1.1.1.2. Civil Vs Criminal Procedures: Scope of Application

They are different in their **purposes** and the **ultimate objectives** underlying their very establishment the types of **relationships** they chiefly govern; the nature of the **legal interests** that would be affected at their violations and, hence, the **parties** who would have sufficient stake therein so as to invoke a **justiciable controversy**, laws may also be classified into **'civil'** and **'criminal'**. And they are different in **areas of applications since** the former deals with 'civil' matters whereas, the latter is concerned with ' criminal' cases.

Crimes are more serious and sufficiently injurious to the public as compared to civil wrongs which affect only the private victim.

A crime is **an offence against the community as a whole** for which the offender is held criminally liable and faces **penal sanctions**. A civil wrong, on the other hand, is an infringement of the legal interests of **private individuals** and is redressable, principally, through **reparation of damages.** Moreover, consequential to the nature of the legal interests affected in a civil dispute, the cases are to be **initiated and instituted** in a court of law **by the aggrieved party himself** (or his legal pleader); wherein law enforcement organs are but to **avail remedies** for those who have valid claims. In other words, in a civil litigation, the judge is there, in the whole, to decide whether any legal right of the plaintiff is affected; and, if so, whether one is entitled to any relief. It thus follows that the main **purpose** of administration of civil justice is primarily to **enforce rights;** and, hence, a civil case may **end up** in an **award of compensation** to the individual victim or **dismissal** of the case**.**

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

Regarding, differentiating civil cases from criminal ones, three parameters are here:

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

been committed against him by another.

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

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

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

In some exceptional civil cases, however, a **specific relief (personal performance) or forced performance** of legal obligations, such as, **restitution or delivery of goods or an injunction** could also be demanded.

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

The **third test** is concerned with the **availability of alternative dispute settling mechanism** in either of the cases. Seen from this perspective, **civil cases are subject to negotiations;** and, hence, a compromise could be reached upon independently between the parties themselves.

However, one must take note of the fact that **a certain single act may give rise to both a civil and a criminal case** whereby the parties are at liberty to negotiate over the civil aspect of the matter.

To sum up, a civil case is one instituted primarily by an individual for the purpose of securing redress in monetary terms. Understandably, civil procedure is, thus, **a method employed in the initiation and disposition of such civil disputes.** Moreover, the parties are at liberty to negotiate over their disputes even

while the case is still pending; and have it withdrawn from the court any time, but before a final judgment is rendered. In contrast to this, **criminal cases are not subject to such alternative dispute settlement mechanisms.** This means, the matter lies exclusively within and is done under the power of the prosecution officers irrespective of the negotiations and the agreement that may be made between the victim and the offender; unless, of course, the case falls within the category of 'offences upon complaint'.

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

In the general parlance, rules of civil procedure aim to ensure that disputes are handled by an **impartial** legal tribunal in a **fair and orderly** manner and as **expeditiously and economically** as possible. They are, in brief, meant to secure the **just, speedy** and **inexpensive** disposition of cases. More specifically; they aim at **treating the parties to a law suit equally** in enforcing their rights and the corresponding duties and laying down the ground for a smooth and orderly flow of litigation so as to **make the decision within a reasonably fair and quick time.**

the generally held belief has been that the **indeterminable number and complexities of the procedural steps followed in the litigation process; lack of procedural transparency;** the great **uncertainty** of the governing rules and the irreconcilably divergent **inconsistencies** in the application of the law
are some of the distinguishing features of our judicial processes.

Now we will discuss the essential ingredients of justice:

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

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

A. Neutrality of the Presiding Judge

Any person who sits in judgment over the interests of others must be able to bear an **impartial and objective** mind to the question in the controversy; i.e. he/ she should **impart justice without fear or favor.**

Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result.

Bias is a condition or state of mind, an attitude or point of view, which

sways or colors judgment and renders a judge unable to exercise his or her functions impartially in a particular way.

There are two attributive features of impartiality. The first feature is **subjective impartiality**, which refers to the impartiality of the **judge** himself and second is **objective impartiality** of the tribunal; i.e., **the tribunal/ court** or bench should provide the public with the guarantee that it operates impartially; i.e., conditions that avoids suspicions of impartiality.

