by way of appeal is the right given to parties. This right is available once only as of right. For example, if a case is initiated in the First Instance Court, an appeal as of right can be made to the High Court. The second appeal to be filed to the Supreme Court depends on the decision of the High Court. If the High Court confirmed the decision of the First Instance Court, no second appeal is allowed, but if the High Court reversed the decision of the First Instance Court by exercising its appellate jurisdiction, the second appeal is possible. This is the rule provided under Article 9 of Proclamation No. 25/96. This is also the rule provided under Article 321 of the Civil Procedure Code.

520. If the case is initiated first in the High Court, appeal is possible once only and it is filed to the Supreme Court. Because no court exists above the Supreme Court, no appeal can be filed against its decision. The means available to review decision made by the Supreme Court that exercised its appellate jurisdiction over the decision of the High Court is cassation, which is discussed later on.

521. The purpose of appeal is to check whether or not subordinate courts committed errors. This serves as an instrument of accountability of those who make decision in trial courts and/or administrative agencies. Courts are independent of the two branches of the government. Hence there is no means available to the other branches to control the acts of the judiciary. The judiciary controls its own mistakes by itself through various mechanisms of review, one of which is appeal.

522. Appeal is possible if certain prerequisites are fulfilled. Now we consider these requirements next.

A. Parties That are Entitled to Appeal

523. Appeal is limited to parties to a suit. That means, parties named in the file of the lower court only exercise it. This means that a third party who did not participate in the litigation before the lower court cannot appeal against a decision. This is provided under Article 320(1) of the Civil Procedure Code Article 320(1). Thus, a third party who did not litigate in the lower court cannot take an appeal.

524. However, in one case that appeared before the Supreme Court on intervention, the court allowed appeal to a third party who requested to intervene in litigation pending in the High Court. The High Court considered his application for intervention under Article 41 and said that he was not interested in the litigation going on between the original parties and then dismissed his application for intervention. He appealed to the Supreme Court from the decision of the High Court that dismissed his application for intervention. The Supreme Court accepted his application and ordered the High Court to get intervened in the litigation going on. The order of the Supreme Court was based on the justification that his non-intervention now could make him oppose a decision and this would amount to the wastage of the precious time of the court that could have been used for considering other cases. It was said that his intervention would avoid the possibility of another from being filed over what was essentially one cause of action and concluded that the intervention was proper.

525. Appeal is not limited to a party against whom a decision is made. It is possible that the party for whom a decision is made may also appeal if he is not happy with the relief awarded to him. For instance, the judgment-holder may appeal if he is of the opinion that the relief awarded to him is not sufficient. This is provided under Article 320(1). It is also possible that both parties may appeal if both feel that they are unhappy with the decision given.

526. For example, the court decided for the plaintiff, but he may be awarded a relief lower than that he claimed and he may take an appeal from the decree. On the other hand, the defendant may also feel aggrieved by the decision made in favour of the plaintiff and he may file an appeal from the decision that made him liable to the plaintiff.

B. Appellant's Interest should be Affected

527. In order to be entitled to file appeal, a party appealing must be aggrieved by the decision against which he desires to file appeal and that he should adversely be affected by the decision. It means, in other words, that a party seeking appeal is said to be affected by the decision given when the decision rendered operates directly or injuriously up on his pecuniary, personal, or proprietary interest.

C. Finality of Decision

528. This requirement demands that there shall be a final decision/judgment made by a court. The Civil Procedure Code has not defined what it means by a 'final decision'. It, however, defines judgment/decision under Article 3. For our purpose here, final decision means a decision that is conclusive, that determines the rights and duties of parties to a suit, and that brings an end to the litigation between the parties before a court that considered a case. It is a decision by the trial court that determines all the issues involved in a particular lawsuit. It means, in other words, a decision of the trial court that ends litigation on the merits of the case and leaves nothing for the court to do but to execute the judgment.

529. For example, suppose that the plaintiff brought an action based on defamation and the court decided that there is no defamation committed by the defendant and rejected the claim of the plaintiff. This decision is conclusive as to the case on defamation and, hence, it is considered to be a final decision.

530. The rationale supporting finality clause is based on the desire to maintain judicial economy and efficiency. The assumption is that a single appeal in which all objections to the trial court's ruling are raised will be more efficient than several appeals, each of which requires arguments and hearing. In addition, many adverse rulings may not demand appellate review. A losing party on a particular ruling may prevail at the trial and the decision may be rendered in his favour.

531. For example, if the court rejects the defendant's preliminary objection, it does not necessarily mean that he will lose the case. He may win the case ultimately, and thus he may not seek an appeal at all. This will save appellate court's time.

532. If appeal were allowed from any order given by the court, there would be numerous and overflow of appeals to appellate court.

533. Unless there is a final decision, there is no appeal possible. That is why Article 320(3) provides that no appeal is possible from interlocutory issues.

534. Interlocutory issues are issues raised before a court that, as such, are incidental to a case. The decision on request for adjournment, ruling on preliminary objection raised by a party, the decision of the court to either admit evidence or reject it as inadmissible, and so on, amount to interlocutory matters. A ruling made on them is not appealable unless the ruling itself is conclusive and brings an end to the litigation.

535. For example, if a preliminary objection raised by the defendant is well-founded and accepted by a court, the court may strike out a suit or dismiss it and, hence, such ruling will become final in which case appeal is possible. However, if a decision on interlocutory issue does not dispose of a case, it cannot be subject to appeal.

536. For example, if the court rejected the preliminary objection based on period of limitation, and the court rejected the objection after hearing the other party, the party against whom the ruling is made cannot appeal from such ruling. This is because there is no final decision in that case and that the outcome of the litigation is unknown until a court delivers final decision. In addition, it aims at controlling unnecessary appeals in the sense that the final decision rendered may avoid even appeal itself. Furthermore, if an appeal from a decision on interlocutory matter were allowed, it would lead to multiplication of appeals from any order given by subordinate courts, and this affects the decision-making process and also causes delay of proceedings.

537. Exceptionally, the decisions on interlocutory issue that are subject to appeal are provided under Article 320(4). See Article 320(4).

538. The decision under Article 320(4) involves restraint of a person or deprivation of property and that a person is entitled to an immediate ruling on the validity of the detention or transfer. For example, suppose that a judgment-debtor is arrested for creating obstacle to the execution of a decree passed against him. He can appeal against the decision of the court that ordered his arrest. The decision to arrest a person makes him lose his liberty. Hence, he is entitled to challenge a decision to deprive him of his liberty.

539. It does not, however, mean that the rulings made on interlocutory issues are not subject to appeal at all. They can serve as grounds of appeal after a case is finally decided. That means, for example, that a party can state in his memorandum of appeal that the interlocutory matter over which he demanded remedy is unreasonably rejected or disregarded by a court. The appellate court could consider it while hearing the appeal. Thus, while a case is pending, any ruling made on interlocutory matter except detention and transfers of property cannot be appealed from. This is because they are incidental issues that could not usually dispose of cases appearing before courts.

D. Exhaustion of Remedies

540. This requirement demands that the party appealing should exhaust the remedy available, if any, in the lower court. Before exhausting such remedy, a party is not allowed to appeal. This is because if such remedy is available in the lower court, the lower court may provide appropriate solution to a party and this avoids the appeal itself. This applies even if a matter is an appealable one. This is provided under Article 320(2).

541. In one case decided, a court decided to dismiss a case on the basis of Article 73 of the Civil Procedure Code because the plaintiff failed to appear on the date fixed for the first hearing of the suit. The plaintiff appealed against the dismissal. The appellate court said, in ruling on the appeal, that a party had a remedy in the lower court and decided that the appeal is not in accordance with the procedure required, which is the exhaustion of remedies in the lower court, which is provided under Article 320(2). This is because the party could present his good cause that prohibited him from appearing before the court on a date fixed for the first hearing of the case

and demands it to get the dismissal set aside as stipulated under Article 74 of the Civil Procedure Code. It is only after he sought such remedy that he can then appeal if the lower court could not accept his reasons.

E. Period of Limitation

542. The requirement here is that the application of appeal, that is, the memorandum of appeal, shall be filed to the appellate court within sixty days after the pronouncement of decision Article 323(2). The memorandum of appeal shall be filed within sixty days of the judgment appealed from being delivered. The period of limitation here starts to run from the date the judgment is pronounced by a court. It is not from the date a party receives the copy of decision.

543. If a party could not lodge his appeal within a given time, there is a possibility of filling an appeal out of time. The rules governing appeal out of time are found in the Civil Procedure Code under Articles 324–326.

544. Appeal out of time is an appeal filed to the appellate court after the expiry of the proper time for making an appeal. It means, in other words, an appeal that is made after sixty days that the decision is given.

545. The reason why appeal out of time is allowed is to avoid the loss of substantive right as result of failure to appeal within a prescribed time. This is because if a party fails to appeal within the time fixed by law, he will be deprived of his right to appeal and the original decision given would be final. However, the law attaches condition to exercise appeal out of time. Such appeal is allowed if the failure to appeal within the proper time is because of some reasons beyond the control of the appellant. Hence appeal out of time is not allowed for any reason. It is for exceptional reasons that the law permits a party to file his appeal out of time.

546. If the memorandum of appeal is filed after the expiry of the period of limitation provided under Article 323(2), the registrar of the court shall refuse to accept it and shall inform him to file an application for leave to appeal out of time. It means that an appellant shall file an application different from the memorandum of appeal to seek the permission of a court to file the memorandum of appeal. If he files his memorandum of appeal, the registrar shall refuse to accept. It means a party should rather file an application in which he requests permission from the court in order to present his memorandum of appeal. This is provided under Article 324.

547. The application for leave to appeal out of time shall be in writing and state the reason why the appellant failed to appeal within the time under Article 323(2) and shall also be accompanied by evidence as may be necessary for the decision of the court on such application. This makes the court to be in a better position to rule on the application. This is the rule under Article 325.

548. If the court is convinced that the appellant was prevented by good cause from appealing within the prescribed period under Article 323(2), the court can allow him

to file his memorandum of appeal provided there is good cause for the failure to appeal within the prescribed time Article 326. It is obviously difficult to define what constitutes the term 'good cause'. The Civil Procedure Code does not provide general factors that can establish it. It is to be determined on facts and evidences produced by the party that files an appeal out of time.

549. The term 'good cause' for an appeal out of time should be interpreted narrowly. This is because it is an exceptional rule to Article 323(2). Exceptional rules should be interpreted in a strict manner. Extending the time of appeal for good reason in all circumstances prolongs litigation. In addition, the interest of the party successful in the lower court should be secured if an appeal against it cannot be made in a proper time.

550. What amounts to 'good cause' cannot clearly be determined. It depends on the circumstances surrounding the failure to take the appeal in time.

551. One reason often alleged by a party applying for appeal out of time that caused difference in decisions of courts is the lapse of time caused by failure of the courts to make a copy of decision on time and give it to a party. As a rule, a party should apply to a court to obtain a copy of the decision. Sometimes, courts may not be able to copy the file and give it to a party within a reasonable time. This may cause lapse of the time for appeal. When a party applies to a court for leave to appeal out of time on this ground, some courts accept it as good cause and others say that it is not a good cause because he could file the memorandum of appeal and indicate to the appellate court that he applied to the lower court to obtain a copy of the file. The Supreme Court finally came up with a directive to demand courts in order to consider such reason as good cause. Because the administration of files of courts at federal level is nowadays improved as a result of the Court Administration Reform Program, parties can no longer use such reason as a justification for making an appeal out of time.

552. When a party applies for leave to appeal out of time, the court may hear both the applicant and the respondent before deciding on the application as per Article 325(3).

F. Form of Appeal

553. Another requirement on appeal is a formal requirement. An appeal shall be filed in the form prescribed by the Civil Procedure Code and it shall comply with the contents given under Article 327.

554. However, the definition given to pleadings under Article 80(1) of the Civil Procedure Code includes a memorandum of appeal. Hence, all the rules relating to pleadings apply to the memorandum of appeal.

555. The form and contents of pleadings are provided under Article 327. If it fails to comply with these requirements, it may be rejected by the court, or may be returned to the applicant for the purpose of amendment within a fixed time. See Article 330.

556. In the memorandum of appeal, the appellant must set forth his grounds of appeal, the grounds on which he objects to the judgment of the lower court. The grounds must be stated concisely and without argument, and where there is more than one ground, each shall be stated separately and numbered. He cannot set forth new grounds not raised in the lower court. See Article 328.

557. If the memorandum of appeal is not in accordance with Article 327, the court can reject it on the basis of the rule that applies to the rejection of the statement of claim. This can be implied from Article 32(2). The word 'suit' includes appeal and the word 'plaintiff' includes the appellant.

558. If all the requirements for appeal are fulfilled, the court issues summons on the respondent to appear on a fixed date to reply to the appeal made by the appellant (see Article 338). On that date, both parties are supposed to appear, because it is the first date for the opening of appeal.

559. If both parties appear, the hearing on appeal is subject to the same rule applicable to the trial of a fresh suit. Thus, it is the appellant, as a rule, that is entitled to begin the opening of a case. This is provided under Article 339.

560. The presumption on hearing appeal is that the decision of the lower court is considered to be correct, that the lower court used appropriate law and properly assessed the facts of a case. It is, therefore, the responsibility of the appellant to show that the decision is erroneous so that it should be set aside or reversed by the appellate court.

561. In making a decision on appeal, the appellate court basically considers the records of the lower court, and the arguments of the appellant as set forth in his memorandum of appeal. However, it may not limit itself only to the records of the lower court and arguments stated in the memorandum of appeal. It can base its decision on any other ground. See Article 328(3), and it may also base itself on new issues that it allowed the parties to litigate on. This rule is also provided under Article 182(2).

562. It is possible sometimes that the appellate court may hear a case without calling upon the respondent to appear. This is given under Article 337.

563. The hearing of an appellant alone is possible when an appellant bases his appeal entirely on the records of the lower court and does not apply for permission to produce additional evidences and further argument. In such instance, the appellate court may decide the case solely on the basis of the grounds set forth in the memorandum of appeal. The court may hear the appellant only and may dismiss the appeal without demanding the appearance of the respondent if it agrees with the decision of the lower court and that there is no mistake committed by the lower court. This procedure can be equated with the dismissal of statement of claim for failure to

state a cause of action. Thus, if the court finds that the appeal is groundless, after considering the appellant, there is no need to look at the response of the respondent.

564. Note here that the appellate court cannot reverse the decision of the lower court by hearing the appellant only under Article 337. To reverse or set aside the decision of the lower court, the respondent must be summoned and heard.

565. In one practical case decided by a court, a party appealed and the appellate court (the High Court) heard the appellant only and reversed the decision of the lower court. The respondent applied to the Supreme Court by alleging that the decision to reverse the case without hearing him was erroneous, because it is contrary to the rule under Article 337. The court accepted the appeal of the respondent and quashed the decision by saying that the reversal of the case without hearing the respondent was against the provisions of Articles 337 and 338.

566. The possibility to produce additional evidences before appellate court is governed under Article 345. The general rule is that parties are not allowed to produce additional evidences on appeal. This is because as per Article 137, parties are supposed to produce evidences during the first hearing of a suit. They are not allowed to produce evidences at a later stage of proceedings. This rule extends also to appeal. That means evidences that were not produced during the hearing in the lower court at the first hearing of suits may not be produced on appeal. Article 345 also provides similar rule in this respect.

567. The reason why parties are not allowed to produce additional evidence before an appellate court is that an appellate court is a court that reviews a case only and does not conduct a retrial of a case. Hence it limits itself to the records of the lower court. That is why Articles 328 and 329 provide that no new issues, facts, arguments, and such that were not raised in the lower court cannot be raised before the appellate court.

568. However, in limited cases, the appellate court may allow parties to produce additional evidences. These are provided under Article 345. Further evidences can be produced when:

(a) the lower court rejects evidence that it should have admitted. For example, suppose that 'A' produced evidence before the Woreda Court. The Woreda Court rejected it by saying that it was irrelevant or in admissible. This evidence, which was rejected by the Woreda Court, may be produced before appellate court if the appellate court believes that such evidence was rejected by the lower court unreasonably. Actually, it is the lower court that can accept or reject evidence by using its discretion in this respect as provided under Article 138, which provides that a court may at any stage of the suit reject any document that it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection. It means that the lower court has abused its discretion under Article 138 in rejecting the evidence.

(b) the appellate court requires the parties to produce evidence or call witnesses, it is possible that the parties may produce additional evidences. This is when the appellate court believes that the evidences used by the lower court in making a decision are not adequate or that important evidences are missing and not used. The evidences are ordered to be produced by the appellate court's discretion. The appellate court orders these evidences to be produced if it believes that there is a gap in the record of the lower court and that without these evidences, it is not possible to determine the case and pass a fair decision.
(c) the appellate court orders the production of additional evidences for any other reason. This provision applies to permit a party who failed to produce evidence during the trial of a case in the lower court and that he convinced the appellate court that he was prevented from producing evidence for substantial reason. It is the appellate court that decides on circumstances in which new evidences are produced before it for this reason.

569. It is only these limited cases that justify the production of new/additional evidences before the appellate court. Hence, a party litigating in the lower court cannot withhold some evidences for the purpose of producing them on appeal if he is unsuccessful in the subordinate court. Thus he must produce all of his evidences for a trial in the lower court if they are in his possession.

570. After hearing the appeal, the appellate court passes a decision on it. The decision of the appellate may be to confirm, reverse, or vary the decision of the lower court. This is provided under Article 348.

571. It can also remand a case to the lower court as provided under Articles 341 and 343. We will discuss Articles 341 and 343 later on.

572. The appellate court confirms the decision of lower court if it is of the opinion that there is no error with it. It reverses the decision of the lower court if it finds that there is error in the application of law in the decision of the lower court.

