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ETHIOPIAN LAW OF PERSONS

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This chapter introduces:-

- Definition of persons and commencement of physical personality.
- Contrast physical and juridical persons;
- Explain the ancient and medieval usage of the term “persons”;
- Define and illustrate “subject” of law and “object” of law;
- explain the beginning of physical personality and
- Define birth, conception and viability;

Definition: Persons

- The word ‘person’ traces its roots from the Latin ‘persona’ which in its ancient usage meant “the mask which covers the figure of the actor.”
- The **mask indicates the role that the actor played**, and the audience in effect “recognize the character as soon as it saw the mask.”
- Persona thus designates a **role or part**
- **Thus persona/person → role player/performer of sth.**
- Under earlier legal systems human beings who took part in juridical relations were regarded as **persons** while those who couldn’t perform juridical acts were considered as lacking legal personality.
- Q. What is juridical act???
- How about slaves and females? Can they be considered as persons as per the defn. of earlier legal system?

Cont…

- At present, application of the term ‘person’ also applies to entities that have international legal personality.
- So, person is to mean:-

  1. physical persons/natural persons
  2. Artificial persons/ legal persons/juridical persons/entities……..

- The words “human being” and “person” are not interchangeable.
- What is the reason behind?

➢ B/c person connotes both physical and artificial persons.

- All physical persons and entities in modern legal systems are persons, and take part in legal relationships as subjects of rights and duties.
- Unfortunately, however, the same term is used in Ethiopia (for example “**sewoch”** in Amharic) for **two different referents**: that is, to refer to **human beings and legal entities** as subjects of the law.

- Thus the term ‘person’ refers to **both human beings and juridical entities.**
- Articles **1 to 393** of the Civil Code deal with natural persons.
- Juridical (or legal) persons are regulated by **Articles 394 ff.**
- **legal persons** are **entities** other than natural persons that are endowed with legal personality by virtue of the law.
- The state, territorial subdivisions of the state, ministries, public associations, trade unions, partnerships, companies, etc. are juridical persons **from the time of their establishment until they are dissolved and liquidated.**
- Such legal entities (either public or private} as stated above are endowed with **juridical personality.**
- Same as physical persons, have **rights and duties**; enter into contracts, can sue, be sued and perform various juridical acts.
- **However,** it must be noted that there are rights of personality that cannot be exercised by juridical persons, such as the **right to vote, peaceful Demonstration etc**.

Cont…

- What is personality?
- Subject of law vs. object of law?
- The term "**subject of the law**" is different from "object of the law".
- **Everything that is covered by the law is its object**, but it is not expected to bear rights and duties.
- A negligent driver who runs over a dog violates the rights of property of the owner of the dog. **The owner of the dog is subject of rights** in this example. And he will be subject of duties (extra contractual liability) in case his dog bites anyone. Similarly, a person who kills a wild animal in violation of the laws on wildlife conservation infringes the law. In such instances, harm is said to have been caused to objects of the law.

- The human person is subject of rights from its **birth to its death**" Art. 1 of cc
- The words "**human person**" (under Article 1) refer to anyone who is member of **mankind;** i.e. to anyone who has the distinct features of a human being.
- **Deformities and handicaps** are acceptable as long as they are the sorts that could occur through various natural or other misfortunes.
- But in case the **new-born offspring's variation from the common features of human beings** is such that coining some other new word becomes necessary, it **can't apparently be considered a human person**.
- So, Physical personality begins from birth and lasts in death.
- What about commencement and end of juridical persons?
- **Birth**
- The term "birth" may create some problems of interpretation.
- Black's law dictionary defines birth as "the act of being wholly brought to separate existence."
- When is a child considered to have a **separate existence**? "In this respect one tends to make a distinction between the **complete extrusion of the child from his mother's womb and the cutting of the umbilical cord**.
- At any rate from that moment on, the child becomes a person in the legal sense of the word and, in the ultimate instance, birth will be established through medical evidence." (Vanderlinden: 10)

- The other issue that needs to be addressed is whether the legal existence of a person begins as of birth without the requirement of **viability,** i.e. capability to live outside the womb for 48 hours after birth. **Art. 4 cc**

There are two contending interpretations.

✓ According to the first interpretation, the only condition for acquisition of personality is birth; and the issue of viability arises by way of an exception only when the **interest of the conceived child requires**

✓ The second line of interpretation contends that for a child to acquire personality s/he should in all cases be **born alive and viable.**

❖ **Supporters** of this interpretation contend that the sources that **Professor Rene David had embodied** the conditions of **life and viability** as prerequisites for physical personality.

- According to their view, Article **100 "implicitly precludes declarations of birth**" if the child hasn't lived for forty-eight hours.
- Many lawyers support the **first interpretation** because they argue that we can't resort to interpretation if the law is clear.
- **Article 1 is so clear** that the issue of interpretation can in no way arise.
- And, Article 100 does not implicitly preclude declaration of birth if a child has not lived for 48 hours.
- In fact, the provision requires declaration of birth notwithstanding (i.e. - even if) **the child dies within 48 hours after birth**.
- Had personality not been acquired before 48 hours, there would have been no reason for recording a child who died within this period.
- Q. **Which line of interpretation is reduced in the CC in your view?**

- There are instances where the **interest of a conceived** child is put at stake if personality is attributed only after birth.
- A case in point is the **inheritance right** of a child whose **father has died before he is born**, as envisaged under Article 834 of the Civil Code.
- Similarly, the interest of a conceived child should be protected where a parent dies under circumstances that entitle children of a deceased to **receive damages, life insurance or other payments.**
- Article 2 is meant to solve such problems.
- It reads:
- A child merely conceived shall be considered born whenever **his interest so demands provided that he is born alive and viable (Article 2)**

Cont…

- A child is deemed to have been conceived on the 300th day preceding its birth (Article 3).
- A conceived child may acquire personality while he is still in his mother's womb provided that:
  - His interest so requires, particularly where conceived child be called for succession (article 834),
  - He is born alive, and,
  - He is viable (i.e.- Capable of living for at least forty-eight hours after birth (arts. 4/1 and 4/2).
- These three cumulative conditions are required for granting personality to a conceived child.
- However, if a succession devolves upon the child "**of which the debts exceed the assets**, it can very well be that his personality will not be invoked in that connection" (Vanderlinden: 15).
- This is because the child **does not have interest** in being called for the succession.

Cont…

- Viability is presumed where a child lives for 48 hours after its birth (Article 4/1).
- Moreover, a **child who dies within 48 hours after its birth** "due to a cause other than a deficiency in (bodily) constitution" is **presumed to be viable** because s/he wouldn't have died at that moment had it not been for the incidence that caused the child's death.
- E.g. medical malpractice, accident like car crush, Fire……..

Attributes of legal personality

- By attribute of personality we are referring to the characteristics or distinguishing features that legal personality are endowed with.
- Once an entity or a unit is recognized as person by law, then it will have certain attributes from the mere fact of it being recognized as a person. Some of these are the following:-
- **The ability to sue or be sued in its own name.** Once an individual human being or an artificial person acquired its personality after fulfilling certain requirement it can bring an action against others. Similarly others can institute an action against it.
- **The ability to own and administer property.** Only a person can own and administer properly. Both physical persons and artificial persons can own and administer properly of any kind, i.e. tangible or intangible, movable or immovable.
- **The ability to enter in to contracts.** An entity whether a human being or any other entity, once it acquired personality, it can enter in to contracts and acquire rights and duties for itself.
- **The obligation to pay taxes.** Once an entity acquired a personality as per the conditions prescribed by law, it will have the obligation to pay tax on the income they earn and the properly they own, as defined by the tax law.

Cont….

- **Having a name:** – It may be very simple to coin a name and call a certain being by that.
- But names do really affect the legal position of a person because they are mechanisms of identifying the civil identity of a specific person in the society and of legally conferring/imposing upon it powers and disabilities.
- Furthermore, since use of a name can modify the legal status of a person, the law provides for protective mechanisms against abuse and usurpation of the name by others.
- Generally, **it is through name as a manifestation of civil identity that a person in the eyes of the law can become a party to a legal transaction**, and thus it is a fundamental attribute of personality.
- **These are some of the attributes that physical persons and artificial persons commonly share**.
- There are also specific attributes that are applicable only to physical persons or artificial persons. The ability to make will, holding fundamental rights and duties are for example, attributes of only physical persons.

Case problems and issues for discussion

- Ato “A” died thirty days before his wife “B” gave birth. Two hours after the birth of the child at Gandhi Hospital, the Doctor “C” predicted that the child would die within 18 hours from the time of its birth. The child was taken home and unlike the doctor’s prediction, he was alive for 30 hours from the moment of his birth, by the time he died having fallen from the arms of a baby-sitter. Ato “A” doesn’t have another child. The issue of the child’s viability and his entitlement to inherit Ato A’s property has caused dispute between the deceased child’s mother and the parents of Ato “A”.

A. So, can the child succeed his father?

- This chapter will address the issues of particularizing persons by name, and locating them through residence and domicile.
- At the end of this chapter students are expected to:
  - A) state the function of names of persons;
  - B) explain the requirements of first name, patronymic and family name under the civil code;
  - C) discuss the gap between the law and practice in the use of family name in Ethiopia;
  - E) contrast abuse of name and usurpation of name;
  - G) contrast the citizenship, domicile and residence of a physical person;
  - H) contrast residence and sojourn……

1. Name

- Names have the purpose of identifying individual physical persons.
- Name is one attribute/characterstics of physical personality.
- The **constitution** of the federal democratic Ethiopia **considers name as the right of every child.**
- Article 36/1(b) of the const. provides that “every child has the right to a name and nationality.”
- The particular laws that deal with name of physical persons are articles **32 to 46 and articles 3358 to 3360 of the civil code.**
- **A) principle:**
- According to article 32, every individual has a **family name, one or more first names and a patronymic**; and they are written in that order **in administrative documents.**
- **B) current practice:**
- **Family names** indicate members of a **common male-line descent.**
- However, family names haven’t yet been introduced after the promulgation of the civil code.
- The provisions of the civil code on family name **haven’t been able to alter the Ethiopian tradition** of using **first names followed by the father’s first name (patronymic).**

- As a result, many foreign institutions face difficulties in recording the names in Ethiopia.

