Law Of Civil Procedure I

Chapter I: Introduction To Civil Procedure: Conceptual And Historical Background (6hrs)

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Chapter I: Introduction To Civil Procedure: Conceptual And Historical Background (6hrs)

The Nature & Functions of Civil Procedure Law

A. The Nature of Civil Procedure Law

- Civil procedure is that body of law which deals with the ***processes*** of adjudicating **a civil case** before a court of law
- Civil procedure law tells us the ***"processes"*** we need to employ to enforce our rights & obligations defined by **the substantive law**.
- **What are these *"processes"* of adjudication?**

- These include, but not limited to:
  - Determination of court of jurisdiction
  - The form & contents of pleadings
  - The hearing of parties and their evidences
  - The form & contents of judgments & decrees
  - Reviews of decisions
  - Execution of decrees, etc.
- ‘**justice rushed is justice crushed**!’,
- **‘justice delayed** is **‘justice denied’,**

- It is a '***means to an end'; not an end in itself-the end being the enforcement of rights and obligations.***
  - It is an "adjective" law-lacks its own independent existence.
  - You don't have it for the sake of it
  - You don't apply its rules for the sake of nicety, for the sake of formality
    - **Substantive vs procedure**
    - **Civil case vs Criminal case**

Substantive Vs Procedural Laws:

One Way of classifying laws

- **substantive** and **adjective**.
  - **Adjective rules**
    - **procedural** and **evidence** laws
- **Substantive laws,**
  - define rights, duties, privileges and liabilities of persons and
  - set out regulatory norms for their mutual relations in their ordinary course of life and seek to avoid disputes between and among individuals and groups in a society.

- They intend to achieve this by
  - carefully delimiting their respective legal spheres;
  - by, primarily, predefining their rights and the corresponding duties in an intelligibly ascertainable manner- adjusting human conducts

- **prescription without application is nothing but pretence.**
  - the rights and duties envisaged by the laws would mean nothing unless they are fully enforced; most importantly, when they are breached or violated.
  - one may comfortably conclude that procedural rules, in essence, **give effect ("life") to the ends sought to be achieved by substantive laws.**

- **The law of procedural rules, unlike substantive laws, is commonly deemed operative from the day of their coming into effect** to all cases pending in such very day and there after (Art 1 of the Cv. Pr).
  - laws affecting substantive rights are, in principle, construed to be non-retroactive in effect;

- **The other broad criterion for distinguishing between the two areas of rules is connected** to their respective **contents (purposes)** and the **functional correlations** between them.
  - Rights and duties, remedial mechanism
  - Conduct outside and inside court room

Court To Consider Procedural Rules By Its Own Initiation

- Art 1856(2) ,period of limitations should be pleaded by the parties;
- Civil procedure code Art. 78, 49, …….court

Civil Vs Criminal Cases

- **The nature of the legal interests to be preserved:**
  - violations of legal interests recognized and protected by law -are considered to be **legal wrongs** thereby **entailing liabilities** and **incurring legal sanctions** upon the wrongdoer.
  - These wrongs and the attending liabilities are, considered to have either **private** or **public** nature.

- The breaches of private rights, affecting **individual interest-----civil injuries**;
- violations of **public interests**, affecting the society as a whole----**crimes**.

- **The purpose of initiating a law suit and the nature of the relief**
  - **criminal law**
    - **Purpose** maintenance of peace and order of the general public
    - **Relief** focus's basically **on punishing or rehabilitating the wrongdoer.**
  - **civil Law**
    - purpose repairing the wrong---
    - the remedy given by courts in **are** damages, injunction, ….etc

- **The Nature Of The Parties Instituting The Legal Action**
  - Criminal actions must be initiated by the government, and
  - Civil actions can be filed by **the aggrieved party himself** (or his legal pleader);
    - A physical person against another physical person”; or,
    - “A physical person against a legal person “, or,
    - “A legal person against another legal person

- **Availability Of Alternative Dispute Settling Mechanism**
  - civil cases are subject to negotiations;
  - the parties are not at liberty to negotiate in criminal case
  - *prosecutions, are free of cost to the aggrieved party;*
  - *Civil actions are not free of cost to the aggrieved party;*

B. The Functions of Civil Procedure Law

- General function: enforcement of substantive rights & obligations-its ultimate objective
- The difference between good and bad handling of procedure can make the difference between winning and losing.
- ***Rights are meaningless without remedies. Procedural law is the law of remedies.***

So Civil Procedure Law:

1. Ensures that the "***outcomes*** of judicial proceedings (judgments & decrees) are consistent with the rules of substantive laws
2. Ensures that the **"processes"** of adjudication is fair;
   - the losing party must feel he has had his 'day in court', i.e. the opportunity to defend his rights even if he lost the case

The Objective of Civil Procedure Law

- the overriding objective serves as ‘ *a compass to guide courts and litigants* and legal advisers as to their general course
- The overriding objective, is to ‘enable the court to **deal with cases justly**’, which includes, so far as is practicable:
  - (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;

- (c) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party;
- (d) ensuring that the case is dealt with expeditiously and fairly; and
- (e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

- **Court to ‘seek to give effect to the overriding objective when it**
  - (a) *exercises any power given to it by the Rules, or*
  - (b) *interprets any rule’.*
- *‘Dealing with cases justly’ is exemplified by the principle that a litigant should* not be prevented from pursuing his claim merely because he is technically in breach of a procedural rule.

- *'Doing justice' means that the courts ought* to decide claims as far as possible on their merits, and not reject them on grounds of procedural default.
  - where a party commences with the wrong form, or
  - relies on a wrong statutory provision, or
  - makes an error in quantifying his claim so that the amount claimed is a serious underestimate of his loss,
  - permission to amend should readily be given, especially where the defendant has not been misled by the errors

- Is any objective expressly stated in the Ethiopian Civil Procedure Code?,
- If not, can you deduce its objective from its nature?
- The efficient and effective administration of civil justice?
  - Efficient in term of time, energy, money (cost) involved in litigation-cost cutting
  - Effective in terms of decisions in line with substantive law rules.

- **Its interpretations and applications should be guided by its ultimate objective of enforcing & advancing substantive rights**
- Utmost care must be taken so that substantive rights should not be lost for the sake of procedural nicety or due to wrong understanding and application of procedural rules.

The Overriding Objective And Methods Of Interpretation

- It is perhaps self-evident – but is nevertheless worth stating expressly – that one effect of the overriding objective will be a more purposive approach to the interpretation of the new rules.
- Questions of construction of the CPR will, or should be, approached with the overriding objective in mind, rather than as a matter of narrow and detailed syntactical analysis.
- 'For the letter killeth, but the spirit giveth life.'

- **How do you think should our Rules of civil procedure be interpreted?**

Fundamental Procedural Rules

- ICCPR 14(1) defines the right to a fair trial.
- It recognizes that **'all persons' are 'equal'** before the courts and are entitled to a **'fair and public hearing'** in the determination of any 'criminal charge' or of 'rights and obligations in a suit at law' **by a 'competent, independent and impartial' tribunal 'established by law**

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

- **Neutrality of the Presiding Judge**
  - Personal Bias…… **impartial justice without fear or favor, free of bias**
  - Pecuniary/ Subject-Matter Bias-- No one should be a judge in his own case, conflict of interests

- **The Right to be Heard**
  - **Notice** has to be given to the party before the proceedings start and,
  - A party has to be given an adequate and reasonable (effective) opportunity to explain

- **Equality of Treatment**
  - each party to a law suit should be treated equally without discrimination of any sort
    - getting legal aids (services)
    - Rule Equality, Same issues should be resolved through similar legal rules
    - Outcome Equality ,Similar issues, under same circumstances, should have similar outcomes

- **The right to a fair trial requires judges to be impartial.**
  - "impartiality" is the state of mind of a judge towards a case and the parties to it, implies:
    - judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties
    - judges have no interest or stake in a particular case and do not hold preformed opinions about it or the parties.

- Cases must only be decided impartially; “on the basis of judge’s conscience and their interpretation of facts and in accordance with the law, without any restriction”.
- The concept of impartiality creates a correlative duty for judges to step down from cases in which they think they will not be able to impart justice impartially or when their actual impartiality may be compromised.

- **Minimum Requirements Of A Fair Hearing.**
  - Adequate opportunity (time and space) to prepare their case; the right to present arguments and evidence; and meet opposing arguments and evidence, either in writing, orally or by both means;
  - The right to be tried in his presence; to defend himself in person or through legal assistance of his own choice during all stages of the proceedings; and to be informed, if he does not have legal assistance, of this right;

- Decision based solely on evidence known to the parties to the proceedings;
- The opportunity to have a decision rendered **without undue delay** and to which the parties are **provided adequate notice and the reason thereof;**
- The right, except in the case of the final appellate court, to appeal or seek leave to appeal, decisions to a higher judicial tribunal;
- Deprivation of liberty must be in accordance with law
- An interpreter; if s/he cannot understand or speak the language used in the courts;

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

2. Public Hearing of a Suit

- **Justice must not only be done but must also be seen being done**
- In principle when the court undertakes such a hearing, the public at large, must have access to the litigation process (court-room) without, of course, negating exceptional situations of inherently confidential nature-wherein courts may consider cases in a closed chamber (“in Camera”).

3. Independence Vis-a-Vis Accountability of the Judiciary

I. Judicial Independence

- In general terms, “independence” refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts
- “Independence” requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers.
- ***Public confidence in the judiciary***
- ***Independence is necessary precondition to impartiality***

- **Judicial independence is not a privilege or prerogative of the individual judge.**
  - It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.
  - The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court;

- no outsider – be it government, pressure group, individual or even another judge should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision
- Judicial independence refers to both the individual and the institutional independence required for decision-making.
- Judicial independence is, therefore, both a state of mind and a set of institutional and operational arrangements.
- The former is concerned with the judge's independence in fact;

- the latter with defining the r/n ships b/n the judiciary and others, the other branches of government, so as to assure both the reality and the appearance of independence
- The r/n ship b/n these two aspects of judicial independence is that an individual judge may possess that state of mind, but if the court over which he or she presides is not independent of the other branches of government in what is essential to its functions, the judge cannot be said to be independent

- **A. Institutional Independence**
  - **The Bangalore Principles of Judicial Conduct**
  - All international human rights instruments refer to a fair trial by “an **independent and impartial tribunal”.**
  - The principle of an independent judiciary derives from the basic principles of the rule of law, in particular the principle of separation of powers
  - “there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law”.

- According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government.
- Different organs of the State have exclusive and specific responsibilities, it is not permissible for any branch of power to interfere into the others' sphere
- The principle of the separation of powers is the cornerstone of an independent and impartial justice system
- In fact, having a judiciary that is independent of the other branches of government is a necessary condition for the fair administration of justice as well as intrinsic to the rule of law.

- This notion means that the judiciary has to be independent of the other branches of government, namely the executive and parliament, which, like all other State institutions, have a duty to respect and abide by the judgments and decisions of the judiciary.
  - This constitutes a safeguard against disagreements over rulings by other institutions and their potential refusal to comply with them.
  - Such independence as to decision-making is essential for upholding the rule of law and human rights.

- **The *UN Basic Principles on the Independence of the Judiciary lay out***
  - ✓*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.*
  - ✓*It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".*
- Such independence is spelt out in black and white by the Constitution (Art. 79);
- **The notion of institutional independence is related to several issues.**

Financial Autonomy And Sufficient Resources

- The judiciary needs adequate resources to discharge its functions appropriately
  - Inadequate resources may render the judiciary vulnerable to corruption, which could result in a weakening of its independence and impartiality
- Another factor that undermines judicial independence and impartiality is the lack of participation of the judiciary in the elaboration of its budget.
- A further requirement regarding financial autonomy dictates that the judiciary should be autonomous to decide how to allocate its resources.

- **In Ethiopia:**
  - Courts have full authority over their internal and, financial affairs;
  - such as, the power of drawing up and implementation the administrative budget and management of its personnel (Art 79 (6) of the Constitution and Art 16. of Proc .No.25/96) : and,
  - the right to salary and pension
  - The 1995 Constitution declares the independence of the judicial branch and articulates the structure and powers of the courts.

Conditions Of Tenure And Promotion

Conditions Of Tenure

- lack of adequate security of tenure for judges have an adverse effect on the independence of the judiciary
- Unless judges have long-term security of tenure, they are susceptible to undue pressure from different quarters, mainly those in charge of renewing their posts
- Judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office

- The Constitution(Art. 81) prohibits the removal of judges before retirement age except for violation of disciplinary rules, gross incompetence or inefficiency, or illness that prevents the judge from carrying out his responsibilities.
- Such determinations are made by the State and Federal Judicial Administration Commissions, which likewise decide issues of

- One of the most common practices that affects judges' tenure is that of appointing "provisional judges", i.e. judges who not enjoy security of tenure in their positions and can be freely removed or suspended.
- Another way to impinge on judges' tenure is to make them undergo a rectification procedure at certain intervals in order to determine whether they can continue in office.

Promotion For Judges.

- Another way of guaranteeing the independence of the judiciary is by establishing a clear system of promotion for judges.
- *Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience*

- **APPOINTMENT**
  - lack of any independent mechanism responsible for the recruitment and discipline of judges limits the independent of the judiciary
  - through strict selection criteria and in a transparent manner.
  - Unless judges are appointed and promoted on the basis of their legal skills, the j judiciary runs the risk of not complying with its core function: imparting justice independently and impartially.
  - Thus, there are two crucial issues related to the appointment of judges.
    - appointment criteria ***and***
    - appointment ***body and procedure***

- **Appointment Criteria**
  - In order to avoid appointments that would seriously undermine the independence and impartiality of the judiciary,
  - International law specifically excludes selection criteria such as a person's political views, race or colour.
  - These motives are irrelevant to the judicial function, the exception being the requirement for a person to be a national of the State concerned

- **Under the Constitution, (Art.81(1-3))**
  - the President and Vice-President of the Federal Supreme Court are appointed by the HPR upon the recommendation of the Prime Minister;
  - other federal judges are appointed by the House of Peoples' Representatives from a list of candidates selected by the Federal Judicial Administration Commission.
  - The State Council shall, upon recommendation by the Chief Executive of the State, appoint the President and Vice-President of the State Supreme Court.

- State Supreme and High Court judges shall, upon recommendation by the State Judicial Administration Council, be appointed by the State Council.
- The State Judicial Administration Council, before submitting nominations to the State Council, has the responsibility to solicit and obtain the views of the Federal Judicial Administration Council on the nominees and to forward those views along with its recommendations.

- If the Federal Judicial Administration Council does not submit its views within three months, the State Council may grant the appointments.
  - Is the view of Federal Judicial Administration Council **binding on the State Council ?Or simply advisory?**
  - Does the constitution provide its effect?
  - if we look from the point of view of state sovereignty ,wouldn’t it amount to interference?
  - W/t about from function of state high and supreme courts? Delegation?

- A federal and State judge can be (**Article 79(4) of the constitution**)
  - any Ethiopian who "is loyal to the Constitution;
  - has legal training or acquired adequate legal skill through experience;
  - has a good reputation for his diligence, sense of justice and good conduct;
  - consents to assuming judgeship; and
  - is not under 25 years of age

- **The *UN Basic Principles establish that:***
  - *"Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.*
  - *Any method of judicial selection shall safeguard against judicial appointments for improper motives.*
  - *In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status,*

- *except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.*

- **Appointment *Procedure***
  - it is preferable for judges to be elected by their peers or by a body independent from the executive and the legislature.
  - *The authority taking the decision on the selection and career of judges should be independent of the government and the administration.*
  - *In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules*

In Ethiopia Proclamation 24/1996.

- Judicial Administration Commissions have been established by legislation at all levels of government
- These commissions have extensive powers and duties to recommend candidates to fill judicial positions, issue and enforce disciplinary and ethical standards, investigate disciplinary complaints, and decide issues concerning the transfer, salary, allowance, promotion, suspension, medical benefits, assignment, and termination of judges

- **The independence of the judiciary requires it to have exclusive jurisdiction over all issues of judicial nature and to decide whether an issue before it is of judicial nature.**
  - As a corollary, judicial decisions cannot be changed by a non-judicial authority, except for cases of mitigation or commutation of sentences and pardons

Fundamental Freedoms

- *members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly;*
- *provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*
- This reaffirms the importance of these freedoms as a means for judges to protect their independence

Eg. Freedom of association

- play an essential role in ensuring that the independence of the judiciary and the rule of law are respected.
- bring judges together and allow them to organise themselves in order to defend their independence and that of the judicial profession more effectively

- **B. Functional Independence/Personal Independence**
  - For a trial to be fair, the judge or judges sitting on the case must be independent
  - apart from any system of appeal, a judge deciding a case does not act on any order or instruction of a third party- inside or outside the judiciary.
  - in the process of discharging their judicial tasks, judges should be free, internally, from their own colleagues and/or from the influence of superior courts;

- or, externally, from any kind of outside intrusion, fear or influence; and they should solely be bound and guided by the law.
- the irremovability of judges by the executive must in general be considered as a corollary of their independence
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law,
- without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

- A judge must act irrespective of popular acclaim or criticism
- Outside influences must not colour judgment
- Any attempt to influence a judgment must be rejected
- A judge must be independent of other judges
- Judge not obliged to report on merits of a case
- Attempts to undermine judicial independence should be resisted

II. Accountability of the Judges

- it is a well established fact that if left **unregulated and unguided power** is liable to be abused.
- independence should not be left without restraint, there has to be credible means of safeguarding those cherished human values.
- Independence of the judiciary should not be taken as a special privilege of the judge himself.

- , litigants should be offered **reasonably adequate appellate opportunities**;
- judicial proceedings have to be **transparent and open** to the general public; and, judges should be ready and bold enough to **receive criticisms** on their decisions
- While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour.

- For this reason, judges must conduct themselves according to ethical guidelines. In order to provide judges with clear rules of conduct, several countries have approved codes of ethics to regulate judicial behaviour
- In the international sphere, the *Bangalore Principles of Judicial Conduct* contain the set of values that should determine judicial behaviour.
- These values, which are reflected in most codes of conduct, are: independence, impartiality, integrity, propriety, equality, competence and diligence.

- As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions.
- States have a duty to establish clear grounds for removal and appropriate procedures to this end.
- The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

- **4. Establishment of the Courts by Law**
  - In the fundamental principles of administration of justice, an item which, in reality, no less weighty than others, is the requisite for courts to be established by law.
  - , the **structures** of the courts; their **hierarchical relations** and their **comparable jurisdictions** have to be explicitly constituted by law; and,
  - only courts so established can assume judicial function.

- inherent in this premise is that **special or temporary bodies that take away judicial powers from regular courts;**
- **and by and large, do not follow procedures prescribed by law ought not to be set up.**
- **Judicial power should principally and solely be vested in the regular courts.**
- This is without negating the existence of the so-called **‘administrative tribunals’-** which are constituted by law and entrusted with some quasi-judicial (delegated) power

Assignment

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

The Two Models of Civil Procedure

- A legal “system,” “is an operating set of legal institutions, procedures, and rules,”
- while a legal “tradition” is “a set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in the society and the polity, the proper organization and operation of a legal system, and the way law is or should be made, applied, studied, perfected, and taught.

- *Thus, while it is difficult to speak of a singular and unvarying adversarial or* inquisitorial “system,”
- we can speak of two distinct traditions, each marked by a particular approach and theory of law

A. The Adversarial Model

- Common law system
- Parties lead the proceedings
- Judge acts as a neutral arbiter
- His position is passive :doesn't undertake any independent investigation into the subject matter of the dispute
- The trial procedure has to offer equal chances to the parties competing for their right before a jury.

- This system is much more competitive than the judicial system according to the continental legal systems
- His role is not to find the ultimate truth
- His duty is to oversee the proceedings and to ensure that all aspects of the procedure are respected
- He doesn’t himself interrogate the witnesses, his main task is to ensure that the questions put by the parties are relevant
- At the end, he decides the case according to the more convincing evidence.

"Common Law: England and America

- After the last pleading is served pleading is said to be closed. **This is the pleading Stage**
- If defense not served default judgment is given;
- Future procedural steps begins from the date of closing of pleading.
- The rules on this future timetable are called directions; timed as from close of pleading
- The crts lays down w/t future procedural steps are to be taken in action and a time table for those steps
- It covers procedural steps applicable between the period of closure of pleading and trial; **The Directions Stage**

- **Summons For Directions Before Master-(England) Pre-trail Conference-(America)**

❖ **Discovery ---**

- ✓ Discovery is designed to serve as the principal **mechanism by which mutual knowledge of all relevant facts, except privileged evidences, will be achieved.**
- ✓ The overriding purpose of discovery is nothing less than **to promote the ascertainment of the truth and ultimate disposition of the lawsuit** in accordance therewith.

- The combination of strict rules of pleading and compulsory disclosure further reduces the necessity of additional exchange of evidence
- Under the civil law there is no discovery as such.
- However, a party has a right to request the court to interrogate a witness or to require the opposing party to produce a document
- '**litigant-driven'** fact-finding process

Purposes And Effects Of Discovery Procedures

- **Obtaining Factual Information**
  - To go to trial with the best evidence available to prove his contentions and with good knowledge of the presentation that his adversary will make
    - Surprise and delay are thus avoided
    - The chance that the judgment will rest on accurate findings of fact is enhanced.

Narrowing The Issues

- Makes it unnecessary to rely heavily up on pleadings for exchanging information, narrowing issues, or disposing untenable claims or defenses
- It helps to eliminate fictitious issues, claims, or defense by revealing over whelming evidence on one side, there by paving the way for stipulations, settlements, and summary disposition
- To secure ,if possible, an admission of facts in the aid of proof, to supply the want of it and to avoid expenses.

Promoting Settlements And Just Results

- Facilitate more and earlier settlements by providing each side fuller knowledge of the strength and weaknesses of its case. Promote just settlement

Inspection---Request For Inspection Of Document & Other Things

- -of documents referred to in pleadings and affidavit
- A party can request and entitle to obtain documents, premises, electronically stored information and tangible things in the possession or control of the other party.

Exchange of Expert reports–Physical or Mental Examination

- disclose the expert witness's report on the matter ,since if not agreed up on an expert may be called on trial, e.g.. Medical report filed with statement of claim
- examined by a suitably credentialed expert if physical or mental condition of the person is in issue)

Request For Admission

- Request may be for genuineness of documents, the truth of factual allegations, or the applicability of legal concepts to specific fact in issue,
- This device resembles pleadings in that it isn’t to discover new information but to establish facts,
- Unless the recipient party denies the request they are deemed admitted for the purpose of litigation.

- **Interrogatories**
  - Written Qs to be answered by the party under oath,
  - Only to a party to an action.