573. A decision is reversed if the error committed affects the right of the appellant or if it affects the power of the court to hear the case or denies a party a fair trial. To explain this, look at the example given below.

574. For example, suppose that 'A' brought action against 'B' in the Woreda Court (first instance court). 'B' raised an objection that the court lacks local jurisdiction, but the court disregarded his objection and considered the case and finally passed a decision. If 'B' appealed and the appellate court believed that 'B' could not defend himself in the court for the reason that the forum was inconvenient for him, the appellate court could reverse the decision of the lower court if it believes that the trial of the case by such court caused failure of justice under Article 10 of the Civil Procedure Code. This is because lack of local jurisdiction is related somehow to the power of a court to pass a proper decision and is also connected to the right of the party to a fair trial of a case.

575. The decision of the lower court may also be reversed if the lower court applied erroneous law or incorrectly applied the law.

576. If the error committed by the subordinate court is that which amounts to procedural irregularity, the decision may not be reversed for the sole reason of commission of such procedural errors as per Article 211(2). It means that the decision of the lower court is to be reversed if the error committed is a substantial one that prevents the court from giving a valid decision. If the error committed is found to be a substantial one, the appellate court is not entitled to reverse the decision but to quash it and order a retrial of the case by the lower court as per Article 211(2).

577. An example of substantial error is where the lower court erroneously ruled that it has local jurisdiction despite the objection of the defendant. If it is found out that the defendant could not properly defend himself as result of the trial of the case by such court, the appellate court may take the measure mentioned under Article 211(2). That means it quashes the decision and orders an appropriate court that has local jurisdiction to try the case.

578. The appellate court can vary the judgment of the lower court. This means that the appellate court agrees basically with the decision of the lower court but introduces a modification to it. Variation of the decision of the lower court relates mainly to the relief stated by the court in the decree.

579. The appellate court may remand a case to the lower court. Here the appellate court does not agree with the decision of the lower court but orders the lower court to retrial the case. The appellate court remands the case in at least two circumstances. One is provided under Article 341.

580. The remand to be ordered under Article 341 is when the decision of the lower court is based on a preliminary point. For instance, 'A' brought action against 'B'. 'B' raised an objection that the subject-matter of a suit has already been settled by compromise. The court accepted it and dismissed the suit. If 'B' filed an appeal and the appellate court believes that there is no valid compromise concluded between 'A' and 'B', it can reverse the decision of the lower court and may remand the case for a trial. This is because the lower court has not seen the merit of a case, because its decision was based on a preliminary objection.

581. The remand made under Article 341 is left to the discretion of the appellate court. It is not under obligation to remand a case. If it thinks proper, it may reverse and try the case itself.

582. It is important to take note of the fact that before remanding the case under Article 341, the appellate court must have concluded that the decision on the preliminary point should be reversed. It is not empowered to remand the case here for the subordinate court to take additional evidence on that case. It must, in addition, arrive at the conclusion that the making of the decision on the case as a result of the decision on the preliminary point was an erroneous one.

583. The second instance whereby appellate court remands a case is given under Article 343. This is when the lower court omits to frame some issues or fails to determine any question of fact, the appellate court may frame issues and remand the case to the lower court so that it conducts a trial on these issues.

G. The Second Appeal

584. Appeal is given to parties as of right once. This is given under Article 321 of the Civil Procedure Code and Article 9 of Proclamation No. 25/96. It is possible that a party may feel unhappy with a decision of an appellate court and seeks to challenge it. This is related to second appeal. We discuss issues relating to second appeal below.

585. The second appeal is possible when an appellate court varied the decision of the lower court. For example, if a decision is given by the First Instance Court, a party dissatisfied with such decision can appeal to the High Court. If one of the parties is unhappy with the decision of the High Court, appeal can be filed to the Supreme Court if the High Court that exercises its appellate jurisdiction varies the decision of the First Instance Court. However, if the High Court confirmed the decision of the First Instance Court, no second appeal can be filed to the Supreme Court.

586. If the High Court varied or reversed the decision of the First Instance Court, a second appeal can be filed to the Supreme Court. However, there is no provision in the Civil Procedure Code governing how the second appeal should be considered by the Supreme Court nor is there any provision in Proclamation No. 25/96 dealing with this issue. However, in the second appeal, the appeal is from the decision of the first appellate court, that is, the High Court that varied or reversed the decision of the First Instance Court. The second appeal is not a review of the decision of the trial court, that is, the First Instance Court. The question is whether or not the appellate court, that is, the High Court, committed error in varying or reversing the judgment of the trial court, that is, the First Instance Court. Thus, the second appeal should be limited to that aspect of the decision of the appellate court that varied or reversed the judgment of the first court.

II. Review by Cassation (Review by Appeal to the Supreme Court)

587. This review is different from ordinary appeal that it is exercised by the Supreme Court and not by an ordinary appellate court and also that the scope of the review is limited to fundamental errors of law.

588. Review by cassation is a form of review made by the court of the last resort. At both the federal and state levels, review by way of cassation is made by the Supreme Court. No other court is, therefore, empowered to review cases through cassation. It means that review by cassation is reviewing the final decision of courts from which no appeal lies or that which has exhausted the available appeals with a

view to deciding whether or not it contains some errors of law, which is basic error of law.

589. Apart from saying that the Federal Supreme Court has a power of cassation over any final decision containing a basic error of law, the Constitution has not defined what cassation is. The same holds true for Proclamation No. 25/96. It deals with the cassation power of the Federal Supreme Court without, however, defining what it means by cassation.

590. Article 80(3) of the Federal Constitution provides that the Federal Supreme Court has the power of cassation over any court's final decision containing basic errors of law. This Article is vague and does not indicate the decision of the courts that are subject to cassation. Article 10 of Proclamation No. 25/96 lists, however, the final decisions of courts that are subject to cassation. Thus, the proclamation tries to give a meaning to Article 80(3) of the Constitution.

591. Article 10(1) of Proclamation No. 25/96 refers to an instance whereby the High Court exercises its appellate power over the decisions given by the First Instance Court and confirms their decisions. If the decisions of the lower court (First Instance Court in this case) are confirmed, no more appeal is available to the parties. Hence, the decisions of the High Court become final and cannot be reviewed by way of appeal any more. For more information on this issue, see the discussion on review upon appeal, which we discussed in this unit.

592. Article 10(2) refers to an instance whereby a case falls under the first instance jurisdiction of the Supreme Court. The case is to be directly filed to the Supreme Court and if it is decided, it becomes a final decision and non-appealable, because there is no court above the Supreme Court. Here you have to note that the Supreme Court does not have first instance jurisdiction on civil mattes unless a civil case joined with a crime falling under the first instance of the Supreme Court or unless a case is heard by it as a result of transfer of suits made under Article 8(3) of Proclamation No. 25/96.

593. Article 10(3) indicates that the final decisions given by the Regional Supreme Court over regional matters can also be reviewed by the Cassation Division of the Federal Supreme Court. This Article gives a meaning to Article 80(3), which says 'any court's final decision'. It means cases to be reviewed by way of cassation may come from the federal court and/or regional court. Thus, the Federal Supreme Court can review final decisions of Regional Supreme Court containing the basic error of law through cassation. However, note here that if there is a cassation remedy available in the Regional Supreme Court, one cannot approach the Federal Supreme Court to review the Regional Supreme Court's decision through cassation. This is the rule of exhaustion of remedies.

594. Article 10(3) is the manifestation of the fact that the two courts in Ethiopia (federal and regional courts) are not totally separated from each other. It means in other words, that the parallel structure of courts, which seems to be prescribed by Article 80(1 and 2) of the constitution, is breached for the sake of review by cassation.

Hence Article 80(3) can be considered to be an exception to Article 80(1) and (2). This is made for the purpose of a achieving a uniform interpretation and application of law in the country.

595. For the application of revision by cassation, there are certain requirements to be met. The first is that there must be a final decision that is non-appealable or that which has exhausted the available appeal. Cassation is, therefore, a remedy available if appeal has already been applied and exhausted or if the case decided is non-appealable.

596. The second is that it is error of law only that qualifies for review by cassation. Errors of facts do not qualify for review by cassation, whether they are fundamental or not. The error of law itself must be a fundamental one. Minor errors of law, are, therefore, not fit for revision by cassation. Both Article 80(3) of the Constitution and Article 10 of the Proclamation demand the presence in a final decision of a basic error of law in order for revision by cassation to apply.

597. It is, in fact, difficult to come up with a definition of basic/fundamental error of law. What amounts to a basic or fundamental error of law depends on a case-by-case consideration of decisions alleged to have contained a basic error of law. This is because there is no law that provides guideline to illustrate for basic error of law. However, decisions that violate clear provisions of law, or that are not based on law, or that are based on irrelevant law, and so on can be considered to be containing basic error of law. For example, if the final decision given by a court is against a clear provision of law that does not require any interpretation, it is said to have contained a basic error of law.

598. The review by cassation may be initiated by the President of the Supreme Court by his own motion or upon recommendation by the division of the Supreme Court or one of the parties to a final decision. This is the rule under Article 21(1) of Proclamation No. 25/96. Before the case is heard, three judges shall investigate the application requesting review by cassation. The three judges scrutinize the application and determine whether or not the case qualifies for cassation (see Article 22 of the Proclamation). The three judges determine whether or not there is a prima facie evidence of a basic error of law in the decision. It is only when the application discloses the prima facie presence of fundamental error of law that the three judges accept and refer it to hearing in cassation.

599. If the three judges decide that a case qualifies for review by cassation, the case will be considered by at least five judges (Article 21 of Proclamation No. 25/1996).

600. The application for review by way of cassation shall be made within 90 (ninety) days from the date on which the final decision challenged is rendered.

601. There are no rules on cassation in the Civil Procedure. This is because it was introduced after the coming into force of it. The provisions of the Civil Procedure dealing with Zufan Chilot are not dealing with revision by cassation.

§3. Extraordinary Review

602. Revision by the Court of Rendition, and review for the purpose of restoration of expired period of limitation can be considered an extraordinary form of review because they are usually done by the very court that rendered the decision, and not by higher courts.

I. Review by the Court of Rendition

603. Review by the court of rendition is the revision made by the very court that entertained and decided on a case. For example, if the First Instance Court has decided a case, the revision here is to be made by the same court. Another example, if the case has been decided by the High Court, the revision here is to be done by itself.

604. Revision by the court of rendition is a mechanism by which a party who is dissatisfied with the first trial of a case may request a new trial of the same case by the very court that decided the case on the basis of certain reasons. If the reasons provided by him are sufficient, it gives the judge who decided on a case the chance to correct the problems that affected the first decision and, thus, avoids possible appeal. Hence, this review puts the court of rendition in a better position to know what happened and to assess the proceedings again in order to take into account the effects of the grounds alleged by a party applying for review.

605. The court of rendition revises its own decisions on the basis of three grounds. The first ground for the revision by the court of rendition is when there procedural irregularity in the first decision it has rendered. This is provided under Articles 207–212 of the Civil Procedure Code. The second is if new evidence is discovered subsequent to the judgment, which is under Article 6. The third is when a third party makes an opposition to a decision given by a court, which is provided under Articles 358–360.

A. Procedural Irregularity

606. Commission of irregularity by the court of rendition may cause a review of the decision made. The court that rendered the decision may set it aside if there is procedural irregularity in the disposition of the first case that affected the decision substantially. The irregularity is such that affected the making of the decision substantially. This means that not all irregularities may cause a revision.

607. Procedural irregularity is non-compliance with provisions of the Civil Procedure Code or regulation enacted based on it. It is failure to conduct proceedings in accordance with the procedural rules. This definition is derived from Article 207. Examples of procedural irregularity include, making a decision without hearing the testimony of witnesses of one party, or failure to rule on the preliminary objection

raised by one party, etc. If one party raises one of the grounds of preliminary objection, the court is bound to rule on it before hearing the case.

608. Not all errors amount to procedural irregularity. Some clerical or arithmetical errors in summons, judgment, decree, or order, or any errors arising therein from any incidental slip or omission, do not constitute procedural irregularity. See Article 208. For instance, a mistake relating to the date indicated in the summons can easily be corrected and does not amount to procedural irregularity. Another example is when there is a mistake in the decree as to the amount awarded to a party. For instance, the amount stated in words is twenty thousand but the amount in number is stated as 200. This mistake can easily be rectified and does not constitute procedural irregularity.

609. The issue of commission of procedural irregularity may be raised by the motion of the court or by the application of the parties as per Article 208. If a party intends to apply for the setting aside of the proceedings as a result of procedural irregularity, he must apply at the time when preliminary objections are taken or at a later time when the applicant has knowledge of the irregularity as per Article 209(3). Thus, the party has two options to raise about procedural irregularity.

610. The setting of proceedings on the basis of procedural irregularity is made when two requirements are fulfilled as per Article 210. The first is when the court the irregularity affects the issue to be decided and this affects or is likely to affect the applicant. Here, the irregularity is such that affects the disposition of the case. This means that any irregularity does not lead to the setting aside of the proceedings. For example, if the court decides to make a decision without hearing his witnesses, this will affect the issue to be decided and also affects the interest of the applicant. This is because the testimony of the witnesses of the party that could have been considered as evidence would not be considered in that case. The case would be decided without considering one of the evidences of the party.

611. The second is when the applicant has not taken any step in the proceedings after knowledge of the irregularity or has taken such a step under protest. This means that the applicant intends to challenge the proceedings and, thus, decides not to take any step in the proceedings. If he proceeds with the proceedings, he may not challenge the irregularity committed in the proceedings.

612. In addition, the court must make sure that the irregularity cannot be remedied. If the irregularity can be remedied, there is no need to set aside the whole proceedings.

613. If all of these requirements, which are provided under Article 210, are not fulfilled, the court dismisses the application. The effect of the dismissal of the application is that the proceedings underway shall continue as though the application had not been made Article 210(2).

614. Unless an application to set aside the proceedings on grounds of irregularity has been made to the court, the occurrence of the irregularity may not be taken as a ground of appeal as per Article 211. The exception here is an irregularity arising from an alleged lack of material jurisdiction or one alleged to exist in the judgment or

decree. Thus, if no appeal is made against the decision given that contains procedural irregularity, such proceedings will not be void. This means the proceedings are valid unless challenged by an appeal. Such proceeding is also valid when an appeal is made but the appellate court confirms the decision as per Article 212.

II. Revision upon Discovery of New Evidences

615. The revision under Article 6 is based on the discovery of new evidences. This review is subject to certain conditions. In order for the revision under Article 6 to apply, the first requirement is that a party should not have filed his appeal to the appellate court, even though a matter is appealable. This is because appeal is one of the means to revise a decision. If he prefers appeal, he cannot at the same time demand review by the court of rendition. Thus, even if the matter is subject to appeal, a party should not have exercised this right.

616. The second requirement is that he should have discovered new evidence after the decision is given. The new evidence must be the one that affected the decision of the court. The evidence discovered here should disclose the commission of bribery, perjury, forgery, and so on, which are considered to be improper conducts. It means that the new evidence discovered is not referring to any kind of new evidence, which a party could not produce at the first hearing of a case. It is the evidence that shows the commission of improper conducts only that can serve as a ground of revision here. Any crucial evidence that could have been used cannot serve as a ground for review here unless it indicates the commission of improper conducts.

617. The definitions of forgery, perjuries, and bribery are found in the relevant provisions of the Criminal Code.

618. The list of improper conducts listed under Article 6 is not an exhaustive one. A new evidence disclosing improper conducts other than perjury, bribery, or forgery can be used for revision under Article 6. This is because the phrase 'such as' under Article 6(1)(a) indicates that evidences disclosing other improper conducts can serve as a ground for revision here. But such grounds must be related to the listed ones.

619. The third requirement for revision under Article 6 is that the new evidence must be discovered after the court has given a decision. If he discovered the evidence prior to making of a decision and failed to introduce it to a court, or failed to raise the issue to the court, he cannot raise about such evidence after a case is decided. For instance, if one of the parties to a suit came to the evidence that the witnesses of the party are bribed to give false testimony while the case is being considered by the court, he should raise this matter to the court immediately. If he concludes that the court itself can find out that the testimony is a false one during the examination stage, he cannot raise it after the decision is given even if the court could not realize that the witnesses' testimony is a false one.

620. The fourth requirement is that the new evidence discovered should be material and that it should have affected the decision. If it is not material and does not affect

the decision, its mere discovery does not lead to revision. It means, in other words, that the improper conduct must have a significant bearing on the decision of the court.

621. The fifth requirement is that the application for review shall be made within one month after the evidence showing improper conduct is discovered Article 6(2).

622. The sixth requirement is that a party applying for review shall pay the court fee, because the review is a separate proceeding. This is because a party is demanding the consideration of a case again. Hence he should pay another court fee for the revision. It is, however, under the discretion of the court to either rehear, or decide otherwise as to what it thinks is proper in the given circumstance.

623. If all these requirements are fulfilled, the court accepts the application and gives notice to an opposite party to provide him with an opportunity to appear and reply to the decision made for him that is now challenged. It is in the discretion of a court to make an order in regard to the rehearing of a case. The word 'rehearing' under Article 6(3) indicates that there is the reconsideration of the same case that has been decided.

624. Article 6(4) provides that no appeal shall lie from the decision of a court to either reject or accept the application. Thus, a party whose application is rejected can file an appeal from the decision on the case if he fulfils all the requirements for appeal. He cannot, however, file an appeal against the mere order of the court to receive application and conduct the revision of the case nor can he appeal from the decision of the court to reject the application made for review.

625. Note that the improper conducts can be that of the parties to a suit or their witnesses and that these conducts entail criminal liability. The application for review shall be supported by affidavit.