C) Family Name:

- A person born after the promulgation of the Civil Code of 1960 takes the father's family name as his family name.
- If the father **doesn't have a family** name, the child shall take his **father's first name (patronymic)** as his family name. (Articles 33/1, 36, 3359/2)
- A child whose father is **unknown or a disowned** child (33/2) shall have the **family name of his mother.**
- The manner as to how a person's **family name is determined** is stipulated in Articles 3358 to 3360.
- Accordingly family name is, **the family name of the father** or the patronymic of a senior male ascendant.

- The attempt of the Civil Code to introduce family names in the Ethiopian context seems to have **failed to take the Ethiopian reality into account**.
- An entirely foreign element has been **transplanted without regard to the Ethiopian reality.**
- Usage of family names was originally a Roman tradition and Ancient Greeks, for instance, used to be designated by a single name.
- In the Ethiopian context, the various traditions in the designation of names can be synthesized in the introduction of mechanisms that would reduce identity of names.
- **Lack of efforts to publicize** the concept of family name is apparent in Ethiopia.

D) Choice Of First Names

- According to articles 34 and 35 of the civil code, **first name is chosen by the father, or, in his default, by the family of the father**.
- This clearly reflects the traditional male supremacy in one of its absurdly extremist manifestations.
- The **mother of the child has been put on the third rank** in choosing the name of the child ranking after the father and the family of the father, while she deserves an equal status in this regard.

E) Forbidden First Names (Art. 38)

- A person cannot have the first name of the father, mother, brother or sister.

F) patronymic (article 36):

- The usual **first name of the father** is a person's patronymic.
- First name and family name will be used (without patronymic) where father is unknown, or where patronymic and family name are identical.

G) change of names:

- Change of family name may be authorized by court (42) where it is applied for **good cause** AND if such change is **not prejudicial to third persons**.
- Change of first name (43) can be authorized by court upon application.
- Unlike change of family name, the condition of good cause or another restriction has not been attached to change of first names. Why???

H) Abuse Of Name

- Using once own name in excess of normal practice.
- The fulfillment of the cumulative elements under Art. 45 constitutes abuse of name. These elements are:

➢ Using one's own name
➢ In the exercise of occupational or professional activity
➢ With the object or effect of causing prejudice
➢ By harmful confusion
➢ To the credit or reputation
➢ Of a third person.

አንቀጽ 45- <u>በራስ ስም ያለ አግባብ ስለ መጠቀም **(Abuse Of Name)**</u>

- አንድ ሰዉ የሙያ ስራዉን በሚያከናዉንበት ሁኔታ ዉስጥ በገዛ ስሙ የመገልገል ጉዳይ በይመስላል ከሚደርሰዉ መዘባረቅ የተነሳ በሌላ ሰዉ ክብርና ገናናነት ለይ ጉዳት የሚያደርስ ግብ ወይም ዉጤት የሚያስከትል ነገር ልኖረዉ አይገባም።

I) Usurpation Of Name:

- A person may resist the usurpation of his name (46/1) by another person where such usurpation **causes or is likely to cause material or moral damage**.

- 2. Ato Tekle loves art and Artist Afework Tekle's fan. His son Mamush has a remarkable talent in painting since childhood, and Ato Tekle named his son after the renowned Ethiopian painter. Mamush was thus registered as Afework Tekle when he joined kindergarten. Ultimately, Afework joined the Fine Arts School, and a year after his graduation from Art school, the young Afework organized an art exhibition in concert with his friends. Can Maitre Artist Afework Tekle oppose the signature that reads "Afework Tekle" under every painting drawn by the young Afework?
- 3. Can a person change his surname upon conversion to a new religion?

- The (Ethiopian Civil) Code distinguishes between three kinds of names (Family Name, First Name and Patronymic).
- The family name is the one which is always mentioned first on all official documents concerning a person (Article 32).

Characteristics of Family Name

- The main function of the family name is to unite the family group under one common designation.
- It is the visible legal bond uniting all the members of the lineage.
- A second character is that names are extra commercium.
- No contract having a family name as an object can be considered as valid under Ethiopian law (Article 40); thus one is not free to give, sell, hire or lend one's name.
- The only exception to that rule is trade names which are governed by special provisions under the Commercial Code.
- Thus Article 127 of the (Commercial) Code establishes that trade names are part of the property of traders.

Patronymic Names

- A patronymic name is one which does not belong exclusively to a given person.
- It is common to all the members of the family who descend through males from the same author.
- It is the element which shows the affiliation/attachment to a certain family.

Residence and Domicile

- In addition to identifying persons by name, persons should also be individually located.
- Citizenship, domicile and residence identify the location of persons for the purpose of legal transactions.
- Citizenship denotes the moral, social and political tie of a person to a State.
- Domicile defines a person's legal tie to a place that has its systems of law.
- A person can have only one domicile at a time.
- New domicile is acquired where a person establishes his residence in a new country with the intention to live there. Such a person may acquire new domicile without changing his citizenship.
- A person may be an Ethiopian or a foreigner with regard to nationality or citizenship, and can have Addis Ababa as his domicile.
- Residence is more specific and links a person to the particular place where he normally resides.
- Articles 174 to 191 deal with residence and domicile.

c) Residence versus mere sojourn

- Residence is different from a mere sojourn in a certain place for some days or weeks.
- Thus mere sojourn in a place doesn't constitute residence (175/1).
- Yet, residence is acquired if a person's sojourn (ጊዜያዊ ቆይታ) is to last or actually lasts for the period stated under Article 175.
- If a person: intends to stay at a place (i.e.- At a sojourn) for more than three months, or,
- Actually stays in such sojourn for more than three months without a prior intention of staying that long, he acquires residence (175/2) in such place.
- It should be noted that a **sojourn** which is intended to **last for more than three months** is considered as **residence** from the moment the person starts living in the sojourn provided that **he intends** to stay there **beyond three months**.
- **Illustration:**
- A person has a villa at the seaside and goes there regularly during his vacation, for a month or so. Such place could be considered a residence for the period, while this would not be true if each period of vacation was spent in a villa rented in a different place.

- **Art. 174. - Definition.**
- The residence of the person is the place **where he normally resides.**
- **Art. 175. - Mere sojourn in a place.**
- (1) The **mere fact that a person is for a time in a certain place shall not be sufficient** to constitute for him a residence in such place.
- (2) Notwithstanding the provisions of sub-art. (1), a residence is acquired whenever the **sojourn is to last, or has lasted**, in fact, more than three months.
- **Art. 174 ትርጓሜ**
- **የአንድ ሰዉ መኖሪያ ቦታ የሚባለዉ ለግዜዉ የሚኖርበት ስፍራ ነዉ**
- **175 ድንገተኛ መሰንበቻ ቦታ**
- (1) አንድ ሰዉ ለጊዜዉ በአንድ ቦታ ቢሰነብት ይህ የተባለዉ ቦታ መኖሪያ ቦታ ለማሰኘት አይበቀም
- (2) ስለሆነም መሰንበቱ የሚቀጥል የሆነ እንደ ሆነ ወይም ከሦስት ወር በላይ ቆይቶ እንደሆነ የመኖሪያ ቦታ ነዉ ይባላል።

D) Principal and Secondary Residence

- A person may have several residences (177), and in such cases one of them shall be considered as "**principal residence**" owing to the criteria of **normality, frequency and the length of time** that a person relatively stays in one of the residences.
- The issue whether a person's presence in a particular residence is normally more predictable than that of other residence(s), and how frequently and how long he lives in that particular place are the factors we may consider when two or more residences seem to have the characteristics of principal residence.

F) Residence determined by law

- **Persons without proved residence:**
- The place where such person is shall be deemed to be his residence (176) because a person has to have at least one residence.

Married couple, minors and judicially interdicted persons:

- Married couple shall live together in their conjugal residence (Article 640/1 of the Civil Code and Articles 53 and 54 of the Revised Family Code).
- In addition to the conjugal residence, a married woman may have her own residence (178/1).
- Minors and interdicted persons may have residence of their own other than the one (178/2) determined by the guardian for the minor (265) or the interdicted person (Art.362).
- **Public officials and traders**
- The **place where a public official exercises his functions is considered as his residence** (179), and the **place where a person carries on trade** shall be deemed to be the residence of the trader (180).

G) Special Rules Of Residence

- Although a person acquires residence if s/he stays in a place for three months (Art. 175), there are special rules that require longer periods.
- For the purpose of **marriage, elections and taxation**, the law requires longer periods of residence owing to the fact that a **minimum of six months** have been considered to be necessary.
- It is to be noted that a spouse need not be resident of the place where his/her marriage is to be registered if his/her parents or close relatives are residents of the place for over six months.

Domicile

- ***A) Definition***
- Article 183 defines domicile as “the place where such person has established the principal seat of his business and of his interest, with the intention of living there permanently”.
- Principal seat of business refers to the place where occupational activities are carried out; and a person’s seat of social and family life is considered as the principal seat of his interest.
- Permanent intention to reside in a certain place is presumed “where a person has his normal residence in such place”. (184/1)

B) rationale

- The issue of domicile arises when conflict of laws require the determination of the legal system that must be applicable.
- **C) unity of domicile:**
- Unlike residence, one can't have more than one domicile. A person can have only one domicile at a time (186).
- Where a person's place of work differs from the place where he has his family and social life, the latter shall be deemed to be his domicile (185).