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

I. Personal Bias

This is usually arises from **friendship, relationship** (either personal or professional) or **hostility or animosity** against either of the parties; or, **negativity from personal prejudices; or even political rivalry.**

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

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

The rule against pecuniary bias originates from the legal maxim: ***"nemo judex in cause sua",*** implying that no one should be a judge in his own case; and, it arises from **monetary interests** in the subject matter of the dispute, no matter how small or insignificant it might be. Where the judge himself is a **party** or has **some connection** with the litigation so as to constitute a **legal interest** that should disentitle him from being a 'judge in his case'.

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

Any one against whom an action is taken or whose right or interest is, thereby being affected should be **aware of the information** against him and should also be granted a **reasonable opportunity to defend him self.** The governing maxim in this case runs: ***'audi alter am par tem'***; meaning '**Hear the other side**'– no body should be condemned unheard. Two of the facets of the maxim are:

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

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

This principle implies equal subjection of all persons to the ordinary laws of the land as

administered by the regular courts of law; and, law extends protection to everyone.

I. Equipage Equality

This implies equality between the litigants in preparing their respective pleadings in getting legal aids (services) in searching for evidence etc, irrespective of their differences in income levels. (Art 91 of the Cv. Pr. Cd.).

II. Rule Equality

Under similar circumstances, each party should be subjected to and protected by, similar rules. / Art 58 (a) of the Cv. Pr. Cd/

III. Outcome Equality

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

1.1.2.2. Public Hearing of a Suit

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

All cases should be held in an open court proceeding except some private matters. Open court proceedings ensure **transparency** of judicial activities and secures the **acceptability and reliability** (credibility) of the judiciary.

1.1.2.3. Independence of the Judiciary and Accountability of the Judges

In this section we discussed two interrelated concepts: **Independence** and **accountability.**

I. Judicial Independence

There are two judicial independence: institutional and personal/functional.

Institutional or administrative independence which is usually related to the concept of separation of powers-is a mechanism through which, on the one hand, a balanced coordination and cooperation among the three branches of the government is ensured; and, at the same time-signifies the freeing of the judiciary from an **unwarranted encroachment or influence** of any sort.

Institutional independence insured though the following ways:

a. Legal Basis

It should be based on legal foundation (for instance, Arts 78&79 of the FDRE Constitution.)

b. Independence to Administer Internal Affairs

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

- Such independence is spelt out in black and white by the law (see, for instance, Art. 79 of the FDRE Constitution);
- Courts have full authority over their internal and, financial affairs; such as, the power of drawing up and implementating the administrative budget and management of its personnel (See, Art 79 (6) of the FDRE Constitution and Art 16. of Proc .No.25/96) : and,
- Judges are appointed in such a way that guarantees their independence including, enjoyment of a secured tenure of office; i.e., up until the retirement age); and, their removal from their judicial duty is made in due process as sanctioned by law and in restrictive grounds so prescribed.

Moreover, there have to be sufficiently clear and unambiguously defined rules on training and promotional opportunities of the judges; their transfers; decisions on disciplinary measures; suspension or removal from their duty etc before reaching the legally mandated term of office, Hence, such crucial issues as merit, experience, integrity and remuneration schemes determine the extent to which judges are independent from all sorts of internal and external influence including of course, of the litigants themselves.

B. Functional/Personal Independence

Complete and meaningful independence of the judiciary, can be guaranteed if only it is **supplemented by a functional or individual independence**- which could either be internal or external.

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**.

II. Accountability of the Judges

Independence of the judiciary should not be taken as a special privilege of the judge himself. In addition to availing workable **normative and institutional**

protective measures, litigants should be offered **reasonably adequate appellate opportunities**; judicial proceedings have to be **transparent and open** to the general public; and, judges should be ready and bold enough to **receive criticisms** on their decisions or analysis of the issues.

Hence, the judiciary has to be **amenable to the law**. Judges are to be held responsible for their decisions. In other words, they are not allowed to act as free riders.

I.1.2.4. Establishment of Courts by Law

Judicial power should principally and solely be vested in the regular courts. This, of course, is without negating the existence of the so-called **'administrative tribunals'-**which are constituted by law and entrusted with some quasi-judicial (delegated) power-as the present day compelling necessity of the proper dispensation of justice so demands.