Depositions ,Exchange of Witness statement—

- disclose the factual details of what your witness are going to testify on trial in the form of written report ; dated and signed by the witness
- Unlike interrogations, this means that the lawyer can follow up responses to obtain more information,
- The witness is usually represented by a lawyer who can object questions,
- The testimony is recorded and may be used as evidence at trial,

- **Interlocutory applications by affidavit……**
  - amendment of pleading and Request for further and better particulars of the pleadings
  - The value of the action-----if disputed
  - Application for an order of extension of time for carrying out a procedure
  - Application for setting aside of default judgment

- Application for Summary judgment…… where the plaintiff can show, affidavit evidence, that the defendant has no arguable defence ;to obtain early or speedy judgment before the trial.
- Interim payments and security for costs

Further procedures for obtaining evidence and information(Other Directions)

- Detention and preservation of property
- Interrogatories
- Notice to admit facts
- Discovery and inspection of documents and property in the possession of non-parties
- Photographs, sketches, and police accident report books----disclose where relevant
- Interlocutory injunction---in urgent cases, b/n commencement of proceeding and trial.

- **Settlement Of Actions----ADR**
  - Examining parties
  - Discussing with parties and look for better strategy
  - Discuss as to ADR
  - Clarifying what is not clear—amendment
- **Fixing a date for trial----and Trial**

Pleading Rules

- The pleading requirement in most common-law systems requires that the claimant state the claim with reasonable particularity as to facts concerning persons, place, time, and sequence of events involved in the relevant transaction.
- This pleading rule is essentially similar to the Code Pleading requirement that governed in most American states prior to adoption of the Federal Rules of Civil Procedure in 1938.9

- This rule was abandoned in federal courts in the United States in 1938 and replaced by Notice Pleading, which required a much less detailed pleading.
- The Principles and Rules require that pleading be in detail with particulars as to the basis of claim and that the particulars reveal a set of facts that, if proved, would entitle the claimant to a judgment.

Presentation Of Evidence.

- It is well known that in the civil-law tradition the evidence is developed by the judge with suggestions from the advocates,
  - while in the common-law tradition the evidence is presented by the advocates with supervision and supplementation by the judge.
- Furthermore, in many civil-law systems the evidence is usually taken in separate stages according to availability of witnesses,

- while in the common-law system it is usually taken in a consecutive hearing for which the witnesses must adjust their schedules.

- More fundamentally, the basic conception of the plenary hearing in the civil-law system has been that of an inquiry by the judge that is monitored by advocates on behalf of the parties,
  - while the conception of a trial in the common-law systems is that of juxtaposed presentations to the court by the parties through their advocates.

- **Common Law civil procedure is necessarily a very flexible and complex system.**
  - Because rules of procedure are often written in broad language and place only modest limits on the court's power or creativity, the American judge has considerable discretion in decision-making.
  - Moreover, the American judge also wields extensive control over the proceedings, parties, attorneys, and third parties.

- **The American judiciary has a broad social and political role.**
  - Judges often create substantive public policy and social regulation through precedents announced in the decision of private litigation.

The Jury System

- Although the judge plays a central role in the American legal system, the systemic effects of a jury system must also be considered in order to understand its technical procedural rules.
- the jury system, which necessarily interjects an element of amateur legal administration and consequently a degree of unpredictability and often high damage awards..

Division Of Proceedings Into Pre-trial And Trial Phases

- Jury trial and concentrated final hearing also require extensive pre-trial preparation in order to avoid surprise and delay at trial.
- The structural division of proceedings into pre-trial and trial phases allowed development of a system of discovery, which, in turn, justified the relaxation of the rules of pleading
- Trials may be dramatic, but the reality is that most cases settle.

The standard of proof in civil actions

- The standard of proof in civil actions is the 'preponderance of the evidence,' which makes it comparatively easier for plaintiffs to satisfy their burden of proof than the civil-law standard.
- From a comparative perspective, the system as a whole is notably plaintiff-oriented.

Critics

- lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial.“
- Discovery, has a double edge: it facilitates truth-finding, but can also result in burdensome and expensive proceedings in complex cases.
- It leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.

2. The Inquisitorial Model

- A Civil Law System
- **Judge leads the proceedings,**
  - plays more active role by questioning witnesses and formulating issues
    - ✓ His main role is establishing the material truth on the basis of available evidence
    - ✓ Most civil law systems include a judge that is proactive in managing the case, promoting settlement,' and interrogating witnesses.‘

- **Civil law procedure is a rigid and formalistic system.**
  - Rules of procedure are written in elaborate detail and leave little room for judicial discretion in procedural matters.
  - Under the presupposition that codes are coherent and exhaustive, court decisions are made with strict reference to rules and principles, with policy considerations and "external values" left to the legislature
  - As a result, the law is relatively simple and straightforward and leaves little room for judicial precedent.

- **Civil law civil procedure is more systematic, logical, structured and 'scientific' than American civil procedure**,
  - it favors consistency and specificity rather than flexibility and generality.
  - A common misconception among common law lawyers is the notion that the civil law judge exercises great power over the conduct of proceedings.
  - On the contrary, civil-law codes of civil procedure largely dictate the proceedings to be followed and neither the judge nor the parties have much room to deviate from it.

Rules Of Pleading

- Most countries require plaintiffs to provide, in their initial pleadings,
  - substantial factual allegations to support their legal claims and
  - often also evidence to support those factual allegations.
- Even the more liberal French system requires the plaintiff to provide a statement of the facts on which she justifies her claim
- *The plaintiff's lawyer commences a lawsuit in Germany* with a complaint.

y in damages or specific relief, and
mere notice pleading..
is Italy.

Evidence Gathering

- Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions.“
- The major documents in the plaintiff's possession that support his claim are scheduled and often appended;
- other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified.

- It should be emphasized, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client.
- Digging for facts is primarily the work of the judge
- the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work.

- He doesn’t have to wait for the counsels to present evidence, but he can actively initiate introducing evidence and may order a party to disclose evidence in his possession
- assigning judges rather than lawyers to investigate the facts.
- Judge’s duty is not only deciding the case according to the stronger evidence, but also to **ascertain the truth** and then to **make a just decision**

Social And Political Role

- the judiciary in civil law systems has, comparatively, a limited social and political role and, in principle, does not create public policy or social regulation through the litigation of private controversies.
- E.g. by precedents

Pre-trial and Trial

- there is no distinction between pre trial and trial, between discovering evidence and presenting it.
- Trial is not a single continuous event.
- Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require.
- "The whole procedure up to judgment may therefore be viewed as being essentially a series of oral conferences."

Judicial Preparation.

- *The judge to whom the case is entrusted* examines these pleadings and appended documents.
- He routinely sends for relevant public records.
- These materials form the beginnings of the official dossier, the court file.
- All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the dossier, which is open to counsel's inspection continuously.
- When the judge develops a first sense of the dispute from these materials, he will schedule a hearing and notify the lawyers.

Hearing.

- *The circumstances of the case dictate the course of* the hearing.
- Sometimes the court will be able to resolve the case **by** discussing it with the lawyers and parties and suggesting avenues of compromise.
- If the case remains contentious and witness testimony needs to be taken, the court will have learned enough about the case to determine a sequence for examining witnesses.

Examining And Recording.

- *The judge serves as the examiner in-* chief.
- At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners.
- Witness testimony is seldom recorded verbatim;
- rather, the judge pauses from time to time to dictate a summary of the testimony into the dossier."

- The lawyers sometimes suggest improvements in the wording of these summaries, in order to preserve or to emphasize nuances important to one side or the other
- civil law jurisdictions are becoming more open to certain "American" adversarial-based procedures, such as party-driven witness examinations

Expertise.

- If an issue of technical difficulty arises on which the court or counsel wishes to obtain the views of an expert, the court-in consultation with counsel-will select the expert and define his role.

Further Contributions Of Counsel.

- *After the court takes witness* testimony or receives some other infusion of evidence, counsel have the opportunity to comment orally or in writing.
- Counsel use these submissions in order to suggest further proofs or to advance legal theories.

Judgment.

- *After developing the facts and hearing the adversaries'* views, the court decides the case in a written judgment that must contain full findings of fact and make reasoned application of the law

Critics

- Non adversarial system-one in which litigants would be remitted to faceless bureaucratic adjudicators and denied the safeguards that flow from lawyerly intermediation.

Discussion Question:

- what is the underlying theory that explains the d/c in the role of court b/n common law and civil law systems?
- Whose duty is it to help find truth?

Rules of Civil Procedure in Ethiopia: Historical Development

- Rules of Civil Procedure in Ethiopia: A Brief Historical Overview
- Sources of civil procedure law in Ethiopia
- Salient Features of the 1965 Civil Procedure Code

Rules Of Civil Procedure In Ethiopia: A Brief Historical Overview

- **Up until the end of the 19th century**
  - customary and informal procedural rules
  - Ethiopia was identified with the absence of a systematically organized judicial process or uniformly applied procedural laws.

- the absence of competent expertise- which, the implementation of modern procedural laws indispensably demands
- there was no adequately articulated and/or formally institutionalized system of administration of justice
- in practice- dispute were resolved adversarial contentions as the "*Tattayaq-muget*".
- culminating in the royal institution of the emperor: known as the "*Zufan Chilot*" which is literally interpreted as the 'Crown-Court'

- a litigant could not get his case resolved to the best of his satisfaction at the informal village tribunal,
  - he would go to the lowest level official adjudicator- known as the "*Chiqa-Shum*"-
  - the next higher official-the 'Deputy-Governor'
  - the decision of the Deputy-Governor, would go to the Governor of the district whose decision could, in turn, be reviewed upon by other higher officials called "*Womber Rases*

- The litigation process could also be extended as far and high as the *"Afe-Negus"*,
- The marathon appellate procedure would however come to an end only after having reached, the apex of the judicial structure; as a final resort, to request a review by the Imperial Majesty's Bench which was presided by the Emperor himself.
- *Zufan- Chilot'*
- a thinking which found its way even in the country's procedural laws (Art 138 of the Cr. Pr. Cd. and Art.322 of the CV. Pr. Cd

Proc.No.2/1942

- called the ‘Administration of Justice Proclamation’
- which attempted to curtail the number of appellate rights to, only, one: whereby each court would hear an appeal from the next lower court.
- establish the country’s judicial structure
- is the law that had laid down the very foundation for the development of procedural laws in Ethiopia.
- constituting the ever modern court structure in the judicial history of this country, also entrusted the judiciary to issue regulation that would be employed in court proceedings, subject, of course, to the approval of the then Ministry of Justice.

- **In 1943,**
  - the first ever written procedural law (called, ‘Court Procedure Rules’) was promulgated as ‘Leg. Not. No .33/1943’.
  - , the ‘Rule’, which encompassed 99 articles of both civil and criminal procedures,
  - The material source of the law is said to have been the Indian procedural laws,
  - British judges who were working in the judiciary rendered assistance in the drafting of the law
- **In 1951**
  - a rule relating to appeals to the Imperial Supreme Court was issued as ‘Leg. Not. No 155/1951’.

- **Until promulgation of the 1965 Civil Procedure Code, a number of other laws of procedural nature were also made. These include**:
  - Proc. No. 130/1953 (and the amending Proc. No. 135/1954) for the establishment of judicial power;
  - Leg. Not. No. 177/1953, on the enforcement of judicial relief;
  - Leg. Not. No. 176/1953 (and the amending Leg. Not. No. 179/1954) on the execution of judicial decrees;
  - State Leg. Not. No. 176/1954, on Insolvency and Advocates' fees; and,
  - Leg. Not. No. 195/1963, for the Determination of Material Jurisdiction of Courts.

- **Civil Procedural Code of 1965**
  - was drafted by the Ministry of Justice,
  - was issued as a Decree in 1965.
  - encoding every rules relating to civil matters under one and single document, all procedural rules concerning matters now covered by the Code,
- **Proc No 51/1975,**
  - reduced the number (rights) of appeals to only one;
- **Proc No 84/1975 ,**
  - amended Art 31/1 of the Code to the effect that an application for change of venue could only be admitted before the hearing of evidence.

❖ What are the Sources of civil procedure law in Ethiopia Today ?

A. The FDRE Constitution: on matters of:

- The type and structure of courts,
- The division of judicial power b/n federal and state,
- The relationship between federal and state courts

B. The Civil Procedure Code, 1965

- have embodied comprehensive rules that apply to civil litigations of any sort,
- it is also concise in a sense that it contains only 483 articles-divided into chapters and paragraphs.
- Indian origin ; verbatim copies of the 1908 Indian Civil Procedure Code
- Basically adversarial
- Meant for the then unitary gov't
- Difficulties to apply it to the current federal arrangement

An Imperial Decree- No clear legislative history

- there could arise a problem relating to the approach to be taken in the process of interpreting its provisions.
- The problem here is that, since the Code was not promulgated by the parliament,
- there are no documents containing legislative debates (“travox preparatory”) on the drafts of its provisions, there is no thing published, indicating the drafters intent i.e.

- the background policy explaining the contents of the legal rules and prescribing guidelines for interpretation.
- In such instances, it is suggested that a more practice-oriented mode of interpretation would best facilitate the proceeding and help ensure the general purpose of the rules of procedure.

- **It encompasses rules on, among others,**
  - jurisdiction of courts;
  - framing of issues;
  - parties to and scope of litigation;
  - service of summons;
  - pre –trial and trial proceedings;
  - revision of decisions and
  - modes of executions.

- **the four schedules of forms governing pleading process, miscellaneous matters and execution,** stipulated at the end most part of the Code
  - Art. 80(2) of the Amharic text make the use of the forms indispensably **mandatory,**
  - while such a strict prescription is missing from the English version.
  - Art 244(4) of the Amharic Code stipulates that non- observance of formal requirements cannot be a ground for a preliminary objection

- The master texts of the Code, being originally drafted in English, and,
- then, translated into Amharic, the inconsistencies are supposedly attributed to the Amharic mistranslations.
- In such instances, some lawyers suggest that it would **be profitable to consult the English version the primary source material**; and,
- if accessible, **the relevant provisions of the Indian Civil Procedure Code**, the original source document of the latter.

- In the enforcement of the laws, as the provisions of the Civil Procedure Code are to be read in conjunction with and interpreted (when the need arises) in the spirits of the substantive laws, the latter would undoubtedly have an appreciable effect on the former.

- **the Code had empowered the then Ministry of Justice:**
- to issue regulations, concerning any matter which under the Code may or shall be prescribed; and,
- to make rules so as to add or amend the provisions of the Code
  - Normal law making process
  - Less credit is given for procedural law??/
  - Does it apply in present federal Ethiopia?

c. Federal and state laws

- Examples:
  - Federal courts Proc. No.25/96, W/h amended proc. 40/92 establishing federal courts in Dire dawa and AA
  - Oromia courts Proc. No. 141/2008
- They deal with the structure & jurisdiction of their respective courts- a subject for civil pro.

D. Other substantive laws,

- rules of procedural nature in the Civil Code,
- rules of procedural nature in the Commercial Code,
- rules of procedural nature in Labour laws,
- rules of procedural nature in Land laws,
- rules of procedural nature in the Family Code, etc

E. Judicial decisions,

- **e.g. per Proc. No.454/2005**
- which re-amended Proc No 25/96) ---
- with the prescription that the legal interpretation reached upon by the Cassation Bench of the Federal Supreme Court, shall be binding upon the courts,

- Effects of **Proc. No. 454/2005**
  - , እንግዲህ ተግባራዊ የመለኪያ ሚዛንን ለጊዜው ወደ ጎን እንተወውና ወጥነት የአዋጁ ዋና ዓላማና ግብ ነው ብለን እንነሳ። ችግሩ ግን ከዚሁ ይጀምራል። አዋጅ ቁጥር 454/1997 ወጥነትን እንደ ዋና ሆነ ተጓዳኝ ዓላማና ግብ ይዞ ስለመነሳቱ በግልጽ የሚነግረን ነገር የለም።
  - በአዋጁ መግቢያ ላይ እንደተመለከተው የፌደራል ፍርድ ቤቶች አዋጅን እንደገና ለማሻሻል የወጣው አዋጅ ቁጥር 454/1997 ሊወጣ የቻለው ስለፌደራል ፍርድ ቤቶች የወጣውን አዋጅ ቁጥር 25/88 (እንደተሻሻለ) እንደገና ማሻሻል አስፈለጊ ሆኖ በመገኘቱ ነው። የአስፈላጊነቱ መሰረት ምን እንደሆነ በግልጽ የተመለከተ ነገር የለም።

- አዋጁ ዝምታን ቢመርጥም የሰበር ውሳኔ አስገዳጅነት እንዲኖረው የሚደነግገው ህግ ሊያሳካ የፈለገው አንደኛው ግብ የአገሪቱ ፍርድ ቤቶች በተመሳይ ጉዳይ የሚሰጧቸው ውሳኔዎች ወጥነት እንዲኖራቸውና ተገማች እንዲሆኑ ለማስቻል እንደሆነ ታሳቢ አድርገን እንነሳለን።
- እንግዲህ ወጥነትና ተገማችነት የአገሪቱ የፍትህ ስርዓት ዋነኛው ገጽታ እንዲሆን ከታለመ ከብዙ ነገሮች መሐል ቢያንስ የሚከተሉት ሁለቱ ተሟልተው ይገኙ ዘንድ ግድ ይላል ።
- 1. በሰበር ችሎቱ በራሱ የሚሰጡ ውሳኔዎች ወጥነት ሊኖራቸው ይገባል ምንም እንኳን የሰበር ችሎቱ በሌላ ጊዜ በተመሳሳይ ጭብጥ የተለየ ትርጉም ሊሰጥ እንዲሚችል በአዋጁ ላይ የተመለከተ ቢሆንም

- ድንጋጌው በጠባቡ ብቻ ሳይሆን ከመርፌ ቀዳዳ በጠበበ ሁኔታ ካልተተገበረ የሰበር ውሳኔ በስር ፍርድ ቤቶች ሊኖረው የሚገባውን የተሰሚነትና የተቀባይነት ደረጃ በእጅጉ ዝቅ ያደርገዋል።
- በአንድ ጭብጥ ላይ በጊዜው የሚቀያየር የሰበር ውሳኔ በስር ፍርድ ቤቶች ዘንድ ተፈጻሚነቱ አጠያያቂ ነው። አሁንም በተግባር እንደሚታየው የስር ፍርድ ቤቶች አብዛኛውን ጊዜ የሰበርን ውሳኔ የሚጠቅሱት መጀመሪያውኑ የሚያምኑበትን አቋም የሚያጠናክርና የሚደግፍ ሆኖ ሲያገኙት ነው።
- ፈጽሞ መዘንጋት የሌለብን ነገር የስር ፍርድ ቤቶች ህግን እንደሚተረጉሙት ሁሉ የውሳኔውንም ይዘት ለመተርጎም ሰፊ ስልጣን አላቸው።

- ስለሆነም በአንድ ጭብጥ ላይ ወዲያው ወዲያው በሰበር ችሎት የአቋም ለውጥ በሚኖር ጊዜ የስር ፍርድ ቤቶችን ከማደናገሩም በላይ የውሳኔውን የተሰሚነት ደረጃ ዝቅተኛ ያደርገዋል።
- ስለዚህም
  - በተመሳሳይ ጭብጥ የተለየ ትርጉም መስጠት እጅግ አስፈላጊ የሚያደር ሁኔታዎች ወይም ምክንያቶች መኖራቸው እስካልተረጋገጠ ድረስ አንድ ጊዜ የተሰጠ ውሳኔ ፀንቶ ሊቆይ ይገባል
  - የተለየ ትርጉም ሲያስፈልግ ለውጥ ማድረግ የተፈለገበትን ምክንያት በአዲሱ ውሳኔ ላይ በግልጽ ማመልከትና የበፊቱን ውሳኔ በማያሻማ መልኩ በግልጽ መሻር ያስፈልጋል

- ✓ 2. በሰበር የተሰጠ ውሳኔ በብርሀን ፍጥነት በአገሪቱ ውስጥ የሚገኙ ፍርድ ቤቶችና ለሕዝቡ መድረስ አለባቸው ቅጽ እስኪዘጋጅ ከዓመት በላይ እየተጠበቀ ውጤት ለማግኘት የሚታሰብ አይደለም
- ✓ 3. የፌደራል ጠቅላይ ፍርድ ቤት ከአምስት ያላነሱ ዳኞች በተሰየመበት የሰበር ችሎት የሚሰጥ የህግ ትርጉም ለበታች የክልልና የፌደራል ፍርድ ቤቶች አስገዳጅነት ኖሮት በዚህም ወጥነትና ተገማችነት ያለው ብሎም ሁሉን አቀፍ በሆነ መልኩ የዳበረ የፍትህ ስርዓት ሊኖር የሚችለው "ከአምስት ያላነሱት ዳኞች" ሁሌም ቋሚ የችሎቱ ዳኞች ሆነው ሲገኙ ብቻ ነው።

- ቁጥራቸው 5 ሆነ 50 ዋናው አስፈላጊ ነገር በችሎት ላይ የሚቀመጡት ዳኞች እስከመጨረሻው እነዛው ዳኞች ብቻ ሊሆኑ ይገባል።
- ይህ ባልሆነበት ሁኔታ በተመሳሳይ ጭብጥ ተቃራኒና እርስ በርሱ የሚጋጭ ውሳኔ መኖሩ አይቀሬ ነው።

Part Two: Current Judicial System & The Division Of Judicial Power In Federal Ethiopia And Jurisdiction Of Courts (9 Hrs)

The Unitary Court Structure

- the Ethiopian judicial system had been strongly unified and firmly centralized.
- the 1965 Civil Procedure Code-which, in turn, established four levels of courts:
  - ✓ the Woreda Guezat Court,
  - ✓ Awradja Guezat Court,
  - ✓ High Court and
  - ✓ Supreme Imperial Court.

The Present Dual Court Structure

- The 1991 Transitional Charter, uprooted the trend in the country's constitutional history by marking the establishment of a new system-as a fore-state of the ethno-linguistic federalism.

- The 1995 FDRE Constitution is the highest law of the land just as the constitution in each state is the highest law of that state.
- the courts were created by the constitution
- It constituted a federal state structure whereby powers are divided between the Federal and Regional Governments.

- one can say that Ethiopia came to have a double layer of sovereignty.
- **Is it a Dual/parallel or 'mixed' structurally?**
  - **'mixed' b/c of the jurisdictional relation under Art.78:2?**

A Dual or parallel court Structure

- the federal principle of division of power strictly, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided.
- This would lead to a dual set of courts: federal courts applying and interpreting federal laws and another set of state courts applying and interpreting the laws of each state.
- That seems to be the case with the USA and Ethiopia.