D) change of domicile

- The locality of a person's previous domicile shall be retained until he establishes a domicile in another place (187).
  - **N.B. The term "locality" in article 187 implies a wider concept than a specific residence at a particular "place".**
- **E) domicile determined by law**
- persons whose last domicile is unknown (art. 188) shall be deemed to have domicile at their:
  - normal residence; or,
  - In default of normal residence at their ordinary residence; or,
  - In default of residence, where a person is shall be deemed to be the place of domicile.
  - Married couple (189) shall have the same domicile.
  - A minor who is not emancipated (190) shall have the domicile of his guardian.
  - The place where the interdicted person was at the time of his interdiction (191) shall be considered as his domicile.

Summary

Domicile and Residence Defined

- A person's residence is the place where he has his habitation; legally, residence means the place where a person normally resides (Civil Code of Ethiopia Art. 174).
- In Ethiopia, when a person lives in a place for three months, he is deemed to have his residence there (Art. 175/2).
- While residence may have legal significance for certain purposes, e.g., local jurisdiction, it is not, on the whole, a significant legal contact.
- Domicile differs from residence in two respects. First, domicile is a unitary concept; a person may have several residences (Art. 177/1), but only one domicile at a given time (Art. 186).
- Secondly, domicile denotes an element of permanency; it is the place where a person resides and has established his interests with the intention of living there "permanently" a term which also has different meaning.

Domicile under the Civil Code

- Article 183 of the Civil Code provides that "the domicile of a person is the place where such person has established the principal seat of his business and of his interest with the intention to reside there permanently."
- We must define the word **"permanently"** in this context, and it is submitted that "permanently' should mean "**for an indefinite period of time**."
- What may be called a "floating intention to return" **should not** be sufficient to prevent a person from acquiring a **domicile here.**
- **For example, let us assume that a Greek merchant comes to Ethiopia, brings his family with him, and invests substantial amounts of capital in a business. He plans to return to Greece when he retires.**
- He should be considered domiciled in Ethiopia, as his intention is to remain in Ethiopia **indefinitely**.
- This interpretation of domicile is **buttressed/supported** in Ethiopia by the provisions of Article 184 of the Civil Code, which provide as follows:
- 1) Where a person has his normal residence in a place, he shall be deemed to have the intention of residing permanently in such place.
- 2) An **intention to the contrary expressed** by such person **shall not be taken into consideration** unless it is **sufficiently precise**, and **it is to take effect on the happening of an event which will normally happen** according to the ordinary course of things.

Real cases

- For example, if a person came to Ethiopia to work on a five year contract, intending to leave after the expiration of the five years, he would not be domiciled in Ethiopia though he has his residence here.
- **The intention to leave is sufficiently precise** and **will take place upon the happening of a definite event** i.e. **the expiration of the five years.**
- In the case of Shatto v. Shatto [Civil appeal No. 784/56, Journal of Ethiopian Law, 199 (1964)], the Supreme Imperial Court construed Article 183 and 184 and concluded that "permanent" meant for an indefinite period of time. The person whose domicile was in question was a "safari outfitter," carrying on his private business here, and had been resident in Ethiopia for six years. The High Court (with one member dissenting) denied his petition for homologation of divorce on the ground that he was not domiciled here, as he might some day leave the country (he was an American citizen); therefore, it concluded that he did not "intend to live in Ethiopia permanently."
- In reversing the decision, the Supreme Imperial Court held that "the majority was certainly wrong to foresee too much the future." Since he was residing in Ethiopia and has his business here, the presumption of Article 184 applies; in the absence of clear evidence of contrary intention, the presumption was not rebutted, and he was deemed domicile in Ethiopia.

Cont….

- To the same effects is the case of Zissos v. Zissos (Civil Appeal No. 633/56), involving a Greek national who had lived in Ethiopia for some years and whose business was here.
- The person whose domicile was in question was a Greek national who came to Ethiopia in 1910.
- He established a business here and was married here.
- He made a number of visits to Greece during that time and went there when he was seriously ill; he returned to Ethiopia after he was cured.
- The court concluded from his testamentary will that he intended it to be governed by Greek law, since it would be valid under Greek law, but not under Ethiopian law, and since he directed that it be executed by the Greek consul in Addis Ababa.
- The court held that he was not domiciled in Ethiopia.
- The court concluded that there **was not sufficient evidence** to show that the person has acquired a domicile of choice in Ethiopia.
- It emphasized that he continued his "**Greek way of life**" here and thus did not have the intention to acquire an Ethiopian domicile.
- Do you agree this decision in line with art. 184 cc??

- The result would clearly be different under the (Civil) Code.
- He has both his business and his normal residence in Ethiopia.
- The presumption then is that he was domiciled in Ethiopia.
- The intention to return to Greece was “floating” at best, and there was no fixed event upon the happening of which he would return to Greece. In fact, he died here.
- Therefore, there would be no evidence to rebut the presumption that he intended to live here permanently, and today such a person would be considered domiciled in Ethiopia.
- Ethiopia’s policy, as evidenced by Articles 183 and 184 of the Code and the interpretations the courts have put upon them, favor a finding of domicile when a person lives and works here.
- This insures that foreigners residing here and having their business or employment here shall be deemed to be Ethiopian domiciliary (in the absence of) a clear and precise intention to the contrary.

Article 187

- **Article 187 deals with the problem that arises when a person has left his former domicile** with the intention not to return, but has not yet acquired a new domicile.
- Let us say that a Greek national who has been domiciled in Ethiopia decides to return to Greece and live there permanently. He leaves Ethiopia, but dies before he reaches Greece.
- The question is where he was domiciled at the time of death. He has abandoned his Ethiopian domicile, but has not yet acquired a Greek domicile; since he was not physically present there the intention and physical presence have not coincided.
- In such a situation English courts have held that the person reacquires his domicile of origin, that is, his domicile at the time of his birth [Udny v. Udny (1869), Law Reports, 1 Sc. & Div. 441].
- The American courts, on the other hand, have held that the person retains his former domicile until he acquires a new one [In re Jones, 192 Iowa Reports 78, 182 Northwestern Reports 227 (1921)].
- Ethiopia follows the latter approach; under Article 187 of the Civil Code, a person retains his domicile in the locality where it was established until he establishes his domicile in another place.

Cont…

- In summary, the law is very clear with respect to the acquisition of Ethiopian domicile.
- Persons having their normal residence here are presumed to be domiciled here unless this presumption is rebutted by clear evidence of contrary intent, and their leaving Ethiopia is to take place upon the happening of an event that is likely to occur.
- This means that persons living and working here for an indefinite time will be held by the Ethiopian courts to be domiciled here.
- The fact that the law is clear has great significance in the determination of the question of the governing personal law, to which we now turn our attention.

CHAPTER 3 - RIGHTS HELD BY PHYSICAL PERSONS

- Black's law dictionary defines right as "**a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is wrong.**"
- The phrase "legally enforceable claim" indicates that there should be a claim or legal guarantee that is enforceable by courts of law and law enforcement organs.
- The legal guarantee may require another person '**not to do a given act**' (i.e. negative rights) such as the inviolability of domicile; or, it may require 'a duty to do a given act' (i.e. positive rights) such as the duty to supply maintenance (Articles 197 to 212 of the Revised Family Code).
- Positive rights involve duty to act, and a negative right requires the duty to forbearance.
- Social, economic and cultural rights require the duty to act towards making the rights available. They are thus positive rights.

- Rights of personality are held as of birth (Art. 1), although legally binding acts (e.g. contracts) are exercised through a person who is in charge of administering the property of the person with lessened capacity (192-393).
- It is to be noted that holding rights refers to entitlement which may at times require exercising it through a guardian or a tutor.
- The embodiment of rights of personality in civil law facilitates the implementation of these rights which are also enshrined in constitutional law and other laws.
- Articles 8 to 31 of the Civil Code deal with rights of personality; i.e. - rights of every individual by virtue of physical personality. Article 8 provides "Every physical person shall enjoy the rights of personality and the liberties guaranteed by the Ethiopian Constitution" without regard to race, colour, religion or sex.
- Article 25 of the Constitution articulates the principle of equality before the law and entitlement without any discrimination to equal protection of the law.
- This principle includes foreigners because they are not precluded from this principle of equality in all matters (389/1) other than the few specifically identified juridical acts they are not capable of exercising, such as participation in government (389/2) and ownership of immovable property without government permit (390).

Cont.....

- Chapter III of the Constitution entitled "Fundamental Rights and Freedoms" deals with constitutional liberties. It has two parts.
- Part I embodies provisions on human rights (Articles 14 to 28), and the second part of the chapter (Articles 29 to 44) deals with democratic rights.
- Article 14 lays down the principle that "Every person has the inviolable and inalienable right to life, the security of the person and liberty."
- These rights 'i.e. life (Art. 15), security of the person (Art. 16) and liberty (Art. 17)' are further substantiated by other constitutional rights, namely: the right to protection against cruel, inhuman and degrading treatment (Art. 18), the rights of arrested persons (Art. 19), rights of accused persons (Art. 20), rights of persons held in custody and convicted prisoners (Art. 21), the right against retroactive application of criminal law (Art. 22) and the right against double jeopardy (Art. 23), right to honor and reputation (Art. 24), right to equality (Art. 25), right to privacy (Art. 26), freedom of religion, belief and opinion (Art. 27).

Cont….

- Moreover, the rights under Part II of Chapter III of the Constitution (i.e. Articles 29 to 44) deal with the political rights that every person is entitled to.
- It is to be noted that Article 93/4 (c) of the Constitution enumerates the provisions that cannot be suspended nor restricted even at times of a state of emergency.
- These provisions are Article 1 (nomenclature of the State), Article 18 (freedom from cruel, inhuman or degrading treatment), Article 25 (the rights to equality before the law without discrimination) and Article 39 Sub-Articles 1 and 2 (rights of self-determination).