III. Revision upon Opposition

626. Another ground on the basis of which the court of rendition reviews its own decision is when an opposition is filed to its decision. This is provided under Articles 358–360 of the Civil Procedure Code.

627. Opposition is a mechanism available to third parties who were not parties to a suit but are affected by the decisions of a court.

628. There are requirements that are attached to the application of opposition. The first is that a party who opposes a decision should be one who could or should have been made a party to a suit and that is affected by a decision given without his participation in the hearing of the case. This means, any party cannot oppose a decision made by a court. To oppose a decision, an applicant must be one who could or should have been made a party originally and who should be affected by a decision given in his absence.

629. Who could or should have been made a party for the purpose of opposition under Article 358? The following three activities try to deal with persons that are entitled to file opposition.

630. Generally, opposition can be made by indispensable parties to a suit and persons who could intervene under Article 41.

631. The second requirement to file opposition is that the application for such shall be filed before a decision made is executed. Here, there is no specific period of limitation. The application to oppose a decision can be filed from the moment a decision is given up to the time before its execution.

632. The third requirement is that the petition shall be supported by affidavit and that an applicant shall pay the court fee. This is the rule under Article 359.

633. When all the requirements for opposition are met, the court shall notify the parties of the opposition filed and demand them to appear on a date fixed to hear the opposition. The hearing on opposition is subject to the same rules that apply to the original suit and the decision after the hearing of the opposition may be to confirm, vary, or set aside the judgment opposed. This means that upon opposition, the court rehears a case if all the requirements are fulfilled.

634. Note that the purpose of opposition is to enable a third party, who is affected by the judgment given in his absence the court, to request the court for consideration of his interest. He could not be a party at the time of the institution of the suit because he was unaware of a suit made or might not be around when the case was heard and decided.

A. Restoration of Expired Time

635. There are different period of limitations that are found in different provisions of the Civil Procedure Code. For instance, on appeal, on review by the court of rendition, to challenge the decision of the registrar, on execution, on appearance of parties, and so forth, there are periods of limitation fixed by the law. If a party fails to comply with it, some of them lead to dismissal of suit or appeal, some of them lead to temporary closure of suit, etc. Usually the procedure attaches a condition to get the restoration of what has been killed by the period of limitation. The condition attached is usually framed by the term ‘good cause’, ‘sufficient cause’. If a party proves that he is prevented from acting within the time prescribed by law, there is a possibility to get the suit revived. Sometimes, an opportunity is given to the other party to provide his version on the good cause alleged by the party to revive the suit; sometimes, the court handles the matter without considering the other party.

Part V. Incidents

Chapter 1. Challenge of Judges

§1. Disqualification of the Judge in a Case

636. Transfer of suits and removal of judges are closely related matters and are connected with the issues of jurisdiction and impartiality of courts to see cases brought to them. They are challenges against a judge who is otherwise competent to deal with against before him.

637. As a general rule, a case should be instituted to a court that has a jurisdiction over it. If a case is submitted to a court that lacks jurisdiction, it shall be rejected. Transfer of a suit from one court to another makes a modification to the rule on jurisdiction. This is because a case is to be transferred from a court having jurisdiction to another court that does not have jurisdiction. The transfer is to be ordered if there is a problem with a court in which a case is instituted first. The grounds that justify the transfer are provided in the Civil Procedure Code.

638. Article 31(1) whenever it is made to appear to the High Court, at any time before judgment, by application of either party that: (A) a fair and impartial trial cannot be held in any court subordinate thereto; (B) that some question of law of unusual difficulty is likely to arise; (C) that an order under this Article will tend to the general convenience of the parties or witnesses or is expedient for the purposes of justice, the High Court may take an order from which no appeal shall lie to the effect that any suit: (I) be tried by any court not empowered under the provisions of this chapter to try it but not having material jurisdiction to try the same; or (II) be transferred for trial by itself.

639. Article 31 of the Civil Procedure Code lists three reasons for transferring a case from one court to another. The first is when a party applying for transfer alleges that a fair and impartial trial of a case cannot be made by the court in which the case is filed first. A court considering a case must be impartial in considering a case and passing a decision. Impartiality of a court amounts to one of the fundamental procedural principles. Thus, if an impartiality of a court is in question, a party can request the transfer of a suit.

640. Another ground under Article 31 that warrants the transfer of a case from one court to another is when it is contended by a party that a court in which a case is pending cannot properly see a case because the case involves some question of law of unusual difficulty. It means that a case is so complex that it gives rise to complicated issues of law that cannot be resolved by the court in which the case is filed. This ground has something to do with the difficulty a judge faces in grasping the full picture of the cases appearing before him.

641. Still another reason that makes possible the transfer of a suit from one court to another is when a court in which the case is filed is found to be inconvenient to a party. Here the transfer is made for the purpose of achieving convenience to the party. The rules on local jurisdiction are designed to choose a convenient forum for the defendant. If the plaintiff files a case to a court that is inconvenient for the defendant to defend himself, the case may be transferred from such court. The inconvenient court may have local jurisdiction, but it is chosen by the plaintiff with a view to making it difficult for the defendant to defend himself. Such inconvenient court is known as forum non-convenience (inconvenient forum). A court to which a case is submitted is said to be forum non-convenient if it is difficult for a defendant to gather relevant evidences to defend himself and also exposes him to incur a lot of expenses to pursue a case and to bring witnesses to a court.

642. The three grounds for the transfer of a suit stated under Article 31 should be interpreted narrowly. This is because transfer of a suit amounts to an exception to the rule on jurisdiction. If it is interpreted broadly, any reason could be sufficient and causes a transfer of a suit, and this would make the exceptional rule to be a general one.

643. Another reason that causes the transfer of suits that is not listed under Article 31 is found under Article 91. If the pleading submitted to a court is amended and this makes a case to fall under the jurisdiction of a higher court, the court in which a case is filed shall transfer it to another court that is appropriate to see such case.

644. Withdrawal of judges means removing a judge from the trial of a case. The case is brought to the attention of a judge but because of certain reasons, he is to be removed and replaced by another judge. Withdrawal is made to achieve the impartiality of courts. If a judge is believed to be not impartial in a case, he shall be removed from a bench considering a case.

645. Removal of judges is provided in Proclamation No. 25/88. Unlike the transfer of suits in the Civil Procedure Code, the Proclamation listed reasons that lead to removal/withdrawal of judges under its Article 27.

646. The reasons stated under Article 27 are not exhaustive. We could add other grounds on the basis of Article 27(E). So long as a party puts a sufficient/good reason forward, a ground other than those specifically mentioned under Article 27(A–D) can remove a judge. Because withdrawal of judges and the transfer of suits serve similar purpose, one may use the list of the reasons for removal of judges to the transfer of suits.

§2. PROCEDURES

647. There are certain rules related to the transfer of a case. The request for the transfer shall be made any time before a decision. This is a rule under Article 31(1). However, this rule is amended by another proclamation. Proclamation No. 84/1976 says, under its Article 2, that the request for the transfer of a suit shall be made before the consideration of evidence. This is also the rule incorporated in the draft of Civil Procedure Code. It means that the time to demand the transfer is made shorter than the one in the Civil Procedure.

648. Another rule relating to the transfer of suits is that the application for it should not be filed to the same court in which the case is pending. If a case is pending in the Woreda Court, the application for transfer shall be filed to the High Court, if a case is filed in the High Court, the application shall be filed to the Supreme Court. After receiving the application, the High Court can order the transfer of case to another Woreda Court or to itself (see Article 11(2) of the Proclamation No. 25/96). If the case is pending in the High court, the Supreme Court that received the application of the transfer can order the transfer of the suit from that High Court to another High Court or to itself (see Article 8(3) of Proclamation No. 25/96).

649. Unlike transfer of suits, the application for removal of judges shall be made to the same court in which a case is filed. If the judge is sitting alone, the application is to be made to him. If he believes that the reason for his removal is fulfilled, he shall withdraw himself but if he does not believe so, he shall transfer the application to another division of same court or to an appellate court where there is no division in such court. A decision given on the request for removal is final and no appeal is possible from it. Whether or not the request is accepted, the decision remains final and cannot be challenged by any party.

Chapter 2. Intervention

§1. Participation in Trial

650. Intervention is a mechanism by which a party is brought into a pending case to present a claim or defence. It is different from joinder of parties. Joinder is an issue that comes at the beginning of a suit, whereas intervention is a question that comes into the picture after a suit undergoes some steps. It means intervention about instances in which some other person than a party wants to participate in the ongoing trial.

I. Types of Intervention

A. Voluntary and Mandatory Intervention

651. 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 get intervened 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.

652. 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.

653. 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'.

654. 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 is, if a suit is made by 'A' against 'B', who is an agent of 'C', 'C' may intervene, because an agent will be indemnified by principal for damages he causes to the third party in carrying out his function stipulated in agency contract.

655. 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 binds also the intervener.

656. Article 41 does not provide a remedy in case a third party's application for intervention is rejected. In one case decided by the Supreme Court, the Court admitted the petition of a party who got his application for intervention 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 could cause another suit to be filed by him after a decision was made by the High Court. It held that this would cause multiplication of lawsuits and would amount to wasting the precious time of a court on a single cause of action.

657. Whether or not an intervener could make his own claims is not clearly spelt out under Article 41. Normally, an intervener participates in a suit with a view to supporting one of the parties and not to make his own claims. It appears that an intervener is not prohibited from making his own claims. It is possible that the intervenient has the alternative to bring an action in the same issue and claims joinder to the lawsuit at his disposal. This possibility does not preclude intervention if the intervenient chooses to do so. A person who could have participated in the suit may choose to oppose a decision under Article 358 if some conditions are met.

B. Mandatory Intervention

658. 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 of the 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.

II. Third Party Practice (Impleader): General Principles

659. Another issue related to intervention is the notion of third party practice, or impleader, which 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 in to 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'.

660. 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 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 in to 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'.

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

> Article 43(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 defence 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 defence 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.

662. The first requirement is that the defendant shall demand a court for the third party practice in his statement of defence. 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.

663. 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.

664. 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 defence and require him to appear on a fixed date. On such date, 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-founded, it orders his intervention and this makes him third party defendant.

665. 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). He can also raise any claim/defence against the original plaintiff on the same transaction or occurrence as the original action. The plaintiff similarly may assert related claims against the third party defendant.

666. Generally, the third party defendant may assert any defence that the third party plaintiff may have against the original plaintiff's claim. That is why Article 43(2) says that he shall be in the same position as defendant.

667. 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.

668. 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 defence 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 proceedings.

669. 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'. Because they have a joint interest, 'B' is entitled to contribution from 'A'.

670. Joint creditors, joint debtors, joint owners, and so on 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 partly or wholly. Contract of insurance against liability, agency and principal relation, and vicarious liability are some of the main relations that give rise to indemnity. For example, assume 'A' insured his car for liability

caused by his car. If 'C' is injured by a car and brings action against the owner of a car, the owner can demand the intervention of the insurance company. The company is responsible to indemnify the liability arising from the damage caused by a car.

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

672. 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 because it may complicate the original suit unduly or result in delaying its resolution.

Chapter 3. Withdrawal and Discontinuance of Suits

673. Compromise and withdrawal are some of the mechanisms available to parties to terminate or discontinue suits pending in a court of law.

674. Compromise is defined in the Civil Code. According to Article 3307 of the Civil Code, it is a contract by which persons agree, through mutual concession, to terminate an existing dispute or prevent a dispute from arising in the future. According the Civil Code, compromise is an agreement made before or after the suit arises. The Civil Procedure Code deals, under Articles 274–278, with the compromise made after a suit is filed to a court of law. For a compromise made prior to the arising of suits, the relevant provision is Article 244(2), which says that compromise can be a ground of preliminary objection. If the parties have already compromised but one party disregards it and brings action to a court, the other party may invoke the compromise they made as a ground to attack the action made. If the objection is accepted, it leads to the striking out of a suit.

675. The resolution of a pending case by way of compromise may be ordered by the motion of a court or upon the application of the parties and that it can be made at any time before judgment. See Articles 274 and 275.

676. Compromise can be made in a courtroom during the hearing of a suit or outside a courtroom. Compromise contributes toward minimizing the burden of courts and also saves the time of the parties as well as their expenses. Further, it manifests the reconciliation of parties and avoids the loser and winner feeling found in the decision of a court.

677. If it is made as per the pre-conditions that apply to it, it terminates a suit pending in a court of law. Some of the requirements are that it shall be made in written form, that it shall not be illegal or immoral, etc.

678. It is possible, as per Article 274(1), that parties may make a compromise on all or part of a suit pending in a court.

679. Withdrawal is another possibility to discontinue a suit pending before a court of law. It is different from compromise in that it does not involve the agreement of the parties. It is the plaintiff that can request the withdrawal of a suit at any time before judgment. See Article 276.

680. Withdrawal is made where one of the requirements for it is fulfilled. It means that the plaintiff is not entitled to withdraw his case as he pleases. He must indicate the presence of one of the requirements under Article 278. One of the requirements for withdrawal is when the plaintiff indicates that his suit will fail by reason of some formal defect. There is said to be formal defect, for instance, if the plaintiff has not obtained permission to sue as required by Article 244(2) for some cases. Because

this suit will fail, the plaintiff can request the removal of a suit. He can sue later on if such permission is secured. Realization that the evidence at the disposal of him may not entitle to win a case may not serve as a ground to withdraw a case.

681. The withdrawal does not produce a res judicata effect and the plaintiff can file the case if he believes that the procedural defect is rectified.

682. The reasons for withdrawal stated under Article 278 are not exhaustive. For any sufficient reason, the court may allow withdrawal of a suit. The consequence of withdrawal without the permission of a court is provided under Article 279. The plaintiff in such case is prohibited from filing a fresh suit on same cause of action and also costs will be imposed on him. The plaintiff is said to have withdrawn his case, for instance, in due course of the hearing he fails to show and follow up the proceedings.

683. Apart from grounds put forward by the parties to discontinue pending cases, the court may terminate a pending suit. For instance, if one of the parties dies and the subject-matter of the suit may not be capable of inheritance, the court can decide to terminate the suit.

684. If the cause of action subject to suit pending in a court ceases to exist the court can terminate the suit.

Chapter 4. Postponement of the Main Hearing

685. Issues about postponement of the hearing are closely related to the time limit discussed earlier, especially if the time frame is fixed by the court. The court has to stick to this time in approaching whether or not to extend time.

686. An adjournment/postponement of a hearing may be granted only if sufficient cause is shown and also for such time as may be necessary to enable the purpose for which an adjournment is granted to be carried out as per Article 197(1).

687. The parties cannot agree to the effect that the court adjourns the case. Such agreement does not entitle the court to adjourn cases. This does not mean that the parties are not allowed to request adjournment.

688. It is also provided in express terms that no adjournment may be granted on the ground that the pleaders of the parties have failed to appear as per Article 197(4), even if the party alleges that his pleader has an engagement in another court, or that his pleader commits default, for which he fails to appear before the court.

689. If the court grants an adjournment, the court must make sure that the purpose for which the adjournment was granted was carried out as per Article 198(1). If the court makes sure that such purpose is not carried out, it shall proceed as per Article 199. Under Article 199, the court shall check the reason for failure to undertake such purpose. If the reason is attributed to the default of the party, the court shall take the measure stated under Article 199(1). The court shall proceed to decide the suit forthwith. This does not mean that the court shall make a default judgment against the party for the sole reason that he fails to do an act for which the adjournment was granted. Rather, it means that the court shall hear the case and make the decision within such time as to permit the court to make the decision. The court shall make the decision on the basis of the proceedings so far done prior to the granting of adjournment.

690. If the reason is not attributed to the fault of the party, the court shall give further adjournment under Article 199(2).

691. For example, if the court grants adjournment in order to allow a party to amend his pleading and the party fails to such act as a result of his own failure, the court shall proceed to hear the case and then decide it on the basis of issues already framed from the first pleading submitted to the court.

692. There is a possibility of imposing costs on a party that requests an adjournment. Adjournment costs are intended to compensate the other party for the expenses he has incurred for the day fixed for hearing of the suit. The law has given discretion to the court in imposing of costs of adjournment Article 197(3).

693. The practice of past experience of the courts shows that there were frequent adjournment of hearing. Nowadays, following the reform program that was put in place, the courts have now come up with the schedule within with different types of cases can be disposed of. It appears that the adjournment issues have been limited by such time frame, enabling the courts to make decisions in a relatively speedy manner.

Chapter 5. Change (Substitution) of the Parties

§1. Causes of Change of Parties

694. Change (substitution) of parties comes into play when all the property rights and relations of a party are transferred to another legal subject. The main causes of change of parties are the death of a natural person, change of legal status of a legal person, and bankruptcy.

695. 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 in criminal suits. If an accused dies in criminal suits, the proceedings shall automatically come to an end. Criminal suits cannot be transferred to the heirs or members of 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.

696. Article 48(1). The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

697. 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 that 'X' dies does not terminate such suit pending between him and 'Y'. The heirs of 'X' can replace 'X' and pursue the suit against 'Y'.

698. 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, 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.

699. According to the draft of the 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 the making of a decision only.

Part VI. Legal Costs and Legal Aid

Chapter 1. Legal Costs

§1. Types of Costs

700. The purpose of giving costs is to indemnify a party who pursues his right. Hence, costs shall be awarded to the successful party. Costs include those that are incurred in filing the case, the advocate's fee, and the costs for bringing witnesses and documents to a court. The costs for filing a claim is easy to determine because the court fee, which is ETB 25 for cases that may not be assessed in monetary terms and depends on the amount of money involved in other cases that have pecuniary value, can easily be identified. Apart from the court fee, filing a suit to court demands the payment of stamp duty.