These bodies are, thus, as a matter of fact, **off-springs of compromise between the executive and the judiciary** and are set up to share the burden of the case loads of the courts which had almost been unbearably heavy- there by warranting their establishment.

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

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

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

- Adequate notice of the nature and purpose of the proceedings;
- Adequate opportunity (time and space) to

prepare their case; the right to present arguments and evidence; and meet opposing arguments and evidence, either in writing, orally or by both means;

- Counsel or other qualified persons of his or her choice during all stages of the proceedings;
- An interpreter; if s/he cannot understand or speak the language used in the courts;
- The right to be tried in his presence; to defend himself in person or through legal assistance of his own choice and to be informed, if he does not have legal assistance, of this right;
- The guarantee that his or her rights or obligations affected only by a decision based solely on evidence known to the parties to the proceedings;
- The opportunity to have a decision rendered without undue delay and to which the parties are provided adequate notice and the reason thereof;
- The right, except in the case of the final appellate court, to appeal or seek leave to appeal, decisions to a higher judicial tribunal;
- The right to have legal assistance assigned to him, in any case where the interests of justice so requires; and, without payment by him in any such case if he does not have sufficient means to pay for it;
- The right to examine, or have examined, the witnesses against him;
- The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

I.1.3. Rules of Procedure Vis-à-vis Modes of Proceedings

1.1.3.1. The Adversarial Procedure

It is English judicial process or the major proponent of the system (other countries as such as the USA, Australia and New Zealand do also belong to this category).

The prominent characteristics of an adversarial court proceeding, seen from the procedural point of view, is that the parties themselves (or represented by their advocates) shoulder the burden of initiating, shaping and fixing the scope of the litigation. The process is termed as

the core of what might be called the **'factual methodology'** of the system- in contrast to the other style of adjudication, which employs some purely **theoretical reasoning** to reach at a conclusion. The underlying proposition of the system is that truth is most likely to emerge as a **bi-product of the vigorous combat between intensely partisan advocates.**

In an adversarial court proceedings, judges play a relatively **passive role.** Their function is limited to regulating the proper conduct (smooth flow) of process.

1.1.3.2. The Inquisitorial Procedure

This mode of investigative procedure is originally tied to the traditional function of a strong and absolute government, namely the **maintenance of public order and the suppression of crimes.**

It is chiefly employed in the judicial proceedings of the Continent Europe (France and Germany being the representative ones). 'Inquisitorial' procedure is self-expressive in that the judges can inquire deep into the merits of the case so as to be able to decide on what the real issues between the parties are. They can, for instance, order the parties to produce further evidence and critically examine the witnesses of either side, if and when they are of the opinion that a fair decision cannot otherwise be reached.

One may conclude that the prime difference between the two modes of litigations lies mainly on the degree of the roles played by the judge vis-à-vis the actual parties to the case.

Our substantive laws are essentially derived from the civil law legal system whereas the procedural law is from sources substantially influenced by the common law tradition.

CHAPTER TWO

JUDICIAL SYSTEMS IN ETHIOPIA AND JURISDICTION OF COURTS

2.1. The Ethiopian Judicial System: Past and Present

2.1.1. The Unitary Court Structure: Historical Background

Before the end of the 19th century, there was no formally established and systematically institutionalized judicial structure in Ethiopia. It was thus only the 1931 ever written Constitution of the country that could safely be considered as marking the beginning of a new era in the establishment of the modern judicial system.

2.1.2. The Present Dual Court Structure

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

2.2. Jurisdiction of Courts: Essential Elements

It 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.

2.2.1. Judicial Jurisdiction

Judicial Jurisdiction refers to the legal competence of the courts of a particular nation or state to exercise a judicial power i.e., to adjudicate a law suit and render a judgment binding an individual, or his property involved therein.

The issue of judicial jurisdiction normally arises when there is a 'foreign element' in a case appearing before a court of a given state.

In most instances, a court of a state is held to possess judicial jurisdiction if it has sufficient contact with either the defendant or property that is involved in the suit.

In some instances, a court's judgement of a given country may be enforced in another country on the basis of bilateral or multilateral treaties.