2- International Covenant on Civil and Political Rights

- Article 9/4 of the constitution recognizes all international agreements ratified by Ethiopia as "an integral part of the law of the land." Article 13/2 of the constitution further provides that the fundamental rights and freedoms specified in chapter III of the constitution (i.e. Articles 13 to 44) "shall be interpreted in a manner conforming to the principles of the universal declaration of human rights, international covenants on human rights and international instruments adopted by Ethiopia."
- The issue regarding the level of hierarchy that international instruments on human rights have in Ethiopian law doesn't belong to law of persons. It suffices to say that in addition to our domestic laws and the constitution, international instruments ratified by Ethiopia shall be relevant with regard to rights of personality.
- The 1966 covenant on civil and political rights (ICCPR), in particular, has many provisions relevant to rights of personality.

Cont....

- Part III of the covenant (articles 6 to 27) embodies the following rights:
- Right to life (article 6), freedom from torture, or inhuman and degrading treatment (art. 7), freedom from slavery and slave trade in all their forms, servitude and forced labor (art. 8), right to liberty and security of the person, freedom from arbitrary arrest and detention (art. 9), right of detained and accused persons to be treated with humanity (art. 10), freedom from imprisonment merely on the ground of failure to fulfill contractual obligation (art. 11), liberty of movement and freedom to choose residence, freedom to leave any country including one's own and freedom to return to one's own country (art. 12), the freedom of aliens against expulsion (art. 13) except for compelling reasons, right to equality before the law (art. 14), and freedom from retroactive application of criminal law (art. 15), right to recognition as a person (art. 16), right to privacy of family, home and correspondence, and protection from against such interference and unlawful attacks on honor and reputation (art. 17), right to freedom of thought, conscience and religion (art. 18), and freedom of speech and expression (art. 19), freedom from any propaganda towards war, discrimination or hatred (national, racial, religious) art. 20, right to peaceful assembly (art. 21) and freedom of association with others (art. 22), right to marry, found a family and the equality of rights and responsibilities of spouses (art. 23), right to every child to protection by his family, society and the state (art. 24/1), and acquire name (art. 24/2) and nationality (art. 24/3), right and opportunity to take part in the conduct of public affairs (art. 25/a), right to vote and right to be elected (art. 25/b), and the right to have access to equal public service in one's country (art. 25/c), right to equality before the law and equal protection of the law (art. 26), the right of members of minorities to practice their culture, to profess and practice own religion, or use their own language (art. 27).

Cont….

- It is to be noted that article 4/1 of the covenant provides that states “may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social groups.” However, article 4/2 prohibits “derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.”
- Issues pertaining to the inconsistency between the constitution and the ICCPR with regard to the list of non-derogable rights are beyond the scope of law of persons.

3.1- Rights concerning the body

- These rights protect the integrity of the human body during a person's lifetime (both against others and against himself) and also safeguard the body after death.
- According to Article 18/1, "The act by which a person disposes of the whole or a part of his body shall be of no effect … where such act is to be carried out before (his) death … (and) if such act (causes) a serious injury to the integrity of the human body."
- The exception to this rule is an act accepted by medical practice (18/2).
- Promise for the disposition of one's body in whole or in part before or after death is **revocable** / **subject to renunciation** (Art, 19/1).
- A person may refuse to submit himself to a medical or surgical examination or treatment (20/1).
- The two exceptions are:

  a) Laws or regulations providing for physical examinations, compulsory vaccination or similar measures in the public interest (20/2);

  b) The power of the guardian to submit a minor or interdicted person to an examination or treatment beneficial to the incapacitated person's health (20/3).

Cont….

- The following are effects of refusal to submit to examination and treatment that do not involve any abnormal or serious risk:
  a) The person "forfeits the right to avail himself of the illness or infirmity which the treatment could have prevented, eliminated or lessened." (21) A case in point is the forfeiture of the right to seek damages for physical injury while the subsequent damage could have been averted by treatment which the victim refused to undergo.
  b) The court may consider as established the facts which the examination was meant to ascertain (22). For example, a person charged of knowingly transmitting AIDS to a woman may refuse to submit to examination. However, the Court can consider the status of the accused as AIDS Positive.
- A person who has the capacity to make a will (i.e. - including a minor over 15 years of age Art. 308) has the right to prescribe the conditions of his funeral (Art.25). In case, however, the deceased has left no prescriptions, the spouse or relatives may prescribe conditions of the funeral (Art. 26).

3.2- Rights concerning privacy

- The Civil Code provisions that stipulate rights of privacy protect persons against illegal searches and secure the inviolability of a person's dwelling place and correspondence. Rights of privacy also include a person's rights against public exhibition, reproduction and sale of his photograph or image.
- **a) The right against illegal searches**
- By virtue of Article 11, no person shall be subjected to search except as provided by law. The first part of this provision prohibits the restriction of freedom against search, except in the cases provided by law, and its latter part forbids illegal searches.
- Articles 32 and 33 of the Criminal Procedure Code regulate searches on the person himself or his premises.
- **b) The inviolability of domicile**
- "No one may enter the domicile of another person against the will of such person; neither may a search be effected therein except in the cases provided by law" (Article 13/2).
- The term "domicile" under Article 13 should impliedly include residence. The French version uses "la demeure", meaning 'dwelling house' so as to include both residence and domicile.
- Articles 604 and 605 of the 2004 Criminal Code (same as Articles 571 and 572 of the 1957 Penal Code) use the term domicile in its wider interpretation.

c) Inviolability of correspondence

- *The contents of a confidential letter shall not be divulged without the consent of the author (31/1). The two exceptions are: first, it may be produced in judicial proceedings; and secondly, it can be produced where the addressee has legitimate interest (31/2).*
- *The term "confidential" seems to include all letters that are in closed envelope even if they are not marked confidential. Violation of privacy of correspondence by a person to whom it is not addressed (i.e.- an act of deliberately opening a closed letter or envelope that encloses "correspondence, telegrams, business papers or private communications, or a packet, parcel or consignment of any kind …") is punishable under Article 606 of the Criminal Code.*

D) inviolability of a person's image

- *Article 27 stipulates that "The photograph or image of a person may not be exhibited in a public place, reproduced, nor offered for sale without the consent of such person."*

Exception with regard to reproduction (Article 28):

- *Consent of the person is not required if reproduction is justified by:*
  - ✓ *notoriety of such person,*
  - ✓ *public office,*
  - ✓ *requirements of justice or the police, or,*
  - ✓ *facts, events or ceremonies (that are) of public interest or which have taken place in public.*

Art. 27. Image of the person. - 1. Principle

- The photograph or the image of a person may not be exhibited in a public place, nor reproduced, nor offered for sale without the consent of such person.

Art. 28. 2. Exception

- The consent of the person concerned shall not be required where the reproduction of his image is justified by the notoriety of such person or by the public office which he occupied or by the requirements of justice or of the police or by a scientific, cultural or didactic interest, or where the reproduction of the image is made in connection with fact, event or ceremonies of public interest or which have taken place in public.

አንቀጽ 27 የሰዉ ስዕል፤ መሰረቱ፤

- **ባለፎቶግራፉ ወይም ባለስዕሉ ካልፈቀደ በቀር የማንም ሰዉ ፎቶግራፍ ወይም ስዕል በህዝብ አደባባይ ሊለጠፍም ሆነ ሊባዛ ወይም ሊሸጥ አይችልም።**

አንቀጽ 28፤ 2. ልዩ አስተያየት

- **የፎቶግራፉ ወይም የስዕሉ መባዛት ምክንያት የሆነዉ ባለፎቶግራፉ የታወቀ ሰዉ በመሆኑ ወይም በሚያከናዉነዉ ህዝባዊ ስራ ምክንያት ወይም በፍርድና በፖሊስ መ/ቤቶች በኩል አስፈላጊነቱ የተረጋገጠ ምክንያት ያለዉ በመሆኑ ወይም ለኪነ ጥበብ፣ ሳይንስ፣ ለስልጣኔ አስተዳደግ ወይም ለት/ት መስጫ ጥቅም በመሆኑ ወይም ደግሞ የፎቶግራፉ መባዛት የተፈጸመዉ በክብረ በዓል ወይም በህዝብ ስብሰባ ላይ ከተፈጸመ ስርዓት ጋራ ግንኙነት ባለዉ ምክንያት ሲሆን የባለፎቶግራፉ ፈቃድ አስፈላጊ አይደለም።**

- According to the literal reading of Article 28, **these exceptions are applicable to reproduction of images and photographs, but not to exhibition and sale.**
- However, Article 29/1 avails sanctions against the exhibition or sale of image without consent except in the exceptions referred to in Article 28.
- **Sanctions against exhibition or sale without consent (Article 29):**
- Except for the exceptions allowed under Article 28, a person whose image is exhibited or offered for sale without his consent may demand that such acts be stopped.
- Damages (29/2) may be awarded. And moral damages (29/3) may also be awarded if the act doesn't cease immediately when cessation is demanded.
- The spouse, or in default, the relatives stated in Article 30/2 can invoke the sanctions under Article 29 if the exhibition or offer for sale of image is prejudicial to the honor and reputation of a deceased person.
- However, the sanction under Article 29 doesn't include reproduction of image.
- Nevertheless, as long as reproduction of image without consent (27) is forbidden, the sanctions of cessation and damages are self-evident.

- Every person is free to exercise any activity which he deems proper to his calling (i.e.- Occupation) or leisure provided that the rights of others , morality and the law are respected (art. 16).
- A typical example with regard to respect for the rights of others is the right of a spouse who may "in the interest of the household, object to the carrying on of a given occupation or activity" (article 645).
- Another general principle in addition to the one embodied in article 16 is the non-restriction of freedom except in cases provided by law (article11).
- These provisions, i.e. Articles 16 and 11 serve as a general framework for freedom of action, thought, religion, silence, etc … that are embodied under articles 12, 14, 15, 17, 23 and 24.