§2. Compensation of Legal Costs

701. In deciding on the claims for cost, the court has a wide discretionary power. See Article 462, which provides that unless otherwise expressly provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary discretions to this effect.

702. Thus, it is the court that decides a party who is to pay the costs, as to how they are to be paid, and the property from which they are to be paid. A party who claims the costs is not prohibited from coming up with the list of costs incurred and request the court to recover them. In fact, a party is expected to indicate his costs along with the remedies he sought the time when he files his claims to the courts. The defendant who is successful in defending himself may also request to recover the cost he incurs after the case has been decided. Ultimately, however, cost issues are within the discretion of the court. It is common to see that the court gives decision in many cases that the parties should bear their respective costs.

Chapter 2. Legal Aid

703. Legal aid does not exist in its proper sense as used in other countries. There is no responsible office of the government specifically set up for the purpose of providing legal aid to parties in civil case. In a criminal case, if a party does not have a legal counsel, there is a possibility that the accused may get legal counsel at the expense of the government. In civil case, it is the responsibility of parties to get legal counsel or hire an advocate for their case. The only thing that serves or contains some aspect of legal aid is the exemption of the court fee. If a person produces a letter indicating that he is so poor that he cannot afford the payment of the court fee, the court may decide to exempt him from payment of the court fee. Otherwise, there is no possibility to get legal counsel at the expense of the government. Normally, there is no cost to be paid to court for using interpreters, because this is the obligation of the courts to arrange translation for a person who does not understand the working language of the court.

704. All other costs involved in putting filing together, in bringing witness to courts, transportation costs to pursue a case, and such have to be borne by the parties themselves.

705. In some cases, NGOs assist people with providing legal aid by providing legal counsel, by covering all costs involved in the case, usually in cases where issues of women subject to some abuse in relation to marriage and partition of property, succession, etc.

Part VII. Evidence

706. Evidences are documents produced by parties (written documents), testimony given by witnesses (oral evidence), and material (physical proof) objects brought to a court by parties.

Chapter 1. General Principles

§1. The Threshold of Evidence and Burden of Proof

I. Burden of Proof

707. The burden of assertion and proof falls usually on a party who claims something. The party with the burden of proof has the right to begin production of evidences first. Thus, the right to begin follows the burden of assertion and proof (Article 258).

II. Threshold of Evidence

708. The threshold of proof adopted is not clear. This is because the decisions of the courts simply indicate that a party has presented an adequate proof for his claim and does not show the presumption adopted in deciding a case. Although not clearly spelt out neither in the Civil Procedure Code nor in the decisions of the courts, the threshold of proof is not as stringent as the one applied in criminal cases, where the public prosecutor is expected to prove the commission of a crime 'beyond reasonable doubt'. The practice of the courts appears to indicate that the preponderance principle is adopted in civil cases in relation to the threshold of proof although the principle is not articulated in a clear and sustained manner.

§2. Admissibility of Evidence

709. There is no clear rule dealing with admissibility of evidence. This is because the issue of admissibility of evidence is considered to be part of evidence law, which is only in the draft stage in Ethiopia. That is why the Civil Procedure Code has not incorporated rules of admissibility of evidence. The Civil Procedure Code

has left issues about the admissibility of evidence to the discretion of courts as indicated under Article (138) of the Civil Procedure Code, which provides that the court may at any stage of the suit reject any document that it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

710. Evidence is about facts and, therefore, parties are not normally expected to produce evidence about the law. It is the business of courts to manage issues about the law because judges are believed to have the knowledge of the law. However, the practice shows that the courts are lenient toward the legal arguments presented by the parties to prove their case. In fact, the parties usually try to put forward legal arguments at different stages and courts do not generally prohibit the parties from doing so.

711. Issues in connection with facts that need to be proved are provided in evidence law, which in Ethiopian case does not exist in a codified form at present. The draft of evidence law that was put in place long ago is not adopted.

712. Whether hearsay serves as evidence or not is not clearly stated in the Civil Procedure Code. However, one provision of relevance is Article 261, which provides that a witness can testify in relation to what comes to his knowledge directly or indirectly. The indirect knowledge might be argued to include hearsay. Unless one can argue this way there is no rule on hearsay evidence. It is the principles of relevance of the hearsay that the courts may take into account in admitting hearsay as evidence.

713. In addition, there is no regulation of the use of evidence obtained through illegal means or in a breach of rules of secrecy when it comes to civil cases. The only limitation that is regulated under the FDRE Constitution is related to criminal cases where the Constitution says confession obtained through coercion cannot be used against the accused. Whether this rule applies equally to civil cases is not clear. However, one may argue that evidence obtained in violation of, for instance, human rights that are protected by Constitution, such as the right to privacy, should not be used as evidence.

Chapter 2. Administration (Production) of Evidences

§1. Documentary Evidence

714. In as far as documentary evidences are concerned, parties should produce them at a pre-trial stage. The procedure on their production is that each party should annex the documents in his possession with the pleading he submits to a court (Articles 223 and 234). Regarding statement of claim, if the document is in his possession, the plaintiff shall make copies and attach them with the original as annex to his pleadings. If the documents are, however, not in his hands, he shall state the documents and the persons in whose possession they are found and produce such evidences at the first hearing of the suit as provided under Article 137(1). This is the procedure applicable to the production of evidence by the plaintiff. It means that there are two instances of bringing evidences to a court by the plaintiff. Firstly, he shall annex copies and original of documents on which he relies at the time when he submits his statement of claim to the court. Secondly, if the evidences are not in his possession, he shall list them and indicate in whose possession they are. Such documents, which the plaintiff could not annex to his statement of claim but which he listed should be produced on the date fixed in the summons for the first hearing of a suit.

715. The procedure applicable to the production of evidence by the defendant is that he shall bring with himself all of the original and copies of it with his statement of defence on the date fixed for the first hearing of a suit and shall also state documents not in his possession. The same rule and procedure is applicable to the production of evidence by the plaintiff under Articles 137 and 223 apply to production of evidence by the defendant (Article 234(1) makes cross-reference to Article 223).

716. It means that all documents on which parties rely should be produced at a pre-trial stage. If documents are not produced at this time, they cannot be produced at the later stage (i.e., at the time of trial). This is the rule under Article 137(1) and (3):

> Article 137(1). The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in court, and all documentary which the court may order to be produced. (3) Without prejudice to the provisions of Articles 256, no document which should be but is not annexed to or filed with the pleading or produced at the first hearing shall be received at a later stage in the suit on behalf of the party who should have so annexed, filed or produced it.

717. Unless there is a good cause for the non-production of evidence at a pre-trial, the party is not entitled to produce evidence at a trial stage. When there is a good cause for non-production of evidence, the court may allow a party to produce it at a

trial stage. However, the court is given discretion to order the person who has possession of the document to appear with it in court. See Article 264(1).

718. Article 264 is an indication of the fact that the court engages in the production of evidence. This may be considered an element of the inquisitorial system.

719. Where parties produce documentary evidences, the court endorses it by giving a number and title suit to it by stating the name of the parties who produced it and the date on which it was produced.

720. It is up to the court to decide on whether or not the evidences produced by the parties are admissible (Article 138).

721. The documentary evidences produced by the plaintiff may be deposited in the registry of the court for the purpose of inspection by the defendant as provided under Article 223(3). However, the practice is that courts attach copies of evidences to the summons to be served on the defendant together with the copy of statement of claim. It means that there is complete disclosure of evidences used by the plaintiff to the defendant.

722. In as far as the production of material objects (physical proof) is concerned, the same rules that apply to the production of documentary evidences apply to them. Hence there is no separate procedure as regards their production. This is provided under Article 146. Material objects include photographs, exhibits, etc.

§2. Witnesses

723. When parties file their pleadings to a court, they shall annex a list of witnesses who will testify for them at a trial and their addresses. This is the rule prescribed by Articles 223(1)(a), and 234(1). The witnesses identified and listed by the parties should appear voluntarily before the court at the trial stage. There is no need of issuance of a summons to them to demand their appearance before the court at a trial stage. This is because the parties list them and the presumption is that they will appear at a trial voluntarily.

724. If a witness identified and listed fails to appear at a trial, a party can apply to the court for the issuance of a summons to such witness. A party applying for the issuance of a summons to his witness who failed to appear at a trial stage shall pay the court a sum of money that is sufficient to cover the traveling and other expenses of the witnesses appearing before the court. See Article 112(1).

725. Article 112(1) The party applying for a summons shall, before the summon is granted and within a period to be fixed, pay in court such a sum of money as appears to the court to be sufficient to defray the traveling and other expenses of the witness in attending at the court in which he is required to attend and for one day's attendance.

726. This is an obligation imposed on a party applying for the issuance of summons to his witness. The payment of money into a court shall be made prior to the application for the summons. It means that unless a party pays the expenses of witness, no summons is to be issued by the court. See Article 257.

727. It is possible that a party can name a new person as a witness provided that he convinces the court that such witness gives valuable testimony and that he is necessary for the proper determination of a suit. This can be gathered from Article 257.

I. Competence to Appear as Witness

728. Any person having capacity can appear as a witness. Because giving testimony is a juridical act with a legal consequence, a person must be capable of doing it, that is, he must be capable and not minor and must also be with a sound mind, etc. Whether or not the spouse, children, or close relatives can appear as witnesses is not clear. However, the witness by such person may raise issues about the admissibility of the testimony because the relationship between the party and witness is recorded by the court before the witness embarks on giving testimony. Such persons who are related to the party should tell the truth if they decide to appear as a witness.

II. Duty to Appear as a Witness

729. When a witness summoned does not appear at the time he is required to appear, the court shall decide on whether or not the summons has been duly served on him (Article 118(1)).

730. If the court is convinced that the summons has not been duly served on him, it shall issue a fresh summons on him if it believes that the evidence to be given by him is material. However, if the court finds out that the witness has been served with a summons properly and that he failed to appear deliberately or that he failed to appear without good cause, the court might make an order that can even extend to the arrest of the witness, which forces him to appear before the court. The reason why a witness who intentionally or without good cause failed to appear has to be arrested is because he failed to assist the administration of justice.

731. Apart from arrest, the witness could face criminal liability under Article 442 of the Criminal Code.

732. Thus to appear as a witness is considered to be the duty of each person (Article 119). There is no explicit rule in the Civil Procedure as to a person exempted from serving as a witness. The presumption is that a person assumed to know something that can be of relevance as evidence is duty bound to appear as a witness.

733. Sometimes, it may happen that the witness whose testimony is important cannot appear before the court at the date he is supposed to appear owing to the fact

that the witness is about to leave the local limits of the court. In such instances, the witness may be examined by commission. See Article 127. Commission is the mechanism of examining witnesses who cannot appear before the court and give their testimony for various reasons, such as the fact that the witness may be ill or is infirm, or that he is about to leave the local limits of the court. It is the means of examining and taking testimony of witnesses outside the court.

734. The court may issue the commission by its own motion or by the application of either party. Whether or not the court is entitled to name any person as a witness who is not listed by a party by its own motion, that is, without receiving the application for issuance of summons from a party, is an interesting question.

735. Since the primary responsibility for gathering evidences rests on parties, the court may not, as a general rule, name any person as witness. However, in limited cases, the court may name any person as a witness if such party is likely to give crucial testimony and is not called by the parties (Article 264(2)). This may indicate the inclusion of an element of inquisitorial system in the Ethiopian Civil Procedure Code.

III. Refusal to Give Testimony

736. There is no explicit rule in the Civil Procedure Code as to whether or not a witness has a right to refuse to give his testimony. But he can explain why he wants to keep silent. He is under obligation to testify. If he refuses to testify, that could be detrimental to the interest of the party who named him as a witness.

IV. Self-Incrimination

737. There is no explicit rule on whether or not a witness could refuse to give testimony for fear of incriminating himself. The prohibition against self-incrimination is provided under the FDRE Constitution and it appears that the rule applies to criminal cases only and not to civil cases. However, because Ethiopia has become a party to the Covenant on Civil and Political Rights, the rule prohibiting self-incrimination under the Covenant, which is under Article 14 of the Covenant, that covers criminal and civil suits, can be involved to justify refusal to give testimony that incriminates one.

V. Confidentiality

738. There is no rule under the Civil Procedure Code that deals with issues of confidentiality. Other laws provide information that should not be disclosed to the general public. For instance, the Civil Servants Proclamation prohibits civil servants from disclosing some secret information they come across. Such rule is relevant and the person appearing before a court can refuse to give testimony on this ground.

VI. Hearing Witnesses

739. The witnesses that shall testify first are those of the party entitled to begin. It means that it is mostly the witnesses of the plaintiff who testify first.

740. Before saying anything in a court, the witness shall first take an oath or affirmation. The oath made by the witness confirms that the statements to be made by him are true, correct, and genuine.

741. After taking an oath, the witness is to be examined by the parties. There are three stages in the examination of witness. The first is examination-in-chief. The party who called him does this. For example, if the plaintiff begins, he calls his witness and examines him in this stage. The witness examined in this examination is a proponent witness because the party who named him as a witness examines him. Hence, he is supposed to testify in favour of a party who named him as a witness.

742. The questions put to the witness during examination-in-chief must be relevant to the issue to be decided and only to such facts in which the plaintiff has direct or indirect knowledge (Article 263(1)(2)). No leading question shall be put to a witness without the permission of the court.

743. If the question put to the witness is irrelevant, the other opposite party may object to it, which will be decided upon by the court. In addition, the question to be put to the witness during examination-in-chief should not be a leading one. Leading questions are questions that suggest their own answers. Whether or not a leading question is put to the witness depends on the way the question is framed and on the tone of the examiner. However, in some instances, a leading question is possible during examination-in-chief. This is for, instance, when a need arises to refresh the memory of the witness.

744. If a leading question is put to a witness at this stage, the opposite party may raise an objection to it.

745. The second stage in the examination of witness is cross-examination. The opponent party makes this. For example, if the plaintiff calls his witness and examines him in examination-in-chief, the next stage is cross-examination of the witness of the plaintiff by the defendant. For the defendant, the witness is an opponent because he is named by the plaintiff as a witness.

746. The questions framed during cross-examination aim at showing that the statement made by the witness during examination-in-chief is wrong, doubtful, or not a genuine one (Article 263(3)). Leading questions may be put in cross-examination.

747. Cross-examination aims at discrediting the testimony given by the witness at examination-in-chief. Leading questions can be put to a witness at this stage. The questions to be framed at this stage can even go to the extent of attacking the reputation

of the witness. For example, to dishonor the testimony of the witness, the opposite party may say that the witness does not have a reputation to tell the truth.

748. The third and last stage in the examination of witness is re-examination. This is made by the party entitled to begin and who has already examined his witness in examination-in-chief. At this stage, the proponent party tries to rehabilitate the original testimony given by a witness, which is attacked at cross-examination. See Article 263(4).

749. Re-examination aims at clarifying matters that have been raised during cross-examination. A new issue that was not raised during cross-examination cannot be raised at the re-examination stage.

750. The court shall record the testimony of witnesses by stating their names, age, occupation, and address. The presiding judge shall record the testimony given by witnesses unless for some reason he is unable to record it, in which case a judge or clerk under his direction takes it down. Also any objection made in due course of examination of witness shall be recorded. (see Article 269.) All these enable the appellate court to review how the lower court dealt with evidences.

751. The court is authorized to examine witnesses at any stage. For example, the court has the power to examine a witness at any time as stated in Articles 261(4) and 266 of the Civil Procedure. The court exercises such power while the witness is being examined or at the conclusion of his testimony.

752. The court is also entitled to call as a witness any person present in a court to produce any document in his possession. This is the rule under Article 264(2). This shows that the court has a power over the testimony of witness and engages itself in the examination of witnesses.

753. If a witness cannot speak the working language of the court, his testimony must be interpreted by the official interpreter or by such other person as the court may appoint for that purpose (Article 262).

754. The witnesses shall give their testimony in an open court unless the court otherwise directs for good cause (Article 261(3)). The court cannot base its decision on secret evidences that have not been presented in the presence of the parties. Thus a court cannot separately question persons secretly and base its decision on testimony given by such person. The court must base its decision only on evidences presented before a court and on which parties are allowed to challenge each other.

§3. Inspection On-Site and in the Court Room

755. The power of the court to inspect is indicated under Article 272. The rule provides that the court may inspect any property or thing at any stage of the suit concerning which any question arises. The issue is whether or not the judges themselves conduct the on-site inspection. The practice of the court is that it relies

on the expert witness who provides the court with the information about the property or the thing and it is uncommon that judges engage in on-site inspection of property or thing. The inspection is, therefore, limited to the one carried out in the court room.

§4. Expert Witness

756. It is common that the court could appoint persons to act as expert witnesses and hear their witness (Article 264), although the difference between expert witness and ordinary witness is not expressly specified. Such persons named by courts are considered witnesses and that is why Article 268 provides that rules that apply to witnesses equally apply to persons named by the court to give testimony. Based on their experience, skill, and knowledge, expert witnesses give their opinion on the conclusions that can be drawn from the facts and issues at stake. Police, medical practitioners, and accountants are some examples of expert witnesses.

§5. Party Hearing

757. At the beginning of the pre-trial and at the conclusion of hearing, the parties are allowed to make final oral arguments. The hearing of the parties does not amount to acting as witnesses. The parties are heard at the trial to clarify facts and their statements are given evidentiary value as witness testimonies. The parties present their claims and counter-claims, defences, and give their grounds in the opening discussion. During the first hearing, they are given to put forward their opinion before witnesses give their testimony, and at the conclusion of the testimony of witnesses they are allowed to give a final say on the hearing. In doing all these, they do not take an oath and this makes their arguments different from the testimony given by witnesses.