What is more, in spite of the fact that the issue of judicial jurisdiction is, in practice, a procedural matter, it is, in most countries treated as one of private international law, and the rules governing it are found in the latter area. In our case, though the draft document of the 1965 Civil Code had included such provisions in its section that dealt with as issues of private international law, for that portion of the bill was not approved by the then legislature, it could not become part of the finally adopted Code.

There is no, formally speaking, 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 appears before the court right since the early times of the country's judicial practices. In such instances, unless an objection was raised on grounds of judicial jurisdiction, the courts would assume that the jurisdiction exists and entertained the case in the usual business of the court. Otherwise, the grounds would be determined on the basis of the general legal principles developed by foreign laws and applicable to the case under consideration. Hence, on the basis of the nature of the action brought the type of the relief sought by the plaintiff, the grounds for exercising judicial jurisdiction are distinctively put as 'in Personam'(over a person) and 'in Rem'(over a thing) jurisdiction.

2.2.1.1. Jurisdiction in Personam

An action in Personam, which is the usual kind, is brought against a person, natural or legal, and seeking a relief against the person of the defendant.
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(specially the defendant, has to be a foreigner for a question of judicial jurisdiction to arise.); **or,**
- the defendant has consented (expressly or impliedly) to the exercise of jurisdiction by the Ethiopian court(even though a party is not otherwise subject to the Ethiopian jurisdiction, he can consent to the assumption of such jurisdiction by the courts.); **or,**
- The act which is the subject matter of the suit occurred or is situated in Ethiopia.

(They are not cumulative or they are optional)

2.2.1.2. Jurisdiction in Rem

It is against the thing/property. It is 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.

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

sought with respect to the property itself.

2.2.2. Material /Subject-Matter Jurisdiction

Material jurisdiction-which is virtually synonymous and equated with the term-'subject-matter jurisdiction', hence, refers to the power of a particular court of a state to determine the type or kind of a dispute involved in a case.

There are two broad criteria commonly employed to determine the material jurisdiction of courts in Ethiopia. These are: '**Subject Matter' jurisdiction and 'Pecuniary' jurisdiction.**

2.2.2.1. Subject Matter Jurisdiction

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

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

In principle, State subject matter is a matter that arises on the basis of State Law. However, there are conditions where issues raised on the basis of State Law may be categorized under the jurisdiction of Federal Courts. In such a case, State Courts will handle the Federal case through delegation. In states where the Federal High Court is not established, the States Supreme Courts are delegated to see Federal High Court cases while the States High Courts are delegated to see Federal First Instance cases.

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

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

A. Federal Courts: General Vs Limited Jurisdiction

The civil jurisdiction of the Federal First Instance and High Court are treated, under Arts 11 and 14 of proc. No 25/96 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.

B. States Courts: Original Vs Appellate Jurisdiction

Though the rules of the Civil Procedure Code on material jurisdiction are objectively inconsistent with those of the proclamation, and, hence, considered to be inapplicable, the jurisdictional limits of States Courts are determined based on the provisions of Art 13 of proc. No 25/96.

II. Type of Cases: Exclusive Jurisdiction

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

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

2.2.3. Local Jurisdiction

The rules on Local Jurisdiction have to do with an area where a case shall be tried, or, in other words, take us to the specific court to which a law-suit is to be submitted; and, in effect allocate cases among the same level of courts (say, the Federal First Instance Courts) within a given court structure. Moreover, the rules on local jurisdiction are framed in such a way as to primarily enable one to refer the case to a particular court convenient for the parties and their witnesses, particularly, the defendant. Incidentally, inherent to the nature of the process, the rules also accomplish another significant task of curbing inconveniences which may arise from certain purposely calculated 'forum-shopping' tendencies of some litigants.

2.2.3.1. The Basic Place of Local Jurisdiction

There are certain factors that determine the place where a law-suit shall be instituted. For the purposes of local jurisdiction, the most relevant place, what might also be called the 'basic place', is, in simple and pure terms, the place where local jurisdiction lies unless it is prohibited by law or a court sitting in another place is authorized to assume the jurisdiction This being the general rule of the provisions of the Civil

Procedure Code that sets forth the guiding principles in this respect, Art 19(1) of the Code stipulates that the basic place of local jurisdiction lies with "…the court of the place where the defendant actually resides or carries on business or personally works for gain."

A. "…actually resides…"

Accordingly, a person's primary residence would, thus, be the place where he actually resides for purposes of local jurisdiction-which probably is the place where it is convenient for one to defend a suit brought against him.