- Dual system of federal and state courts means that almost everyone in any of the states is simultaneously within the jurisdiction, or reach, of two judicial systems, one state and the other federal.
- Under a dual federalism model, federal officers may not exercise state power and state officers may not exercise federal power

- Where separate court systems exist it is assumed that judicial power should be divided between them in line with the rest of the federal arrangement.
- There is a fear that state courts might not fully enforce and implement federal policies. This view remains skeptical about the competence of state courts.
- There is some distrust in state courts in adjudicating federal laws.
- Besides there is the need for maintaining uniformity in the interpretation of federal laws.

- The USA Constitution provides that the judicial power shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.
- As a result, two types of federal court are established: the constitutional courts, also called Article III courts and the legislative courts also called Article I courts.
- The former are established by Congress under Article III of the US Constitution while the latter owe their existence to Article I of the same Constitution

- Because of this duality, the state courts administer state law and federal courts administer federal law
- the Supreme Court is not the highest court of appeals over the state judiciary, which is quite independent from the federal judiciary
- At state level, each state has its own independent judicial system.
- The highest court in each state is the ultimate authority on what the law is with regard to state law from the state's point of view

- **In Germany**
  - in contrast to the situation in the United States, most matters involving federal law are litigated initially in state courts subject only to ultimate and limited federal appellate review

- **The Indian constitution**
  - ✓ sets up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system.
  - ✓ Unlike the United States, there is a single integrated system of courts for the union as well as the states that enforce and interpret both the Union and state laws and at the head of the entire system stands the Supreme Court of India.

- **The Ethiopian Constitution states that:**
  - supreme federal judicial authority is vested in the federal Supreme Court and
  - reserves for the HoPR to decide by a two-third-majority vote to establish inferior federal courts as it deems necessary, nationwide or in some parts of the country
    - ✓ Art.79:1, Cons: '*judicial powers are vested in the courts*');
    - ✓ see also Art.4 of the C.Pro.Code

The Constitution

- provides for the establishment of two sets of courts: at the Federal and State level.
- both the Federal and the Regional Governments are endowed with their respective structure of courts-

In Ethiopia Three-tired:

- First Instance (trial and appeal courts) both at Federal & state levels.,;
- High Courts (trial and appeal courts) both at Federal & state levels.,&
- Supreme courts (appeal court) at Federal levels.
- State Supreme courts (appeal court) on state matter.
- State Supreme courts (trial and appeal courts)on federal matters .

- Recently parliament to establish inferior federal courts a full-fledged dual court structure is on its way,
- Proc. No. 322/2003, FHC Esta. Proc., A Proc. to Provide for the Establishment of Federal High Court in some Regions, *Fed. Neg.Gazeta*, 9th Year No. 42, Addis Ababa, 8 April 2003.
- Proc. 322/2003,Article 2, the Federal High Court has been established to enforce exclusive federal matters in some selected states mainly the SNNPRS, Gambela, Benishangul-Gumuz, Somali and Afar.

- All the state constitutions stipulate that the judiciary of the regional state shall be organized and comprise the regional supreme, high and first instance courts.
  - E.g., Art. 67-69 of Amhara, 72-77 of SNNPS, 62-67 of Tigray and 61-66 of Oromia State Constitutions.
- SO the Ethiopian judicial system theoretically speaking is organized on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations .

- However, until the enactment of the new laws the operation of the federal and state courts was an integrated one.
- One probable reason for the original design of the dual but delegated court structure under Article 78(2) was the lack of trained legal experts when it was set up in 1995.
- However, after 10 years of experience it appears that the delegated function of state courts has brought some inadequacies in the enforcement of federal laws

- **A Mixed court Structure Shared Judicial Power**
  - the dual structure of courts, one set of courts interpreting federal laws and another set of courts enforcing state law.
  - Ethiopia too seems to follow the same pattern.
  - But this parallel system does not necessarily imply that each set of courts exercises jurisdiction that is completely exclusive of the other

- **Judicial powers in USA can be:**
  - exclusively federal….. which the federal legislature may provide to be exercised exclusively by federal courts
  - exclusively state and
  - shared judicial powers…. which state courts have a concurrent jurisdiction with that of the federal courts
- In concurrent judicial powers b/n the federal and state judiciary, mechanisms should be installed to resolve conflict of jurisdiction.
- There may be confusion for litigants as to where to file their case.

- **By virtue of the Constitutional stipulations,**
  - The establishment of federal courts save the Federal supreme court w/h sits solely in AA, is not mandatory by the constitution;
  - Federal High and First Instance Courts sit in AA, Dirre-Dawa and **in such other places as may be deemed necessary by the HPR**.
    - ✓ their jurisdiction are delegated to and exercised by the States' supreme and high courts, respectively.

- **The Constitution,**
  - Prohibits '**ad hoc' or 'special'** courts outside the regular court system and,
  - ' explicitly recognizes religious and customary courts and envisages their establishment by law –
    - whose power is limited to personal or family matters-may be established or given official recognition.

- it not only exclusively vest judicial power both at the Federal and States levels on regular courts and institutions so empowered,
- ‘the phrase “… institutions legally empowered to exercise judicial functions…” under Art 78(4) of the FDRE Constitution, is said to have been included to denote and encompass administrative tribunals such as the ‘Labor Relations Board, ‘Tax Appeal Commission’,’ Civil Service Tribunal’ ; the’ Privatization Agency ’, ‘and others…..’.

- But there are controversial tribunals introduced from time to time by the federal legislature and they do seem to dismantle the courts jurisdiction.
- The clause of prohibition is understandable in light of the terrible experience under the military that used to set up many such special courts for summarily executing political suspects and the clause appears to be a significant departure in this regard.
- While this was the background, recent developments seem to cast some doubt on the workability of this principle.

- Slowly, important powers are being taken away from the regular judiciary to special tribunals within the various ministerial offices
- The trouble in Ethiopia is that such tribunals are neither autonomous nor subject to review at a higher level.

- However, legally speaking, there seem to be ambiguity and imprecision, with regard to ‘Kebele Social Courts’ and municipal courts (Art.78:5&4, FDRE Cons)operating in Addis Ababa, Dire Dawa and in the Regional States.
- There are two lines of arguments:
  - Supporters of the first one say these Organs Are considered as judicial branch of the administrations-they are not tribunals
  - The second one, say even if they are not tribunals we have to broadly define tribunal;

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

Activities

- With respect to the legitimacy of ‘kebele’ social courts, which line of interpretation do you endorse? Why?
- Where do we fit social courts and municipal courts? Are they part of the regular ct system? Or are they part of the executive? Or neither here nor there?
- Jurisdictional dispute: rule of interpretation-presumption in favor of regular courts; *courts have ‘inherent power’ over civil case unless otherwise clearly provided*

- Whose jurisdiction is it to legislate on the law of civil procedure in Ethiopia? Federal? State, or concurrent power?
  - Check out Article 55 of the FDRE Constitution?
  - States have power to legislate their own code of civil procedure should they desire?

Judicial power and Jurisdiction Of Courts

- **Judicial power**
  - Judicial power is the authority vested in courts and judges to hear and decide cases and controversies in conformity with the law and by methods established by the law and to make binding judgments on them
  - the power to construe and apply the law when controversies arise over what has been done or not done under it.

- A power conferred on a public officer involving the exercise of judgment and discretion in deciding questions of right in specific cases affecting personal and proprietary interests.• In this sense, the phrase is contrasted with *ministerial power.*

Jurisdiction

- A court's power to decide a case or issue a decree
- "Rules of jurisdiction in a sense speak from a position outside the court system and prescribe the authority of the courts within the system.
- They are to a large extent constitutional rules.

- The provisions of the U.S. Constitution specify the outer limits of the subject-matter jurisdiction of the federal courts and authorize Congress, within those limits, to establish by statute the organization and jurisdiction of the federal courts.
- Thus, Article III of the Constitution defines the judicial power of the United States to include cases arising under federal law and cases between parties of diverse state citizenship as well as other categories.

- The U.S. Constitution, particularly the Due Process Clause, also establishes limits on the jurisdiction of the state courts.
- These due process limitations traditionally operate in two areas: jurisdiction of the subject matter and jurisdiction over persons.
- Within each state, the court system is established by state constitutional provisions or by a combination of such provisions and implementing legislation, which together define the authority of the various courts Within the system.

Jurisdiction Of Courts

- one of the fundamental procedural principles stipulates that courts which entertain disputes must only be the ones constituted by law.
- Accordingly, the law which establishes the courts grants them the power to handle law suits.
- Thus, what we call ‘jurisdiction’ of courts, in this respect, refers to the power of courts, to hear and determine a case; thereby, rendering a binding judgement.

- There are three essential elements that establish jurisdiction of courts; namely,
  - judicial jurisdiction,
  - material jurisdiction and
  - local jurisdiction.

Judicial Jurisdiction

- Judicial Jurisdiction refers to the legal competence of the courts of a particular nation or state to exercise a judicial power
  - ✓ i.e., to adjudicate a law suit and render a judgment binding an individual, or his property involved therein.
- the issue of judicial jurisdiction is, in practice, a procedural matter but, in most countries treated as one of private international law, and the rules governing it are found in the latter area.

- The issue of judicial jurisdiction normally arises when there is a '**foreign element**' in a case appearing before a court of a given state.
- **A case is said to have involved a foreign element,**
  - if either of the parties is a foreigner to that state or
  - the **transaction** or **property** , which is the subject matter of the suit, occurs outside of the territorial boundaries of that state.

- judicial jurisdiction has to do with the enforcement of the judgement of a court against a foreign defendant who does not usually possess property in the country where the case is heard and finally determined.
  - on the basis of bilateral or multilateral treaties.
  - on the bases of a concession of reciprocity

- the court of a state to which a judgement is sent for execution will consider only whether the court that gave the judgement possessed judicial jurisdiction
- unless an objection was raised on grounds of judicial jurisdiction, the courts would assume that the jurisdiction exists and entertained the case in the usual business of the court.
- a court of a state is held to possess judicial jurisdiction if it has sufficient contact with either the defendant or property that is involved in the suit.

- the factors that establish judicial jurisdiction are determined by relevant legislations of states.
- In our case, the draft document of the 1965 CC had included such provisions in its section that dealt with as issues of private international law,
  - that portion of the bill was not approved by the then legislature, it could not become part of the finally adopted Code.
  - Hence, that there is no, law in Ethiopia that specifically govern the issues of judicial jurisdiction

- In spite of the absence of the relevant legal rules on judicial jurisdiction, cases involving foreign elements have appeared before the court and the grounds would be determined on the basis of
  - the general legal principles developed by foreign laws and applicable to the case under consideration.
    - on the basis of the nature of the action brought
    - the type of the relief sought by the plaintiff,

- Thus the grounds for exercising judicial jurisdiction are distinctively put as
  - ‘in Personam’(over a person) and
  - ‘in Rem’(over a thing) jurisdiction.

- **Jurisdiction in Personam**
  - An action in Personam,
    - is brought against a person, natural or legal, and seeking a relief against the person of the defendant,
      - the claim is made for an order requiring the defendant to do (payment of compensation) or
      - refrain from doing an act(requesting an order prohibiting the defendant from doing an act) would thus be an in Personam suit;

- On the grounds of the general legal principles, and the usual court practices, Ethiopian courts are held to assume judicial jurisdiction in Personam where either of the following requirements are fulfilled:
  - the defendant is an Ethiopian national or domiciliary; **or,**
  - the defendant has consented (expressly or impliedly) to the exercise of jurisdiction by the Ethiopian court; **or,**
  - the act which is the subject matter of the suit occurred or is situated in Ethiopia.

Jurisdiction in Rem

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

- A judgement in rem is a judgement declaratory of the status of some subject-matter,
  - a judgement in rem settles the destiny of the res (property) itself (or of some interest therein) not merely as b/n the parties themselves;
  - but, as against ‘the entire world’; and,
  - thus, binds all persons claiming an interest in the property inconsistence with the judgement-even though pronounced in their absence

Material Jurisdiction

- **Subject Matter**
  - ✓ Jurisdiction of the subject matter is the power to hear and decide cases of a given type and it is important for this reason:
  - ✓ Defects in the court's jurisdiction of the subject matter cannot be waived and can be raised at any time, even when the case is on appeal.
  - ✓ If the court finds that it lacks subject matter jurisdiction, it must dismiss the case.

- **In determining subject matter jurisdiction basically three issues that need to be cleared from the outset.**
  - 1st, whether the case is not one falling outside the judicial power of ordinary courts and are meant to be dealt with by other tribunals
  - 2nd, a distinction has to be made horizontally between the Federal and Regional/States matters (jurisdiction).
  - 3rd , it has to be decided as to which level of court is competent, pecuniary juris diction

- **Matters outside the Jurisdiction of Courts**
  - courts are given the power to decide cases and settle disputes in accordance with the law.
  - such a judicial power does not make them competent to see all kinds of cases referred to them.
  - so long as only they are justiciable ones (Art 37 of the FDRE).

- **Justiciable matters,**
  - for this purpose, may broadly be defined as inclusive of all cases unless the law provides otherwise.
  - the Constitution guarantees every citizen right of access to justice.
  - It is stated ‘every one has the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.

- This seems to define broadly the scope of judicial power.
- It suggests that not all disputes are within the scope of judicial power.
- Judges or other bodies with judicial power decide only justiciable matters, those that arise from actual cases and are capable of settlement by legal methods. Art. 37 (1).

State and Federal Subject matter

A. The Division of Judicial Power in Federal Ethiopia

- Art 80(1) of the Constitution provides that the Federal Supreme Court has the final say on Federal matters
- Art 80(2) of same, stipulates that Regional Supreme Courts shall have the final authority, and, hence, gives final decision on regional matters.
- Though the Constitution purports to lay a clear distinction between the 'Federal matters' and the 'Regional mattes',

- it is not , nonetheless, of much significance, in definitively specifying as to what constitutes Federal or Regional matters-so as to enable one in precisely determining the respective powers of the courts.
- There are two conceivable ways of looking at the issue under consideration in order to determine the respective competence of the Federal and Regional courts.

- **The first technique attempts to solve the problem on the basis of the power-sharing method of the Constitution itself.**
  - in consonant with the theory of ‘federalism’,
  - the FDRE Constitution, defines the powers and functions of both the Federal and Regional governments
  - It is the source of power allocation (Art. 50(8) b/n the centre and the units; don’t look else where to assert your power
  - The same formula shall apply with respect to judicial power allocation

Mode of power allocation under the Constitution:

- Federal power exhaustively listed;
  - It doesn't define 'federal matters' for purpose of division of judicial power b/n the centre and the periphery;
  - It enumerates only federal executive and legislative power; see Arts. 51, 52 &55 of the FDRE Constitution
- Concurrent powers defined
- Residual powers left for the states

Implication of the mode of power division for judicial power allocation

- You can't confer jurisdiction upon federal courts by way of implication/tacitly
- State matter is defined in the negative: something not federal is state; an indirect way of ascertaining state matter
- Power not expressly listed as federal matter automatically falls under state matter unless otherwise listed as concurrent jurisdiction
- **judicial power is the corollary of legislative power**

- **In USA according to Article III, federal judicial power extends to:**
  - (1) cases arising under the Constitution, the laws , and treaties made by USA;
  - (2) admiralty and maritime cases;
  - (3) controversies between two or more states;
  - (4) controversies to which the USA is a party, even where the other party is a state;
  - (5) suits between citizens of different states;
  - (6) cases begun by a state against a citizen of another state or against another country.

- Article III, "The judicial Power of the United States, shall be vested in one supreme Court, and in such **inferior Courts as the Congress may from time to time ordain and establish**
- Congressional power to define the jurisdiction of the federal courts **within the limits of Article III**
- **State courts have concurrent jurisdiction over cases within the federal judicial power except when Congress specifically prohibits it (exclusive jurisdiction).**

- **In America under the constitution (Art.3) state and federal courts have concurrent jurisdiction;**
  - ✓ Federal exclusive subject matter is authorized by federal statute
  - ✓ **Except these matters exclusively allocated to federal courts state courts have concurrent jurisdiction over federal matters despite the establishment of federal courts in states**
  - ✓ There is no such thing as delegation.

- **Concurrent Jurisdiction:** Jurisdiction that might be exercised simultaneously by more than one court; litigant chooses where to file.
- **Exclusive Jurisdiction.** A court's power to adjudicate an action or class of actions to the exclusion of all other courts

Discussion Exercise

- So what is the subject matter jurisdiction of federal courts in Ethiopia?
- Is it corollary of legislative power?
- If it is corollary, what is the jurisdiction of state courts over federal matters arising in their states?
  - Approaches to Arts. 78(2) & 80(1&2)
    - is it ‘delegated’ or ‘original’? ‘revocable’ or ‘non-revocable’?
    - Delegated vs concurrent powers over the so-called ‘federal matters’

- Do federal courts have jurisdiction over civil cases arising in the states where no federal ct is yet to be established?
- Or is it the ‘exclusive’ jurisdiction of the states themselves until a federal ct is established there?
- The implication of Proc No.322/2003?

- **B. Jurisdictional Relationship Under The constitution**
- There are two views as far as the Ethiopian court structure of shared judicial power is concerned.
  - On the one hand there are those who hold that the dual court structure is strictly taken both under the constitution and the proclamations issued and
  - as a result contend that civil or criminal cases fall either before an exclusively federal court or an exclusively state court;

- hence there is no case of shared/concurrent judicial power.
- One indication of this is the fact that Proclamation 25/96 has not openly provided for the existence of shared judicial powers.
- Proc. 25/96; Proc. 254/2001; Proc. 321/2003.

- The other view, despite the law's silence there still remains a concurrent judicial power. E.g.:
  - labour cases ,as per Art. 55(3) of the Constitution that are federal law matter.
  - The commercial code too is a federal law by virtue of Article 55(4) of the Constitution and
  - the same holds true for the penal code (Art. 55(5)).
- the state courts do adjudicate criminal cases in the regular discharge of judicial duties, *not in their delegated powers*

- The fact that the federal Supreme Court does also review state cases when it discovers errors of law also suggests the existence of shared judicial powers.
- As a result despite the apparent parallel existence of courts, like other powers, there are shared judicial powers.

- Besides the federal and state constitutions incorporate a huge number of rights and freedoms.
- It is declared that ‘All federal and state legislature, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter [chapter three].
- It must be emphasized also that it is a duty imposed on the judiciary at all levels, apart from the other branches.

- ‘respecting and enforcing’ fundamental rights and freedoms by the judiciary is meaningless, unless the judiciary is involved in interpreting the scope and limitation of those rights and freedoms which it is bound to enforce.
- In this respect, contrary to popular thinking, the federal and state courts are not prohibited from interpreting the constitution,
- This adds to the view that that there is shared judicial power although the final say as far as constitutional interpretation of parliamentary legislation is concerned, is reserved to the HoF.

- Provisions of the constitution uses “delegation “ and “concurrent” interchangeably;
- **Art. 78: Independence of the Judiciary**
  - *2. ..Unless decided in this manner, the jurisdictions of the FHC and of the FFIC are hereby **delegated to the State courts**.*
  - Amharic version ”.....lekillin firdbeetoch tesetuwal” doesn’t indicate delegation

Art. 79: Judicial Powers

- *7. …The HPR shall allocate compensatory budgets for States whose Supreme and High courts concurrently exercise the jurisdictions of the FHC and FFIC .*
- Budget is allocated for what is indicated as “delegation “ under Art. 78(2) and “concurrent” under Art. 79(7);
- *Since the heading of Art. 79 is about judicial power and its Amharic version says “….darribew lemiserut…”*, not “..bewikilinnaa…”
- Thus this power is concurrent,

- **Art. 80: Concurrent Jurisdiction of Courts--- exercising the jurisdiction on Federal matters**
  - *2. State Supreme Courts shall have the highest and final judicial power over State matters.* ***They shall also exercise the jurisdiction of the Federal High Court.***
  - *4. State High Courts shall, in addition to State jurisdiction, exercise the jurisdiction of the Federal First-Instance Court.*
- It indicates **Concurrent or original jurisdiction** and state may claim jurisdiction in the presence of federal courts

Art. 80: Concurrent Jurisdiction of Courts-----appeal ability

- 5. Decisions rendered by a State High Court exercising the jurisdiction of the Federal First-Instance Court are **appealable to the State Supreme Court**.
- 6. Decisions rendered by a State Supreme Court on Federal matters are **appealable to the Federal Supreme Court.**

- **Made FSC a final appellate judicial authority, but limited to:**
  - federal matters originally decided by state supreme court
  - federal matters decided by state supreme courts in their appellate jurisdiction in variation of state high courts decisions
  - federal matters decided by state supreme courts in their appellate jurisdiction affirming state high courts decisions is not appealable to FSC
  - Shows concurrent

- If we say delegation it can be taken away when federal courts are established;
- This can be the case if the constitution is upholding the principle of Exclusive jurisdiction with regard to federal subject matter
  - Only federal courts are allowed to adjudicate cases arising under the law;
- Our constitution does not expressly empower HPR to determine federal Exclusive jurisdiction
- It is not clear as to whether under proc. 25/96 there is federal Exclusive jurisdiction or state Exclusive jurisdiction over federal matters;

- *The HPR has the power of Establishing federal high and first instance courts per Art. 78:2 of the Constitution*
- *This mandate :*
  - Defining their jurisdiction ‘vertically’, Not to divide judicial power b/n federal and state courts ‘horizontally’ ;
  - the horizontal allocation of judicial power b/n the centre and the units is the business of the Constitution, not that of the Parliament through a subsidiary legislation!!

- In USA Federal and state **judicial power** (matters) are distinguished under Art. III of the constitution
  - Our constitution does not
- Congressional power to define the exclusive jurisdiction of the federal courts within the limits of Article III
- the Constitution must initially authorize Congress to enact a particular law;
- No express empowerment of HPR under our constitution

- But the **the constitution clearly enumerated powers between the national and state governments**
- So any controversy wh/r a given case is fed. or state should be resolved only by reference to the Constitution, not to Proc. No. 25/96
- Therefore concurrent power===appealable to federal supreme court; **State exclusive is not appealable.. Abebe's position**
- A state supreme court decision on a federal matter, not exclusive, could be final and binding without resort to the federal Supreme Court except by way of cassation.

- a decision of a state supreme court on shared, not delegated powers, as a matter of *practice* can't be appealed before the fed.I Supreme Court and the latter does not seem to have realized that it is divested from reviewing all federal cases arising from federal laws
- The appellate power of the FSC is explicitly stated under Art. 80(6) 'decision rendered by a state Supreme Court on federal matters are appealable to the FSC' and appeal cases from state courts exercising *delegated* federal jurisdiction to a higher court in the hierarchy are stipulated under Article 80 (4) and (5).