A) freedom of residence

- The right to freely establish one's residence wherever it is suitable and change the place of such residence is embodied in article 12/1.

B) freedom of thought

- Article 14 stipulates the freedom to think and express ideas (14/1) subject to the restrictions in respect for the rights of others, morality and the law (14/2).

c) Freedom of religion

- The exercise of religion is respected (15) provided that such rites are not utilized for political purposes or (are) not prejudicial to public order or morality.

D) marriage and divorce

- The undertaking not to marry, not to remarry, to divorce or not to divorce is void (17), and this provision aims at protecting a person against his own acts that unduly restrict his rights.

E) the right to keep silent

- "any admission or manifestation of the will obtained by methods causing molestation to the personality shall be of no effect" (art. 23). The amharic version uses the words "physical pressure" instead of "molestation of personality" and thus seems to be narrower in scope than the English version. The phrase "molestation of personality" in the English version apparently accommodates moral pressures as well.

F) professional secrecy

- The right to professional secrecy is respected (24/1) if revealing such facts is betrayal of the confidence placed in a person by virtue of his profession. However, professional secrecy cannot be invoked against the duty to report offences against the state and the armed forces as required under articles 254 and 335 of the criminal code.

Case for discussion

The following is the summary of a real event published in Time magazine (September 18, 2000)

1. Jodie and Mary are conjoined twins. They are conjoined at a circular pelvis. One of the twins, Mary, has a flaccid, useless heart, no working lungs and an underdeveloped brain. She can suck, kick and open one eye but may not have consciousness. Her body mate Judie is bright, alert and sparkling. Mary's life depends on Jodie's heart and lungs, and the strain will probably give Jodie heart failure and kill both in three to six months.

- Assuming that this happened in Ethiopia, can surgeons detach Mary (denying her the right of life stipulated under Article 1 of the Civil Code) to let Jodie live a relatively normal life?
- Does forbidding the surgery on the other hand violate Jodie's right to life?

Cont…

2. Ato “A” has a wife and seven children aged three to seventeen. He has no means of supporting his family. He came across a certain opportunity and agreed to sell one of his kidneys to a patient Mr. B, who is quite familiar with such underground practices in his country. While Dr. X was undertaking the due preparation for the kidney transplantation, Mr. Y (who is Mr. B’s business adversary) intervened and invoked the inviolability of Ato A’s integrity of body pursuant to Article 18 of the Civil Code.

a) Can Mr. Y succeed?

b) How do you see the legality of blood donation? Would your opinion be different with regard to sale of one’s blood for blood transfusion?

Ch. 4 LESSENED/Reduced CAPACITY

Introduction

- By virtue of Article 1 of the Civil Code, an entitlement to rights of personality starts as of birth; and under exceptional circumstances rights such as successions can include the conceived child, provided that its interest so requires. (Arts. 2-4, 834).
- There may be exceptions to the principle of holding of rights upon birth.
- For example, the constitutional right to vote and to be elected (At. 38 of the Const.) is held by persons who have attained the age required by law.
- However, there are restrictions in the exercise of these rights by minors, insane persons, etc. even if they hold all civil rights from the moment of birth.
- We should thus make a distinction between holding rights and exercising them.
- **A person who holds rights and exercises them is said to have the capacity to enter into legal relations, while a person who holds rights, but exercises them through a guardian or tutor is referred to as a person with lessened capacity.**

General principles

- **a) Capacity is the rule and incapacity the exception**
- Article 192 provides that "Every physical person is capable of **performing all acts of civil life unless he is declared incapable by the law".**
- In other words, everyone has the capacity to exercise the rights he holds unless he is within the group of persons whom the law declares incapable of performing juridical acts on their own, i.e.- without being represented by a guardian or a tutor.
- **b) Capacity is presumed unless proved otherwise**
- A person's capacity to exercise juridical acts is presumed (196/1), and anyone who invokes the issue of incapacity bears the burden of proof (196/2).
- **c) The deprivation in the exercise of rights is not absolute**
- It must be noted that the words "unless he is declared incapable by the law" under Article 192 do not denote absolute incapacity or total disability to perform any act of civil life.
- Juridical acts (i.e. - acts that entail legal consequences) are merely a very small fraction of the large multitude of acts of civil life in a person's day-to-day activities, relationships and endeavors.

Cont….

- Despite a person's incapacity to **perform juridical acts, the exercise of his rights and performance of his duties remain unaffected in most domains of civil life, other than juridical acts that require prudent and rational decision.**
- **Of course, the incapacitated person is not deprived of holding these rights; but instead, he is merely required to exercise them through a guardian or tutor.**
- In short, the capacity to exercise rights is lessened under certain circumstances; and the entitlement to these rights is not completely deprived.

d) The prohibition of renunciation and voluntary restriction of rights

- The exercise of rights cannot be renounced (195/1). And, a voluntary limitation in the exercise (enjoyment) of rights is void "unless it is justified by lawful interest" (195/2). The phrase "legitimate interest" in Article 9/2 is replaced by "lawful interest" in Article 195/2.
- Yet the word "lawful" is as vague as "legitimate" unless we resort to the Amharic version that reads "ስለማህበራዊ ጥቅም ሕጋዊ ተገቢነት" (lawful and legitimate in view of social interest); or even more so, to the French draft that uses the words "law and public order".

Lessened capacities are categorized in to two groups:

1. General incapacity (Art. 193):- occurs due to

- Due to age: Minority (Arts.198-338 C.C; Arts 215-318 RFC)
- Due to mental or physical condition:
  - ✓Notorious insanity and apparent infirmity (Arts. 339-350)
  - ✓Judicial interdiction (351-379)
- Due to penal sentences: Legal interdiction Arts 380-388 (E.g. Art 123, Criminal Code, 2004)

2. Special incapacity (Art. 194) occurs due to:-

- ✓Due to foreign nationality (Arts. 389-393)
- ✓Due to special functions, e.g. Article. 302

Cont…

- Foreigners are classified under “special incapacity” because they are capable of performing all juridical acts other than few (specifically identified) juridical acts that they are not capable of exercising.
- Special functions may also entail **special incapacity. For example, according to Article 289 of the Revised Family Code,** a tutor can’t conclude contract with the minor, nor can he accept the assignment of any right or claim against the minor, unless he is authorized by court

Purposes of lessened capacity

- Direct exercise of certain juridical acts (such as legally binding contracts) requires a certain level of maturity, mental condition and the like.
- The law duly lessens/minimizes such rights of certain groups of persons on the basis of their status of minority, notorious insanity, apparent infirmity, judicial interdiction and legal interdiction for the following reasons:

A) to protect incapacitated persons from others who may take advantage of their inexperience, inferior judgment, etc.; And to protect these persons of lessened capacity from their own erroneous decisions and acts that could be detrimental to their interests.

B) in the case of legal interdiction, the incapacity has the purpose of protecting society from offenders.

Definition and effects of minority

- A minor is a person of either sex, who is below eighteen years of age (Art. 215 -RFC), and minority starts from the beginning of physical personality.
- A minor cannot perform juridical acts (i.e.-acts that entail legal consequences) “except in cases provided by law” (216/3- RFC).
- The words “except in cases provided by law” indicate that there are certain juridical acts that minors are allowed to perform.

Juridical acts that can be performed by minors

- The juridical acts that minors can perform are stipulated under Articles 242, 263, 264, 134/1, 140/2, 140/3, 291,292,293 and 295 of the Revised Family Code.

A) guardianship and tutorship

- A minor can be a guardian or tutor of his own children (Art.242 -RFC). This provision applies to cases where a minor happens to be a parent outside wedlock, because marriage (upon dispensation of not more than two years, Art 7/2, RFC) emancipates a person from minority (Art. 311 RFC).
- In principle, there is lessened capacity owing to minority; and as exception to this principle, the person under the age of eighteen is entrusted with tasks as guardian and tutor of his/ her child that require capacity. The solution under such circumstances seem to be the advise the parent-minor to apply for emancipation.

B) receiving income from work

- From the age of fourteen onwards, the minor himself shall receive the income deriving from his work (Art. 263/1 -RFC).
- By virtue of Article 263/2 (RFC), the minor "may freely dispose of such income in accordance with the law, after making contribution to his own maintenance."
- The original Amharic version reads "ለራሱ ቀለብ የሚሆነውን ለአሳዳሪው ከሰጠ በኋላ..." meaning "after having given his expenses of maintenance to his guardian ...."

C) receiving income from donated or bequeathed property

- A minor may **receive income** from property donated or bequeathed if the person who donates, bequeaths or leaves the property orders that the minor and not his guardian receive and use the income.
- The contract of donation or will can also enable the minor to administer and use such income (Art. 264 -RFC).
- It must be noted that Art. 264 (RFC) doesn't allow the minor to administer and use the property that is donated, bequeathed or inherited under the circumstances stated in the provision, but can only administer and use "income from such property".

D) acknowledging a child

- A minor shall personally make declaration to acknowledge that he is the father of a child (Art. 134/1 -RFC).
- Where the acknowledgment is made without the guardian's authorization, the minor can revoke such acknowledgment as long as he is a minor and within one year following his attainment of majority (140/2 -RFC).
- Such right of revocation can only be exercised by the minor himself and not by his representatives or heirs (Art. 140/3 –RFC).

E) acts of everyday life

- The tutor may expressly (292/1 -RFC) or tacitly (292/2 RFC) authorize the minor to conclude contracts, "which considering his age and his financial position, are to be regarded as acts of everyday life".
- Article 293 RFC defines acts of everyday life as acts, which do not require authorization of the court (293/1 RFC) or acts that entail expense or obligation whose value does not exceed three hundred Birr (293/2 RFC).