Part VIII. Special Procedures

Chapter 1. Special Proceedings

§1. Special Procedures

758. The proceedings in a court can be divided into two. One is ordinary proceeding (proceedings in first instance), and the other is special proceeding. The proceedings discussed earlier relate to ordinary proceeding. The division of proceedings into ordinary or special is implied from Book IV of the Civil Procedure Code. An ordinary proceeding is set in motion by filing a statement of claim to a court. This implies that a special proceeding is initiated by filing special documents apart from statement of claim. The differences between ordinary and special proceedings are that the latter does not involve a full-scale hearing of a suit, and that they shall be supported by special document, mostly affidavit, which is not a requirement for the ordinary proceedings. Some of special procedures are discussed next.

I. Summary Procedure

759. Summary procedure is the procedure by which the plaintiff may prosecute his claim without involving a full-scale trial of a suit. It is made to settle particular types of cases in shorter and faster procedures. The plaintiff is not under obligation to bring a suit in summary procedure. Even if a suit is fit for summary procedure, the plaintiff may use ordinary proceedings instead of summary procedure. That is why Article 284 uses the word 'may'. Thus, it is the procedure that may be set in motion at the discretion of the plaintiff.

760. Summary procedure is limited to specific cases listed under Article 284. It cannot apply to other cases not specifically mentioned here. If we look at the cases listed under Article 284, the plaintiff is entitled to recover the specified amount but the defendant has refused to pay the amount. The suits subject to summary procedure relate to the payment of a certain amount of money to be paid at a fixed time. For example, if the defendant received the goods under contract but refused to pay the price, summary procedure is proper for the plaintiff to recover the amount specified in the contract.

761. Generally, summary procedure is made where the plaintiff seeks to recover a debt or liquidated demand in money that should be paid by the defendant. The claim for the payment of such money arises from a contract relating to bill of exchange, promissory note, simple contract debt, or it arises from a bond or contract written for payment of a liquidated amount of money. It arises from a guarantee where the claim against the principal is respect of a debt or a liquidated amount. In all of these cases of summary procedure, the important question is that the payment is the liquidated amount of debt. The plaintiff must be entitled to recover a specific sum of money at the time a suit is made.

762. There are certain requirements for the application of summary procedure under Article 284. The plaintiff should indicate in his statement of claim that he is instituting his case on the basis of summary procedure, that he should support it with an affidavit in which he verifies the cause of action and the amount claimed, and that in his belief there is no defence to the suit. If the court admits it, the court does not issue a normal summons on the defendant. This makes it different from the ordinary proceedings. In the ordinary proceedings, the court issues the summons after accepting the statement of claim.

763. After admitting the application for the summary procedure, the court serves a special summons on the defendant. The summons notifies that he is sued for a specific amount of money and that he must obtain leave to defend the suit. It means that he cannot directly appear and defend himself. He must obtain leave to present his defence within ten days from the date the summons is served on him. If he fails to make an application for leave to present his defence within a time fixed by court, the court shall make a decision for the plaintiff (Article 285). The permission to present defence is granted to the defendant only if the application and affidavit filed by him disclose reasons that the court considers to be sufficient.

764. As a rule, there is no full-scale hearing in summary procedures. Hearing of both parties is possible when the court grants permission to the defendant to present his statement of defence.

765. From the provisions of Articles 284 and 285, you can see that the summary procedure enables the plaintiff to avoid a full-scale trial of a suit.

766. The application for leave to defend, which is to be made by the defendant, shall be supported by affidavit, which states whether the defence to be raised by him goes to the whole or part of the suit (Article 286). After receiving the application for leave to present a statement of defence from the defendant, the court must serve notice of the application and with the copy of the defendant's affidavit.

767. After considering his application, the court conducts a hearing and then decides whether or not to allow the defendant to defend himself.

768. Affidavit that shall accompany the statement of claim filed in summary procedure is defined under Article 3 of the Civil Procedure Code. According to this Article, affidavit shall mean a statement of facts in writing lawfully sworn or affirmed.

It is a document by which a party confirms that what he is alleging is genuine, true, and the correct one.

769. The affidavit that accompanies the statement of claim filed in summary procedure may be made by the plaintiff himself or by any other person who can swear to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his belief there is no defence to the suit.

II. Accelerated Procedure

770. Accelerated procedure is another type of special proceeding. It does not need the naming of a specific defendant. It is available for some kinds of applications. The kinds of applications for it are provided under Article 305 of the Civil Procedure Code.

771. A party entitled to have his case seen by accelerated procedure must file a written, dated, and signed application within the period fixed by law for making such applications, or where no period is fixed, within fifteen days from the occurrence of the facts on which the application is based. See Article 301(2). Mostly, the time is fixed by law with respect to matters that are to be challenged by using accelerated procedure. If the law does, however, not fix time, the application shall be filed within fifteen days.

772. The application shall be supported by affidavit. If the application is accepted by the court, the summons is not served on the defendant. The procedure is essentially an ex parte one. The court decides on the application of the plaintiff without hearing the defendant (Article 303(2)). If the court finds, after receiving the application, that what the plaintiff applies for is genuine, it issues a certificate to him. There is no decision or decree to be issued by the court. The court issues certificate applied for.

773. Article 302(2) implies that accelerated procedure avoids the defence that can be made by an opposite party. It is the procedure whereby there is no participation or hearing of an opposite party.

774. The court can dismiss the application if the applicant is not qualified to act in the proceedings or if it is not in the proper form or not filed within the prescribed time or if the court finds that the subject-matter of the application cannot be properly disposed under accelerated procedure. See Article 302.

775. Accelerated procedure is available to certain applications. A party applies to a court for issuance of a certificate. If the court accepts the application, the applicant obtains a dated and signed certificate, and then he can present the certificate to the appropriate authority/official to make him perform a desired act or entry. The official cannot refuse to do it. However, the official can request the court to get the order of the court on the application set aside.

776. No appeal is possible from decisions on applications filed under accelerated procedures unless it is an application under Articles 309–311. See Article 306. Whenever the appeal is possible, it must be filed within ten days from the giving of the decision.

§2. Other Special Procedure

777. There are some special procedural matters. They are special in the sense that they deal with some interim measures taken by the court pending hearing of the suit. Some of the main ones are explained next. Some will be seen under the chapter on enforcement of judgments.

I. Temporary Injunction

778. Temporary injunctions are orders made before final decision for the purpose of protecting the rights of the plaintiff from actions taken by the other party that would prejudice his rights during the pendency of the suit in a court. They are orders that require the party from doing a certain act or requiring him to do a certain act. These orders may require the continuation of a course of action, the observance of certain standards of conduct, or certain acts are not to be undertaken. Although affirmative acts may be required of the defendant, the essence of temporary injunctions is that they are intended primarily to preserve the status quo.

779. If you look at the situations in which temporary injunctions are ordered, the aims of issuing these orders are to prohibit the defendant from acting acts that will cause injury to the interest of the defendant and to prevent acts undertaken by the defendant that will render a final judgment of the suit ineffectual.

780. Temporary injunctions are ordered in two situations. The first is in relation to the interest of the plaintiff with respect to the property in dispute, and the second is in relation to the interest of the plaintiff in contractual relation.

781. Concerning the property interest of the plaintiff, temporary injunction is ordered when the property in dispute is in danger of being wasted, damaged, or alienated by a party to the suit; or when the property in dispute is in danger of being wrongfully sold in execution of a decree; or when the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors. In such cases, the court may grant temporary injunction to restrain the act or may take any order it thinks fit (Article 154). It is the plaintiff who applies for issuance of a temporary injunction that should indicate to the court that the acts of the defendant cause one of these damages to his interest. The application of the plaintiff shall be supported by affidavit or other evidences as the case may be. In order to issue temporary injunction, after receiving application to this effect from the plaintiff, the court should determine that protection is necessary so that the plaintiff will not suffer irreparable injury before his claim is established, and that the plaintiff is likely to encounter irreparable injury if the injunction is not granted.

782. An example where temporary injunction may be granted is when the defendant tries to remove agricultural produce found on the land subject to dispute. If the defendant is not restrained and he removes the produce from the land, it is likely that the plaintiff faces an irreparable injury because he may not get the produce as they originally stand. Hence the court may issue an order restraining the defendant from removing the produce from the land subject to dispute until the suit over the land is decided. The order is given here to maintain the status quo intact until the case is settled by the decision of the court.

783. Another example is when the decree-debtor secures judgment and also gets the property of the decree-debtor attached. If the decree-debtor applies to get the property attached sold, a third party may apply to get the temporary injunction against the selling of the property if he claims that the property belongs to him. This is because the property is said to be wrongfully sold in execution as provided under Article 154.

784. Another instance whereby a temporary injunction may be ordered is in relation to contract. Where the plaintiff has brought suit to restrain the defendant from committing a breach of contract or other act prejudicial to him, a temporary injunction to restrain the breach or the commission of the act may be granted. See Articles 155 and 400 of the Civil Procedure Code. Here the defendant is restrained from breaching the contract or committing the act while the case is pending.

785. If one party applies for temporary injunction, the court should give notice to the opposite party against whom it is going to be issued (Article 157). The only exception under Article 157 is when giving notice to the opposite party causes delay and this defeat the purpose of giving temporary injunction. In such case, no notice is given to the opposite party. It is granted *ex parte*. It means, in other words, that temporary injunction is ordered without notifying the other party of the order.

786. The party against whom the order is given may apply to get the order discharged, or varied, or set aside by the court. See Article 158. This Article seems to apply when the order is given without giving notice to the opposite party. This is because in other cases the party is given notice and that he may put forward his opposition to the order and then the court may take this objection and then decide on the application for the order.

787. If the party against whom the temporary injunction is ordered fails to comply with the order, he faces two consequences under Article 156. The court may order the attachment of the property of the party who fails to comply with the order and may also sentence the person for contempt of court in accordance with Article 443 of the Criminal Code.

788. Under Articles 154 and 155 a temporary injunction is ordered if the plaintiff has made a prima facie showing that he has a cause of action against the defendant. This is because it is ordered prior to the determination of the dispute's merits and the order may do a substantial injury to the defendant. Hence, a court issues temporary injunction only when the plaintiff has demonstrated a clear case of entitlement. If the

facts alleged in the application of temporary injunction are in dispute, the court can refuse to grant it.

789. By 'prima facie showing of cause of action' it does not mean that the court should examine the merits of the case closely and come to the conclusion that the applicant has a case in which he is likely to succeed. Deeper examination of the question is not a requirement here. In deciding prima facie case, the court is to be guided by the apparent strength as revealed in the affidavits or other evidences. In order to make out a prima facie case the plaintiff need not establish his title. It is enough if the plaintiff can show that he has a fair question to raise as to the existence of the right which he alleges and can satisfy the court that property in dispute should be preserved in its present actual condition until such question can be disposed of.

790. The court may also refuse to grant temporary injunction after balancing the relative inconvenience it poses to the parties. Thus, if granting the injunction would do more damage to the defendant than denying it would do to the plaintiff, the court may not grant temporary injunction.

II. Interlocutory Orders

791. Interlocutory orders are orders given by the court while suits are pending before a court of law. They are orders in relation to property, money, custody of minors, or payment of alimonies, etc. They may be given while a suit is pending or at the execution stage, etc. This can be inferred from Articles 160 and 165.

792. Interlocutory order given under Article 160 applies when the subject-matter of the suit is an immovable property. The immovable property concerned here may be subject to a suit or may be attached before judgment. From Article 160, we can draw a conclusion that interlocutory orders do not apply to an immovable property subject to suit.

793. The reason why interlocutory order is made is because the immovable property subject to the suit or attached before the decision is one that is subject to speedy and natural decay. Hence, to avoid the property from facing such problem, the interlocutory order given is to sell the property. The immovable property may also be sold not only because it is subject to speedy and natural decay but also for any other sufficient cause that demands the sale of such property.

794. It is at the discretion of the court to decide the manner and terms of sale of property under Article 160.

795. An interlocutory order under Article 161(1)(a) applies to any property. Here, the law does not make distinction between the types of property. The interlocutory order given here is for the detention, preservation, and inspection of the property.

796. For example, suppose that 'A' defames 'B' and 'B' brought action to claim both material and moral damages arising from the act of 'A'. If 'B' alleges that his

hotel suffered huge financial losses as the result of the defamation and 'A' feels that the amount of material damage is an exaggerated one, he may apply to the court so that the court inspects the financial activities of the hotel in order that the fair amount of damage may be determined.

797. Interlocutory order is subject to the application of the party (Articles 160 and 161). The party may be the plaintiff and the defendant (Article 162).

798. Article 165 indicates that there can be various interlocutory orders. The application for interlocutory order may be made at any time after the institution of the suit (Article 162).

799. Before ordering any interlocutory orders, the court must give notice to an opposite party. For example, if the plaintiff applies for an interlocutory order, notice must be given to the defendant; if the defendant makes application for an interlocutory order, notice must be given to the plaintiff (Article 162(1 and 2)).

III. Appointment of Receiver

800. Appointment of a receiver is another provisional remedy. It is a procedure by which a plaintiff, or in some instances any person having an interest in property that is subject of a lawsuit, requests that the court appoint a competent person to manage some or all of the defendant's property until the settlement of a pending case. The person appointed as a temporary receiver deals mainly with the property subject to litigation pending before a court. However, such person may also deal with any property, which means that the property may not be subject to litigation. This is given under Article 166(1) as this article says 'any property'. Thus, in appropriate cases the court may appoint any a receiver to deal manage the property that may not be subject to litigation between parties. This is possible, for example, if the defendant owns a single property and if he is wasting it, the court may appoint temporary receiver if the defendant continues to waste the property and that the plaintiff may not realize anything on his decree if such property is wasted.

801. Article 166(1) seems to provide the reason for appointment of temporary receiver. However, the reason stated under this Article is not clearly stated because it says that the appointment is made whenever it appears to the court to be just and convenient. We could say that the reason why the court appoints temporary receiver is when there is a substantial danger that the property concerned will be removed, lost, or materially damaged or destroyed by the defendant. Because the appointment of temporary receiver represents an interference with the defendant's peaceful enjoyment of his property, a temporary receiver may not be appointed unless there is clear and convincing proof of necessity for appointment of such a person. For example, the plaintiff must indicate in his application that there is likelihood of irreparable harm to the property, which will affect the enforcement of the decree that might be issued in his favour.

802. From the reading of Article 166, the appointment of temporary receiver is given at the discretion of the court. That is why the article says 'may'.

803. The court appoints a person to serve as a temporary receiver when an application to this effect is filed to it. See Article 166(2). The factors taken into account before making the appointment are also provided under the same Article. The factors serve as criteria to order the appointment of temporary receiver.

804. The receiver appointed by the court has specific powers designated to him. His powers are specified under Article 166(1) (b, c and d). The powers given to him are broad if you look at these sub-Articles. It does not, however, mean that all these powers are conferred upon him at a time. These powers are stated in the order of appointment. The order of appointment may give him some of these powers. His power is limited to ones given to him specifically in the order of appointment. Thus, he is subject to the control of the court that appointed him.

805. The receiver's role as an officer of the court makes it unlawful for him to delegate his powers or responsibilities to others. The receiver may be appointed before or after the judgment is given and the decree is issued. The appointment is made at any time before the decision on the case pending is made, or at the time of pending of execution proceedings (Article 166(1)(a)).

806. The receiver is entitled to remuneration as fixed by the court for serving as a receiver. See Article 167.

807. The duties of a receiver are given under Article 168. If the receiver fails to discharge his duties as per the powers specifically designated to him in the order of appointment, or if he acts outside the scope of powers given to him, he may face consequences stated under Article 169.

Chapter 2. Family Law Cases

808. Marriage may be concluded in three different forms: marriage concluded before an officer of civil status, religious marriage, and marriage according to custom. Marriage concluded in one of the three ways is valid as long as the free consent of both spouses is secured and the minimum marriage age is met. The causes of dissolution of marriage are death of one of the spouses; dissolution ordered by the court due to violation of one of the essential conditions of marriage, such as age, consent, etc; and divorce. Divorce may be brought about by the mutual consent of both spouses and when such mutual agreement is accepted by court or where the spouses or one of them files petition for divorce. Divorce by mutual consent shall be in written form and the spouses are not supposed to invoke reasons as to why they mutually agree to get divorced. When an application for divorce by mutual consent is filed to it, the court tries to convince, in a separate or joint session attended by both spouses, to renounce their intention to get divorced. If the spouses do not change their intention to divorce, the court may, taking into account circumstances, give them a cooling period of not more than three months. If the spouses do not change their mind after the end of the cooling period, the court shall approve the conditions of divorce agreed upon by both spouses.

809. A joint or separate petition is another cause of divorce and here there is no mutual consent for divorce. When such petition is brought to its attention, the court shall try to convince the spouses to change their mind and ask them to sort out their disputes amicably. If this attempt fails, the court may ask the parties to resolve their disputes through arbitrators of their own choice. If they refuse to get the matter referred to arbitrators, the court may give a cooling period of three months. If they agree to resolve their disputes through arbitrators of their own choice, the court shall wait for the report of arbitrators. If the cooling period or arbitrators fail to bring any change, the court shall pronounce divorce.

810. Upon dissolution of marriage, the pecuniary relations between the spouses is governed by the agreement made by the spouses or the contract of marriage or by the provisions of the Family Code in instances whereby the agreement of parties or marriage contract is found to be not tenable under the law.

Chapter 3. Insolvency Proceedings

811. There are at least three insolvency proceedings – bankruptcy, business reorganization, which in Ethiopia is known as scheme of arrangement, and rehabilitation of debtor. These proceedings are regulated in the Commercial Code, Civil Procedure Code, and Civil Code.