Discussion Exercise

- Is allocation of judicial power b/n the centre and the units is the business of Proc. No. 25/96?
- So what is the status of the proclamation? Vertical ??
- Does HPR has the power to determine and allocate judicial power between federal and states?

- despite the lack of definition of what constitutes a federal matter ‘we can presume that all cases that arise or claims that are based on federal law may be called a federal matter and the rest may be categorized as state matter
- Accordingly, all laws enacted by virtue of Article 55 of the federal Constitution by the HoPR are federal laws

- Yet this rules out the possibility of *shared* judicial power
- This rather vaguely stated principle of federal and state matter is somehow defined under the proclamation that establishes federal courts.

HPR's understanding of 'Federal matters'

- **Article 3 of Prc.No.25/96 federalizes three matters:**
  a) Source of cause of action-a look at the substantive law defining rights & obligations
  b) Identity of parties involved in the suit
  c) Place of cause of action

a) **Sources of 'cause of action'**:

i. FDRE Constitution.
ii. Federal laws
iii. International treaties.

- certain kinds of cases may be heard by the federal courts because of the nature of the *subject matter* of the litigation.
- we look at the *'cause of action'* of the plaintiff, not at the *'defense'* of the defendant even if it arises under these sources to federalize a case.

Discussion Exercise

- Do you think that these cases are truly ‘federal matters’ in the spirit of the Constitution, if not in express terms of same?

Cases is based on Constitution and International treaties

- Is there any civil case that can directly arise from this source?

Cases Arising Under Federal Laws

- Federal courts have subject matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties” - - **federal question jurisdiction.**
  - ✓This , in USA, means that if your cause of action is based on a federal statute, you can sue in federal court.
  - ✓ This jurisdiction is not exclusive; you are not *required to* sue in federal court merely because your case is based on a federal statute.

- **Federal’ laws are:**
  - laws which are enacted by the HPRs
  - Regulations and directives enacted by council of ministers
  - international agreements adopted by the HPR are treated as Federal laws.

- **State law causes of action:**
  - Each state has its own legislators and appellate judges, each with their own opinions about what the law should be, and each free to legislate accordingly.
  - each state would always apply its own substantive law
  - But a part of the substantive law of each state consists of “choice of law” laws, which may require a given case to be decided under the substantive laws of some other state!

- There are conditions whereby cases arising under State Laws be regarded as Federal subject matter:
  - where the parties to the litigation are those listed under Art. 5(1)-(4) of Proc No 25/96;
  - in Addis Ababa or Dire Dawa (Art 80 of the Constitution and Arts 11(1) (b) and 14(2) of Proc No 25/96).
- Consequently, State cases are cases that arise on the cases of State Law and that are not categorized under Federal cases.

Discussion Question

- what about lawsuits in which you assert some causes of action based on federal statutes and others based on state law?
- Does including a state law cause of action in an otherwise federal case deprive the federal court of subject matter jurisdiction?

- In general, no. If there is at least one valid federal cause of action, the federal court is said to have **pendent jurisdiction over the appended state law** causes of action.
- In fact, it is commonplace for lawsuits in federal court to include both federal and state causes of action

- **State law causes of action in federal court:**
  - consider what happen when the plaintiff sues in federal district court on a cause of action based on state substantive law.
- **Can this happen?**
  - Certainly; by definition, federal diversity jurisdiction cases involve causes of action based on state substantive law; otherwise they would be federal question cases.
- **W/h substantive law should apply?**
- **W/h procedural law? ;If have d/t laws,**

In USA:

- In diversity cases, federal courts apply federal *procedural law* (the federal rules as interpreted by the federal courts), but the *substantive law is the law of the* state in which the court sits,
- In other words, a federal district court sitting in state X should, in theory, determine substantive law issues exactly as if it were a state court in state X

- **As a practical matter, in federal district court, we can generalize and say that except in rare instances:**
  - 1. Any issue covered by the Fed. Rules of Civ.Proc. is procedural, and the rules control.
  - ***2. Any cause of action involving a federal statute is*** a federal question, and federal substantive law (including federal appellate court interpretations) controls.
  - ***3. On any other issues, state law controls, as interpreted*** by the state appellate courts of the state in which the district court sits.

- In Ethiopia:
  - Cause of action arises under state law: federal cts apply state law in their forum,
  - Substantive Laws to be Applied by Federal Courts:
    - Art. 6(1)(a)-- Federal laws and international treaties;
    - Article 6(1)(b)-- Regional laws where the cases relate to same;
    - Article (2)== Regional laws to be applied shall not be applicable where they are inconsistent with‘ Federal laws……

The federal supremacy issue: is it the case in Ethiopia?

- Do federal laws take precedence over state laws in case of conflict?
- No express provision in the FDRE Constitution establishing federal supremacy
- Article 6(2) of Proc. No. 25/95:
- The bad example of family laws
- The good example of rural land laws on issues of succession

Discussion Exercise

- Does the subject matter jurisdiction of federal courts extend to and congruent with areas covered by the laws issued by the federal parliament (HPR)? **ART. 3????**
- Not really per the practice of federal courts; they limit themselves to cases under Art. 5(1-10) of Proc. No.25/96

- **The mismatch b/n Arts. 3(1) & 5 of Proc. No.25/96**
  - Art.3(1) covers every federal law, but Art.5 enumerates only few federal laws such as **nationality law,** and few matters under the Commercial Code (e.g, **negotiable instruments & insurance**), **intellectual property, and habeas corpus**
- In USA the federal courts also have *exclusive* jurisdiction over bankruptcy, patent and copyright law.

Exercise Question:

- what about the rest of federal laws not listed under Art.5?
- The question then is whether what is defined under Proclamation No. 25/96 is only *exclusive* federal jurisdiction and as to whether there is a shared/concurrent judicial power between federal and state courts?
- What does the practice look like?

- the phrase ‘federal laws’ is given a very wide definition under Article 2(3) of Proclamation 25/96 as ‘laws of the federal government include all previous laws in force which are not inconsistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution.’
- the proclamation that defines the civil and criminal jurisdiction of federal courts lists *only a fraction* of the offences or cases to be adjudicated by federal courts

- one can’t conclude that the proc. exhaustively enumerated the jurisdiction of fed. Courts
- It is certain that state courts do adjudicate cases arising from federal laws in their competence as state courts, not in their delegated function.
- **what power state courts have on the rest of federal laws not listed under Art.5?**

- **1st position: exclusive state jurisdiction**
  - Abebe argues that those fed. cases not mentioned by Proc. 25/96 belong to **'exclusive state jurisdiction** b/se a fed. matter by virtue of this proc. is narrowly defined
  - The rest of the federal laws, w/h are not enumerated, are then understood to be within the jurisdiction of state courts.
  - It indicates original jurisdiction and state may claim jurisdiction in the presence of federal courts

2nd: position:_Concurrent powers

- The point, however, is that it is difficult to think federal courts are prohibited from adjudicating what is inherently their subject matter.
- Not every case arising from federal law, as the Constitution suggests, is within the jurisdiction of federal courts.
- what is stated in the proc. constitutes exclusive fed. powers, the balance rightly is adjudicated by the state courts as they do exercise shared powers but not as exclusive state powers.

- The appellate power of the FSC (Art. 80(6))----‘decision rendered by a state Sup. Court on fed. matters are appealable to the FSC’ ;
- appeal cases from state courts exercising *delegated* federal jurisdiction to a higher court in the hierarchy are stipulated under Article 80 (4) and (5).
- a decision of a state sup. court on shared, not delegated powers, as a matter of *practice* can’t be appealed before the FSC and the latter does not seem to have realized that it is divested from reviewing all fed.l cases arising from fed. laws

- The notion of exclusive state power, in the context suggested by Abebe, rules out what is inherent jurisdiction of federal courts.
- Hence the better view is to consider the bulk of federal cases adjudicated by state courts as shared, not as exclusive state matter and what is defined by Proclamation 25/96 is the exclusive federal matter

- **Which line of argument Do you agree with?**

- **Would Proc 25/96 Art. 5 be federal statute setting out federal exclusive jurisdiction in civil cases?**
- **Since there is no federal court is yet to be established in states what jurisdiction they have on matters enumerated under Art. 5 of the procl. ?**
  - **exclusive' ?,concurrent?, delegated?**
  - **The implication of Proc No.322/2003?**

- **1st, Not Federal Exclusive, Not state delegation, but concurrent power**
  - In USA Federal and state **judicial power** (matters) are distinguished under Art. III of the constitution
  - Congressional power to define the exclusive jurisdiction of the fed. crts within this limits.
  - **Except these matters exclusively allocated to federal courts state courts have concurrent jurisdiction over federal matters despite the establishment of federal courts in states**

- This can be the case if the constitution is upholding the principle of Exclusive jurisdiction with regard to fed. subject matter
  - Only federal courts are allowed to adjudicate cases arising under the law;
- **Our constitution does not expressly empower HPR to determine federal Exclusive jurisdiction**
  - **It is not clear as to whether under proc. 25/96 there is federal Exclusive jurisdiction or state Exclusive jurisdiction over federal matters;**

- **The HPR has the power of Establishing FHC and FFIC per Art. 78:2 of the Constitution**
- This mandate :
  - Defining their jurisdiction ‘vertically’, Not to divide judicial power b/n fed. and state courts ‘horizontally’ ;
  - **the horizontal allocation of judicial power b/n the centre and the units is the business of the Constitution,**
  - **not that of the Parliament through a subsidiary legislation!!**

- So any controversy wh/r a given case is fed. or state should be resolved only by reference to the Constitution, not to Proc. No. 25/96
- So matters enumerated under Art. 5 are not federal exclusive, therefore ,are concurrent power of state and federal

Therefore ,fed. matters not enumerated under Art. 5 are state exclusive and are not appealable to FSC

2nd, Federal Exclusive, State Delegation

- the Constitution speaks of delegation until the HoPR decides to set up lower fed. courts across the country, implying the revocable position of the delegated power.
- The Amharic version, however, is less explicit implying a given authority, not necessarily a delegated one.
- On the other hand Article 79(7) speaks of concurrent power rather than a delegated one, and the same term is employed under Article 80 which outlines rather more the concept stipulated under Article 78(2).

- Despite the apparent confusion in the use of terms delegated or concurrent power,
- the delegated function of state courts is restricted to exclusive federal matters rather than to shared federal powers.
- Until such time as the HoPR establishes fed. courts throughout, state courts have delegated power to adjudicate exclusive fed. cases as defined by the proc..
- But state courts have concurrent/shared, not delegated power over other fed. matters not mentioned under the proc.

- For shared power they do not need delegation.
- Proc. 322/2003,Article 2, the Federal High Court has been established to enforce exclusive federal matters in some selected states mainly the SNNPRS, Gambela, Benishangul-Gumuz, Somali and Afar. ….. implies revocable delegation
- the original design of the dual but delegated court structure under Article 78(2)

- **Which of the above arguments have legal ground and reasonable?**

b) Identity of Parties

- The Constitution makes no express reference to any single person or entity that can federalize a case.
- Art.5 lists some groups: check constitutionality!

1. **Federal Gov't organ-(Art.5(1))**
   - Does it include private face?
   - Since under Art.5(1)) there is no provision " in connection with their official responsibilities or duties" like in Art. 5(3) does it includes private face?

- the public/sovereign face; its private face may fall under state jurisdiction

2. Federal employees acting in their official capacities; **Art.5(3)**
   - personal capacity falls under state jurisdiction

3. Foreign nationals- **Art.5(4)**
   - to send positive image

4. suits b/n persons permanently residing in different regions'; 'Diversity Jurisdiction' of Federal Courts

- Art.5(2) of Proc.25/96: 'if the case involves parties who are permanent residents of different states, the case will be held under the jurisdiction of Federal Courts.
- **The idea here is that the** federal courts should provide an impartial forum for suits between residents of different states.

- **Discussion Question**
  - Any clue in the Constitution?
  - The Traditional American justifications
- **Suits b/n residents of Addis/Dire Dawa and of the states, example, Addis vs Oromia:**

- **What does it mean for an action to be between citizens of different states?**
  - *Citizenship as used here* means "domicile ,
  - *Residence is a less exact term; in this text, we will use it to mean the same as domicile*
  - *For purposes of procedural law, citizenship of a state and domicile in a state are the same thing.*
  - A corporation is considered to be a citizen of any state in which it is incorporated and also of the state in which its principal place of business is located.

- **What about more complex disputes in which there may be a number of plaintiffs and defendants?**
- **In USA:**
  - For there to be federal diversity jurisdiction, there must be “complete diversity.”
  - That is, there can be no defendant who is a resident of the same state as any plaintiff.
  - if there is any state that appears on both lists, there can be no federal diversity jurisdiction.
  - **Does this apply in Ethiopia?**

- **The Q is how should Art 3 (1) and (2) of the Proc. be understood-vis-à-vis Art 5(2)**
- Specifically Article 3(1) ….. a case based on federal laws, …….federal subject matter;
- Art. 3(2) … parties specified in Federal Laws.
- The question is, whether the ‘Federal Laws’ and the parties thereto under **Art 3(2)** could be included under the ‘Federal Laws’ mentioned in **Art .3(1)** ?
- Where parties indicated under Art. 5(2) are parties specified in federal laws as per the principle under Art. 3(2)?

- There is no contradiction between articles 3(1) & 3(2) of the Proclamation. This is because:
  - while in articles 3(1) the base for jurisdiction is the issue of litigation, in articles 3(2), the base for jurisdiction is the identity of the parties, not the issue that they raise.
  - Therefore,, Federal Courts will have subject matter jurisdiction over cases arising from Federal Laws as well as on issues (though based on states laws) between parties who have been specified in Federal Laws.

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

c. Place of Cause of Action

- Art.3(3) ‘places specified in the Constitution or Federal Laws’.
- **Has the Constitution named any place?**
- **Can HPR simply name a place and federalize any case arising from that place?**
- Arts.11 &14 of Proc.25/96 ‘ civil cases arising in Addis Ababa & Dire Dawa’

Discussion Question

- Overlapping jurisdictions in Addis:
  - federal vs Oromia;
  - **whose jurisdiction is it to see cases involving the 'interests of Oromia' in Addis?**

Federal review of state court's decision

- **On federal matters (art.80:6) of FDRE Constitution;… Review by appeal**
  - Decisions rendered by a State Supreme Court on Federal matters are appealable to the FSC.
    - ✓ **That given by state supreme court in its first instance jurisdiction? or**
    - ✓ **Its appellate jurisdiction---- reversed or amended?? Or affirmed by state supreme court????**
  - **Review by cassation, Art,80:3**

- **On state matters (art. 80:3a of FDRE Constitution;….. Review by cassation**
  - The issue of double cassation: for & against federal review of state matters(art.80: 3&6)
  - The developing practice of precedent(Proc.No.454/2005

Discussion Question

- What if state courts refuse to recognize and execute federal court decisions or vice versa?
- How about the case as b/n the states themselves?

The full faith & credit issue

- Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.
- Congress may by general Laws prescribe the manner in w/h such Acts, Records, & Proceedings shall be proved,& the Effect thereof.
- This "Full Faith and Credit Clause" gives Congress what amounts to enforcement authority over the required recognition by each state of the judgments, records, and legislation of other states.

- No express constitutional answer
- Article 50(8) of the Constitution requires only comity
- The one-way-traffic of Article 35(1) of Proc. 25/95

Summary: Discussion Questions

- How far do you think HPR's understanding and definition of 'federal matter' is consistent with the Constitution?
- How clear and neat is the boundary that divides judicial power as b/n states and federal in Ethiopia?
- In whose favor does the presumption exist in the event of jurisdictional confusion?

- How far federal courts exercise restraint so that their power is kept within its constitutional limit? Or how aggressive they are in federalizing and usurping power?
- How comfortable the states are in relinquishing or retaining judicial power vis-à-vis their federal counterparts? How nationalist or federalist they are?

- ***Jurisdictional Limits of Courts:***
- **General , Limited and Exclusive subject matter jurisdiction.**
  - **General subject matter jurisdiction.**
    - A court of general original subject matter jurisdiction is a trial court with the power to hear any type of action.
    - courts, we assume that the court has subject matter jurisdiction over everything, except where there is some law that makes an exception

- **Limited subject matter jurisdiction**
  - **Their jurisdiction extends only to** a few specific categories of cases for which legislature has passed laws allowing suits in some court.
  - Federal courts, in contrast to the state courts, are courts of **limited subject matter jurisdiction.**
- **Exclusive Jurisdiction**,
  - Cases which must be filed in a particular court

Original Jurisdiction vs Appellate Jurisdiction

- **Original** or trial **Jurisdiction**
  - you can only originate a lawsuit in a court that has original jurisdiction over it.
  - For most types of federal cases, the Ist instance court has original jurisdiction and the high Court and Supreme Court have only appellate jurisdiction— that is, they have the power to hear only appeals.

Appellate Jurisdiction

- Appellate courts review the trial court record, hear oral arguments, and research the law to arrive at their decisions to either affirm or reverse the decision of the trial court.
- They focus on issues of law and can review issues of fact only to the extent they decide that the trial court's decision was reasonably based on the evidence presented at trial.

Jurisdictional Limits of Courts: **Pecuniary Jurisdiction *Vs Types of Cases***

- The civil jurisdiction of the Federal First Instance and High Court are treated, under its Arts 11 and 14 respectively.
- The two grounds the Proclamation employed to determine the jurisdictional limit of the Federal Courts are: the amount of money and the type of the case.
- FFIC= not exceeding Birr 500,000.00
- FHC= in excess of Birr 500,000.00,

- **States Courts:**
  - *E.g.. Proc. 141/2000 of Oromia*
    - *Woreda–* claims that involve *up to 30,000.00 for movables, and up to 50,000.00 for immovable*
  - *Other states civil code* Art 13 or their respective courts establishment proclamation

- **The Nexus B/N The Proc 25/96 And The Civil Code**
  - **Art. 7,"**.Civ. Pro. C. as well as other relevant laws in force shall apply with respect to
    - matters **not provided for** under this Proclamation
    - insofar as they **are not inconsistent** therewith
- **Eg. Filiations,**
  - **Under FFIC or FHC? Can it be valued?**
  - **Is it covered? Inconsistent?**

- **Determination of Amount in Controversy**
  - litigant has to make valuation of the suit.
  - Valuation decides forum of the suit as courts are separated into hierarchy of different pecuniary limits.
  - Pecuniary jurisdiction goes on increasing as we move up in the ladder of hierarchy of courts.
  - Litigant is not free to assign any arbitrary value to the suit for the purpose of choosing the forum.
  - The court has power to require the litigant to prove that the valuation is proper.
  - However, in practice, most of the time the valuation made by litigant in respect to the suit is accepted.

- In Ethiopia ;Art. 16(2) the Code provide that, In deciding under Art. 131 whether it bas pecuniary jurisdiction, the court shall have regard to the amount stated in the statement of claim in accordance with Arts. 226-228.
  - **Kwt.226;** particulars as to amount of claim in general.
  - ***Kwt.227*** *Claim relating to periodical dues.* ***Definite and Indefinite****…*
  - ***Kwt.228;*** *Establishment, enforcement, or termination of right.*

- **W/t is d/ce b/n Art. 228 Vs *Claim which can't be expressed in money (Art.18)*?**
  - **under Art. 228** though the actual value of the right to be established, enforced or terminated can't be indicated, but there is a consequent pecuniary benefit.
  - it is not about the case which can't at all have monetary value.

- **Claim w/h can’t be expressed in money :-**
  - No any pecuniary benefit immediately resulted.
  - the whole purpose of the action must be for recognition or otherwise of a pure title.
  - it may be a step to be taken towards a benefit to result from still another action.

- **Art.16(3)** Where part of the claim is admitted at "any time before evidence is produced and the amount or value of the subject-matter of the suit is accordingly reduced, the court
  - may try the suit or
  - of its own motion order the transfer of the suit to such subordinate court as has pecuniary jurisdiction with regard to the amount or value thus reduced.

- **Art. 16(4)** Where a suit has been instituted in a court competent under the provision of this Chapter, such court shall remain competent not- Withstanding that the amount or value of the subject-matter of the suit Decreases or is reduced in consequence or changes in economic circumstances.

Plurality Of Claims

- **Art.** 17(1),-several claims united, **aggregate**.
- **Art.** 17(1) and 11(4), Consolidation, **as ordered**.
- **Art.** 17 (2), principal and accessory claims, and alternative claims, **higher value.**
- **Art.** 17(3) – counter claims, **higher claim**.

NO WAIVER OF JURISDICTION –

- In principle subject matter jurisdiction cannot be conferred by consent or waiver, and judgment rendered without subject-matter jurisdiction is *absolutely void*
- *But it should be clearly indicated under the law,*
- ***Does it indicated under our law? Art. 211, 231, 9……??***
- ***What would be the effect of judgment given without subject-matter jurisdiction in Ethiopia?***

Local Jurisdiction

- The concept of jurisdiction allows us to answer the question, “Would a court in this state have the power to render a binding decision in this case?”
- Jurisdiction does not, however, answer an important related question: “**Is this court a *reasonable and convenient place in which to litigate* this case?”**

- **Venue is a further limitation on the place of suit,** based on convenience.
  - Even if a given court has jurisdiction over our suit, we cannot proceed there if venue is not proper.
  - In theory, the venue rules are designed to channel each lawsuit into the court that can hear it most efficiently, preferably without making the parties and witnesses travel great distances.
  - In practice, venue rules are made by legislatures

The Basic Place of Local Jurisdiction

- Art 19(1) **Without prejudice to the provisions of the following Articles** and to such special places of jurisdiction as may be provided for by any law every suit shall be instituted in the court of the place where
  - ✓ the defendant actually resides or
  - ✓ carries on business or
  - ✓ personally works for gain.”

- Art 19(1) **Without prejudice to the provisions of the following Articles…… ..Indetexebeqe honoo….**
- and to **such special places of jurisdiction as may be provided for by any law…….. *Leeloch firdbeetooch baleelaa higgi silxaan kaltesexaachew baqar…..***
  - **Is equal status given for provisions following Art. 19 and special laws?**
  - **W/t is the difference between Amharic and English versions?**

- When do you think would Art. 19 is applicable?
- Would it be applicable in the presence of the following article?
- Positions
  - Applicable…**Without prejudice….**indicates
  - Not applicable…cross-reference of Art. 27 to Art. 19
  - Applicable where the provision are permissive and not where they are mandatory; Art. 10(1)

A. “…actually resides…”

- Indian civ. procedure is not as such concerned with the legal residence of the defendant; but, it merely requires his voluntary and actual residence.
- thus, the fact of having, ancestral home at a place and paying an occasional visit to it, may not suffice to endow it the status of an ‘actual and voluntary’ residence.
- our Civil Code has envisioned one place as a ‘principal’ residence, and considering all the remaining as ‘secondary’ ones.