F) will, marriage and being adopted:

- A minor is entitled to make a will on his own as of his attainment of sixteen years (Art. 295/2 -RFC).
- A minor over sixteen years who is allowed to marry according to Art 7/2 (RFC), is entitled to give his consent because Art. 6 (RFC) applies regardless of age.
- Opinion of the child may be considered before the court approves the agreement of adoption (Art. 194/3/a RFC).

G) other juridical acts:

- A minor has the right to bring an action in court as stipulated under Articles 300, 160/1 and 161/1 of the Revised Family Code.
- Moreover, the tutor shall consult the minor (aged fourteen or above) in all important acts concerning him (Art.291/1 -RFC).

Sanctions against the acts of a minor performed in excess of his powers

- Juridical acts of a minor performed within the limits of his power are valid and binding. Minority can't thus be invoked to invalidate such acts.
- The issue of invalidation arises only where the minor acts in excess of his powers. Article 299 (RFC) provides that "The juridical acts performed by a minor in excess of his powers shall be of no effect". The literal reading of this provision renders the contract *void from the very beginning (void ab initio)*, *while a careful contextual* interpretation in light of Article 300 (RFC) and other provisions clearly shows that juridical acts performed by a minor in excess of his powers are *voidable (i.e.-subject to invalidation) and not null and void even prior to their invalidation*.

Cont….

- Void contracts are of no effect from the very beginning. A strict literal interpretation of Article 299 (RFC) is inconsistent with the relatively specific Article 300 (RFC) which reads: “The nullity of juridical acts performed by the minor may be applied for only by the minor, his heirs, or his representatives”. This renders juridical acts of a minor (that are beyond his powers) voidable, i.e.-capable of being invalidated, only upon the request of the minor, his heirs or representatives. Had such contracts been void as per the literal reading of Article 299 (RFC), any party could have been able to declare that the contract is null and void from the very beginning.
- However, request for invalidation (on the ground of incapacity) cannot be made by the party who has contracted with the minor nor any other party other than those stated under Article 300 (RFC).
- This clearly indicates that the contract remains valid unless the minor, his heirs or representatives apply for invalidation.
- This renders juridical acts of a minor in excess of his powers voidable (Art.300 -RFC), and not void in spite of the misleading reading of Article 299 (RFC).

A) exceptions where contracts with minors are not invalidated

- Acts of everyday life shall remain valid "…where the other contracting party could in good faith believe that the minor had received the authorization to conclude them and has not taken advantage of the inexperience of the minor" (Article 301/1 -RFC).
- This provision can't be overstretched and be made to apply to juridical acts other than acts of everyday life (Arts. 292, 293 -RFC)
- Payment made to a minor remains valid "to the extent of the enrichment which remains to his benefit on the day when the action of invalidation is instituted" (Art. 302/1 -RFC). Or else, the payment is null, subject to the minor's duty to make repayment (302/2 –RFC).

B) reinstatement, extra-contractual liability and damages

- Invalidation of contracts inevitably entails reinstatement (1815/1).
- By virtue of Article 303 (RFC), the provisions relating to extra-contractual liability (2027-2161) and unlawful enrichment (2162-2178) shall apply to minors as well.
- The father, the mother, the person in charge of the minor, etc. (Arts, 2124, 2125) shall be liable under the law where the minor child incurs an extra- contractual liability.

Termination of minority

- By virtue of Article 310 (RFC), the lessened capacity of the minor shall cease upon his attainment of majority (i.e. eighteen years) or upon being emancipated.

A) emancipation due to marriage

- Article 7/1 of the Revised Family Code (RFC) prohibits both genders from concluding marriage before the attainment of the full age of eighteen years.
- As exception to this stipulation, Article 7/2 (RFC) enables the Minister of Justice to grant dispensation of not more than two years upon the application of future spouses, or the parents or guardian of one of them, for serious cause.
- This provision is an amendment to Articles 581 and 607 of the Civil Code which allow marriage for a woman upon her attainment of fifteen years.
- Article 7/2 of the Revised Family Code which substitutes Article 581/2 of the Civil Code creates the possibility of marriage for the man or the woman since their attainment of sixteen years, under the circumstances stated under Article 7/2 (RFC) .

B) explicit emancipation

- Article 312/1 of the Revised Family Code allows the guardian or tutor of a minor or any interested party to apply to court for the emancipation of a minor who has attained the age of fourteen years. The court may emancipate the minor after considering the factors stated under Article 312/2 of the Revised Family Code.

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Article 7. Age

- 1) Neither a man nor a woman who has not attained the full age of eighteen years shall conclude marriage.
- 2) Notwithstanding the provisions of Sub-Article (1) of this Article, the Minister of Justice may, on the application of the future spouses, or the parents or guardian of one of them, **for serious cause**, grant dispensation of not more than two years.

Article 312 - Explicit Emancipation

- 1) Where a minor has attained the age of fourteen years, his guardian or his tutor or any interested person may apply to the court for his emancipation.
- 2) The court may decide to emancipate the minor after considering his conditions, the reasons applied for, and where it finds that the emancipation is in the **best interest of the minor**.

C) Effects and irrevocability of emancipation

- An emancipated minor is deemed to have attained majority (Art.313 RFC).
- The emancipation of the minor cannot be revoked (314/1 RFC) despite the dissolution of the marriage (314/2 RFC).
- The only exception where a court may revoke a minor's emancipation (Art. 314/3 RFC) is where it has pronounced the dissolution of the marriage on the ground that one of the spouses (or both) had not attained the age prescribed by law for marriage.

Case problems and issues for discussion

- 2. At the age of 16 (sixteen), Abebe won a lottery prize. He lives in Addis Ababa with his remote relative. His father is dead and his mother lives in the countryside far from Addis. He kept this fortunate event secret and collected his prize misrepresenting himself as a person of 19 (Nineteen) years of age through a forged ID card.

  a) Can Abebe's mother invoke his minority and demand repayment if Abebe has squandered the money?

  b) If instead the National Lottery Authority discovers Abebe's minority and is informed that Abebe has put the money he received in a savings account at the Commercial Bank of Ethiopia, can the National Lottery Authority invoke Abebe"s minority to have the money blocked until Abebe attains 18 (eighteen) years of age or until he is represented by a tutor?

- 3. Lily, a beautiful girl, was married at the age of 16, but divorced six months later. Soon after her divorce, she sold most of her property to a neighbour (Woizero X) intending to go abroad. Her plan didn't materialize and she wants to invalidate her contract of sale by invoking minority. Can she?
- 4. "A" is twelve years old and works as a listro for his livelihood. Should A's tutor be with him to receive and manage the income payable to "A" from his services?

Real case

- In a Petition dated Miazia 16, 1998 E.C., the petitioner stated that she is the neighbor to the grandparents of a minor child on whose behalf she is submitting the present petition. Thirteen years ago, a certain W/ro S. Wolde had two children -namely M. Wolde and the present child - from an unknown father. Their mother concluded marriage with Ato F. Gudo and started to live with him. She gave the children to her parents. After the death of the mother on Yekatit 3, 1995 E.C. the husband submitted a false petition to court under File Number 102991/95 to be appointed tutor/guardian of the child and his petition was accepted on Hamle 30, 1995 E.C. whereby he took possession of a house and other property which belonged to the grandparents of the children and has expelled the children from the house.
- The petitioner stated that Respondent Ato F. Gudo was appointed tutor/guardian of the child, H. Wolde by falsely alleging that he is his father and he has been reaping the fruits of property which belongs to the children. Since the child is now 16 years old the, Petitioner has requested the Court to declare the emancipation of the child under Article 312 of the Revised Family Code, Proclamation No.213/2000.
- The Court has considered the pleading of the Petitioner and the testimony of the witnesses. They have testified that the stepfather of the children has failed in his responsibility and the child has ended on the street with no one to care for him. His younger sister M. Wolde who is only 14 years old was also expelled and is living with relatives. The Petitioner has in the last 3 years started to take care of the present child for humane reasons. The stepfather is renting the house and using the proceeds for himself alone.

Cont….

- The Petitioner is poor and blind but has been taking care of H. Wolde after she found him on the street. The stepfather had been beating the child and accusing him of theft to have him detained by the police. The child is now working as taxi assistant and pursuing his education.
- The Court has considered the case. The Revised Family Code No.213/2000 Art.312 provides for explicit emancipation and says “Where a minor has attained the age of 14 years his guardian or his tutor or any interested person may apply to the Court for emancipation.”
- The Petition is based on this text of the law and is presented in the interest of the child. The stepfather of the child became the tutor/guardian by falsely saying he is his father in order to get some material benefit and has inflicted suffering on the children.
- The power of tutor/guardian conferred on Ato F. Gudo on Hamle 30, 1995 E.C. is herby annulled. Testimony has been given in Court that the child has reached the age of 16 years, the Court has thus concluded that his emancipation will be in his best interest and has hereby declared the child emancipated.
- **Order**
- It is hereby ordered that all parties informed of the appointment of Ato F. Gudo as tutor/guardian on Hamle 30, 1995 E.C. shall be informed that his appointment has been annulled by this Court.
- **Review Questions:**
- a) Would emancipation be in the best interest of the child if there were options to substitute another tutor?
- b) What if ‘H. Wolde’ imprudently sells every property immediately after his emancipation?

Insanity that is not notorious

According to Article 339/1, an insane person is one:

- who cannot understand the importance of his actions
- as a result of being insufficiently developed (i.e.- retarded development, mental disease or senility).
- The two cumulative elements in the definition of insanity pertain primarily to the mental condition of the person, and secondly to his inability to understand the importance of his actions.
- In appropriate cases, persons who are feeble-minded, alcoholics, persons who are habitually intoxicated and prodigals/waste fully extravagant shall be entitled to the protection given to insane persons (339/2).
- An interpretation a fortiori seems to enable us consider that habitual intoxication can accommodate drug addicts although they are not expressly included owing to the non-existence of the problem as an issue of public concern when the Civil Code was enacted in 1960.