812. The bankruptcy proceedings aim at the liquidation of the debtor's business. The liquidation of an insolvent business in Ethiopia is governed primarily by the Commercial Code that was enacted in 1960. Some provisions on bankruptcy are also found in the Civil Procedure Code and Civil Code. Liquidation is basically done through a judicial process, which can be initiated by the debtor, by one or more creditors, by the public prosecutor, by the court itself or heir (Article 976 Commercial Code). In such cases the court can appoint one judge for the purpose of reviewing the affairs and activities of the debtor. At the first hearing or on receiving the report of the appointed judge, the court declares the debtor bankrupt (Article 977 of Commercial Code). The bankruptcy proceeding is basically overseen by the court, a commissioner, and a trustee. The judgment of bankruptcy would appoint a *commissioner* in bankruptcy and one or more trustees in bankruptcy (Article 981 of the Commercial Code). The court that has declared a debtor bankrupt has the power to oversee all the bankruptcy proceedings and to make orders on matters that are outside the powers of the commissioner. It also has the power to hear appeals from orders of the commissioner. The commissioner on the other hand has the power to supervise and deal with all matters concerning the bankruptcy estate. The administration of the estate, however, is invested in the trustee, although he is under the supervision of the commissioner. The trustees, the number of which can never exceed three in number, are appointed from a list of qualified persons of good integrity. The trustee, like the commissioner, is appointed by the court and can only be removed by the same.

813. The judge who is appointed for the purpose of investigation in the bankruptcy proceedings can get the assistance of a trustee if so requires. The appointed judge has the duty to report his findings to the court. The judge must fix the date for suspension and declare the debtor bankrupt on the first hearing, or when appropriate, on the date when the report by the appointed judge is submitted. In the judgment of bankruptcy the judge is duty bound to appoint the commissioners and one or more trustees in bankruptcy.

814. Rehabilitation proceeding is also governed by the Commercial Code and is initiated by the debtor himself through a composition submitted to the commissioner. On receipt of the composition, the commissioner takes the advice of the trustees and the creditor's committee, who notifies the creditors if he thinks that the composition has a merit. The vote of the creditors is needed for the effectiveness of such a composition and it must be approved by two-thirds of the creditors representing two-thirds of the debts. Such rehabilitation needs the confirmation of the court, which

can only be rendered after thorough consideration of the report of the trustees and that of the commissioner. Once such rehabilitation is confirmed by the court in its judgment, it suspends the effects of bankruptcy and is binding on all creditors other than those holding security *in rem* that they have not relinquished and unsecured creditors whose claims have arisen during the bankruptcy proceedings. After confirmation, the carrying out of the rehabilitation, which must follow the detailed instructions contained in the judgment, is the responsibility of the commissioner, the trustees, and the creditor's committee.

815. Reorganization proceeding is governed by the Commercial Code and is set in motion when a trader who has or is about to suspend payments and has not been declared bankrupt applies to a court of law for the opening of a scheme of arrangement. The application for reorganization can only be accepted by the court if it includes the balance sheet of the firm, the profit and loss account, a list of commercial credits and debts, with the names and addresses of the creditors and debtors. The debtor must file these documents together with a report giving the reasons for his suspension or impending suspension of payments and the reasons for his proposing a scheme of arrangement. The debtor shall also show that he has been registered in the commercial registry, that he has been keeping proper accounts, that he has not been declared bankrupt nor made scheme or reorganization, and that he has not been convicted of specific types of offences indicated in the Criminal Code.

816. In the proceedings of reorganization, the debtor, courts, the commissioner, and the creditors are involved, each with its own specific task indicated in the Commercial Code.

817. Generally, courts play significant role in all the insolvency proceedings. Commissioners, trustees, and other organs and institutions engaged in playing a role in insolvency proceedings are under the control of courts. The appointment of these bodies is made by courts and in many cases they are removed by courts.

Part IX. Seizure for Security and Enforcement of Judgments

Chapter 1. Seizure for Security

§1. PROCEEDINGS

818. Proceedings in civil cases are initiated by filing a statement of claim to a court of law. If the statement of claim is admitted by a court, the court conducts a pre-trial and/or trial proceedings, and finally renders judgment and issues decree. If there is failure to comply with the terms of the decree issued, then the issue of execution comes into play. Before execution comes the issue of seizure for security purpose and arrest of the party not to tamper with the property in order to lay the ground for smooth execution after the decision is given. The two can be put under the provisional remedies in Ethiopian case.

I. Provisional Remedies

819. Because the defendant may dispose of his property in such a way as to put it beyond the court's reach, or because he may undertake an act that might frustrate the relief requested by the plaintiff, a plaintiff may call for some protective measures while a final decision on the merits of the case is pending. These protective measures are known as provisional remedies. Thus provisional remedies are remedies awarded to the plaintiff before decisions on the merits of the cases are rendered. They are called provisional remedies because they are remedies that have temporary effect. They remain effective until final decisions on the merits of cases are given.

820. By using one of these remedies, the plaintiff may ensure that should he prevail on the merits, there will be assets available to satisfy his interest. This is particularly true for provisional remedies such as arrest before judgment and attachment before the court delivers judgment. This does not mean that the only provisional remedies that protect the interest of the party are arrest before decision and attachment before judgment.

821. There are many provisional remedies available to a party while the case is pending. Next we discuss some of the main provisional remedies.

II. Arrest before Judgment

822. There is a possibility of arrest after judgment in cases whereby the judgment-debtor fails to satisfy the decree issued against him as indicated under Articles 386, 387, and 389. The arrest effected here is related to the execution stage. Arrest is not limited to the one given after the decision is rendered and the decree is issued but also possible before the decision is given, that is, while the case is pending in a court of law.

823. Arrest before decision is also possible in certain instances. It is designed to prevent a defendant or a plaintiff against whom a counter-claim is made from defeating the execution of a decree that may be passed against him by absconding the local limits of the court's jurisdiction or disposing of his property. It is a temporary remedy given to a party while the litigation is pending.

824. The law has made a distinction between properties for the purpose of application of arrest before judgment. Arrest before judgment applies to all suits except immovable property. In other words, if a suit pending before a court involves immovable property, arrest before judgment does not apply as a provisional remedy. This is clearly stated under Article 147(1). That is why Article 147(1) says 'Where at any stage of a suit, other than a suit regarding immovable property.' This phrase excludes suits in relation to immovable property.

825. The reasons why arrest before judgment is ordered are listed under Article 147(a and b). The first reason is when a party has absconded or is about to abscond from the local limits of the court's jurisdiction, or has disposed of or removed his property or part of the property with a view to obstructing or delaying the execution of any decree that might passed against him. It is important to establish a connection between the absconding or disposing of or removing the whole or part of the property and the intention to frustrate a future decree that might be issued by the court. For example, if the defendant is to leave or has already left the local limits of the court, it must be shown that his intention for doing so is to obstruct or delay the decree that might be issued against him.

826. The second reason is when a defendant is to leave Ethiopia and this creates reasonable probability that the decree to be issued in the future will be frustrated or delayed. Here, there is no need to show the intention to frustrate the execution of the decree. It is sufficient to show that the party is leaving Ethiopia and that this creates reasonable probability that the execution of the decree is frustrated or delayed as a result of the defendant's departure from Ethiopia. For instance, if the plaintiff shows that the defendant is planning to stay abroad indefinitely, it is likely that the court may order the arrest of the defendant under Article 147.

827. The application for arrest before judgment can be made at any time before the decision is rendered by the court. It means that it can be made at pre-trial or trial proceedings. This can be gathered from Article 147(1), which provides 'at any stage

of a suit'. The application shall be supported by affidavit or other evidence on oath. See Article 147(1). Affidavit or other evidence on oath can be used alternatively.

828. If the court makes sure that all the requirements under Article 147(1) are met, it issues an arrest warrant to detain the defendant. The aim of his arrest is to force him appear before the court and ask him why he should not furnish security for his appearance. The purpose here is not to restrain the liberty of the defendant but to compel him to appear before the court and then furnish security for his appearance. This purpose is to be found under Article 147(b). Thus the defendant may avoid arrest by paying the officer entrusted with the enforcement of the warrant of arrest at the time he comes to arrest him. If he pays sufficient money that can satisfy the claim of the plaintiff, the court will hold the money until the case is decided. See Article 147(2). If he does not pay the money to the officer who is ordered to arrest him, he will be arrested and brought before the court to show why he should not furnish security for his appearance. The court examines him and if it comes to the conclusion that the defendant has not shown good cause, the court orders him to either deposit court money or other sufficient property as security for his appearance (Article 148(1)). The purpose of depositing money or property in the court is to guarantee his appearance at the time when called upon by the court (Article 148(1)).

829. If the defendant who is arrested and brought before the court fails to furnish security, the court may order him to be arrested and detained in civil prison until he complies with the order of the court to furnish security for his appearance, or until the case is disposed of (Article 150). However, the detention lasts for six months only (Article 150).

830. It is possible that a third party may serve as surety for the defendant. However, such surety may be discharged from his obligation at any time (Article 148(1). By application, he may apply to get discharged from the obligation of surety as of right. If the third party applies to get relieved from the obligation of surety, it is the responsibility of the defendant to look for another surety. If the defendant cannot find another surety for his appearance, he may be detained.

831. Arrest before judgment is not for committing a criminal act; rather it is made for committing a civil wrong. That is why a person arrested before judgment is kept in civil prison as provided under Article 150. This can also be implied from the fact that the person is automatically released from detention as soon as he furnishes security for his appearance.

III. Attachment before Judgment

832. As a rule, attachment is ordered for the reason that the judgment-debtor fails to comply with the decree issued against him. It is also possible that there is attachment before a decision is rendered.

833. The rules on attachment before judgment are designed to prevent the defendant from disposing of or removing his property with a view to frustrating the decree that

might be issued against him. They aim at giving an assurance to the plaintiff that the decree issued for him would be satisfied.

834. The rules relating to attachment before decision apply to all types of suits. Unlike the rules on arrest before judgment, it does not make distinctions between the types of suits. All movable and immovable properties are subject to attachment before judgment.

835. The reasons for ordering attachment before decisions are provided under Article 151. The first one is when the defendant is to dispose of the whole or part of his property with an intention to delay or obstruct the execution of the decree that might be issued against him. Here, there must be a close link between the intention of the defendant and the act of disposing the whole or part of the property. The intention of the defendant in disposing whole or part of the property is to delay or obstruct the execution of any decree that might be issued against him (Article 151(1)(a)).

836. A vague statement in the application for attachment that the plaintiff comes to know from a definite source that the defendant is disposing of the property with the intent to delay or obstruct the decree that may be passed is not sufficient under Article 151(1). Full particulars about the source of information and why the plaintiff thinks that the defendant is about to dispose of his property with the requisite intent should be stated.

837. The second reason is provided under Article 151(1)(b). This is when the defendant is about to remove whole or part of any of his properties from the local limits of the jurisdiction of the court. The intention element is also applicable to this reason.

838. It is up to the plaintiff to prove that the acts of disposing or removing to be done by the defendant is to delay or obstruct the execution of a decree that will be issued by the court in favour of him.

839. The application for attachment before judgment can be made at any time of a suit. The plaintiff may apply at any time from the moment the suit is filed up to the time before decision is rendered. Article 151(1) that says ‘at any stage of a suit’.

840. The application shall be accompanied by affidavit or any other evidence. See Article 151(1). It is the plaintiff who must indicate in his application the property to be attached and its estimated value (Article 151(2)).

841. If the court believes that the plaintiff complies with the requirements for attachment before judgment, the court issues summons on the defendant to appear and ask him why he should not furnish security for the execution of the decree that might be issued against him. If the court finds, upon examination of the defendant, that he fails to show the cause why security is not furnished, the court might order that the property mentioned in the application of the plaintiff be attached (Article

152(1)). The attachment is made in the manner provided for the attachment of property in execution that is ordered after the decree is issued (Article 153(1)).

842. The court should attach the property without requesting the party to furnish security or showing why he should not furnish security. This is because the purpose of attachment is to guarantee that the decree that might be issued will be satisfied. Thus, if there is security, there is no reason to attach the property of the defendant. A blanket order of attachment before judgment without offering the defendant to give security is not a valid one under Article 151(1).

843. The security can be furnished in the form of a certain sum of money or in the form of depositing the property mentioned in the application of the plaintiff (Article 151(1)(b)).

844. If the defendant shows the cause why he should not be requested to furnish security, the court orders the attachment to be released (Article 152(2)). This is one of the considerations that make the attachment to be a provisional one.

845. The attachment ordered before judgment may be withdrawn for reasons specified under Article 153(4). It is withdrawn, firstly, if the defendant furnishes security together with the costs of attachment. This makes the attachment to be a temporary one. Thus, the reason why attachment before the decision should be ordered is to force the defendant to furnish security for the execution of a future decree that might be issued against him.

846. Another reason for withdrawing attachment ordered before judgment is when a suit itself is dismissed. It does not revive even if the dismissal is set aside and the suit revives.

847. If any objection to an attachment is ordered before the decision, such objection shall be investigated in the same manner as an objection to the property attached in the execution of decrees. This means that the objection will be investigated on the basis of Articles 418–420.

848. Attachment before judgment applies to the plaintiff against whom the counter-claim is made. See Article 151(1). This is because such plaintiff will become the defendant and the original defendant will become the plaintiff.

Chapter 2. Enforcement of Judgments

§1. Enforcement of Domestic Judgments

I. Proceedings

849. Execution of decision gives a meaning to a decision/judgment made and decree issued. It is enforcing the decision against the decree-debtor who failed to satisfy the interest of the decree holder.

850. There is apparently a distinction drawn between judgment and decree. Judgment has to do with the decision of the court on the case brought before it and contains the reasons for it. As such, judgment is not capable of execution or enforcement. It is the operative part of judgment that will be enforced. The operative part of judgment is known as decree, which deals with the relief awarded by the court to the parties. The decree states the obligation that the decree-debtor shall undertake or refrain from undertaking or the order that the decree-debtor shall pay a definite sum of money or shall deliver a particular thing, etc.

851. As a rule, execution is to be made by the court that has given a decision and issued a decree. This is given in Article 371(1).

852. However, in some instances there is a possibility to transfer the execution of decree to another court. This is ordered by the motion of the court or upon the application of the decree-holder. This is made for the convenience of execution if one looks at the reasons specified under Article 372 that deals with the transfer of execution. It is ordered because execution is not possible in the place where judgment is given. Thus, to execute judgment conveniently, it may be transferred to another court where the defendant resides or carries on business or where he has sufficient property to satisfy the decree issued against him.

853. The procedures on transfer are that the copy of the decree issued and the order for the execution of the decree shall be produced by the party seeking execution. The court to which the execution is transferred (the transferee court) shall have the same powers in executing the decree as the court that passed the decree. It shall not investigate into the content of the decree, but if there are uncertainties, it shall seek clarification from the court that issued the decree. This is given under Article 373(2).

854. There is a possibility of transfer of execution from federal to regional courts as stipulated by Article 35 of Proclamation No. 25/96. Even if not given under this Article, it is possible that transfer may be made from regional to federal courts as well. There is no reason why such transfer is not possible. Transfer of execution can be made within federal courts or within regional courts.

855. It is possible that issues of execution might arise when a case has been considered and decided by appellate court. Where a decree is issued by an appellate court, the appellate court may itself give directions as regards the execution, or it may delegate the execution to the court that first heard the case and decided on it. See Article 183(1)(f). If the appellate court delegates the execution of the decree, the party seeking execution must then apply for execution to the court that first heard and decided the case.

856. The mere fact that a decision is rendered and that a decree is made on its basis does not mean that the decree is executed automatically. The court does not order execution unless it receives the application for execution from the decree-holder. This is provided under Article 378(1), which implies that execution of the decree is a separate proceeding. It is initiated only when the decree-holder applies to it.

857. Once an application for execution is made, the court executing the decree has complete control over the proceedings, and all questions arising between the parties in the suit in which the decree was passed concerning the execution, discharge, or satisfaction of the decree must be determined by that court and not by a separate suit (Article 375(1)). For example, if there is an objection to the execution or to the property attached in enforcing the decree or if there is an objection to the sale proceedings, all these questions are to be settled by the court executing the decree and, therefore, they do not need a separate suit. The reason why this power is given to the court that executes the decree is to make the execution proceedings have the same finality as the original suit, and that all questions that could have been raised in relation to the execution must be raised before the court executing the decree.

858. If the court gives a decision, it means that the judgment-debtor should comply with it and give a meaning to it. If the decree is not enforced by the decree-debtor, the judgment-holder may set in motion execution proceedings by applying to the court that passed the decision and issued the decree to request the issuance of process for its execution (Article 378(1)). The application for execution shall contain items listed under Article 378(3) and the requirements set forth under Article 379. If these conditions are not complied with, the court may reject the application or take other possible measures specified under Article 385(1).

859. After receiving the application for the execution from the decree-holder, the court shall serve summons together with the copy of the application of execution on the decree-debtor to require him to appear on a fixed date. On such date, the court asks him, if he appears, why he failed to execute the decree passed against him. He can raise any objection to the execution as a reason for failure to comply with it. See Article 386. If the court finds out that the decree is satisfied, or that the application of execution is barred by period of limitation, for example, it shall dismiss the application that is filed for the purpose of obtaining execution.

860. If the judgment-debtor appears, he is bound to answer all questions that are put to him by the court and the decree-holder (Article 386(2)). It is possible that the court may issue summons to any person or may require the production of any book or record (Article 386(5)). This power makes the executing court to be in a better

position to decide on whether or not the judgment-debtor is able to satisfy the decree issued against him and then whether or not to issue the process of execution. Upon examination of the decree-debtor and other persons as may be the case under Article 386(5), if the court comes to the conclusion that the decree-debtor is not able to satisfy the decree, the court does not issue the process of execution (Article 392(2)). In such case, the application filed for execution should not be dismissed. This is because the court may issue process for execution at any time if it is sure that the judgment-debtor has become able to satisfy the decree (Article 392(2)).