- primary residence is one in which someone stays more normally or more frequently, or for the longest period.
- if it is observed that one spends almost equal amount of time at all the places; then, all of them may reasonably be considered as the residence of the person concerned.

- **B. “…carries on business…”**
  - one may reside within the jurisdiction of one Court, and owns a business in another-whereby one would be subjected to both jurisdictions.
  - The test of “…carrying on business…”, is determined neither on the bases of the continuity or intermittence of the business, nor on the physical appearance or effort of the individual concerned.
  - Rather, it is the fact of owning interest in the business and enjoying profits there from, which matters most.

- This means, having a share in the profit or the loss and a voice (some control) over the business is an important factor.
- This would practically be apparent where, a person, while living in a place, conducts business in a different place through an agent(Art.58 (b) of C.P.C).

- Art 19 (1) A suit against joint defendants may be instituted in the ,court of any of the places where any of the defendants resides or carries on business or personally works for gain.

- **Art. 20.- Defendant residing abroad**
- There are two positions as application of Art. 20(1 and 2)
- **Position 1---**
  - Art. 20 (1) – Ethiopian national defendant not residing, carrying on business or personally working for gain in Ethiopia
  - Art.20(2) defendant is a foreigner not residing, carrying on business or personally working for gain in Ethiopia

- **Position 2**
  - Art. 20 (1) – applicable to **all non-resident defendants)** ,
  - Art.20(2) , is simply to explain Art. 20 (1) and for security of execution
- Which line argument is plausible?
- If we say Art. 20(1) is applicable only to Ethiopian nationals w/h court w'd have local jurisdiction on a foreigner not residing, carrying on business or personally working for gain in Ethiopia and <u>does not own movable or immovable property in Ethiopia</u> but **consented to our judicial jurisdiction**

Suits against the State, Art. 21

- Suits against the State or a Government department or agency may in the discretion of the plaintiff be instituted in the court of the place where:
  - (a)the plaintiff resides, carries on business or personally works for gain;
  - (b) the contract to which the suit relates was made or was to be executed; or
  - (c) the act giving rise to liability occurred.

Art. 22.- *Suit against body corporate*

- (I) Suits against a business organization shall be instituted in the court of the place where the head office ,or branch against which the suit is made is situate.
- (2) Suit against an association committee. trust or endowment shall be instituted in the court of the place where such association committee, trust or endowment was formed or where such association committee, trust or endowment requires by law to be registered, at such place of registration.

- (3) 'Suits regarding the liability of an officer of a body corporate may be instituted in accordance with the provisions of this Article or those of Art. 27 (1).
  - Art. 27 (1) ….be instituted in the court of the place where sum wrong was done or- in accordance with the provisions of Art. 19.
    - Art. 19.. place where
      - the defendant actually resides or
      - carries on business or
      - personally works for gain

Art. 23.- *Suits regarding successions*

- Suits regarding a succession which is being liquidated shall be instituted in the court- of the place where the succession was opened.

Suits Regarding Contracts

- **Art 24(1), Contracts generally**,-- place of formation, execution, place mentioned in the contract; Art 19
- **Contracts of carriage**,
  - Art.208 of the Maritime Code, suits involving contracts of carriage by sea are to be instituted at the court sitting at the port of arrival of the good
  - suits concerning contracts of carriage by air are to be instituted according to Art 647 of the Commercial Code.

- **Art. 24(3) Contracts of Insurance**,
  - may be instituted in the court of the place where the head office of the insurance company is situated or registered or where the object insured is situated
- **24(4)** Contracts of pledge, deposit, or bailment.
  - are instituted in the court of the place where the property is located.

- Practically the issue is as whether provision relating to Contracts generally applicable to the special contracts under Art. 24(2, 3, &4)

Art. 25, Suits Involving Immovable Property

- must be instituted at the place where the immovable property exists.
- suits Involving Immovable Property: Suits
  - for the recovery of immovable property with or without rent or mense profits;
  - for partition;
  - for determination of any right to or interest in immovable property; and
  - for compensation for wrong to immovable property.

Practical problems

- Suits involving immovable vs **Suits Regarding Successions**
- Suits involving immovable vs **Suits Regarding family matters**

- **Art. 27 ,Suits for Wrong Done to Persons or Movable Property**
  - It is the question of local jurisdiction in case of extra contractual liability.
  - such suits may be instituted in the court of the place where the wrong was done or in accordance with the provisions of art 19.
- **Practically whether Art. 27 or Art. 24 is applicable in case of wrong to a person in a car for transportation of persons?**

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

Change of Venue (Transfer of Suit)

- the transfer is to be ordered where there exists a problem with the proceedings in the court where the case is originally instituted.
- the rules on local jurisdiction are primarily designed to achieve handiness for the parties.
- Consequently, transfer of suits from a court to another is basically meant for the suitability of the parties; particularly, the defendant.

- the plaintiff might have trickily chosen a court with a view to making it painstakingly intractable and unreasonably expensive for the defendant to defend himself properly.
- such inconvenient court is known as ‘forum non-convenient’-inconvenient forum.
  - ✓’ if it is found to be insurmountable for the defendant to gather relevant evidences so as to sufficiently defend himself; and,
  - ✓ exposes him to incur unreasonably high costs to pursue the case and to bring his witnesses to the court.

- **Under Art 31 of the Code, there are three grounds that justify such transfer.**
  - The first factor is when there is an allegation that a fair and impartial trial cannot be made in the court where the suit was instituted.
  - the court in which the case is pending cannot properly handle the proceeding since the case involves some question of law of unusual difficulty.
  - the third rational is where the court seized of the case is found to be inconvenient to the party so demanding.

- **The rule on the transfer of suits is an exception to the general principle,**
  - Thus narrow interpretation should be adopted when the need arises.
  - This means, a transfer should not haphazardly be permitted for the sole fact that a party preferred to have his case tried somewhere else.
  - If it is broadly interpreted, a party may raise every bit of conceivable reasons thereby making judicial proceedings intolerably tedious and too costly.

- **Though not articulated under Art 31, there is also another ground which could cause the transfer of suits**.
  - This could be implied from Art 91 of the Code.
  - when a pleading submitted to a court is amended and this makes the case to fall under the jurisdiction of a higher court, the court that was holding the case shall transfer it to the higher competent court.

- **Proc No 84/1975 , application before the hearing of evidence.**
- amended Art 31/1 of the civil procedure Code to the effect that an application for change of venue could only be admitted before the hearing of evidence.

Removal of Judges

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

Art 27 of the Proc., if the judge:

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

Conflicts of Jurisdiction: Priority, Pendency and Consolidation of Cases

- There is a possibility for conflicts of jurisdiction to emerge between courts
  - -where a court alleges that the matter falls within its jurisdiction while the other contends that it has the competence over the same case.
  - where two or more courts dismiss a case on the ground that it does not fall within their respective jurisdiction.

- The power to determine on such conflict of jurisdiction is conferred upon the Federal Supreme Court.
- As a rule, a suit arising from a single cause of action may not be instituted and/or tried by more than one court at a time.
- to avoid the possibility of inconsistent judgements that may be rendered on a single case;
- thereby, making its enforceability practically impossible.

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

A. Priority

- The question of priority arises when a plaintiff institutes two or more suits on the same cause of action in different courts.
- It will result in the harassment of the defendant to defend his case in both areas.
- the two courts could give inconsistent judgments.
- it will be difficult to execute the inconsistent judgments.
- To avoid this problem, the rule of priority is provided under Article 7 of the Code.

- the rule of priority takes into account the time of submission of the case to a court of law-whereby, the court in which the suit is filed first will have priority to consider the case; and,
- consequently, the second file in the other court shall thus be dismissed.

B. Pendency

- Article 8 covers the problem of pendency.
- As a rule, no court shall try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties in another court in Ethiopia having jurisdiction.
- Thus, if, while a suit is pending in a court, another suit is also filed in another court over the same cause, that would give rise to the problem of pendency,

- serve as one of the grounds for preliminary objection as per Art 244(2) of the Code, whereby a party may oppose the second suit.
- To avoid this problem, the Code has provided a rule on pendency.
- When the court is aware that another similar case is already instituted in another court between the same parties, it will dismiss the suit or it may direct the parties to apply for consolidation.
- Ethiopian court is not prevented from entertaining a case that is already pending in a foreign court(Art. 7)

C. Consolidation of Suits

- Consolidation is a procedure that is applied when two or more suits pending in different courts or the same court and between the same parties give rise to similar issues and are to be decided in different courts.
  - the matter in issue in one suit is closely related to a suit pending in another court
- In such a situation, either party can make an application to a higher court that the cases be consolidated for trial under Art 11- whereby the higher court will direct one of the subordinate courts to try the case.

- Thus where there is a question of pendency, then, both suits will be consolidated under the procedure of consolidation.
- For instance, in a suit for recovery of a property by one claiming a right to possession and a suit by the possessor claiming that the plaintiff in the other action has committed a trespass to the same property.
- In both cases, the issue is the same: who is entitled to the property?

Chapter III: Parties To And Dimension Of Suits (12 Hrs)

Parties To A Civil Suit: General Requirements

- The people who are suing or being sued are referred to as the **parties to the suit.**
- The parties to a civil suit in first instance jurisdiction are known as plaintiff and defendant.
- Plaintiff is a party who makes an allegation and initiates proceedings in a court of law;
- whereas, defendant is a person subject to a claim, i.e., a party against whom a claim is filed.

- In appellate court are called appellant and respondent.
- *When a procedural rule refers to any party, it does not mean any person—it means anyone who is a plaintiff or defendant in the lawsuit in question*
- There is a requirement that applies to a party plaintiff and party defendant as well as to parties that are brought into a pending suit as intervener, third party defendant, etc

- **First, all parties participating in a civil suit should have capacity. Art. 33(1)**
  - Capacity is the power or ability to perform juridical act.
  - Being a party to a suit is one of the juridical acts.
  - capacity to sue or be sued is an individual's ability to represent his interest in a law- suit without the assistance of another.
  - Every person is presumed to have capacity to perform juridical acts unless provided otherwise by law., Art. 192 of the C.C.

- Incapable persons cannot be parties to a suit,
- **Incapacity is divided into two.**
  - One is based on physio-psychological condition, (Art. 193 of the Code).
- ✓ minors, insane and infirm persons and persons subject to criminal sentence and deprived of some of their civil rights.
  - Incapacity due to the status or special function of a person.
- ✓ for instance, agents

- Incapable persons cannot sue or be sued in their **own names** (Art. 33(1).
  - E.g., a person below 18 years of age
- Their legal representatives shall represent them.
- If one of the parties is 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 (Art. 34(2) of the Code)
- Incapacity is one of the grounds of preliminary objection under Art. 244(2) of the Code.

Party Plaintiff

- Plaintiff is a party who brings action.
- To be plaintiff, the first requirement is to possess capacity to perform juridical acts in general.
- The other requirement is that a person must be the real party interest with regard to the particular claim or allegation he brings to a court of law against another party.

Vested Interest, Article 33(2),

- It means plaintiff should possess the right required to be enforced under the governing substantive law.
- Only someone with legal title to the right affected by the defendant's conduct could sue at law.
- The requirement is not that the person is the one who will ultimately benefit from the successful decision made in his favor
- It must be a person who has an immediate stake at a time of filing a case.

- At a time of filing a case, he should show that he has a vested interest in the subject matter of a suit.

- **The reason why the law attaches this requirement to party plaintiff are:**
  - **because a civil suit concerns individual interest/ right**
    - ✓ It is up to a concerned party only to either litigate or abandon a claim.
    - ✓ no other person could decide to bring action for a real party with interest in a suit.

- **to avoid defendant facing two suits over a single cause of action.**
  - The person who has an original interest and another person pursuing his right could bring two suits at different times and this exposes defendant to two suits.
- The determination of whether a person appearing as plaintiff may have a vested interest depends on cases appearing before a court.
- One cannot provide an exhaustive list of cases containing a vested interest here.

- in all cases plaintiffs are expected to indicate a cause of action in their statement of claim as per Articles 222 and 231 of Code.
  - It is from what is stated in plaintiff's claims that whether or not a plaintiff has a vested interest in a case can be decided.
- E.g., a contract of assignment gives rise to issues of a person with a vested interest.
- A question of vested interest is also raised in suits based on loss of support as a result of the death of a person ,**Article 2095**

Effects of Lack of Vested Interest

- If an action is brought by a plaintiff who does not have a vested interest, an opposite party should raise this as an objection .
- Absence of a vested interest in a suit is a ground of preliminary objection under Article 244(2) of the Code.

- **On the basis of the objection of the other party, the court may order the substitution or addition of a party as a plaintiff.**
  - The court makes the substitution or addition if a suit is made by such plaintiff through a genuine mistake as per the rule under Article (40) 1 of the Code.

- **W/t if a suit is made by a plaintiff deliberately to benefit from a claim in w/h he knows that he doesn't have a vested interest?**
  - The Code does not provide any rule, answer,
  - The remedy is to dismiss his case and impose penalty on him for creating inconvenience to defendant, and he could also face criminal liability.
  - This is to be inferred from Art 481 of the Code and Art 452 of the Penal Code-w/h can extend to a suit made deliberately to obtain benefit without having a vested interest.

- **The substitution or addition can also be made by a court's owns initiative.**
  - Without relying on the objection of a defendant,
  - the court may order the substitution or addition of party plaintiff by looking at a claim made by wrong plaintiff.
- **If the defendant fails to raise objection and a decision is made for a party without vested interest, can he object to a second suit made by a real party with interest?**
- **If no w/t would be a remedy for the defendant?**

- the defendant cannot object to a second suit made by a real party with interest.
  - What he or she should do in such case is to satisfy the claim of the real party with a vested interest and
  - bring a suit against the other party on the basis of the provisions of the law of unlawful enrichment to recover what he has already paid for him.

Party Defendant: Allegations

- Art. 33(3);No person may be a defendant unless the plaintiff alleges some claim against him.
- A person sued must be the one responsible for the wrongs committed and claims arising there from.
- Thus, a plaintiff should state the claim he is demanding against defendant, **Art. 224**
- This is because courts are thereto settle real disputes and, hence, if no claim is made against the defendant, he cannot be made a defendant in a suit.

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

Representation in Civil Suits: Types and Requirements

- Representative suit is a suit in which others represent real parties to a suit.
- Representation is allowed in civil cases Art. 65 Code.
  - ✓ 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.
  - ✓ Appearance in person is limited to some cases where a court believes it is necessary for the proper determination of the suit.

- This means representation is a rule in most civil cases, and appearance in person is an exception.
- The types of representation can be categorized generally into two.
  - **The First type involves** a situation in which the representatives act for the interest of the real parties to a suit.
    - They act on behalf of real parties and do not have their interest at stake in a suit.
    - This category includes the representations specified under Articles 34, 57-64.

- **The second one relates** to a situation where the representatives represent the interest of others as well their own interest.
  - They serve two interests here.
  - This category applies to the representation under Article 38 of the Code.

Legal Representation: Types and Requirements

- The representation under Article 34 is known as legal representation.
- A legal representative represents persons under incapacity.
- Since incapable persons cannot be parties to civil suits, their legal representatives should represent them.
- Their legal representatives are their organs of protection.

Representative Class Suits: Requirements

- is provided under Article 38 of the Code
- The reason for this representation is that a suit involves several persons is inconvenient for all concerned to be parties.

- is inconvenient for such a group of persons to proceed with a case individually.
- 'a class action is the action brought by a representative plaintiff (collective standing), in protection of a right that belongs to a group of people (object of the suit), which judgment will bind the group as a whole (res judicata).

- **Class Action** (art 38) & art 37(2) of the FDRE Constitution,
- Class action vs. joinder of plaintiffs. Why class action?
- **Requirements:**
  a) Large number of persons vs several persons
  b) Homogeneous/sameness of interests
  c) Consent of interested persons; how do we secure this if the class size is so large?

a) Leave of court
b) Who has the standing to sue? Should s/he be a member of the class necessarily? See Art 37(2:b)

- **Large number of persons vs several persons**

- **What does the phrase “same interest” mean here?**
  - No definition is given to it.
  - It is interpreted to mean that all the members of a group to be represented have a common interest, that all have a common grievance, and that the relief they demand is beneficial to them all.
  - By the same interest it does not mean that the claim of parties has a single cause or that it arises from the same transaction only.

- By the same interest, it means that as plaintiffs, they must demand the same relief against the defendant for the same wrong committed against all of them;
- as defendants they must be invoking the same defense against the plaintiff on the same cause of action.
- Thus, same interest means some thing more than same cause of action (same transaction) under Article 35, which we will discuss in this unit.

- An example where a representative class suit is allowed is where a local administrative body decides to give a residential area for investor and persons living there are to be transferred to another place.
- If persons claim that a decision is unlawful and challenges the decision itself, they are considered to have the same interest.

Parties Should Consent To Be Represented

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

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

Agents and Pleaders

- provided under Art.57 of the Code.
- any appearance, application or act in or to any court, required or authorized to be made or done by a party in such court may be made or done by the party in person or:

- ✓ his legal representative,
- ✓ by his agent or
- ✓ by a pleader able to answer all material questions relating to the suit or accompanied by a person able so to answer.

- **Representation by agent**
  - This is provided under Article 58(a).
  - is one where a person is authorized to act on behalf of a party to a suit.
  - Family members of a person (spouse, brother **sister**, son, father, **mother** or grandfather or **grandmother** can be agents if they appear in a suit without receiving remuneration or reward .
- the agent for the government is a person authorized to act for the government with respect to judicial proceedings (Art. 59 and 60).

- Art. 61 and 62 of the Code provided agents for members of the Armed Forces and prisoners.
  - Any person can serve as their agent if they produce a written authorization to that effect.

- **A person can also be represented by his pleader/advocate.** Art 63 of the Cv. Pr. C)
  - A pleader is a person who holds an advocate's license, and
  - no person may appear in this capacity unless he holds such a license.
  - A pleader has to produce his license together with a letter of authorization from a person who authorized him.

Joinder of Parties and cause of Action

- Why joinder?
  - Procedural efficiency
    - ✓ avoid multiple suits --- thereby avoids the possibility of making conflicting decisions.
    - ✓ save time, energy, money
  - protection of interests

- **Some Are Against This Procedure;**
  - joinder of parties multiplies the number of parties and widens the scope of litigation and consequently causes delay of proceeding
  - it results in embarrassment of the defendant and makes him not to be able to properly defend himself
- Art. 221 tries to strike a balance between these two conflicting interests toward joinder.
  - If it results in a delay of proceedings or embarrassment of defendant, the court may order separate suits.

Types of Joinder of Parties

Permissive Joinder of Parties

- Here the motion of parties makes the joinder.
- The parties entitled to join can choose between joint actions or separate suits.
- They are not obliged to bring a joint action or defence.
- This joinder is provided under Articles 35, and 36(1,2,3,4,5,6) of the Code

1. Joinder of Plaintiffs (CPC.art 35)

- The requirements:

a) A right to relief (vested interest/cause of action).

- Each plaintiff must have a right to relief.
- It could exist in the form of a joint right, a separate right, or as an alternative.
- It means that each person has a right that exists independently of the right of others &he can bring separate suit on it.

- **A right to relief is alleged to exist jointly, severally or in the alternative,**
  - jointly,
  - severally or
  - in the alternative,

b) The right to relief of each plaintiff must arise from *'same transaction'* or *'series of transactions*...'.

- **Transaction'**
  - is not equivalent to 'juridical acts' such as contracts.
  - It refers to circumstances, events, situations...
- **same transaction' is not 'same cause of action';**
  - the same transaction can give rise to different right to relief or causes of action.

- the identity of a cause of action and the sameness of the specific relief sought are not requirements;
- each plaintiff may have a distinct cause of action d/t from a co-plaintiff
- The parties may claim different remedies.
- What matters here is the source of claim.

- *series of transactions*…’.

c) Common issue of law or fact

- Not all issues to be decided have to be common;
- single issue which cuts across all seems enough.

2. Joinder of Defendants (art36)

- **The requirements of sub.1 of art 36:**

a) The right to relief (plaintiff's cause of action) is enforceable against several defendants

- who may be liable jointly, severally or alternatively).
- His right to relief against each is maintainable separately if he wishes
- defendants' liability may not have to arise from same transaction.
- **Can you imagine?**

- **it is less likely that there will be a common question of law or fact if the suits arise from separate transactions.**

- **B. Common issue of law or fact;**
  - is it possible to have cases arising from d/t transaction giving rise to a common issue of law or fact?

Article 36(2)

- makes an exception to Ar.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

- **Article 36(5) provides**
  - where the plaintiff does not know who caused the damage to him-from among several persons-and who is to pay him.
  - In such instance, he can join them.

Effect of Misjoinder and Non-Joinder of Parties

- **What will happen if there is a mis joinder or non-joinder of parties?**
- Article 39
  - If the joinder is a permissive type, the mis-joinder or non-joinder does not result in the defeat of a suit.
  - a court does not dismiss a case
    - drop a party improperly joined and demand substitution

- Indian Experience
  - If a party suing in representative capacity fails to proceed the suit / defence with due diligence, the court substitutes it with any other person having the same interest in the suit.
  - Courts are empowered to make addition and substitution of the parties to the suit after the action has been brought or strike out the name of any party improperly joined at any stage of the proceedings

- either upon application of the parties or *suo-motu* in appropriate cases and on such terms and conditions as appear to be just.
- In the absence of necessary parties no decree can be passed.

Mandatory Joinder Of Parties

- which is usually known as joinder of indispensable parties.
- parties are under obligation to bring a joint action or defense.
- There is no choice given to parties other than a joint action or defense.
- Mandatory joinder applies to both plaintiff and defendant.
  - joint owners, joint creditors or debtors, husband and wife over common property,

- All of them are concerned.
- That is why they are considered to be indispensable party.
- The absence of one will necessarily affect one’s right.
- 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.

Discussion Questions

- Is there mandatory joinder of parties, whether plaintiffs or defendants?
- What will be the effect of non-joinder of a necessary party? See art 40(2)
- Is it procedural or jurisdictional? See Art 39
- Does the CPC of Ethiopia recognize an ‘indispensable party’?

- Except for Art. 36(3) & (4) (J/defdts) the Code doesn’t have rule on mandatory joinder of pff.
- 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.

- **Article 36(3)**
  - a suit concerning property administered by several trustees, executors or administrators,
  - all such persons shall be made parties to a suit against one or more of them,
- **Article 36(4)----**
  - Where the pff sues for the recovery of immovable property free of occupants, such occupants, whatever their title, shall all be made parties to the suit.

Discussion Questions

- What will be the effect of non-joinder of an indispensable party? art 40(2)
- Does it lead to failure of a suit?
- Does the rule under Article 39 apply in this case?