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- Juridical acts performed by an insane person are not invalidated on mere grounds of insanity unless the insanity is notorious (347/1, 341, 342).
- Yet, the insane person can invoke defects in consent (1696-1710) on account of his insanity (347/2).
- This remedy can be invoked only by the insane person himself and not by his heirs or his creditors (348).
- There are two exceptions (Art. 349) where heirs or creditors may invoke defects in consent on account of insanity, namely:
- A) where the terms of the contract clearly reveal insanity (349/1), or,
- B) where the judicial interdiction of the person has been demanded.
- The English version of Article 349/1 is not as clear as the official Amharic version that reads "… የውል አድራጊው የአዕምሮ ጉድለት ከተደረገው የውል ቃል የሚታወቅ እንደሆነ (በቁጥር 348) የተደነገገው ደንብ ተፈፃሚ አይሆንም".

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- **3.2- Notorious insanity and apparent infirmity**
- Legal protection is given to a person whose insanity is notorious (publicly known) or whose infirmity is evident (343}.

A) definition of notorious insanity (341)

- A person is notoriously insane where: he is an inmate of a hospital or an institution for insane persons or nursing home by reason of his mental condition (339) for the period for which he remains an inmate.
- The three cumulative elements of the definition are being an inmate, the mental condition of the person and the duration of the legal protection.
- In rural communities of less than two thousand inhabitants the insanity of a person shall be deemed notorious, where his family or those with whom he lives watch over him and restrict his liberty of movement due to his mental condition (342).
- The figure two thousand is merely meant to indicate communities where the inhabitants have a relatively closer relationship that enables them to know the mental condition of an insane person (346/2) who lives in their commune or in an adjacent commune.
- However, the Amharic version of Article 342 reads "… ከሁለት ሺህ የማያንስ … (i.e. in rural communities of not less than two thousand inhabitants)". This is obviously a mistranslation, because unlike the English version it requires two thousand or more inhabitants.

B) apparent infirmity

- The Civil Code defines infirmity under Article 340, according to which, an infirm is deaf-mute, blind, etc. who as a result of his condition can't take care of himself or administer his property.
- This definition embodies two cumulative elements, namely, the *physical condition of the person and the resultant inability to take care of oneself or administer property*.
- Infirm persons are given legal protection only where they "invoke in their favor the provisions of the law which afford protection to those who are insane" (340).
- In other words, an infirm person is not availed with the protection unless he demands for it.
- The Civil Code doesn't list situations where an infirmity may be considered apparent. The court may thus take notice of the apparent visibility of the infirmity or receive medical evidence.

C) juridical acts of notoriously insane and apparently infirm persons

- Juridical acts performed by a notoriously insane (343/1) or apparently infirm (343/2) person may be invalidated upon the request of that person, his representatives or his heirs.
- Their acts are subject to invalidation (344) on mere ground of notorious insanity or apparent infirmity.
- Parties who had in good faith concluded contracts with notoriously insane or apparently infirm persons are entitled to damages caused by the invalidation (345, 346).
- Moreover, the notoriously insane person is extra-contractually liable (2027-2161) and is bound by obligations resulting from unlawful enrichment (2162-2178) as though they were of a sound mind (350).
- Unless otherwise provided by law, Article 2030/3 requires assessment of fault on the basis of good usage or reasonable standards of good conduct for the purpose of extra-contractual liability without regard to the age or mental condition of the person concerned.

- Notorious insanity only lasts for the period during which the person is an inmate of a hospital, an institution for insane persons or a nursing home by reason of his mental condition. And, the issue whether an infirmity is apparent is at times controversial. The best means of securing adequate and sustained legal protection for insane and infirm persons is thus through judicial interdiction i.e. the withdrawal of the capacity to perform juridical acts in order to protect the interest of the interdicted person and his presumptive heirs.

The phases involved from application to appeal

A) Application for interdiction

- Judicial Interdiction may be applied for "… by the insane or infirm person himself, or by his spouse, or by any of his relatives by consanguinity or affinity, or by the public prosecutor" (353/1).

B) examination of the application

- The court is required to see the person whose interdiction is applied for (354/2), and where his personal appearance is impossible, the court may have the condition of the insane person examined by delegating one of its members or by appointing an expert (354/3). Before its pronouncement, the court should be convinced that interdiction is necessary (354/1).
- ***C) judgment and registration of interdiction***
- Where the health and interest of the insane person (351/1) or his presumptive heirs (351/2) so require, the court may pronounce interdiction. The same reasons justify the pronouncement of interdiction with regard to infirm persons (351/3, 340). The court may define the scope of the interdiction in its judgment (371/1) and can authorize the interdicted person to do certain acts himself (371/2). Articles 356 and 357 stipulate the requirement and procedures of registering judgments of interdiction and any judgment modifying the effects of interdiction.

D) retroactive effect of judicial interdiction

- The condition of insanity obviously precedes the date of application and judgment. In other words, the person who is entitled to apply for the interdiction of a certain person would not file his application to court unless he invokes the condition of insanity.
- The court can thus “declare that the insanity of such person was publicly known since such date as may be fixed in the judgment” (352/1).
- But the date fixed in the judgment should not precede that of the application for interdiction by more than two years (352/3).
- **E) appeal**
- Article 355 enumerates the parties who may appeal against a judgment of interdiction.
- The literal reading of the provision seems to exclude the right (of the person who has filed the application) to appeal against the court’s refusal to pronounce interdiction.

Acts that may be performed by judicially interdicted persons

- A) The judicially interdicted person can contract marriage if he is authorized by court (369) upon application by the interdicted person or by his guardian.
- B) The personal consent of the interdicted person and his guardian are required for requesting divorce or end an irregular union (370).
- C) The action to disown a child "may, with the permission of the court be instituted by the interdicted person …" (370/2, 791/1).
- D) The judicially interdicted person can acknowledge paternity with the permission of the court (749).
- E) The concurrence of the interdicted to certain acts of the tutor (371/3) may be made a requirement.
- The juridical acts that can be performed by judicially interdicted persons are relatively fewer as compared to the acts that are allowed to be performed by minors. Nevertheless, the court may authorize the interdicted person (371/2) to do certain acts himself. The words "certain acts" seem to refer to the authorization of acts other than those stated above, because article 371 becomes redundant if it is interpreted to refer to acts already enumerated in the provisions that precede it, i.e. Articles 369 and 370.

Juridical acts in excess of the interdicted person's powers

- Acts that are performed by an interdicted person in excess of his powers shall be invalidated upon application by the judicially interdicted person, his representatives or heirs (Article 373/1 cum 314).
- In the case of marriage, however, Article 369/3 allows any interested party, other than the ones stated above, to apply for the nullity of the marriage contracted by an interdicted person, without prior authorization by court.
- Third party in good faith who is not aware of the interdicted person's disability is entitled to damages caused by the invalidation of the contract (Articles 374, 375).

Withdrawal of judicial interdiction

- Application for withdrawal of interdiction may be made by the spouse, by any relative (by consanguinity or affinity) or by the public prosecutor (articles 377/2 cum 353/1).
- It may also be made by the guardian or tutor of the interdicted person (377/3).
- Pronouncement of withdrawal of the interdiction shall be made by court (378) where it appears that:
  - ❖ The causes of the interdiction have ceased,
  - ❖ That the interdicted person can conduct himself and administer his property by himself.
- The disability of the interdicted person shall cease upon the court's pronouncement of withdrawal of interdiction (377/1). The withdrawal shall have the same effects as the emancipation of the minor (art.379 cum 333) in all matters that concerns the care of his person and the management of his pecuniary interests.

Legal Interdiction

- According to Article 380 “a person interdicted by law is one from whom the law withdraws the administration of his property as a consequence of a criminal sentence."
- Pursuant to the same provision legal interdiction is determined by penal laws. Article 123 (c) of the 2004 Criminal Code inter alia (among other things) deprives an unworthy offender of “his rights to exercise a profession, art, trade or to carry on any industry or commerce.”
- The rules governing judicial interdiction apply in cases of legal interdiction (381).
- The acts that the interdicted person is not entitled to perform are subject to invalidation upon request by the interdicted person, the person who has contracted with the legally interdicted person, or by the public prosecutor (387/2).
- The words “of no effect” in Article 387/1 seem to imply the act’s being void from the very beginning (void ab initio).
- Article 382/2 on the other hand, stipulates for invalidation upon request by the appropriate party, and in effect seems to render the juridical act of a legally interdicted person voidable rather than void.

Cont…

- However, one can strongly argue in favor of considering juridical acts of a legally interdicted person as void on two grounds.
- First, the act can be considered as though its subject matter is illicit; and
- secondly, unlike the other grounds of general incapacity, the nullity of the juridical act may be requested not only by the interdicted person … and the public prosecutor, but also by the person with whom the legally interdicted person contracted (Art. 387/2).
- The rights of the legally interdicted remain unaffected in relation to his person (i.e. marriage, divorce, acknowledgement of a child and disowning a child).
- Thus, he doesn't need a guardian, but only a tutor for his proprietary interests.
- This feature considerably distinguishes legal interdiction from the other kinds of general incapacity.
- Legal interdiction ceases when the interdicted "has undergone the punishment for the duration of which the disability is to last" (388).

Organs of protection

- The organs embodied in the Civil Code in order to protect, represent and care for minors, judicially interdicted persons and legally interdicted persons are the guardian, tutor, co-tutor, tutor ad-hoc, family council and the assistant tutor.
- Only some of these organs of protection are needed for certain categories of lessened capacity. It must also be noted that the Revised Family Code of 2000 does not include the co-tutor, family council and assistant tutor among the list of organs of protection for minors.