861. It is actually the obligation of the decree-holder to convince the court that the judgment has sufficient means and ability to satisfy the decree issued.

862. If the decree-debtor does not appear or show the reason for not executing the decree, the court orders the process for execution. It means that the court proceeds to undertake the proceedings involved in execution (Article 386(3)).

863. There is a possibility of arrest of the decree-debtor at execution. The first instance whereby the decree-debtor may be detained is provided under Article 389. There are two reasons for the detention of the decree-debtor under Article 389. The first is when the decree-debtor refuses without good cause to comply with the decree after being examined under Article 386. Actually, when the decree-debtor does not show good cause as to why he failed to satisfy the decree issued against him, the court issues a process for the execution of the decree under Article 386(3). The detention under Article 389(1) (a) is ordered for not showing good cause. This Article has to be considered as an exception to Article 386(3). This is because under Article 386(3) when there is failure to show good cause, the court issues the process of execution, not order the detention of the decree-debtor, but under Article 389 there is the possibility of arrest. Thus, Article 389 is to be considered to be an exception to Article 386 in this respect. The detention to be ordered under Article 389(1)(a) is left to the discretion of the court. It means that there is a deliberate failure to comply with the decree while one could practically satisfy the decree.

864. The other reason for the detention of the decree-debtor under Article 389 is when the decree-debtor is practically able to comply with the decree and satisfy it but has intentionally failed to do so.

865. After the detention, the decree-debtor is to be put in civil prison for a period not exceeding six months. There is, however, no separate civil prison in Ethiopia at present. The detention in civil prison implies that the reason why a person is detained is not for committing a crime. It is rather for committing a civil wrong that he is put in civil prison. If the decree-debtor who has been detained satisfies the decree or its satisfaction is soon obtained, he shall be released immediately. He can also be released when the decree- holder requests for it. This also implies the fact that the reason why the decree-debtor is detained is not for committing a crime.

866. The release from detention does not in itself relieve the decree-debtor from satisfying the decree. The same is true for detention. Even if he is detained, he is not discharged from complying with the decree. See Article 391.

867. Another possibility whereby the decree-holder can be arrested is indicated under Article 386(4). This Article relates to the decree issued for the payment of money. The arrest is ordered when the decree-debtor is summoned to appear to show the cause why he failed to comply with it, but he fails to appear on a date fixed in the summons, and also that he becomes an obstacle to the execution of the decree or that he is about or is likely to abscond or leave the area or when he is to dispose or remove part of the property that could be subject to the execution (Articles 386(4) and 387(1)).

868. The arrest under Articles 386(4) and 389 aim at forcing the decree-debtor to comply with the decree.

869. Another possibility whereby the decree-debtor may be arrested is found under Article 400(2). This is possible if there is failure to satisfy decrees relating to a specific performance or injunction and when the decree-debtor has willfully failed to comply with the decree despite the fact that he had an opportunity of satisfying the decree.

870. After the examination under Article 386(1), if the court believes that there is no reason why the decree should not be executed, it shall issue the process of execution under Article 386(3), or it may order the arrest of the decree-debtor under Article 389. However, if the court believes that the decree-debtor is unable to pay the amount specified in the decree, the court does not issue the process of execution (Article 392(2)). This applies, for instance, when the bankruptcy of the decree-debtor is declared after the decree is issued. In such case, issuing the process of execution does not ensure the execution of the decree.

871. The grounds that could serve as objections to execution of decree include: (a) that satisfaction of decree has already been made, meaning that the decree-debtor has already discharged his obligation under the decree issued against him; or (b) that the decree-debtor is unable to satisfy it owing to the fact that, for instance, his bankruptcy is declared. If the decree-debtor is unable to satisfy for the reason that he does not have means of income, there is no issuance of execution proceedings; or c) that the execution is barred by period of limitation. There is a period of limitation specified under Article 384 for the purpose of initiating execution proceedings. If the application for execution is not made within this period, that is, it is made after the expiry of the period fixed, the application is barred by period of limitation. Hence, lapse of the period of limitation on execution can be used as a ground of preliminary objection under Article 244.

872. The period of limitation for execution is provided under Article 384. Article 384 does not deal with a period in which the first application to execute the decree should be filed. One can, however, apply the period of limitation for the enforcement of contract, which is ten years. This is because Article 1677 of the Civil Code says that the provisions of contracts in general shall apply to any obligations. Decree entails obligations and, hence, if we do not find some provisions governing its execution, we may apply the provisions of contracts in general pursuant to Article 1677 of the Civil Code. Thus, the first application for execution shall be filed within ten years.

873. Article 384 talks about a period of limitation for the second application. For example, if the decree-holder has filed an application for execution, seeking the attachment of certain property, and after the expiry of ten years, files another application seeking the attachment of other property, the latter application constitutes a fresh application and would be barred. In the first application he sought the attachment of specific property and because he is now seeking the attachment of different property, the second application is barred after the expiry of the ten-year period.

A. Modes of Execution

874. The modes of execution used depend on the type of decrees issued. We have various modes of execution. We consider some of them next.

875. Decrees relating to the payment of money may be executed by the attachment and sale of the property of decree-debtor (Article 394).

876. The property attached may be movable or immovable property. Article 394 does not make a distinction between the properties subject to attachment. There is no requirement under Article 394 that the decree-holder should first proceed against immovable property. However, the value of the property attached must correspond with the amount specified in the decree.

877. The modes of payment of money after the decree under Article 394 is enforced are provided under Article 395. Decrees relating to the recovery of specific movable property or a share of such property are to be executed by the seizure of the property or share of it and then delivering it to the decree-holder. See Article 399. This mode is applicable only to property in the possession of the decree-debtor. If the property is in the possession of someone else, the decree-holder should apply to get it attached (Article 409).

878. The rule under Article 399 refers only to specific movable property or a share in property that is capable of being delivered. For example, if the decree gives the decree-holder an undivided share in movable property, say, for instance, a half-interest in a horse, the property cannot be delivered and, hence, the mode of attachment under Article 399 does not apply in such case.

879. This mode is particularly in line with the nature of movable property, which can easily change hands. Decrees for the delivery of immovable property are executed by delivering the possession of the immovable property to the decree-holder and to effect this, the court may order the eviction of persons occupying it. See Article 402.

880. Attachment is the mode used mostly for the enforcement of decrees relating to payment of money. It means the seizure and delivery of the property of decree-debtor in the custody of law with a view to satisfying the decree issued for the decree-holder. In short, it is the process of bringing the property of the decree-debtor under the control of the court.

881. Attachment can also be used to effect delivery of movable property not in the possession of the judgment-debtor under Article 399. In addition, it may be used under Article 405.

B. Properties Exempt from Attachment

882. By attachment, it does not mean that any property of the decree-debtor is subject to delivery into the custody of law. Some property shall not be liable to attachment and sale. Article 404 lists properties not subject to attachment.

883. The reason why the properties listed under Article 404 are excluded is that they are necessary for the daily life of the decree-debtor. These properties are considered to be important to sustain his livelihood. The exemption under Article 404 favours the interest of the decree-debtor for it allows the debtor to retain certain property free from appropriation by creditors. It aims at providing the debtor with property necessary for his physical survival and to allow the decree-debtor to have minimum level to sustain his life and his family in terms of financial capacity and source of income. Properties not subject to attachment are the following: the necessary wearing apparel, cooking vessels, bed, and bedding (404 (a).

884. The word 'necessary' under Article 404(a) seems to draw distinction between the properties mentioned here for the purpose of attachment. By a contrario reading of this provision, if these properties are considered to be not necessary to the decree-debtor, they may be attached by the order of the court. The word 'necessary' is vague and is susceptible to various meanings. It may mean that which is absolutely physically necessary to the decree-debtor, or it may mean that which is convenient, useful, appropriate, and so on to the interest of the decree-debtor. This vagueness in the meaning of the word 'necessary' makes it difficult, if not impossible, to limit the scope of application of Article 404(a) and in clearly limiting properties that are exempt from attachment under this provision.

885. Another problem related to Article 404(a), apart from the word 'necessary', is identifying the properties themselves. It is difficult to determine the properties falling in the category of wearing apparel, cooking vessels, bed, and bedding of the judgment-debtor. No definition is given to these properties nor is there any distinction drawn as to whether or not the properties here are used or unused ones.

886. Cooking vessels are also exempt from attachment under Article 404(a). It is difficult to identify properties falling in the category of cooking vessels. Does the refrigerator fall under the category of cooking vessels? What if the judgment-debtor has some expensive cooking vessels? Are they subject to attachment and then force him to use traditional cooking vessels? This is subject to interpretation by taking into account the word 'necessary' and the state in which the judgment was.

887. The meaning and items that are considered to be bed and bedding of the decree-debtor are not clear. Does it make a difference if the judgment-debtor has an

expensive bed? Does bedroom furniture fall under these properties? It is subject to debate but one should see it in the light of the word 'necessary'.

888. Tools, instruments, or implements of any kind used by the decree-debtor in his profession, art, or trade are also exempt from attachment (Article 404(b)). The law does not make a distinction between the types of instruments or tools for the purpose of exemption applicable here. Does it refer to one used by hands only? The law seems to basically protect carpenters, painters, potters, and other daily labourers.

889. Another problem associated with the properties mentioned here is their scope. Whether traders fall here or not is not clear. This is because the word 'trade' is used here. The concern of the provision here is to protect the daily labourer and as such traders do not seem to fall here.

890. Another category of exemption includes cattle and seed-grain that are necessary to enable the judgment-debtor to earn his livelihood (404(c). This provision aims at protecting judgment-debtors who base their livelihood on agricultural activities. The properties of judgment-debtors who are agriculturalists that are exempt from attachment here are cattle and seed-grain that are necessary to enable him to sustain his life as per the English version of Article 404(c); however, the Amharic version seems to include other properties that are considered to be necessary to the decree-debtor by the court. The Amharic version seems to extend the exemption to other properties that are necessary for agricultural activities. This may include for instance, fertilizer, tools, etc.

891. Nowadays, some agriculturalists use combiners, tractors, and so forth to run their agricultural activities, and whether or not they fall under Article 404(c) and benefit from exemption is subject to question. The law does not seem to take into account these types of agriculturalists and provide protection to them.

892. Food and money necessary for the judgment-debtor and his family for three months are also exempted from attachment (Article 404(d)). The amount of money and food exempted from attachment is to be determined at the discretion of the court. The court considers the means of income of the judgment-debtor and other considerations in determining the amount of money and food exempted from attachment.

893. Pensions and alimonies are also exempted (Article 404(e)). As per Article 404(e), pension is totally exempt from attachment. However, the Public Servants Pension Proclamation provides that part of the pension may be subject to attachment where it is ordered by a court. It seems that there is a contradiction between these two laws in as far as attachment of pension benefit is concerned. One can resolve it by the principle that the latter law prevails over the former, or one can also say that this is a contradiction between the substantive law and procedural law and in that case the issue is whether attachment is a question of procedural law or substantive law. Once this is resolved, then the appropriate law is applied. Attachment issues are considered to be procedural matters and largely governed by procedural laws and, hence, is a question resolved by procedural rules.

894. Salary is subject to attachment but the law puts limits to the amount of salary subject to attachment. The law exempts some portion of the salary from being attached. It is only up to one-third of the salary that can be attached. There is a possibility that the entire salary may be exempted from attachment provided that the salary earned by the judgment-debtor is ETB 2 per day. It means, in other words, that the salary earned by a person should be ETB 60 or less so that it be exempted from attachment.

C. Modes of Attachment

895. The mode of attachment to be used depends on the type of decree issued. It is actually the responsibility of the decree-holder to identify the mode of execution to be used to enforce the decree issued in his favour (Article 378(3)(j)(ii)).

896. When the movable property is in the possession of the decree-debtor, the mode of attachment is the actual seizure of it (Article 406).

897. When the decree relates to agricultural produce, the mode of attachment is to affix a warrant of attachment in the place where the agricultural produce is found. Once it is affixed the produce shall be deemed to have passed into the possession of the court (Article 407).

898. When the property to be attached is the salary of an employee, the mode of attachment is to order the employer to withhold the amount from the salary of the decree-debtor as the court may direct. This is because it is the duty of the employer to pay salary to employees at the end of each month (Article 411).

899. Note here that it is only one-third of the decree-debtor's salary that is subject to attachment as per Article 404. There is the possibility that the entire salary may be exempted from attachment if a person earns ETB 2 or less per day. If the property to be attached is a share of the decree-debtor in movable property, the mode used is to give notice that he is prohibited from transferring the share or interest in it (Article 410).

900. If the decree relates to immovable property, the attachment is made possible by an order prohibiting the judgment-debtor from transferring or charging the property with the right in rem and also prohibiting any person from taking any benefit from such transfer or charge (Article 414).

901. The attached property can be released on certain grounds. Three reasons can lead to the withdrawal of attachment under Article 415:

– where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into the court;
– where the satisfaction of the decree is otherwise made through the court or certified to the court; or
– where the decree is set aside or reversed.

902. In such instances the attachment shall be deemed to be withdrawn. The first is when the decree-debtor pays into the court the amount specified in the decree issued against him together with the costs for attachment. The second is when satisfaction of the decree is certified to the court. The third is when the decision made is set aside or reversed upon its review by the court of rendition or by the appellate court. When the decree is set aside or is reversed, the attachment loses its bases, and hence, the property attached shall be released.

903. Another ground for withdrawal of attachment is provided under Article 417. As per Article 417, attachment is withdrawn if there is a default of the judgment-holder at the execution stage. The following examples elaborate the instances whereby you may say there is a default of the decree-debtor.

904. For example, if the decree-holder fails to appear at a fixed date during an execution proceeding, his non-appearance amounts to default, which results in the dismissal of his application for execution. Upon dismissal of his application of execution, the attachment shall cease, which means that it is withdrawn.

905. Another example whereby you could say that there is default of the decree-holder is if he fails to deposit security to effect the execution in his favour. That means the court may demand the decree-holder to furnish security as a pre-condition for the purpose of execution. The security is necessary in cases when the decree-debtor has appealed the decision and the appeal is pending. Thus, in case the decree is reversed, the security protects the interest of the decree-debtor.

906. The third ground for the removal of attachment is found under Article 419. If an objection is raised to an attachment on the ground that the property is not subject to attachment and the court is convinced that the property is not actually liable to attachment, it shall make an order that releases the property from attachment (Article 419(1)).

907. The effect of withdrawal of attachment is that the property that was attached is to be given back to the decree-debtor.

908. Attachment can be ordered before or after judgment is rendered. An attachment made before decision is given is considered to be one of the provisional remedies. This is because it has a temporary effect. It remains in effect until a decision is given. If a decision is given, it may not have effect depending on the outcome of the decision.

909. The reason why attachment before a decision is made is because the defendant or plaintiff against whom a counter-claim is made is about to deposit of the whole or part of his property or is likely to do same, or is about or likely to remove the whole or any part of his property from the area with a view to obstructing or delaying the execution of any decree that may be passed against him. It can be withdrawn if security for the execution is furnished, or when a suit itself is dismissed (Article 153(4)).

910. Attachment is ordered after a decision is given when the decree-debtor fails to satisfy the decree issued. The modes of execution, property not liable to attachment,

and the removal of attachment we discussed earlier apply to the attachment made after a judgment is delivered and decree is issued.

911. It is possible that an objection to attachment can be made. The possible grounds of objection to attachment include; that the property is not liable to attachment (i.e., it falls under Article 404), or that the decree is already satisfied, or that the property attached does not belong to the decree-debtor or defendant, etc.

912. The objection to attachment is made to a court that executes the decree. This court can be the court that passed the decision and issued the decree or the transferee court (i.e., the court to which execution is transferred). After receiving the application of objection, the court investigates the merit of the objection raised and decides on it on the basis of Articles 418–420. A claim or objection is made by presenting a written application to the court executing the decree.

D. Sale

913. After attachment, what comes is sale of the property of the decree-debtor, if any objection to attachment has been resolved based on Articles 418–420. The proceeding in sale is initiated by application as indicated under Articles 422(1) and 424(1). Sale of the property attached is made by an officer of the court or a person appointed for this purpose (the person conducting sale is known as auctioneer).

914. As a rule, the sale shall be made by public auction. There is a possibility that the sale may be made in a private contract at the request or with the consent of the judgment-debtor and after hearing the decree-holder. Sale in private contract may not be ordered if the judgment-debtor opposes it. This is because Article 422(3) demands that both should agree.

915. Sale by public action involves the proclamation of sale. It is the court that executes a decree that shall cause the proclamation of sale to be made. The purpose of such a proclamation is to invite potential bidders to compete.

916. The places where proclamation of sale shall be published are provided under Article 414(2) in case of immovable property and 425(2). The proclamation under Article 414(2) does not apply at present. Usually, proclamation of sale is published in newspaper.

917. In public auction, the sale is concluded if the lot is knocked down. Sale may be stopped if the decree-debtor satisfies the decree issued against him before the lot is knocked down. Thus, the decree-debtor can still save the property by paying the amount of the debt and the costs before the sale is complete.

918. The time to carry out the sale is provided under Article 426. According to this Article, no sale may take place without the consent in written form of the judgment-debtor until at least thirty days after publication of the proclamation, in case of immovable property, and fifteen days after publication, in case of movable

property. The exception to this rule is where the property is subject to decay or is of a kind that must be stored at a cost in excess of its value. In such case, the property may be sold immediately after attachment without the need of a proclamation.

919. The purpose of the period under Article 426 is to give potential bidders sufficient time to think of the sale and then decide whether or not to take part in the bidding. The decree-holder may not take part in the bidding without the written permission of the court. The law does not at all prohibit the decree-holder from participating in the bidding but his right is restricted. It is subject to the permission of the court. The purpose of the restriction is to enable the court to impose conditions on the decree-holder whenever the court thinks it proper.