The Effect Of Non-joinder Of An Indispensable Party

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

- However, when it comes to the non-joinder of a party plaintiff there is a problem.
- There is no clear provision dealing with a non-joinder of a party plaintiff and its effect.
- Article 40(2) can be considered to have an application to the non-joinder of an indispensable party plaintiff.
- This is because it says that a court may order joinder of a party as plaintiff or defendant if it believes that such party is necessary for the proper determination of a case.

- A plaintiff or a defendant who ought to have been joined (indispensable)
- A defendant or a plaintiff whose presence is necessary for the determination of all the question involved in the suit is indispensable party.
- if there is a non-joinder of a party plaintiff, the court may, by its own motion or upon application of one party, add him a party to a suit subject to his consent.

- It means that if there is non-joinder of a party plaintiff, the court should first secure his consent before adding him as a party plaintiff as per the rule of Article 40(2), which says: "*No person shall be added as plaintiff without his consent*".
- This is because it is the right of a person to sue and, thus, one should not be compelled to appear as a party plaintiff.
- It is up to a party to file a suit or abandon it, since rights of civil matters can be abandoned.

Discussion Questions

- 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?

  - **Jildii 8ffaa L.G. 39540, 47**
  - **Jildii 9ffaa, L.G. 43424,p.277**
  - **Dh/Ijj/M/M/W/F.p.152 (J.6ffaa)**

- the rule under article 39 is not applicable to cases of an indispensable party because parties are supposed to be joined as a matter of obligation.
- There are two options available to a court if an indispensable party plaintiff is not willing to join a suit as a named party plaintiff.
- One is to proceed with the case regardless of the absence of such party, since it is unfair to deny the parties who brought action the remedies they are seeking from a court for the sole reason that a party refuses to become a party.

- Hence, rather than dismissing a case, the court shall make such party a defendant.
- This makes the court to proceed with the case, protects the parties who present a case before a court, and allow him to appeal, since he is appearing as a party defendant.
- As a defendant, he is merely on a record of court and does not have any responsibility to defend unlike a proper named defendant.

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

- Joinder of Causes of Action
  - The Civil Procedure Code failed to define what a cause of action is.
  - The provision of Article 231 says that a statement of claim shall be rejected if it does not indicate a cause of action.
  - Parties are allowed to join as many causes of action as possible so long as joining of causes does not bring about delay of proceeding or embarrassment to a defendant. Parties are allowed to join even unrelated claims. Art. 217

- **An exception is provided under Art. 218,**
  - claims for the recovery of immovable property may not be joined with other kinds of claims except those involving such property.
- **Another is provided under Art. 219.**
  - A claim by or against an executor, administrator, or heir in his representative capacity cannot be joined with a claim by or against him in his personal capacity

- With the exceptions of these cases, a single plaintiff or plaintiffs with a joint interest may unite any number of claims against the same defendant or the same defendants jointly,
- so far as such joinder does not result in delay of considering a case or an embarrassment to defendant. (See, Art 221 of Cv. Pr. C)

Intervention of third Parties(Art. 41)

- **Intervention is a procedure where by**
  - a non party, up on timely application, present a claim or defense in pending action in order to protect his interests and become a party for that purpose,
- Intervention **is a procedure which**
  - Counter balances the many devices that afford protection and give pff or defendant choice in the selection of parties to the suit
  - Regulates the progression of application until determination on the application

Types of Intervention

- **Intervention of right---divided in to two**
  - **by statute**
    - ✓ Intervention is granted as a matter of right where a statute confers an unconditional light to intervene
    - ✓ E.g. In USA in suit in w/h the constitution of an set of compress is in Q,

- **to protect intervener's interest**
  - Is granted where the applicant claims an interest relating to the property or transaction that is the subject of the action and
  - is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interests
  - Eg, USA; Fed. Rule of C. pro. 24(a) (2)

Permissive Intervention

- The court has discretion to permit a non party to intervene if;
  - ✓ A statute confers a conditional right to intervene
  - ✓ A question of law or fact in common with the main action is part of the applicant's claim or defense
  - ✓ The standard for permissive intervention corresponds to that of permissive joinder.

- In order to establish that his presence is desirable, **the intervener should show an arguable claim against an existing party to the suit, though the court retains a complete discretion whether or not to permit the proposed joinder.**
- **So intervention is not a matter of absolute right in this case.**
- **Ours is also permissive**

Purposes of Intervention

1. the plaintiff have an interest in having forum if there is no alternative forum available, then his/her interest will be satisfied);
2. the defendant may properly wish to avoid multiple litigation or inconsistent relief, or sole responsibility for a liability he shares with another;

3. The interest of the outsider whom it would have been desirable to join will be determined as a practical matter.
   - protecting the interest of third party intervener-the outcome of the proceeding will affect him/her.
4. It is the interest of the court, and the public in complete, consistent and efficient settlement of claims.

Standards Intervention

- **substantive standards**
- **Procedural Standards**

- Whether intervention is allowed depends on the balancing of two conflicting policies:
  - ✓That the plaintiff should be allowed to be " master of his action", in the sense of joining such parties with him or against him as he wishes; and
  - ✓That other interested parties and the court has an interest in avoiding multiplicity of litigation or inconsistency of results, w/h may require overriding the plaintiff's choice of parties.

Substantive Standards

- **1st: Substantive right or interest relating to the property or transaction that is the subject of the action**
  - **Substantive right or interest**
    - ✓ Legally protectable ,Economic or non economic interest, Art 33
    - ✓ **Nature and sufficiency of interest**
    - "Significantly legally protectable interest"
    - direct, substantial, and legally protectable interests

Relating To The Pending Action

- Intervention is not an independent proceeding rather accessory to pending original action,
- An intervention will be allowed only if it is connected to the claims of the parties by a sufficient link.
- This prohibit him from raising issues that are not evident from the action,
- This is because there is no room of protecting interests unless that interest is going to be adjudicated by pending action,

- Should not be independent claim
- Those who have right or liability which can be enforced or defended independently should not be allowed
- s/he can intervene on either side or adverse to them.
- ✓ Joinig plaintiff in claiming what is sought by the complaint
- ✓ By uniting the defendant by resisting the claim of plaintiff
- ✓ Adversely to both

2nd: Outcome of litigation may impair intervener's interest

- This is not limited to legally binding effects, such as resjudicata, but looks to the practical impact of resolution of the litigation on the intervener's interest.

- E.g. Plaintiff sued trade and Industry ministers claiming it was improperly allowing the state to issues licenses to run soap factory W/O first requiring preparation of implemental impact statements.
  - Companies with licenses application pending were allowed to intervene
  - Rationale:- As a practical matter, such applicants would be affected by the outcome of the litigation if it cause the state agency to alter its mode of operation and require of applicants for licenses.

- **3rd:Intervener not adequately represented by present parties.**
  - If the intervener claims the right kind of interest and shows a threat of practical requirement intervention would be denied on the ground that the intervener's interests adequately represented by the present parties.
  - The burden of demonstrating in adequacy of representation is minimal

- Factors to be considered in evaluating adequacy of representation
  - The amount at stake for the intervener and the present parties,
  - The ability and resources of the present parties to litigate effectively, and
  - The existence of any conflicts of interests b/n the present party and the interveners.
  - Parties must be in similar situation

Discussion question

- Are there clear substantive standards for intervention under Art. 41?
  - Under Art. 41 (1) and (2) an applicant may only be permitted to intervene where he or she shows facts that justify he or she is interested person in pending suit.
- What sort of interest is sufficient to invoke Art. 41 ?

- **Under Art. 41(1) it is stipulated that:**
  - English version; **"...Any person interested in a suit b/n other parties……''**
  - Amharic version **''……በጉዳዩ የገባኛል የሚል …. ''**
- **So what does the phrase "interested in a suit" mean?**
- **Can we interpret it so as to accommodate the above standards?**

- **In legal science the phrase "interested in .." has got two meanings:**
  - **The First Meaning ;** Having substantive right or interest relating to the property or transaction that is the subject of the action
    - Right directly or substantially connected to the original pending action
      - Same issue
      - the interest of the intervening party is the interest of a person who was the party to the suit
      - Not independent cause of action

- **The Second Meaning of the phrase Is :**
  - directly affected by the outcome of the controversy;
  - postulates that the person concerned must have some direct interest”
  - **Indian CP C Art.89:**
    - the disposition of the action in the absence of the applicant would impair his interest or,
    - will directly affect his or her proprietary or pecuniary interest.

Discussion Question

1. There is a debate as whether we can develop substantive standards using the above two meanings of the phrase.

- ✓ Some argue as it is a way out legal interpretation;
- ✓ Others argue as it is not interpretation but law making, since judges do not have this power in our legal system there is no remedy except amendment of the provision

✓ **Which of these arguments best serve the justice?**

2.W/t does the statement "the disposition of the action ……, will directly affect his proprietary interest" indicate as to the relief sought by the applicant?

- ✓ Is intervention invoked for protection of interest which would be jeopardized by judgment on original action or judgment that he is entitled to property or transaction w/h is the subject matter to the action?
- ✓ If for judgment, how do you see with payment of court fee?
- ✓ **Cases on civ.pro., p.1-3**

- In USA judgment rendered subsequent to intervention is binding on the intervening party as if she had originally been a party, and h/she has a similar right of appeal
- **Would this be equally applicable in our legal system?**

3. When do you think can we say the disposition of the action ……will directly affect his proprietary interest?

- Judgment on pending action would have resjudicata effect on the applicant?
- Judgment directly be executed on the applicant?

- **Sedler "… *gain or lose by direct legal operation and effect of the judgment …"***
  - ✓ Sedler says these parties are **Indispensable parties**

Discussion Question

- Does this mean other parties would not be affected by the disposition of any pending action?
- What is the difference between indispensable parties and other parties?
- Do you think the procedure of intervention be strictly interpreted so as cover only indispensable parties or be broadly construed so as to include other parties?

- **Indispensable parties**:- are parties who are interested in the controversy and the court cannot do complete justice with out them and **the litigation cannot go for ward**.
- **Necessary parties;** are parties so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their presence in the suit cannot obtained the **litigation will continue with out them.**
- **proper parties:-** are those in whose absence an effective order can be passed whose presence is not needed for a complete and effective adjudication.

Intervention And Mandatory Joinder

- Intervention more flexible than mandatory joiner.
  - ✓ Their grounds are analogous
  - ✓ But does not mean that the litigation should not proceed unless similarly situated non parties are joined.
  - ✓ W/t is needed in intervention are protected and threatened interests.

- The adequacy of the present parties to protect the interests of the non parties does not relieve the court of the duty to add mandatory parties.
- In case of intervention representation is adequate, treatment as a class action may be in order.

- American Supreme court supporting the Indian practice says
  - **“the interest test for intervention in suits is by involving as many apparently concerned persons as is compatible with efficiency and due process”**.
- An Indian scholar also says“
  - ***Intervention should be concerned with the view of assisting parties in obtaining justice and protecting their rights;***
  - ***this procedure recognize the importance of joining parties to protect interests at stake…”***

- **Modern Trend to permit intervention:**
  - many America states are becoming more liberal in permitting intervention
  - English rule had established that the court should give a wide interpretation to the power to allow intervention.
  - the court s'd be mindful that 'one of the purposes of joinder of parties is to ensure that there is not a multiplicity of actions', and
  - a mere commercial interest in the outcome of the action, such as that of a creditor, was not sufficient to entitle such person to intervene,
  - **Does this apply to our case?**

Procedural Standards

1. Pending Action

- For intervention to be allowed there has to be Pending Action
- The question is whether the pending action is that between two parties or one party proceeding?
- **Position 1: Two party proceeding, Art. 41(1),**
  - **English**;“…..in suit b/n other parties ..”
  - **Amharic**;ተከራካሪ ወገኖች በክርክር ላይ ባሉበት ጊዜ”
  - **Both are in plural**

- **Position 2: One party proceeding**
  - Of course Art. 41 is general; But since Art. 32(1)…is mandatory it derogates Art. 41
  - Art. 32(1),The provisions of this Book shall apply in any proceeding under this Code.
    - ✓This book is… Book II. Parties To Suits
    - ✓Art. 41 is one provision of the book
    - ✓One party proceeding is a proceeding under this Code.
    - ✓Therefore, Art. 41 applies in one party proceeding
- ✓ **Which position is plausible?**

2.Making Of Application , Art. 41(2)

- Is annex necessary?
- **Position one: Not**
  - ✓Art. 41(2) does not indicate the content and form of the application
  - ✓It does not refer to Art. 222 and Art. 223
- **Position two: Yes**
  - According to Art. 80(1) it is pleading
  - Acc. to Art. 80(1) pleading …made in … Form in the First Schedule to this Code
  - The schedule requires annex

- **Which position is plausible?**

3. Procedure in permitting Intervention, Art. 41(3)

- After serving the original parties or before that?
- Only judges consider it ?
- Oral litigation?
- Statement of defences by the original parties on the application?

- **Why after intervention is allowed the parties served with a copy of the statement of the intervening party?**
  - Simply for the purpose of notice?
  - For statement of defence? On the merit? Or the permitted intervention?
  - Would permission to intervene be revised for the last time?
  - What if the court is erred in considering the standards? The right to be heard??

- **4. Time To Intervene**
  - Art.41(1)…**a suit**…**before judgment**.
  - Intervention is possible before judgment is given on the suit;
  - deadline for intervention is entry of judgment;
  - Judgment can be given at trial or appellate stage. The **question is**
    - **does judgment include that given at appellate stage?**
    - **What does the word “suit” imply?**
    - **Does it include appeal?**

Position One: Art. 41 Is Applicable On Appeal

- Art. 32(1) …the provisions of Book II shall apply in any proceeding under this Code.
  - Art. 41 is under book II
  - Appeal is a proceeding under this Code.
  - Therefore, Art. 41 applies on Appeal
- Art. 32(2)…. Confirms that….In applying the provisions of this Book to appeals…… the word **"suit“ shall be held to include an appeal**

Position Two: Art. 41 Is Not Applicable On Appeal

- An intervening party is a party for regarding a claim or defense he presents,
  - One can only be a party in courts of first instance, Art. 33(2) and (3)
- Art. 32(2)…. Suit is held to be appeal…… so far as may be,…..which means where appropriate
  - With regard to Art. 41 it is not appropriate
- Art. 320

- Art. 320--**the plaintiff or the defendant** may, ..., appeal against any final judgment.
  - ✓ Intervening party is not a plaintiff or defendant
- Art. 329...the appellant may not raise any fact which was not .....in the lower court
  - ✓ Since he was not a party it is highly probable that Intervening party will raise new thing for the first time

- Art. 40(5) ……only a person who was a party to the suit in the court from whose decree the appeal is preferred, ……would be made a party to the appeal,…….
  - ✓Indicates a person who was not a party at lower court can be a party at appeal
- Under Indian Civil Procedure it is provided as “suit is proceeding in action in courts of first instance as distinguished from proceedings in appellate courts” .
- **Which line argument is practical? Has Legal ground?**

5. Intervention and The Right Of Appeal

- Appeal is taken after all issues involved in the suit have finally be determined by trial court
- Appeal on interlocutory matter is possible if fall under exception of Art.320(4)
- Does intervention fall under this?
- Is there any difference between denial and permit ion of application for intervention?
- If we say it should wait final judgment, what if proceeding take long time and time appeal lapses? 60 days

- If appeal is possible what would be the remedy for the applicant for the original proceeding will get judgment while appeal on denial of application for intervention is pending?
- Does Art. 332 stand to solve such problem?

Intervention Of The Public Prosecutor ,Art. 42.

- 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.

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

Impleader/Third Party Practice , Art 43:

- It is a mechanism by which a defendant brings into a suit a third party on the ground that such third party covers or shares the whole or part of claim of plaintiff
- Third party practice, which is also known as impleader, is the procedural device enabling the defendant in a lawsuit to bring into a suit an additional **party who may be liable for all or part of the original plaintiff's claim against the defendant.**

- **Plaintiff’s Claim As Against The Defendant.**
  - hhh

- The purpose of third party practice is
  - to settle claims involving the same cause of action/ transaction in a single suit
  - avoiding multiplicity of suits.
  - Defendant's claim against 3rd party can be seen in the same suit where the plaintiff's claim against him is being considered.
- **advantages of third party practice claim are:**
  - (a) Speedier determination of the claim or issue against the third party;

- (b) Avoidance of the costs of a second hearing; and
- (c) Avoidance of the risk of conflicting decisions from different judges on essentially similar issues.

- It is optional and that the defendant may claim against the third party in a separate suit.
- **Under Art. 43(1) the defendant shall demand a court for the third party practice in his statement of defense.**

- **The questions are:**
  - whether the application for third party practice is subject to a time limit; and
  - If he fails at this time, w/r he is precluded from doing so at a later stage
- **The English version of Art. 43(1) *says***
  - "…**in his statement of defense** .."
  - But it is not indicated under Art.234 as content of statement of defense
  - Does this make this version questionable?

The Amharic Version of Art. 43(1) :

- **“....ሦስተኛ ወገን በክስ ውስጥ ይግባልኝ ብሎ በመግለፅ ማመልከቻውን ለፍርድ ቤት ማቅረብ ይችላል።**
- Indicates that the demand for third party defendant is made by filling of a separate application containing all grounds;
- But it does not indicate that it is filed along with statement of defense or after that,
- Under Indian C.P.C. it is provided as “ … **along with the statement of defense …**”
- Which means separate application but presented along with statement of defense

- In both cases there is no as such difference regarding their effects (w/r in or along statement of defense)
- But from the above we understand that:
  - The defendant should raise it as soon as he appears before a court to make a defense against a claim of the plaintiff.
  - It means that he should file an application during the first hearing of a suit.
  - If he fails to demand the third party practice at this time, he is precluded from doing so at a later stage of the proceedings.

Requirements

- The defendant has to indicate the reasons why he demands the joinder of the third party in his statement of defense.
  - that he is entitled to **contribution or indemnity** from such third party.
  - the **extent of contribution or indemnity** to be made or covered by such third party
- Substantive requirement: derivative liability b/n principal defendant (third party plaintiff) and third party defendant, ‘contribution or indemnity’

Contribution

- 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.
- Joint creditors, joint debtors, joint owners, etc. share liability and,
- hence, there is a contribution relationship between/among them.
- A defendant may assert A third party liable to the plaintiff and he is not; even if he is liable the action of another toward plaintiff entitles him to contribution

Indemnity

- 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, are some of the main relations that give rise to indemnity.
- Indemnity involves the transfer of whole or part of a defendant’s liability to a third party.
- That although he is liable to the plaintiff he has a right over against a third party for any recovery had against him,

- If the defendant is seeking a contribution or indemnity,
  - the ancillary claim is dependent on the main claim in the sense that the defendant is seeking to pass on to a third party the liability to the claimant, and if the claimant's claim fails, there is no liability to pass on.
  - Accordingly, in cases of contribution and indemnity, a distinction must be drawn between:
  - **(a) cases where the claimant's claim is *settled*,**

- the effect of which is that the ancillary proceedings will continue despite the settlement,
- because there will still be a live issue as to whether the third party should contribute to the settlement; and

❖ **(b) cases where the claimant's claim is *dismissed or struck out*,**

- the effect of which is that there is nothing left to litigate between the defendant and the third party, other than costs.

- **If these requirements are fulfilled**,
  - *the court issues summon on the third* party together with a copy of the statement of claim and the statement of defense and require him to appear at a fixed date.
  - On such a day, the third party should appear and raise any objection he may make to his intervention demanded by the defendant.
  - even if the requirements for the third party practice are fulfilled, it may not be allowed
    - ✓ where it may unduly complicate the original suit or result in delaying its resolution.

- If the third party fails to appear on the date
  - Its effects is provided underArt.76,
  - 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.

- If the defendant appears and raises objection, the court considers and decides on it.
  - If it is not well found, it orders joinder and this makes him 3rd party defendant.
  - Then, he proceeds like a defendant in a normal action.
  - He can make a counter claim or set-off against the original defendant (third party plaintiff).
- **The question whether the third party defendant can fight with the plaintiff.**
- **Different opinions**

Position 1;should not fight

- Art.43(2) Amharic version says" ...u¡c< ¬eØ ኦንዳለ ÃqÖ^M..." but does not indicate with whom.
- Art. 43(2) English version; the phrase " ... the claims as b/n the defendant and third party .."shows that the fight is only with the defendant.
- R.A.Sedler "***There is no provision in the civil proc. code authorizing 3rd party defendant to make a claim against plaintiff.***

- Joining the suit for the benefit of defendant; how can he fight against the plaintiff with out being duly sued by him?
- It contradicts the purpose of the procedure;
- In India as a principle***"… be a party to the suit as if he has been duly sued by the defendant …***".
- But exceptionally" **if the 3rd party desires to dispute the plaintiff's claim, he may apply for leave to defend…** "
- Nothing provided under our CPC like this

- The English version of Art. 76(1) provides the effects of third party defendants failure to appear , not the procedure to be followed when he appears
- The Amharic version of Art. 76(1) supports this position

- **Position 2: Can fight with the plaintiff.**
  - The English version of Art. 76(1).
- Art.43(2) the phrase”...በክሱ ውስጥ እንዳለ ሆኖ ይቆጠራል ።” shows that he is a party to the suit,
- If he is a party to the suit he can fight with all parties to the suit
- Artt.43(2)the phrase”.... shall be deemed to be in the same position as a defendant... “ shows that he is considered as original defendant.
  - In India it is provided like this but qualified
- **Which position is reasonable and logical?**

- The third-party defendant may assert against the plaintiff any defences which the third-party plaintiff has to the plaintiff's claim.
- He may also assert any claim against the pff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
- The pff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the pff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defences

- The 3rd party defendant fights two cases:
  - his own liability towards the principal defendant & the liability of the principal defendant towards the principal plaintiff; see Art.76(1)
- **Is the third party defendant liable to the plaintiffs? See Art 76(2)**
- **Can a court give an execution order directly against third party defendant?**
- **Does Art. 76(2) shows that judgment and order should only against the original defendant?**

- A proclamation to provide for vehicles insurance against third party risks No.559/2008 Art.18(1) ''*Where the judgment is rendered against the insured person..the insurer shall...pay to the judgment creditors any sum payable under the judgment....*''
- Art.18(2) ***The court.....shall issue execution order accordingly.***
- ✓ Does it contradict with Art.76(2)? Or simply affirms that Art.76(2) is a principle?
- ✓ Does the proc. applicable to all third party defendants or only in insurance cases? If not can we say Art.76(2) applies in all other cases?