B. "…carries on business…"

2.4.1. Suits Regarding Contracts

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

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

✡ **Suits Regarding Contracts in General**

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

pledge, deposit or bailment) would, thus, be the place where the contract was made or was to be executed.

In addition, the plaintiff could also institute his case in a place where the defendant resides, works for gain or carries on business, according to Art 19 of the Code.

✡ **Suits regarding contracts of carriage**

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

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

- **Suits regarding Contract of Insurance**

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

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

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

- **Suits Involving Immovable Property**

An issue of local jurisdiction whereby suit related with immovable property is treated under Art 25 of the Civil Procedure Code.

The reasons for the rule are:

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

- **Suits for Wrong Done to Persons or Movable Propert**

Article 27 of the Civil Procedure Code specifically talks about suits for wrong done to persons or movable property. It is the question of local jurisdiction in case of extra contractual liability. According to Art 27(1), such suits may be instituted in the court of the place where the wrong was done or in accordance with the provisions of art 19.

- **Suits Regarding Successions**

According to Art 23 of the Cv. Pr. Co., suits regarding succession

- **Suits upon Several Causes of Action**

Where a suit is based upon several causes of action arising in deferent places, the suit may be instituted

in any court that has jurisdiction over one of the causes of action (Art. 29 of c.p.c).

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

The reason is stipulated under Art. 31 of c. p. c.

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

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

Overview

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

With a view to resolving problems resulting from such circumstances, the Civil Procedure Code treats the matter through the rules of priority, pendency and consolidation.

A. Priority/Art. 7 of c.p.c/

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

Let us assume that A is claiming certain amount of Birr from a defendant on a contract that was made in Addis Ababa and to be performed in BahirDar. In this case, depending on the amount of claim, the plaintiff has the possibility to institute his case both in Addis

Ababa and BahirDar. If the amount does not exceed 500,000.00 Birr, the Federal First Instance Court in Addis Ababa or the High Court of the Amhara Regional Government in BahirDar will have jurisdiction to see the suit. But, if it exceeds 500,000.00 Birr, the High Court of Federal High Court or the Supreme Court of the State will have the jurisdiction over the case.

B. Pendency/Art. 8 of c. p .c/

On the other hand, Article 8 covers the problem of pendency.

As a matter of rule, no court shall try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties in another court in Ethiopia having jurisdiction.

C. Consolidation of Suits/Art. 11 of c. p .c/

It is a situation where the claims of both parties are separate while the matter in issue in one suit is closely related to a suit pending in another court.

Consolidation is thus a procedure that is applied when two or more suits pending in different courts or the same court and between the same parties give rise to similar issues and are to be decided in different courts. In other words, where two or more suits which involve the same parties and similar issues in different courts or where there is a question of pendency, then, both suits will be consolidated under the procedure of consolidation.

Summary

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

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

1. Defendant is an Ethiopian national or domiciliary;
2. Act which is the subject matter of the suit occurred in Ethiopia; or
3. Defendant has consented

(expressly or impliedly) to the exercise of jurisdiction by the Ethiopian court.

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

CHAPTER THREE

PARTIES TO AND DIMENSION OF SUITS

3.1. Parties to a Civil Suit: General Requirements

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

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

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

Capacity is the power or ability to perform juridical act.

Article 34(2) of the Civil Procedure Code states:

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

Incapacity is one of the grounds of preliminary objection specified under Article 244(2) of the Civil Procedure Code.

3.2. Party Plaintiff and Party Defendant

3.2.1. Party Plaintiff

3.2.1.1. Vested Interest

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

Article 33(2), reads as follows:

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

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

interest in a suit. Another reason may also be to avoid defendant facing two suits over a single cause of action. The person who has an original interest and another person pursuing his right could bring two suits at different times and this exposes defendant to two suits.

3.2.1.2. 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 on the grounds that a party bringing action is unqualified to act in the proceedings**./Art.244/2 of c. p. c/**

3.2.2. Party Defendant: Allegations

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

Article 33(3) says:

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

3.3. Representation in Civil Suits: Types and Requirements/Art. 34 of c. p .c/

Representative suit is a suit in which others represent real parties to a suit. Representation is allowed in civil cases and the reason why it is allowed is to be found in Article 65 of the Civil Procedure Code.