920. Whenever the decree-holder purchases the property without permission of the court, or somebody has purchased it on his behalf, the court may, upon application of the judgment-debtor or any other person whose interests are affected by the sale, set the sale aside and direct a resale (Article 430(3)).

921. The auctioneer or any other person entrusted with the task of conducting the sale cannot take part in the bidding. See Article 431(1). This restriction is imposed in order to make them perform their functions impartially. If they are found to have taken part in the bidding, the sale may be set aside (Article 431(2)).

922. Sale of immovable property made may be set aside on the basis of different grounds. The first ground that can cause the setting aside of sale of such property is when the judgment-debtor had no saleable interest in the property sold (Article 446).

923. The second ground that can cause the setting aside of sale of immovable property made is if there is a material irregularity or fraud in publishing or conducting it (Article 445). This is, for instance, if the quality of the house sold was concealed or wrongly described and found out, after the sale, to be of low quality.

924. Generally, when the proclamation made contains a wrong item, it can cause the setting aside of a sale.

925. The third reason for setting aside the sale of immovable property is when a third person has already acquired title over the property before such sale (Article 444). For example, if the judgment-debtor has already sold the property before he was sued and transferred ownership to another person, such property cannot be attached and sold. This is because it is no longer the property of the decree-debtor. If, however, such property is attached and sold, the person who acquired title over it can oppose the sale and get it set aside.

926. The fourth reason for setting aside of a sale made by public auction is when the purchaser fails to pay the remaining payment after he is declared to be the purchaser. For instance, the purchaser is supposed to pay 25% of the sale immediately after the sale is concluded, and the remaining shall be paid within fifteen days (Articles 440 and 441). If he fails to pay the remaining 75% within fifteen days, the sale can be set aside (Article 442).

927. The fifth ground that causes setting aside of a sale is where the decree-debtor has participated in the bidding or somebody has participated on his behalf and purchased the property without the permission of the court (Article 430(3)). This rule is applicable to both movable and immovable property sold.

928. The same rule is applicable to auctioneers and other persons engaged in conducting the sale (Article 431(2)). This rule also applies to both movable and immovable property.

929. In relation to movable property, sale of movable property made may be set aside on the basis of very limited grounds, unlike immovable property, whereby there are many reasons. This is made deliberately so that it goes in line with the nature of movable property.

930. The first reason that causes the setting aside of sale of movable property is provided under Article 435. The setting aside under Article 435 is made where there is irregularity in the sale and the irregularity causes injury to any person who alleges the injury. Here, there must be a connection between the irregularity and injury so that setting aside of a sale made is ordered. Unless there is injury as a result of such irregularity, no setting aside of a sale will be ordered.

931. Setting aside of the sale of movable property may also be ordered for the reason stated under Articles 430(3) and 431(2) as we discussed earlier.

932. There are problems arising from implementation of Article 428 in practice. Its application gives rise to differences in its interpretation among different courts and even among divisions of the same court. As a result of differences in its interpretation, different decisions have been given.

933. Article 428 provides that if there is no one to provide the sum equal to the one specified in the proclamation of sale by auction made as per Article 423(2) at a sale, a second by auction shall be proclaimed in accordance with Article 423(2). The sale in such case shall be effected to the highest bid irrespective of the amount stated in the proclamation. There are basically two lines of arguments over its interpretation.

934. Some judges are of the opinion that there must be bidders at the first auction by sale so that sale will be effected at a second sale to the highest bid at the second action regardless of its amount. As per this argument, if there are no bidders at the first auction after the sale is proclaimed, the rule under Article 428n does not apply. These judges support their argument by the phrase ‘Where the highest bid at a sale by auction does not reach a sum equal to the values stated in the proclamation’ that is found under Article 428(1). According to them, this phrase indicates that bidders appear and the bid took place but the bidders could not provide the sum equal to the one specified in the proclamation of sale by auction. Thus, if no bidders appear, the mere fact that a sale by auction is proclaimed does not constitute that the first auction has taken place. Hence, if there is no first auction, one cannot say that there is second auction if the sale is proclaimed again and bidders appear as a result of a second proclamation.

935. The other judges are of the opinion the phrase 'Where the highest bid as a sale by auction does not reach a sum equal to the value specified in the proclamation' does not necessarily demand the appearance of the bidders at the first auction. If no bidders appear as per the proclamation made and no one is there to provide the sum equal the value stated in the proclamation, it is considered as if the first bid had taken place. Thus, the sale shall be effected to the highest bid at the second auction proclaimed.

936. In considering these two lines of arguments over Article 428, you should take into account Articles 428(2) and 394(2) also the purpose of the Civil Procedure, one of which is to achieve speedy trial of cases.

§2. Execution of Foreign Judgments

937. Sometimes, it is possible that a decision given abroad may be brought before Ethiopian courts for the purpose of execution. The rules governing enforcement of foreign decisions are incorporated under the Civil Procedure Code. There is no treaty in place that binds Ethiopia in relation to execution of foreign judgments. Hence the rules applicable are the ones enshrined under the Civil Procedure Code.

I. Rules Applicable in the Absence of a Treaty

938. Unless there is international convention or treaty to which Ethiopia is a party, the enforcement of foreign decisions in Ethiopia is governed by the provisions of the Civil Procedure Code, Articles 456–461. If there is a specific international convention or treaty that bids Ethiopia and that deals with enforcement of foreign decisions, the provisions of the Civil Procedure Code on enforcement of foreign judgments do not apply. In the absence of such binding Convention on execution of foreign decisions, the provisions of the Civil Procedure Code dealing with enforcement of foreign decisions apply to foreign decisions sought to be executed in Ethiopia.

939. The enforcement of foreign decision falls under the jurisdiction of the Federal High Court as provided under Article 11(2) of Proclamation No. 25/96. The amount of money involved does not matter here. This is because the jurisdiction is given to the High Court depending on the type of suit. Hence, even if the amount stated in the foreign decision to be executed in Ethiopia is less than ETB 500,000, the court that has jurisdiction is the High Court. As discussed under the topic on issues relating to jurisdiction, the Federal High Court has subject-matter jurisdiction on four types of cases specified under Article 11(2) of Proclamation No. 25/96, namely, cases relating to nationality, private international law, enforcement of foreign decisions, and transfer of cases from the Federal First Instance Court.

940. Even if jurisdiction in relation to enforcement of foreign decision is given to the Federal High Court, it does not mean that regional courts are not entitled to execute foreign judgments. This is because the powers of federal courts are delegated to regional courts. Accordingly, the application to enforce foreign decisions should be

filed to the Regional Supreme Court because jurisdiction of the Federal High Court is delegated to the Regional Supreme Court.

II. Procedures on and Conditions Related to the Execution of Foreign Judgments

941. A party who applies to get a foreign decision executed in Ethiopia shall file three things to the Federal High Court. See Article 457. The first one is a written application requesting execution in Ethiopia. The second is a certified copy of the decision to be executed. It means that a party cannot initiate execution proceedings in Ethiopia if he produces a mere copy of the decision. It must be indicated on the copy that it is a certified copy. The certification here is to be made by the foreign court that has rendered the decision sought to be executed in Ethiopia.

942. The third is a certificate issued by the court that passed the decision indicating that the decision is final and enforceable. The certificate must be one issued by the president or registrar of the court who has given the decision.

943. The execution of foreign decisions in Ethiopia is subject to the fulfilment of certain conditions under Article 458. The first pre-condition is that the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given. This rule manifests the concept of reciprocity under international law. It means that the decision of a certain foreign court's decision in Ethiopia may not be made if the decision of Ethiopian courts is not done in that country. For example, if US courts do not enforce Ethiopian courts' decisions, the Ethiopian courts will not as well enforce decisions of US courts' decision. Whether or not a certain state does not recognize and enforce Ethiopian courts decisions is to be implied from the nature of the relations that exist between Ethiopia and the state concerned that one can decide as to whether or not the requirement under Article 458(a) is fulfilled. The second requirement is that a court duly established and constituted should give the judgment sought to be executed in Ethiopia. The foreign court that gave a decision should be one set by law. It means that the court should be conferred upon judicial power by specific legislation enacted. The third is that before the decision was given by the foreign court, the summons must have been duly served on the judgment-debtor. If the debtor of a foreign judgment has not received a legally sufficient summons, which resulted in his failure to appear before the court, the foreign judgment cannot be executed. The fourth requirement is that the decision given abroad must be a final and an enforceable one. According to the Ethiopian Civil Procedure Code, final decision means the decision that is conclusive and brings an end to the litigation between the parties before the court that heard the case. Finality clause applicable to appeal applies here as well. Hence the finality does not mean that a party should have exhausted possible available appeal against the decision given. One can also approach finality from the perspective of the law of the country that passed the decision. However, if the certificate produced with the application for execution of foreign judgment indicates that the decision is final and enforceable, the decision should be considered to be a final one. The fifth requirement is that the execution made in Ethiopia should not be contrary to public order and morality considerations. For

example, if the subject-matter of the case decided in foreign state is moral but is considered to be immoral in Ethiopia, such decision may not be executed in Ethiopia. The foreign judgment to be executed in Ethiopia should not be contrary to the conduct, customs, and accepted practices in Ethiopia.

944. If these requirements are fulfilled, the court shall enable the party against whom the decision is to be enforced to present his comments regarding the execution. The court is empowered to decide whether or not pleadings may be submitted. Where it believes that there are some doubts as to particular issues, it may suspend its decision for the purpose of clarifying the doubts.

945. Basically, the decision on application filed for execution is based on the application unless the court decides to hear the parties for some special reason. If the court accepts the application for the execution of foreign decision and grants permission to execute it, the decision is executed as though Ethiopian Courts had given it.

Part X. Arbitration

§1. Law Governing Arbitration

946. Arbitration is one of the peaceful mechanisms of settlement of disputes. It is a mechanism of resolution of controversies outside regular courts. Matters subject to arbitration are regulated by the Civil Code. Look at Articles 3325–3346 of the Civil Code. The procedures to be applied by the arbitration tribunal, execution of decisions of arbitration tribunal, and appeals from arbitration tribunal shall be governed by the Civil Procedure Code. The procedural rules on arbitration may not affect the substantive rules on arbitration found in the Civil Code. This is in line with the relationship between substantive rules and procedural rules. Procedural rules are there to enforce rights and duties provided by the substantive law.

947. Settlement of disputes arbitration or referring of cases to arbitration is one of the grounds of preliminary objections under Article 244(2) (g). It is a type of preliminary objection that may be waived if not raised at the earliest possible opportunity. It the party fails to raise the objection based on arbitration at the time fixed under Article 244(3), the court can look at the case and no such objection may be raised later on. The court is not entitled to raise such objection even if it knows that the matter is settled by arbitration.

948. The provisions of the Civil Procedure Code providing for procedural rules governing arbitration apply when arbitration is required by law or the parties to have entered into a written agreement to submit present or future differences to arbitration. Thus, settlement of disputes by arbitration may be imposed on parties by law where the law requires them to refer the matter to arbitration. Here, it is the law that initiates arbitration proceedings. It may also be initiated by a written agreement of parties. The parties may agree to submit their present or future disputes to arbitration. Where parties agree to submit their present or future dispute to arbitration, the agreement is treated as contract and, hence, all the provisions of contracts in general shall apply to it. Thus, elements that establish a valid contract are also necessary for the conclusion of a valid agreement on arbitration. That is why Article 315(3) says that capacity is a requirement for persons who intend to submit their disputes to arbitration. Submission of disputes to arbitration is one of the juridical acts that bind parties to it. Hence, to perform such act, the parties need to have capacity.

§2. Matters Subject to Arbitration

949. Not all disputes can be settled through arbitration (Article 315(2)). This Article provides the scope of application of procedural rules relating to arbitration and implies that there are some matters that may not be settled by arbitration. For example, parties to a dispute on administrative contract may not refer it to arbitration. Thus, disputes on administrative contracts are non-arbitrable. For the definition of administrative contract read the Civil Code. Generally, if the law prohibits matters from being referred to arbitration, such matters may not be subject to arbitration (Article 315(2)).

950. The general rule with respect to matters subject to arbitration is that all matters are capable of arbitration unless the law provides otherwise.

§3. Arbitration Agreement

951. Article 3345 of the Civil Code defines arbitration. According to this provision, arbitration is the process whereby the parties to a dispute entrust its settlement to a third party, the arbitrator, who undertakes to resolve the dispute in accordance with the principles of law. Thus arbitration is an agreement and is, therefore, subject to the provisions of substantive law relating to obligations in general and contracts in particular.

§4. Arbitration Tribunal

952. There is no specific arbitration tribunal set up by law in Ethiopia. It is left to the parties themselves. An arbitration tribunal that deals with commercial and business disputes was been set up by the initiative of individual lawyers, Ethiopian Arbitration and Conciliation Center was set up as a company with a view to providing an alternative mechanism for private dispute resolution <www.eacc.com.et>.

953. As a rule, it is the parties who are responsible for the selection of arbitrators that consider their cases.

§5. Arbitration Process

954. Once disputes are referred to arbitration, the procedures to be applied by arbitrators must, as far as possible, be the same as ones applied by a civil court. See Article 317(1). This does not mean that the procedures to be applied by arbitrators are as rigorous as the ones used in a civil court. If all the formal procedures that apply

to a civil court apply to arbitration, it defeats the purpose of submission of cases to arbitration. One of the reasons parties may decide to submit cases to arbitration is to avoid the expenses and time involved in court proceedings. It is a quick mechanism of getting disputes resolved.

955. The rule under Article 317(1) means that there must be a hearing, consideration of evidences of the parties, examination of witnesses of the parties, if any (Article 317(2)). In addition, the procedures on issuance of summons to witnesses under Article 111 and the following provisions of the Civil Procedure Code apply to cases subject to arbitration (Article 317(3)). The point here is that the arbitration proceedings must make sure that there is a fair hearing of cases and that both parties must be given equal opportunity to participate in the litigation. Hence, the arbitration proceedings shall involve informal procedures. It is the informality of procedures that enables arbitration proceedings to make a decision within a short time.

956. As a rule, it is the parties who are responsible for the selection of arbitrators that consider their cases. However, if the parties give the power appointment of arbitrators to a court, or if the arbitrators appointed by parties are disqualified or removed, such appointment may be made by any court. See Article 316(1). The amount of money involved in the dispute does not affect the power of the court to appoint arbitrators. For example, if the amount of money involved in a case brought before arbitration is ETB 600,000, this does not prohibit the First Instance Court from appointing arbitrators that consider this dispute. Actually, the First Instance Court does not have jurisdiction to see this case because it is beyond its jurisdiction. This lack of jurisdiction to consider the case does not preclude it from appointing arbitrators to this case.

957. A person appointed as an arbitrator must forthwith disclose, in writing, whether he accepts or refuses to act as such. Judges are not eligible for appointment as arbitrators, although they may be appointed as family arbitrators.

958. It is the parties that fix the time when a decision, the arbitral award, shall be made and such time may be extended by the parties. See Article 318(1).

959. The manner and form as to how to make the arbitral award are subject to the rules under Articles 180–184 of the Civil Procedure Code. The rules under Article 318(2, 3, and 4) are similar to ones found under Article 180 and the following provisions of the Civil Procedure Code dealing with the manner and form of giving decisions by a civil court.

960. Arbitrators are entitled to remuneration. The fees to be paid to arbitrators are fixed by the parties. If the parties do not fix it, the arbitrators determine it in the arbitral award given.

§6. Arbitration Award

961. Arbitration awards are as binding as a decision of court. Once a case is settled by it, the matter can be as an objection if a suit is brought to the court on the issue resolved by arbitration. Appeals from arbitral awards shall be governed by the rules under Articles of the Civil Procedure Code. The execution of arbitral awards is also subject to the same rules applying to the execution of decisions rendered by civil court (Article 319(2)).

§7. Review

962. The appeal from arbitral award is to be taken to the court, which would have had appellate jurisdiction had the dispute in which the award was given not been referred to arbitration. For example, if the case involving ETB 600,000 was settled by arbitration, appeal from such case shall be filed to the Supreme Court. This is because if such case was not seen by arbitration, the court that would have first instance jurisdiction over the case is the High Court. Hence, an appeal from the decision shall be filed to the Supreme Court.

963. The grounds of appeal are provided under Article 351. The grounds are mainly related to: (a) Content of the arbitral award. An appeal can be filed against an arbitral award if the award is inconsistent, uncertain, or ambiguous or is wrong on its face, in matter of law or fact, or when the arbitrators omitted to decide matters referred to them (Article 351(a and b)). (b) Problems with proceedings of arbitration. Here, appeal can be filed against arbitral awards where there are irregularities in the arbitration proceedings, which include failure to inform one party or both of them as to the time or place of the hearing; refusal to consider evidence of material witness; hearing of one party only, that is, failure to hear both parties (Article 351(c, d(i))). (c) Conduct of arbitrators. Here, if the arbitrators was duly influenced by one party for the reason that they received bribes or otherwise, or if the arbitrator had an interest in the matter itself, appeal may be filed against the arbitral award (Article 315(d) (ii and iii)). Here, the reason for appeal is the misconduct of arbitrators in the sense that the arbitrators received bribes or had an interest in the case itself that made them give a biased decision.

964. The appellate court that considers the arbitral award may confirm, reverse, vary, or remand the award to arbitrators (Articles 353 and 354). These powers are the same as the ones applying to decisions of civil courts on appeal under the Civil Procedure Code. There is a possibility that one of the parties to an arbitral award may request the setting aside of the award. Such request for setting aside is subject to the rules under the Civil Procedure Code.

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