Chapter IV: Pleadings And Pre-trial Proceedings (18hrs)

Law Of Pleadings

- Much of the activity in a lawsuit consists of written documents, prepared by the parties, which are **filed with the court.**
- **Papers are filed** by delivering them to the office of the clerk of the court, where they are added to the court's permanent file of the lawsuit.
- people refer to court papers generically as **pleadings, although, technically, the term *pleadings*** includes only certain papers such as the complaint and answer

Pleadings: Definition

- Pleadings mean all formally written statements filed to a court of law by parties to a suit with respect to their respective claims and/or defenses.
- Art. 80(1) defines pleadings indirectly
  - by enumerating, formally written statements that constitute them,
  - St/claim, st/defense, counter-claim, memorandum of appeal, application or petition and **any other document originating proceedings or filed in reply thereto.**

- **What is proceedings? When a document is said to originate proceedings?**
  - Proceeding also termed *action at la w*
  - “ An action ,to be an ordinary proceeding in a court of justice by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong.
  - It is said to originate….if it is made with a view to getting enforcement of right or claim.
  - *Those filed in reply thereto are pleadings*

- In all legal systems there is a constant tension between two competing goals as W/r or not pleading highly formalized document that had to conform to very specific rules.
  - On one hand, we want the system to be flexible—we consider it unjust for someone to lose his case because he failed to follow some trivial bureaucratic rule.
  - On the other hand, we want justice to be uniform and predictable; we do not want the outcome of a case to depend on the whim of the judge who happens to decide it.

Purposes Of Pleading

- Pleadings is the task in w/h each party to the suit is required to state w/t the dispute is about and w/t he wants the court to do.
- define exactly what issues the court is being asked to decide.
- To frame the issues for the entire lawsuit; no party is allowed to delve into issues that are outside the scope of the pleadings.
- It forces all parties to specify, on the written record, exactly what the dispute is about.
- **Specific purposes…..next**

- **Notice**
  - provide the defendant with notice of the suit and enable him to prepare his defenses.
  - provide a summary of the claims and defenses of parties to a court, which enables a court to frame the appropriate and relevant issues that need decision.
- **Limit The Scope Of Litigation**
  - They fix the issues to be decided, and determine the evidences to be used by the parties and in a way, limit the scope of litigation between parties .

- The court cannot create issues of its own and then pass decision.
- It is based mainly on pleadings of parties that the court tries to frame issues; Art. 248.

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

- **They Try To Expedite Litigation.**
  - realized when the rules on pleading are employed properly by parties and the court.
  - all the rules on pleadings shall be used to achieve this purpose.
  - But the substantive rights of parties should also be taken into account when there is an improper pleading.

Basic Rules Of Pleadings

- The requirements relate to their preparation, format, and content.
- They can be divided into technical and legal ones.

Technical Sufficiency

- relate mainly to the preparation and format of pleadings.
  - The technical requirements are provided under Articles 80(2), 222, 223,234,327-330,
  - The registrar of a court examines them:
- **First ,they shall be handwritten in ink, printed, or typewritten on the prescribed paper. Art.** 80(2).

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

- **The third requirement Pleading must only state Material Facts In Concise Form**
  - Only Facts
    - ✓Something that actually exists; an aspect of reality
    - ✓Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions.
    - ✓ An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation

- No legal argument
  - arguments shall not be incorporated in pleadings.
  - b/se the purpose of pleadings is to furnish the court and the party with information as regards the facts of a case.
  - it is the business of a court to look for the relevant provisions of the law applying to facts stated by parties

- **Does that mean citing any legal provisions is prohibited?**
- **Points of law**
  - Apart from pleading the facts on which his claim is based, the claimant can also **plead a point of law.**
  - Although they are not obliged to plead it, it would be good practice to do so, if it would assist in identifying the real issues in dispute between the parties and give the defendant early notice of the legal basis of the claimant's claim.

- **No evidence**
  - that the parties should not include issues of evidences in pleadings.
  - Facts as regards evidences are to be raised at a trial stage,
  - Legal or factual conclusions

Material Facts

- material facts which the party relies for his claim or defence
- those facts essential to the party's claim or defence, and not the subordinate facts that are the means of proving them.
- A fact that is significant or essential to the issue or matter at hand.
- *allegations of fact that the party proposes to prove at trial (but not the evidence by which they are to be proved) and stating the remedy (if any) that the party claims in the action.

In Concise Form

- By a concise statement of material facts is it mean that they shall state what is demanded in clear, precise and plain language.
- it is because pleadings are read by a court as they stand, and a party is not allowed to add claims or defenses at a later stage.
  - ✓Too short, with no enough detail to understand what the case is about.
  - ✓ Too long, and the reader will lose interest.
- If prepared in line with the forms given by the Code, they become definitely concise.

- **Certain facts, however, are necessary in every case. Here are some of them:**

1. The names of the parties you are suing.

2. The state and residence of the ***parties*** you are suing.

  - In the case of corporations and other entities, you need to know at least the state in w/h the entity is incorporated or created and
  - may also need to know the state in which the entity has its principal place of business.

3. *The main facts that led to the injury for which* your client is suing.
4. *The place where the injury to your client occurred,* and the date on which it occurred.

- **The fourth requirement is that they shall be verified**.
  - The verification is made by signature or mark as the case may be.
  - By verification it is mean that facts alleged in the pleadings are true and correct.
  - If the facts are found out to be false allegations, the party is held responsible
- **The fifth condition is that they shall be signed by the party or person authorized to verify the pleading. Art. 93**

- **The sixth requirement is that annexes ;Art. 223 and 234**
  - Annexes shall accompany, for instance, a statement of claim and statement of defense
  - The same is true for petitions and applications filed for special proceedings that are to be accompanied by affidavit.
- **What measure can the registrar take if one of these requirements is not complied with?**

- **Art. 229 ;the registrar can reject a statement of claim where:**
  - *it is not in the form provided for by Article 222;*
  - *it is not accompanied by the annexes provided for by Article 223; or,*
  - *it is not verified in the manner provided for by Article 92.*
- This Art. does not indicate what the registrar should do if a statement of claim is not signed.
- **What will be the effect/consequence of rejection of pleadings by the registrar?**

Art. 232

- Rejection by the registrar does not prohibit a party from bringing a fresh pleading.
- if the party corrects the defects, he can submit fresh pleading.
- The registrar shall provide reasons for rejection of pleadings.
- A party unsatisfied by such reasons can apply to the bench to review the decision of the registrar.
- The application shall be filed within five days after the registrar made a decision.

Statement of Claim

- A civil lawsuit is begun by the plaintiff filing a **complaint with an appropriate** court.
- The complaint is a formal, written statement in which the plaintiff describes, in summary fashion, what the dispute is about, and what plaintiff wants the court to do.
- The statements in a pleading in which a party lays out his version of what happened to cause the dispute are called **allegations.**

- In addition to general rules of pleading, a statement of claim shall contain certain items that are listed under Article 222
- By looking at these items, one can divide the parts of the statement of **claim into five parts** as clearly grasped from the **schedule(in your module it says four parts).**

The first Part: caption or Title.

- pleadings begin with a caption, w/h serves the same function as a title page in a book.
- In the caption, the plaintiff must state the:
- ✓ name of the court in which the suit is filed,
- ✓ *place where the court sit (hear cases)*
- ✓ title of the suit (complaint or answer), and
- ✓ the names of the parties **including their description and address.**

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

The Second Part: Description of parties /Jurisdiction and Parties

- If the plaintiff is under disability or bringing action in a representative capacity or by advocate , this shall be stated;
- It means that the capacity in which the plaintiff is suing shall be indicated.
- If a person files it as an agent or advocate, the relevant documents shall be produced by such person to show that they are authorized to act on behalf of the plaintiff.

- The plaintiff must allege facts showing that the court has jurisdiction
- If the party has some relationship with another party in the suit—husband, wife, employer, etc.—the relationship should be stated.
- the complaint include “a short and plain statement of the grounds upon which the court’s jurisdiction depends.
- It is also necessary, somewhere in the complaint, to identify the parties.

- ***If the party is an entity, such as a corporation or*** partnership, you should say what the party is and what state's laws it is organized under.
- If the entity does business in the state in which suit is being filed, that should be mentioned as well.

The Third Part: Body Of Pleading

- The third part of the statement of claim is the statement disclosing a cause of action and prayer for relief.
- The statement of claim shall state the facts constituting a cause of action and when and where it arose.
- In the body of the complaint, you must give “a short and plain statement of the claim showing that [plaintiff] is entitled to relief”;

- To do this, you must accomplish two main goals:
  - (1) Give a short summary of the facts of your case, i.e., tell what happened to pff; and
  - (2) state the particular facts necessary to establish each of the elements of each cause of action.
- The complaint ends with a **prayer for relief, a concluding section stating specifically what** plaintiff wants the court to do
  - typically, award a money judgment for damages.

- A party shall state the value of the subject matter of a suit
- Thus, the fact that a court has jurisdiction is also to be dependent on the content of the statement of claim, particularly on the cause of action stated by the plaintiff.
- The statement of claim shall state the demand for the relief to which the pleader believes he or she is entitled to., Article 224.
- The plaintiff shall state specifically the relief that the he or she claims

- plaintiff requests that the Court enter judgment in favour of plaintiff and against defendants and each of them as follows:
- 1. For general and special damages in the amount of $100,000.00.
- 2. For plaintiff's reasonable costs and attorney's fees incurred herein.
- 3. For such other and further relief as to the Court seems just in the premises.

- **It is customary for the allegations** of a complaint to be organized in numbered paragraphs so that they can be easily referred to in the answer and in other court papers.

The Fourth Part: verification and signature

- The complaint concludes with the standard date and signature lines used in all court papers
- “Every pleading . . . shall be signed by at least one attorney . . . ” (except, of course, when the party has no attorney).
- when an attorney signs a complaint, he or she is certifying to the court that he or she has made a reasonable inquiry and believes that the allegations are supportable and proper.

- In other words, the attorney's signature on the complaint gives the court a weapon with which to enforce the ethical requirements
- in addition to the attorney's signature, the client furnish a sworn affidavit attesting to the truth of the allegations of the complaint
- The party and the party's attorney have reasonable grounds to believe a statement is true and do believe it is true, but cannot prove it at this point

The Fifth Part: Annexes ;Art. 223 And 234

- Accompanying Papers
- For the clerk of the court to accept your complaint for filing, you must present, in addition to the complaint itself (including any exhibits that you have incorporated by reference
- A number of copies of the complaint at least equal to the number of defendants upon whom you will be serving process, plus one for your own file.

Documentary Evidence

- Art. 223(1)(b) & 234(1), pff and defdt shall attach to the their respective pleadings :
  - List documents the original and a copy of any document in his possession upon which he sues;
  - If not in their possession, specifying in whose possession or power such documents are;
  - where he has no witnesses or documents to produce, a declaration to that effect, Art. 223(1)(c)

- **Documentary Evidence When To Be Produced**
  - filed with the pleading ,Art. 223, 234 & 137(3)
  - annexed to the pleading ,Art.137(3)—period between filing pleadings and first hearing
  - at the first hearing of the suit, Art. 137(1)
    - ✓ Which has not already been filed in court, and
    - ✓ all documents which the court may order to be produced.

- Art. 137(3) Without prejudice to the provisions of Art. 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.
  - Do you think those to be produced at first hearing are only those listed in the pleading?
  - What does Art. 137(2) imply?

When is Art. 145 is applicable?

- Only from other court or from the record of the ordering court? Or Other governmental offices?
- Court by its own motion?;
  - if yes according to Art. 137(1) only those in whose possession or power such documents are specified?
  - If we say only those specified is it fair to interpret those to be produced at first hearing under Art. 137(3) and (2)are also include unlisted?

Examination By The Registrar

- If the st/claim fulfils all the technical requirements, the registrar shall proceed as per Art. 230
  - gives number to a suit and register it on the register of civil suit.
  - examines and compares the original and copy of document attached to the statement of claim and gives the original to the plaintiff.
  - order the party to pay the court fee.
  - Finally, the registrar shall submit the statement of claim and annexes to the court.

Statement of Defences

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

- The content of statement of defense is given under Article 234.
- The statement of defense has mainly two parts.
- One is caption in which the defendant is supposed to state the name of the court to which he submits his defense, and the number of the suit.
- The other part of the statement of defense is the statement showing the points of defense.

Respond to Allegations of Complaint

- In stating his facts of defense, the defendant must respond to each allegation of the facts made in the statement of claim whether he admits or denies them.

Admission

- A Simple Admission—
- Admit in Part, Deny in Part—
- Admit/Deny Plus Add New Allegations

Denial

- The denial he makes must be put in a direct manner.
- Evasive denial does not amount to a defense under Article 235 rather it amounts to admittance.
  - A Simple Denial
  - A Denial for Lack of Information—

Affirmative Grounds Of Defense,

- In the answer, the defendant may also add any factual allegations that defendant thinks plaintiff has omitted.
- An affirmative defence is one in which, instead of denying plaintiff's allegations, defendant offers some independent reason why defendant cannot be found liable.
- is a defence that relies on factual issues not raised in the complaint.
- Affirmative defences have elements, and defendant must allege facts supporting each element in the answer.

- To do so, it is necessary to know what the required elements are for each affirmative defence being asserted.
- **Affirmative defences specific to that cause of** action (for example, privilege or justification as a defence to false imprisonment).
- **Affirmative defences that may apply to the entire lawsuit,** rather than to individual causes of action, such as incapacity, or that the court lacks jurisdiction or that the action is barred by period of limitation, failure to state a claim ..etc.,

- **Procedural Defences should be considered in every lawsuit:**
  - jurisdiction of the person,
  - jurisdiction of the subject matter,
  - venue,
  - sufficiency of service of process, and
  - indispensable parties
  - res judicata.
  - Pendency
  - arbitration and Compromise,

- **Affirmatively Alleges The Defences Of**
  - accord and satisfaction,
  - assumption of risk,
  - contributory negligence,
  - discharge in bankruptcy,
  - duress, fraud, illegality
  - failure of consideration,
  - , injury by fellow servant,
  - license, payment, release, and

Third Party Claims

- The answer is also the place where the defendant can raise any claims against the plaintiff or against third parties.
- If the defendant believes that there is someone whom plaintiff has not sued who should be involved, defendant may also bring **third-party claims,** which are the equivalent of defendant suing someone else

Counterclaims and cross-claims

- a counterclaim is, **a lawsuit by the defendant against the plaintiff**.
- The allegations of a counterclaim are written in the same way as if the defendant were preparing a complaint against the plaintiff.
- The answer may also include **cross-claims—claims by one defendant against another defendant.**
- Counterclaims and cross-claims are tacked on at the end of the answer, rather than put into a separate filing.

- In the caption, we title the document “Answer and Counterclaim” or “Answer and Cross-claim” instead of merely “Answer.”
- defendant— the person who is asserting the counterclaim—becomes the **counterclaimant, and the plaintiff is referred** to as the **counter defendant.**
- **Similarly, in a** cross-claim, the defendant who is asserting the claim is the **cross-claimant and the other defendant** against whom it is asserted is the **cross-defendant.**

Examination of Statement Of Defense

- If statement of claim is found to be sufficient in terms of fulfilling legal requirements, the court issues summons on the defendant.
- On the date fixed in the summons, both the plaintiff and defendant are supposed to appear before a court for the opening of the hearing of the suit.
- It is on this date that the statement of defense is examined by the court
- The court can reject the statement of defense if it does not sufficiently fulfill the requirements it is supposed to comply with.

- The same rule under Article 229 shall apply to the statement of defense. Art. 238
- If the statement of defense is rejected, the court shall proceed with the trail of the case.
- If he appears with no statement of defense, also the court shall proceed with the case.
- The rejection or appears with no statement of defense 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 Art. 241**

Discussion Question

1. On your module **it is indicated that "..even if statement of defense is rejected, the defendant could defend himself orally under Art. 241..".**
   - **How do you think he will do so?**
   - **By presenting documentary and testimonial evidences?**
   - **No statement of defense , no list of evidences of both kinds; no annex of documentary evidence?**
   - **Only cross examining pff's witness?**

2. Also in your module **If he appears with no statement of defense, also the court shall proceed with the case;**

- Do they mean the same thing? Rejection for not fulfilling the requirements and failure to file?
- **Art. 233 and Art.238**

❖Legal Sufficiency

- After the registrar shall submit the statement of claim and annexes to the bench,
- the judge examines the statement of claim to establish whether or not it fulfills the legal requirements. Art. 231
  - ✓Jurisdiction
  - ✓Cause Action

Cause of Action

- What is a cause of action?
- You can win a lawsuit against someone only if you prove that they did something that the law recognizes as an actionable wrong;
- To pursue a cause of action, a plaintiff pleads or alleges facts in a complaint, the pleading that initiates a lawsuit.
- The points a plaintiff must prove to win a given type of case are called the "elements" of that cause of action.

- ***W/t is the d/ce b/n these three terms?***
  - *claim,*
  - *cause of action, and*
  - *theory of liability—*
- *are often used somewhat interchangeably.*
- All involve a single concept, namely, a way of testing a specific set of facts to see whether it is appropriate for the court to step in and make someone pay.
- ***A claim is an assertion of liability based on a single cause of action and made in an actual lawsuit.***

- In the law, a **cause of action** (a **claim**) is a set of facts sufficient to justify a right to sue.
  - **The fact or combination of facts that gives a person the right to seek judicial redress or relief against another.**
- Also, the legal theory forming the basis of a lawsuit.
  - **The phrase may refer to the legal theory upon which a plaintiff brings suit (such as breach of contract, battery, or false imprisonment).**

- A cause of action generally encompasses both the legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant).
- There are a number of specific causes of action, including:
  - contract-based actions;
  - statutory causes of action;
  - torts such as assault, battery, invasion of privacy, fraud, slander, negligence, intentional infliction of emotional distre

- **Eg. the cause of action for negligence has four elements: duty, breach of duty, causation, and damages.**
- **Thus, to state a cause of action for negligence against Shalala Hotel, Regasa's complaint might allege that**
  - (1) the hotel had a duty to provide safe accommodations for guests;
  - (2) the hotel breached that duty by knowingly allowing the room doors to fall into a poor state of repair so that they do not close properly;

- (3) the hotel’s failure to maintain the doors properly caused Regasa to be injured; and
- (4) Regasa was injured and lost money as a result.

Dismiss For Failure To State A Cause Of Action Or defences

- The cause of action is the heart of the pleading that initiates a lawsuit.
- Without an adequately stated cause of action the pff's case can be dismissed at the outset.
- It is not sufficient merely to state that certain events occurred that entitle the pff to relief.
- All the elements of each cause of action must be detailed in the complaint.
- The claims must be supported by the facts, the law, and a conclusion that flows from the application of the law to those facts.

- **Analysis question for Examination as to Whether Statement Of Claim State A Cause Of Action .**
  - **Analysis question: For each claim being asserted in the complaint,**
    - (1) does the law recognize a cause of action?
    - (2) are all elements of that cause of action properly alleged?

- **Example:**
  - The complaint alleges a cause of action for the tort of battery,
  - but fails to include any allegation that defendant made a harmful or offensive physical contact with plaintiff.
  - Since “harmful or offensive touching” is an element of the tort of battery,
  - the complaint, on its face, fails to state a valid cause of action for battery.
  - Defendant can move to dismiss the cause of action for battery.

Analysis question for Examination as to Whether Statement Of Defence State A Cause Of defences

- **Analysis question: For each affirmative defence alleged in the answer,**
  - (1) does the law recognize the defence as valid ?
  - (2) is the defences correctly pleaded?

- In India there are two basic ways in which a claim or defences can be subject to attack by motion:
  - ***1. There can be an inherent defect in the way that*** the claim or defence has been pleaded—that is, one or more of the elements of the claim or defences can be incorrectly stated or missing; or
  - ***2. The claim or defence can be correctly pleaded,*** with all of its elements correctly alleged, but the evidence supporting one or more elements is not sufficient to create a "genuine issue of material fact."

- Some say ,in our legal system ,it is not necessary to consider evidences in order to determine whether or not the statement of claim discloses a cause of action.
- Does Indian experience is of some help?
- Do you agree?

Effects of Failure to Plead

- A party pleading is supposed to plead all the claims arising from a single cause of action.
- Issues are framed on the basis of allegations made in the statement of claim; if not included in the pleading, it is not put in issue by a court.
- the plaintiff is not entitled to raise this at a trial stage and produce evidence to prove it.
- b/se the other party is not aware of such issue and cannot challenge it.

- Failure to plead means that the plaintiff omits some facts he could have alleged.
- The remedy for failure to plead at the beginning is to request an amendment of pleading.
- In the absence of permission to amend the pleading, the plaintiff is not allowed to raise new issues at a trial and introduce evidence unless the court frames issues by its own motion using the power under Art. 252.
- Failure to plead produces effect **if the defendant raises it**

Failure to deny

- Denial should be specific.
- Failure to deny means that the defendant is not replying to some points of defense against the claim of the plaintiff.
- If the defendant fails to respond to every allegation in the statement of claim, it means that he is indirectly admitting it.
- he cannot raise them at a trial.
- Unless those which prevent a court from giving valid judgment.

Alternative and Subsequent Pleadings

Alternative Pleadings

- An alternative pleading is optional grounds of claims or defenses relied on by a party.
- It does not mean, 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.
- E,g. ,the defendant ---there is no valid contract---if there is performed----if not is prohibited by force majeure....if not no damage....if there is exaggerated

- The possibility of alternative pleading by the defendant is provided under Art. 237.
- the defendant may state different and separate grounds of defense in a single statement of defense.
- There is no limitation as to the ground of defense that is invoked by the defendant.
- Art. 224(1) states the application of alternative pleading to the plaintiff.

Subsequent Pleading

- is also known as further pleading.
- It means pleading again on the same issue on which the pleading already been made.
- The procedure is that once the court fixed a date for the hearing of a suit and conducted a pre-trial proceeding, it shall proceed to a full-scale hearing of a suit since the pleading stage is completed.
- However, further pleading is allowed in certain instances before the trial of a case.
- This is provided under Article 239.

- Further pleading is allowed when the statement of defense contains counter-claim or set- off against the claim of the plaintiff.
- If it does not contain, further pleading is not be allowed unless an amendment is allowed by the court.
- Here a court should first ask the plaintiff as to whether he wants to reply to the defendant’s claim.
- If not ,the court should not order further pleading to be made by the plaintiff

❖Amendments Of Pleadings, Nature And Purpose

- An amendment is the correction of an error or the supplying of an omission in the process or pleadings.
  - ✓might have been well pleaded ……,but which through error or inadvertence was omitted or misstated.
- It is allowed to rectify defects in pleadings.
- If allowed, it introduces a modification to the content of the pleading already submitted to a court.

- The question of amendment is raised when a party tries
  - to produce evidence on something which is not included in the pleading or
  - that the evidences produced do not prove the contents of pleading or
  - that a party comes across new facts that he should have included in his pleadings, etc.
- The provisions of Article 91 and 252 deal with amendment of pleadings.