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

3.4.1. Legal Representation: Types and Requirements

The representation under Article 34 is known as legal representation. A legal representative represents persons under incapacity.

3.4.2. Representative Class Suits: Requirements/Art. 38 of c. p. c/

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

inconvenient for such a group of persons to proceed with a case individually.

3.4.3. Agents and Pleaders

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

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

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

3.5.1. Joinder of Parties

3.5.1.1. Purpose and Significance

Joining or joinder of parties multiplies the number of parties and widens the scope of litigation.

Joining parties and causes of action makes parties to pool their resources together and enables them to share costs of pursuing a suit. It also relieves a burden of court in a sense that a court resolves cases involving many persons or causes of action by a single suit. Rather than treating related cases separately, the court considers a case of many persons or a case involving many causes of action in one file. Further, it avoids the possibility of making conflicting decisions. If suits that can be joined are tried separately, there is a chance of giving contradictory decision over essentially identical suits.

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

Thus, one interest is in favor and the other is against joinder of parties and causes of action. The rule under Article 221 of the Civil

Procedure Code tries to strike a balance between these two conflicting interests toward joinder. If joinder of causes of actions in a statement of claim results in a delay of proceedings or embarrassment of defendant, the court may order separate suits. In all other cases, joinder is, therefore, allowed so long as it does not bring about delay of proceedings or embarrassment to a defendant.

3.5.1.2.. Forms and Types of Joinder of Parties

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

3.5.1.3. Effect of Misjoinder and Non-Joinder of Parties

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

Article 39 deals basically with the effects of mis-joinder or non-joinder of parties relating to a permissive type of joinder.

It means that a court does not dismiss a case for the reason that there is mis-joinder or non-joinder of parties. If a party is not joined or is improperly joined, the appropriate measure is not to dismiss a case but to drop a party improperly joined and demand substitution, and proceed with the parties before a court. If there is non-joinder, the court shall proceed with the case irrespective of such non-joinder. If there is improper joinder of defendants, the plaintiff should be given the option to drop the defendants improperly joinded or to proceed with separate suits.

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

Mandatory joinder applies to both plaintiff and defendant. Except for

Article 36(3) and (4), which applies to joinder of defendants, the Civil Procedure Code does not have an explicit rule on mandatory joinder of plaintiff. This may be because mandatory joinder is a question of substantive law than procedural rules. It is the rules of substantive law that require that a right should not be exercised otherwise than by or against all persons concerned.

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

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

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

3.5.2. Joinder of Causes of Action: Definition

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

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 of civ. P. c/

Art. 218 and 219 are exception to this assertion.

3. 6. Interventions: Conditions and Types

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

There are two types of intervention. One is made by an application of a third party himself, which is provided under Article 41 of the Civil Procedure Code. It is a party himself who approaches a court to intervene in a suit.
Another type of intervention is as of obligation. This is provided under Article 42. The Public Prosecutor is under obligation to intervene in some civil cases.

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

Third party practice, which is also known as impleader, is the procedural device enabling the defendant in a lawsuit to bring into a suit an additional party who may be liable for all or part of the original plaintiff's claim against the defendant. It is a mechanism by which a defendant brings into a suit a third party on the ground that such third party covers or shares the whole or part of claim of plaintiff. It is initiated by a defendant.
The purpose of third party practice is to settle claims involving the same cause of action/ transaction in a single suit. It aims at avoiding separate suits over the same cause of action/transaction. Thus, a defendant who has a claim against a third party does not need to bring a subsequent suit against him. The defendant's claim against third party can be seen in the same suit where the plaintiff's claim against the defendant is being considered/Art. 43 of civ. P. c/

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

3. 8. Change of Parties

In civil suits, there is a possibility that others can replace the original parties upon death of one of them. This is not the case with criminal suits.

in civil cases death of one of the parties does not automatically cause the termination of a suit. There is a possibility that others can replace the deceased party and the suit continues. This is possible if the right to sue survives. Article 48(1) reads as follows.

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

However, there is no change of parties if the court concludes the hearing of a case and adjourns the case to make a decision even if one of the parties dies as provided under Article 53 of the Civil Procedure Code. This means that if one of the parties dies after the hearing of the case is concluded and what remains is giving a decision.

CHAPTER FOUR

PLEADINGS AND PRE-TRIAL PROCEEDINGS

Introduction

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

4.1. Pleadings

4. 1. 1. Definition and Purposes

Generally defined, Pleadings mean all formally written statements filed to a court of law by parties to a suit with respect to their respective claims and/or defenses.

The Ethiopian Civil Procedure Code does not define pleadings in a direct way. However, it contains, under Article 80(1) formally written statements that constitute them, such as statement of claim, statement of defense, memorandum of claim, appeal, etc; and provides that these documents must be the ones that initiate proceedings in a court of law and make replies thereto.

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

A: They provide the defendant with notice of the suit and enable him to prepare his defenses accordingly. This is because a copy of the statement of claim filed by the plaintiff will be served to the defendant together with summons.

B: They provide a summary of the claims and defenses of parties to a court, which enables a court to frame the appropriate and relevant issues that need decision. The court looks into the content of both the statement of claim and

statement of defense; and, then, frame appropriate issues that need to be resolved by the court at the trial of the case.

C: They fix the issues to be decided, and in a way, limit the scope of litigation between parties and determine the evidences to be used by the parties. The court cannot create issues of its own and then pass decision. It is based mainly on pleadings of parties that the court tries to frame issues. The main source for the framing of issues is the pleadings submitted to a court by parties, as indicated under Article 248 of the Civil Procedure Code.

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

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

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

They can be divided into technical and legal ones.

Technical requirements relate mainly to the preparation and format of pleadings. The registrar of a court examines these requirements.

The technical requirements are provided under Articles 80(2), 222, 223,234,327-330, etc.

The technical requirements includes the ff, *first*, is that they shall be handwritten in ink, printed, or typewritten on the prescribed paper 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 *third* requirement is that they shall be made as concise as possible and contain a statement of material facts on which a party relies for his claim or defense.

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

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

Sample verification

> *I, ----------, hereby declare that the facts stated in this claim/defense are true to the best of my knowledge and belief.*
> *Date----------*
> *(Signature and description of the person verifying the pleading).*

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

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

The *sixth* requirement is that annexes must accompany some pleadings. Annexes as provided under Articles 223 and 234 shall accompany, for instance, a statement of claim and statement of defense.

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

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

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

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

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

4.1.3. Major Types of Pleadings

4.1.3.1. Statement of Claim: Requirements and Contents

Statement of claim is a pleading submitted to a court by plaintiff. It is also known as a complaint.

A statement of claim shall contain certain items that are listed under Article 222 of the Civil Procedure Code.

By looking at these items, one can divide the parts of the statement of claim into four. The first is caption. In the caption, the plaintiff must state the name of the court in which the suit is filed, the title of the suit, and the names of the parties including their description and address. If the plaintiff is under disability, this shall be stated; if the plaintiff is bringing action in a representative capacity, this shall also be stated. It means that the capacity in which the plaintiff is suing shall be indicated.

The second part of the statement of claim is the statement disclosing a cause of action. The statement of claim shall state the facts constituting a cause of action and when and where it arose. The presence of statements showing cause of action is considered to be the legal requirement to be met by the statement of claim, as provided under Article 231 of the Civil Procedure Code. See Article 231.

The third part of the statement of claim is the jurisdiction. Once the court has established that a statement of claim disclosed a sufficient and lawful cause of action, it then examines whether or not it has a jurisdiction over a case.

The amount of money stated in the statement of claims is to be confirmed on the basis of the rules under Article 224-226 of the Civil Procedure Code.

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

4.1.3.2. Statement of Defense: Purposes and Contents

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

In this part, the defendant is expected to raise affirmative

grounds of defense, which include facts showing that the claim of the plaintiff is inadmissible on the ground that he is incapable, or that the court lacks jurisdiction or that the action is barred by period of limitation, etc. Apart from these grounds, the defendant can raise any ground of objections to a suit. In addition, the defendant can raise a counterclaim or set off against the claim of the plaintiff.

In stating his facts of defense, the defendant must respond to each allegation of the facts made in the statement of claim whether he admits or denies them. The denial he makes must be put in a direct manner. Evasive denial does not amount to a defense under Article 235 rather it amounts to admittance. See Article 235 below. Evasive denial is a denial in general terms. For instance, saying that, "I am not responsible or I am not liable" is considered to be an evasive denial.