Grounds and the Process

- It should be merely technical-where raised merely for the purpose of enabling to raise a purely technical objection i.e. waive able objections.
- It should be useful and of substance: Where it would help in substantiating claim or supporting defense.
- Should not introduce a totally new and different case.
- It should not change the case to that w/h require further evidence to be adduced by the opponent.
- Should not change specific legal relation on w/h the claim was based , cause of action and title.
- The ultimate test is " can the amendment be allowed with out injustice to the other side or not"

- The amendment is ordered by the motion of a court or by the application of a party.
  - by the motion of a court is limited to cases where the error in pleading is likely to affect the substantive rights of a party.
  - In other cases, ordered on the basis of the application of a party.
- Under to Art. 91 and 252, it is made when 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.

- **Jildii 12ffaa, L.G. 63699 አፓኖ ኢንጂነሪንግ ኮንስትራክሽን ዴርጅት እና አቶ ጥሩነህ ይመር ሏምላ 15/2003**
  - **ግሌጽነት የው** ክስ /አቤቱታ/ በቀረበ ጊዜ ክሱ በተከራካሪዎች አነሳሽነት ወይም ፌ/ቤቱ በራሱ ክሱ እንዱሻሻሌ ሳይረግ በናው የቀረበን የይገባኛሌ ጥያቄ ሊይ የሚሰጥ ፌርዴ ተገቢነት የላው ስመሆኑ የፌ/ብ/ሥ/ሥ/ህ/ቁ. 91/1/

- **Jildii 12ffaa, L.G. 55973 ወ/ሮ አፀ ኤድ እና አቶ ትኩ ዋቅሹም የካቲት 21/2003**
  - በመጀመሪያ በቀረበ የክስ መከሊከያ መሌስ ያሌተካተተን የመጀመሪያ ረጃ መቃወሚያ መሌስ እንዱሻሻሌ በሚሌ ፌ/ቤት በሰጠው ትዕዛዝ መነሻነት ተካትቶ ሲቀርብ ተቀባይነት ሉያገኝ የሚችሌበት የህግ አግባብ የላ ስመሆኑ የፌ/ብ/ሥ/ሥ/ህ/ቁ. 91, 244 የፌ/ብ/ህ/ቁ. 1856

Effects and Related Issues

- Amendment
- ✓ on one hand may cause delay of proceedings.
- ✓ On the other hand, amendment protects a party from losing his substantive rights or being affected as a result of pleading error.
- The phrase in Art. 91 and 252, which says" necessary for the purpose of determining the real question in dispute" aims at striking a balance between these two interests.

- Another factor for striking such a balance is the imposition of damage on a party who requested the amendment of pleadings.
- the tendency in most legal systems is toward allowing amendment....a liberal approach.

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

- the introduction of new evidences does not fall under Art. 91(1) and that there is a separate procedure on the production of evidences.
- Hence, the introduction of new evidence could not serve as a ground for the amendment of pleading.
- A party can request amendment at any time before a court renders decision.

Pre-Trial Proceedings

Issuance of Summons

- Summons refers to a formal mechanism by w/h a defendant is notified of a suit made against him and called upon to appear on a fixed time and date before a designated court to answer an allegation made by the plaintiff against him.
- The authority to issue summons is invested in either the judge or the registrar of a court, Art. 94(3), 233&338 of CPC
- If the number of defendants is more than one, the summons shall be issued and served on each defendant

Why serve summons on the defendant?

- **Basic Policy:** Reasonable notice must be given.
- **Constitutional due Process**: No one should be affected by a judicial proceeding without being given fair hearing
- No jurisdiction without summons (art 78 CPC; an ***ex parte*** decree can be set aside if there was no due service)

❖ Modes Of Service In Their Order Of Importance:

A. Personal Service-

- direct on the defendant (Art 95(3),
- on the defendant's agent who is authorized to accept service (Article 96(1)).
- on the defendant's pleader / advocate, Art. 96(2).
- most effective

B. Constructive Service

- -indirectly through others, such as agents & pleaders (Arts. 96-101).
- It is as good as personal service (Art 96(1))

C. Substituted service (Art.105(1)

- including but not limited to affixing on courthouse & defendant's last known address, postage, newspapers, etc.
- It is as good as personal service (Art. 105(3))

- Summons has to be effective in order to produce legal consequences;
- What constitutes effective summons, then?
- **mode** (Art 70(a) CPC requires *'due service'* and
- **time** (Art 70 (c) requires *'sufficient time'* for the defendant).
- Choose the most effective mode of service available under the circumstances, but watch out the order of importance.

- Which type of substituted service do you commonly use in your courts? Affixing? Newspapers? Postage, any other means?
- Under Art 105(1) it appears that a judge is free to choose any instrument he wishes, but this discretion is not absolute. The judge must choose the one which is most effective in accessing the defendant.

- **Discussion issues**:

i. TheTegegn Ingida case: court published notice in *Addis Zemen* as defendant wasn't found at his physical address. Court refused to set aside ex parte decree under Art 78 holding that substituted service is as good as personal service per Art 105 (3). How effective is the newspapers, especially gov't owned ones? Literacy, distribution, readership issues, etc

ii. Elisabeth Gessesse Case :Court affixed summons only on its room without affixing it on defendant's house despite clear address.

- **Proof of Service of Summons**: See arts 102, 104 &103 CPC
- Art 70(a): plaintiff has to prove that defendant was ***duly served*** for the suit to be heard *ex parte* at first hearing.
- What is ***"due service"*** and ***how do we prove it?***

- A summons is said to be duly served if it complies with the mode prescribed by law and ordered by the court.
- The Proofs:

a) Signed acknowledgment of receipt of service by the defendant, agent, pleader, Art 102(1) &110(1).

b) Endorsement on the original summons stating the time & manner of service as well as the name and address of witnesses present, Art 104.

- **What if defendant refuses to sign receipt of service?**
- Options available (Arts. 102(2), 103, 105(2); see Art 103 Amharic version

1. Issue fresh summons, (Arts 94, 95),or
2. Order substituted service, (Art 105(1), or
3. Consider summons duly served(Art.102/2) and proceed *ex parte* per Art 70(a)

- ***Which option do you take, & why?*** *For example, when do you consider that summons is deemed served and avoid fresh issue or substituted service? Note that the law under Art 102(2) as a matter of principle does not deem a defendant who refused to acknowledge receipt of service as duly served; this is rather an exception. The rule is that the judge has to choose b/n issuing fresh summons or ordering substituted service as Art 102(2) first calls Art 103 into application, and the latter calls in Art 105(2) which requires either fresh summons or substituted service.*

- *But check Art 103 Amharic version where ex parte is automatic.* Which version do you think better serves the interest of justice? Which one is more risky &burdensome?
- What is the practice in you respective benches?

- **What if the defendant is not found at his address?**
- Art. 103 covers cases where both personal and constructive services proved impossible despite due diligence.

1. Plaintiff must return summons with affidavit stating what prevented him from serving, &
2. Court issues either fresh summons or orders substituted service pursuant to Art 105(2)

- **Timeliness of service of Summons**
- Due service is a necessary but not sufficient condition to proceed *ex parte*, Art 70(a & c)
- Adjourn hearing even if there is due service but “not in sufficient time” Art 70(c).
- Due Process: he must be given adequate opportunity to consult lawyer, collect evidence and prepare his defense- fair hearing.

- To determine whether service was timely or not the evidence of due service must indicate the exact date of service.
- What span of time is considered sufficient for purpose of Art 70(c)? The law fixes no number of days; use the analogy of Art 338(2), something missed under Art 233.
- The 10 days of Art 240 are irrelevant.

- **The Role of Courts:**

1) They must choose the most effective mode under the circumstances
2) They must allow sufficient time for the defendant to prepare his defense and travel to court
3) They must remain vigilant as to proof of service

- **Concluding Remarks:**

- Fair Trial→ right to be heard→ summons
- Summons has to be due and timely
- No jurisdiction, i.e. you can't bind the defendant with your decision without effective summons
- Constructive and substituted service are as good as personal service→ ex parte decree may not be set aside per Art 78 for want of due service.
- Judicial vigilance is indispensable.

Appearance of Parties and consequences of non-appearance

- When is the date of appearance? On the date of first hearing
- What is the objective of first hearing? preparing the case for an *orderly trial*.
- What does it take to prepare a case for an orderly trial? See next slide

Topic 3: Appearance of Parties ... cont'd

- **Major activities on first hearing**: mainly based on pleadings filed

1. Check appearance of parties Art 241(Arts 69-78)
2. Identify preliminary objections, if any, and settle them under Art 245(1)
3. Secure clarity over the substance of the dispute by checking denials and admissions, & frame issues; see Arts 241 & 246(1)

Topic 3: Appearance of Parties …cont'd

1. **Checking the Appearance of Parties on first hearing**:

- Appearance can be personal or through duly authorized agent, pleader Art 65
- Give appropriate ruling when both or one of the parties fails to make appearance (Arts 69, 70, 73, 76, 77): striking out or dismissal of suits
- Remedial measures available for a party affected by ruling on non-appearance (Art 71,72, 74, 78): re-opening, fresh suits, setting aside

2. **Ruling on Preliminary Objection (s), if any**

- Plaintiff files no counter reply to the statement of defense. How does he then join issue with the defendant on preliminary objection? If plaintiff wants to deny those objections, how can he go about it if there is no right to file a written counter reply?
- Art 245-hearing of parties and their evidence to rule on preliminary objection.

3. Framing of Issue (s) on the Merit of the Case

- Nature and types of issues, Art 247: points of disagreement, but not all; factual vs. legal issues
- Sources of from which issues can be framed, Art 248-249
- How do you frame issue when there an affirmative defense and plaintiff hasn't file written counter reply? How can he deny affirmative defense? Oral reply.

- Issues need be framed and recorded, Art 246. what is its implication? The scope of trial is limited to the issue framed, helps you reject irrelevant evidences and arguments.
- Party autonomy on issues: they can agree on the issue and give it to court, Art 253

FIRST HEARNG

- First hearing is judge-dominated; judge questions, parties answer them
- Simple cases can be disposed of at first hearing stage

- The First Hearing Day: its significance? Arts 69-74 attach consequences for non-appearance
- The closure of Pleading Stage and the beginning of First Hearing (arts 94(1), 233,238, 239(2), 69, 241)
- When is the date of receiving statement of defense & conducting first hearing? Does the law require different dates for first hearing and receiving statement of defense? Shell Eth. Case; Urgessa Tadesse

- (mis)conception about '*ex parte*'; it doesn't mean defendant is no longer a party nor does it mean his right to participate in the proceeding is lost; it means court will hear the plaintiff's version alone-nothing more; nothing less.
- See Shell Ethiopia for *'wrong definition'*
- The discrepancy b/n Amharic and English versions of Art 72; they are complementary than contradictory

Topic 5: Trial of a Civil Case

- Involves the hearing of evidence and arguments on the issues framed and recorded at the first hearing
- No hearing of evidence on issues not framed during the first hearing; see Art 90
- Production of evidence:
- Documentary evidences are already in the file; see arts 223, 137(3), 256

- Note that at the time of trial all documentary evidences are already in the file annexed under Art 223 or produced by the order of the court under Art 145.
- No documentary evidence is to be produced at trial (see Arts. 137(3), 256)
- But see Art 137(4) which allows the production of documents at a trial stage to impeach a witness, to rebut defendant's affirmative defense, & to refresh the memory of a witness.

1. **Trial distinguished from First Hearing:**

- The purpose of first hearing is to frame issue, but the purpose of trial is to resolve that issue
- At first hearing the court examines/hears the parties with a view to understanding the issue, at trial the court hears the evidences of the parties with a view to resolving that issue.

- At first hearing the parties may not argue on the merit of their case, or the strength of their evidence and the weakness of the evidence of their opponent, but at trial parties make opening and closing arguments on the merit of their respective cases and evidence (Art 259)
- At first hearing parties answer questions about their pleadings which the judge wants to understand, but at trial they argue their cases, i.e. a lot is expected of them at trial.

2. The Hearing of Evidence at Trial

- At the conclusion of the first hearing, i.e. on the framing of issue, the court orders the production of evidence.
- No hearing of evidence on issues not framed during the first hearing; see Art 90
- Whose evidence is to be heard first?
- The order of production of evidence depends on the burden of proof; the court has to order the evidence of a party who begins first per Arts 258 &259.

Topic 5: Trial…cont'd

- Order of Proceeding under Arts 258-259: Begin by hearing the witness of a party who has the burden of proving the issues; the other party is required to enter defense and rebut only if the first satisfies burden of proof (of production and of persuasion)

- Witnesses: do you send summons to the witnesses of both parties at the same time or do you make one after the other and if so whose witness first?

- Court should not order both parties to produce their witnesses at the same time; only when a party who has to begin first i.e. the one who has the burden of proof satisfies his burden that the other party should be instructed to produce his rebuttal evidence.
- No need for a rebuttal evidence when burden of proof is not satisfied.

Topic 5: Trial…cont'd

- Do we have to hear all the witnesses of a party at the same time? What if some of the witnesses failed to appear and others not? Are we to adjourn the case or shall we proceed hearing the witness who has appeared?
- Remember: a proponent has to cover all the costs of witnesses and procedure is required to cut costs of litigation.

3. **The Role of the Court in Proof of Facts: Is your duty to 'truth' or 'justice'?**

- Some of the powers of the court in relation to proof of fact include:

1. Ordering additional evidence, Art 264(2)
2. Rehearing a witness, Art 266
3. Inspecting property in dispute, Art 272
4. Local investigation, Art 132
5. Investigation of Accounts, Art 134
6. Verification, Art 136

Topic 6: Proceedings before First Instance Courts

1. **Ordinary Proceeding:**

- Defendant has automatic right to appear and defend the suit; see Art 233, 234
- Doesn’t discriminate b/n cases; can be used almost for all cases
- Divided into several states: pleading stage, pre-trial hearing stage, trial stage

Topic 6: Proceedings before…cont'd

2. **Summary Proceeding (arts 284-292)**

- Fast-track, avoids full-scale trial
- Right to appear and defend isn't automatic; leave of court is required (art 285), else judgment is for the plaintiff
- Leave may be denied (art 287)
- If leave is granted, case turns on ordinary procedure; art 291
- Only a claim for liquidated money is actionable under it (art 284)
- Additional formalities such as affidavit to support claims which isn't typical

Topic 6: Proceedings before…cont'd

3. **Accelerated Procedure (arts 300-314)**

- Applies only to expressly listed cases, which normally don't involve the direct payment of money from one party to the other as a relief
- Some cases mayn't have defendants; non-contentious cases
- Judgment not appealable, save exceptions; or has to be made in 10 days (shorter than the 60 days normal); see Art 306
- Appeal stays Execution (by *operation of the law*)see Art 306 vs 332

Topic 7: Res Judicata (Art 5)

1. Principle
2. Justifications
3. Exception to the Rule

Topic 7: Res Judicata …cont'd

1. The Principle: Once decided, decided for ever
2. Justification: There should be end to litigation, why?

- Defendant should not be vexed for ever
- Public resource should be used equitably; you don't have take more than your share of the resource that runs the judiciary

Topic 7: Res Judicata...cont'd

- **<u>The requirements of Art 5 of the CPC:</u>**
- Art 5(1):

1. The Requirements of Res Judicata, Art 5:
    - Identity of issues
    - Sameness of parties
    - Finality of former decision
    - Competence of former court

- Matter: directly and substantially in issue both in former case and the case at hand;
- Parties: same (those who derive their right from them) & acting in the same title as before
- Heard & finally decided by ct of jurisdiction; matter is no longer pending; decision was ‘actual’
- Art 5(2): you could have raised it as a defense in earlier suit; so you can’t make it a ground of claim in a subsequent suit. Decision wasn’t *actual*, but *constructive*

Topic 7:Res Judicata…cont'd

- Art 5(3): relief not granted is deemed denied; so you can't re-litigate the case, nor can you invoke art 208 to have the mistake corrected
- Art 5(4): res judicata effect of class judgment on class members; see art 38(1&2)-opt out (deny your consent by notice to the court), or directly participate in the suit

Topic 7: Res Judicata…cont'd

3. The Exception (Art 6): re-litigate the matter

- Public Policy: No tolerance to 'corrupt' decision
- Ground of re-opening under Art 6:Discovery of evidence proving "new and important matter, *such as* forgery, perjury &bribery→ excludes new evidence on the substance of the case.
- Scope: Party-related impropriety; *does it include judicial impropriety, e.g. a bribed judge?*
- Effect: decision would have been different had it not been for the forgery, perjury, bribery →prejudicial error, result-oriented approach
- Time: no specific time is fixed under art 6; does it mean such decision is open for attack for ever??

Topic 7: Res Judicata…cont'd

- Procedural issue under Art 6:
- The effect of appeal: when does it bar re-opening? while pending? or even after appeal is over?
- Act before you appeal, if appealable
- Once you appeal, bring it to the attention of the appellate ct itself: The Ijigayehu case; appeal abandoned to invoke art 6
- If you discover evidence after appeal &even cassation, art 6 is still available! Public Policy of zero tolerance to such decisions. The Ijigayehu case reversed by Tirhas Fisahayie

Topic 8: Appeal

1. Additional evidence on appeal (Art 345, 346)
2. Remand to lower court (Art 341, 211(1 &2), 343,344,)
3. Stay of execution on appeal (Arts 332-336)

Topic 8: Appeal…cont'd

1. Additional evidence on appeal (Art 345, 346)

- The nature of appeal:

a. Scope: It's a review of the *record of the lower court*; we don't normally create new record on appeal (Art 342&329(1))

b. Purpose: remedial & there is *presumption of correctness* in favor of lower court (Art 212).

Topic:8 Appeal…cont'd

- Thus, burden of rebuttal is on the appellant:

1) a prejudicial error must exist as the purpose of appeal is not to make sure that no error has been committed by a judge.
2) 2) Error must be pleaded by the appellant (Art 328(1&2) ; court doesn't have to look for errors as proceeding is adversarial, but see art 328(3)& 182(2 second limb)

Topic: Appeal…cont'd

- The Exception: new record/additional evidence on appeal
- Reason for admission (Art 345(2)? Art 345(1):

a) Lower court rejected an otherwise *admissible/relevant*, *material* and *timely offered* evidence under Art 223(Annex to pleadings
b) Evidence on the record isn't sufficient to lead to a just decision
c) Any other substantial cause? E.g. Art.6 issue

Topic 8: Appeal…cont'd

2. Remand to lower court (Art 341, 211(1 &2), 343,344,)

a) Remand under Art 341(1) Cf to the Amharic version which talks only '*preliminary objections only'.*

- **Scope***:* The meaning of 'preliminary point:

i. upon a preliminary objection without going into the substance of the case, or

ii. Upon a substantive point but without addressing all the issues e.g. Arts 247(4) &182(3)

Topic 8: Appeal…cont'd

- Discretion to remand "…Appellate court may if it thinks fit…remand the case…" see Art 341, meaning it mayn't always necessary to remand.
- When decision was only on a preliminary objection, remand is a must as you neither the evidence nor the decision on the merit of the case; you have no record developed to review.
- When decision was on the merit, you may or may not remand the case.

Topic 8: Appeal…cont'd

- How do you decide, then?
- If the matter left undecided by the lower court can be decided by the appellate court, that is, if it doesn't need any further record on the matter, it should not remand the case!
- If the matter, however, requires evidence it has to remand so that the trial court hears and determines the case on that matter.

Topic 8: Appeal…cont'd

b. <u>Remand under Arts 343 &211(2) ?</u>

- Fundamentally different from the case under Art 341:

i. Art 343 is compelled by the prior <u>*reversal*</u> of the decision of the lower court whereas under Art 343 the appellate court is yet to take position and needs further record to do so.

- The court isn’t in a position to confirm, vary or reverse the lower court’s decision under Art 343 b/c some issues are neglected, and/or a procedural irregularity was committed (Art 211(2)

ii. Under Art 341 lower court will finally decide the case once again, while under Art 343(2) it doesn’t dispose of the case-it hears evidence on issues and sends its records to the appellate court; the latter then takes position

Topic 8: Appeal…cont'd

iii. Stay of Execution and Appeal

- Appeal no bar to execution in ordinary & summary proceedings (Art 332)
- Who orders stay of execution?

1. Court of rendition (Art 333)
2. President of court of rendition (Art 334)
3. President of court of appeal (Art 334)
4. Court of appeal (Art 332)

Topic 8: Appeal…cont'd

- Conditions to grant stay (Art 335)

a) Imminent substantial/irreparable damage

b) Diligence-don't wait until creditor is plunged into cost of execution; it is not a dilatory tactic.

c) Sufficient security must be offered

d) Hearing of both creditor & debtor; *ex parte* is possible but doesn't totally obviate hearing altogether (Art335(2))

Topic 8: Appeal…cont'd

- The 'neglected classic' of shifting the burden to the judgment creditor (Art 336):
- Right to restitution of property taken by decree under Art 349
- Demand security from your creditor so that he will restitute your property if you win on appeal; if he fails to post security, execution should stay; an indirect way of obtaining stay of execution
- The last weapon when stay of execution is denied and judgment debtor is ordered to comply with the terms of the decree

Topic 9: Execution of Decree

- Ratable Distribution (Art 403)
- Third Parties in Relation to Execution (co-sharers and others)
- Second Auction
- Setting Aside of the Sale of Immovable

1. **Execution of Money Judgments:**
   - Attachment and Sale of Debtor's property and Procedural safeguards
   - Exempted property, Art 404
   - Proportionality test, Art 394(2)
   - Manner & time of auction sale, 422-426
   - Auction sale may not be a must; privately negotiated sale, or other ways of raising the money Art 439

1. Third Parties in Relation to Execution

- Objections to Attachment, Art 418-421(Before property is sold)
- Resistance to Delivery of Possession to the buyer at auction (Art 450-455)

- **Adjournment: Once court starts hearing of a suit, it is continued till the final**
  - disposal of the suit, day to day and the adjournment is granted only for unavoidable reasons.506 The grant or refuse of adjournment is in the discretion of the court.
  - There are no guidelines laid down by the Code in this regard, but courts grant adjournments in cases of: sickness of a party, his witness or his counsel, non-service of summons, reasonable time for preparation of a case,

- withdrawal of appearance by a counsel at the last moment, liability of the counsel to conduct a case, inability of a party to engage another counsel, etc.
- However, if the party fails to appear even on the adjourned day, the court either proceed to dispose of the suit *ex-parte / dismiss the suit in case of the* plaintiff / fix any other day for proceedings with the suit / proceed with a case even in absence of a party where evidence of such party has already been recorded as if such party were present / make any other suitable order