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

4.1.4. Effects of Failure to Plead

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

4. 1.5. Alternative and Subsequent Pleadings/ Article 237/.

An alternative pleading is optional grounds of claims or defenses relied on by a party. It is a pleading that aims at maximizing the grounds of claim or defense.

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

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

Subsequent pleading is also known as further pleading. It means

pleading again on the same issue on which the pleading already been made. / This is provided under Article 239/.

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

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

4.1.6. Amendment of Pleadings

4.1.6.1. Nature and Purpose

Amendment of pleading presupposes that a technically and legally sufficient pleading has already been filed and that it is found to be defective in terms of what has been claimed or stated. The amendment is allowed to rectify defects in pleadings. If allowed, an amendment introduces a modification to the content of the pleading already submitted to a court. The question of amendment is raised when a party tries to produce evidence on something which is not included in the pleading or that the evidences produced do not prove the contents of pleading or that a party comes across new facts that he should have included in his pleadings, etc. The provisions of Article 91 and 252 deal with amendment of pleadings.

4.1.6.2. Grounds and the Process

The amendment is ordered by the motion of a court or by the application of a party.

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

4.1.6.3. Effects and Related Issues

Amendment brings into picture the consideration of two interests. One is that it causes delay of proceedings. This is because if it is permitted, the proceedings will start as a fresh one. On the other hand, amendment protects a party from losing his substantive rights or being affected as a result of pleading error.

The introduction of new evidence could not serve as a ground for the amendment of pleading.

4.2. Pre-Trial Proceedings

4.2.1. Service of Process

4.2.1.1. Issuance of Summons

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

4.2.1.2. Modes of Service

Summons for appearance of defendant (Art. 94)
To …"A"…. (Name, description and residence)
Whereas …"B"……..has instituted a suit against you for …"C"…….you are hereby summoned to appear in this court in person or by a pleader duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the ……..day of ……..19…….You must be prepared to produce on that day your statement of defense a list of all the witnesses you intend to call, stating their address and the purpose for which you intend to call them a list of all the documents on which you intend to rely.
Take notice, which, in default of your appearance on the day before mentioned or of your producing your statement of defense or any evidence, the suit will be heard and determined notwithstanding your default.
Given under my hand and the seal of the court, this …….day of …….19……Judge.

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

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

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

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

Another mode of service is one that is similar to personal service. In this mode, summons is not actually served on the defendant in person. Somebody else receives it but the law treats it as if service is made on defendant in person./Art. 105 of civ. And Art. 96/1&2 of civ. P. c.

Another mode of service is known as constructive mode of service.

This is the rule under Article 99, 100 and Article 101.

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

4.2.2 Effects of Non-Appearance of Parties

The principle is this 69(1). See Article 69(1) below.

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

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

appearance of plaintiff is different from that of the defendant.

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

Article 73 that provides the rule in this respect.

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

When the plaintiff appears but the defendant fails to appear, the measure to be taken by the court depends on whether or not the summons has been properly served on the defendant. /Art. 70/a of civ. P. c.

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

When a third party defendant (under Article 43) does not appear, the rule under article 70(a) does not apply. In case of non-appearance of third party defendant, the court decides that he has admitted the claim of defendant. The mere non-appearance of such party amounts to an admission of the existence of contribution or indemnity relations alleged by plaintiff. This kind of judgment is known as default judgment. It is a decision based on the sole reason of absence of third party defendant. It is provided under Article 76.

The fate of the defendant who could not appear on the opening of the suit depends on the presentation of good cause by him. If he shows good cause, he is permitted to defend himself./Art. 72 of civ. P. c/

What are the effects of non-appearance of parties?

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

either be dismissal or striking out of a suit.

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

A suit is dismissed when the plaintiff fails to appear but defendant appears; when both parties fail to show upon appeal; and when an appellant is proved to be in default in serving summon on respondent (see Articles 69(2), 70(d), 73). If a suit is dismissed, the plaintiff is prevented from bringing a fresh suit on the same cause of action. He cannot pay a court fee and proceed with a suit. The dismissal leads to a loss of right to bring action. /Art. 74/.

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

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