1- Guardian, tutor, co-tutor and tutor ad hoc

- The guardian is entrusted to take proper care of the person of the minor, and the tutor represents the minor 'in matters concerning pecuniary interests and administration of property' (Article 216 -RFC).

Cont….

- The guardian shall determine the residence of the minor (Art. 256 -RFC), watch over the health of the minor (257 -RFC), and direct and supervise the minor's upbringing and social contacts (258, 259 -RFC).
- The guardian shall also ensure that the minor be given education (260 -RFC and administers a certain income necessary for the minor's care (261, 262 -RFC)). According to Articles 358, 362 and 363 of the Civil Code, the guardian of the judicially interdicted person undertakes analogous tasks.
- The tutor is in charge of the pecuniary interests of the minor (Arts. 269 to 298, RFC), the judicially interdicted or the legally interdicted person, and administers the incapacitated person's property with due prudence and honesty (Arts. 319-327, 358, 366, 367, 383 and 384 of the Civil Code).
- The guardian of the minor is at the same time the tutor (231/1 -RFC). The exception to this rule of joint responsibility are: appointment of a tutor by a parent retaining guardianship (232 -RFC), appointment that indicates a separate function (233, 231/2 –RFC) and separation of the functions (226 -RFC).

Cont….

- The minor's guardians and tutors are his parents (219 -RFC). One of the parents shall exercise these functions in case of death, incapacity or unworthiness of the other parent (220/1 -/RFC). The functions are performed:
  - ❖ By the mother where the father of the child is unknown (220/2 -RFC),
  - ❖ by the person appointed by mutual consent or by court in the case of divorce (221 -RFC),
  - ❖By a testamentary guardian or tutor appointed by a parent's will (222, 223 -RFC),
  - ❖ by persons determined by law where the conditions above do not exist (225 -RFC), and
  - ❖By persons appointed by court (227 to 229, RFC).

Cont….

- As regards judicial interdiction, the court that declares the interdiction shall in all cases appoint the guardian and the tutor.
- According to Article 359 of the Civil Code, “No person, other than the spouse, the ascendants and descendants of the interdicted person, shall be bound to retain the function of guardian or tutor … for more than five years.”
- Legally interdicted persons, as stated earlier, do not require guardians, and the tutor in charge of administering the property of the legally interdicted person is appointed by the court (Art. 383, Civil Code).
- In addition to guardian and tutor there may also be a **co-tutor appointed by court (Art. 219, Civil Code).**
- **By virtue of Articles 220, 221 (Civil Code) and 234, 235 (RFC), a tutor ad hoc shall be appointed by court where there is conflict of interests between the tutor and the incapacitated person, or if there is conflict of interests between several minors represented by the same tutor (235 –RFC).**

2. Family council and assistant tutor

- With regard to minors, the Revised Family Code has given the functions of the family council to courts.
- Yet, the Civil Code provisions that embody the functions of the family council apply to other incapacitated persons.
- It also applies to minors in jurisdictions where the Civil Code is still applicable.
- The **family council is concerned with the overall wellbeing of the incapacitated person. It may be convened by the guardian, tutor, assistant tutor, court or any member of the family council (248).**
- **It is normally active under various circumstances such as death, incapacity or unworthiness of parents.**
- Where significant pecuniary issues are involved in particular, the family council is entitled to direct and supervise the activities of the tutor.

Cont.....

- In regions where the Revised Family Code has not yet been adopted, the family council of a minor is normally comprised of the direct ascendants, brothers and sisters (of age) of the minor (241).
- If the council doesn't comprise four members or in case of divorce, the family council is constituted pursuant to Articles 242 to 246.
- The family council of a judicially interdicted or legally interdicted person "shall consist of his ascendants, his brothers and sisters who are of age, his spouse and his descendants who have attained majority (360, 385).
- One of the members of the family council or a third party (261) may be appointed as an assistant tutor.
- The ***assistant tutor represents the council in receiving the accounts of the tutor, assists the tutor "in the performance of the acts specified by the family council," convenes the family council, and replaces the tutor (at the latter's request) when a particular act involves the tutor's conflicting interest.***

Termination of functions of organs of protection

- The functions of organs of protection terminate (227) under the following circumstances:

A) When the incapacity ends;

B) When the incapable person dies;

C) Where a person exercising the function dies, is declared absent (215), becomes incapable, unworthy or is removed;

D) If a new person is appointed to substitute the function of the previous person.

- Under circumstances “a” and “’’b” the functions of organs of protection apparently cease to exist thereby rendering an organ of protection unnecessary.
- However, circumstances “c” and “d” involve change of persons who exercise the function of protection and not the termination of the function of the organs of protection.

Case problems

1. Ato “Z” is blind since childhood. He has recently graduated from high school at the age of twenty, and aspires to pursue college education. His elder brother gave him One Thousand Birr for New Year shopping. Is Ato “Z” incapable of entering into contract if he wants to buy a wristwatch with the money?
2. Ato "Z" is a commercial dairy farmer. For about a year, he is under persistent headache and insomnia. He was an inpatient of Emanuel Hospital (for a week) when he signed a contract to deliver dairy products at a price stated in the agreement. During the weeks that followed price of butter soared and Ato Z wants to invoke notorious insanity. Result?

Case

- In a petition dated Sene 21st 1997 Eth. C., the Petitioner stated that his wife W/o R. is suffering from mental illness and is unable to take care of herself or of her property. He has requested the court to pronounce judicial interdiction so that proper measures may be taken for her care.
- The Petitioner has produced his marriage certificate and evidence from a Medical Board attesting to the impairment of the mental health of his wife.
- The Court has summoned and interviewed Woizero R. and has observed the mental condition of Woizero R. Moreover, the Court has been able to verify that the lady is suffering from mental illness from the attestation of the Medical Board of St. Paul's Hospital. The court has therefore pronounced the judicial interdiction of Woizero R. and has appointed her husband Ato T. Demissie as her tutor.
- The case is closed, and returned to archives.

Case 2

- This case was presented to this Court by way of Appeal dated Tikimt 29/1997 E.C. against the judgment of the lower Court made on Tikimt 15/1997 E.C. under File no. 233/97
- The statement of claim made to the lower court by the plaintiff requested the appointment of the plaintiff as tutor for his uncle who is mentally ill. After examining Article 41 of Proclamation Number 361/95 and its amendment under Proclamation Number 408/96, the court decided that it has no jurisdiction to make the appointment requested.
- After having examined Article 2/1/g of Proclamation Number 408/96 this court has found that this provision does not forbid the appointment of tutor for adults and the provision is not solely applicable to minors. Therefore, the lower court has erred in concluding that it has no power to make such an appointment. This court has therefore reversed the judgment of the lower Court and has remanded the case in accordance with Article 343/1 of the Code of Civil Procedure in order for the lower Court to consider the evidence and make the appropriate decision.

CHAPTER 5 - END OF PHYSICAL PERSONALITY

Death

- It is to be recalled that Article 1 of the Civil Code states death as the end point of physical personality.
- There are, however, cases where death is probable, but not certain. Such cases involve the issue of absence.
- Unfortunately, many courts are currently lenient in rendering declaration of absence, and they seem to undermine the core issue that need to be proved to justify declaration of absence.
- Indeed, there seems to be more focus on lapse of the period stated in the law (since the last news from the alleged absentee), although the facts of the case may not lead to an assumption of probable death.

1. Probable death of a person: Absence

- There are cases where the death of a person is not certain but probable in view of his disappearance for a long time without news about him.
- The uncertainty of his death or his being alive creates problems with regard to the execution of rights that depend on his death (such as the interest of heirs and legatees) or as regards the performance of obligations that are dependent on his being alive.
- Declaration of absence thus fills the gap of this uncertainty through mechanisms such as granting certain rights to heirs and legatees, and meanwhile securing the right of the absent person in case he would reappear.
- Probability of death should be the ground for the judicial declaration of absence.
- However, courts seem to be lenient in declaring absence mainly focusing on lack of news from the person that is alleged to have been absent.

A) Conditions, application and jurisdiction

- “Where a person has disappeared and has given no news of himself for two years, any interested party may apply to the court to declare his absence” (154/1).
- The two conditions herein, namely, disappearance of a person and absence of news from him for two years or more justify application for the declaration of absence by any interested party.
- The court of the place in which the absentee had his principal residence has jurisdiction to receive the application and give its judgment (154/2).

b) Publicity

- The application for declaration of absence must be publicized in the manner prescribed by court (i.e. through newspaper, radio, or whatever the court prescribes) in the place where the absentee had his last principal residence and in any other place where the court considers such publication useful (155).
- This requirement of publicity is mandatory.
- Such publicity may enable the court obtain news or information about the absentee.

C) Inquiry

- The court may (in addition to the publicity stated above) order an inquiry about the absentee (156), with the assistance of the public prosecutor in all places it considers useful.

D) Declaration of absence

- The court shall declare absence "where the death of the absentee appears to be probable" (157/1).
- The court is required to declare the absence a year after the date of application where the absentee has disappeared for five years or more prior to the date of application and no news have been heard following publicity (159).
- It would have been more reasonable if the time for the court's declaration of absence had started from the date or publicity rather than the date of application, because the time between publicity and declaration of absence can be very short if, for example, publicity is made many months after application for the declaration of absence.
- This problem can be resolved by utilizing Article 158 that allows the court to postpone its judgment for a year or postpone the effect of its judgment for a year after its delivery.

E) Declaration of death where the absentee's death is certain

- If the evidence that has been gathered by court "establishes in a manner which may be considered certain that the absentee is dead, the court to which the application for the declaration of absence was made, may deliver a judgment declaring the death of the absentee" (161).
- Article 111 applies to cases where an application is made to court requesting declaration of death of a person who has disappeared under such circumstances that his death is certain although his remains have not been found.
- However, Article 161 applies where the applicant initially invokes probable death and the court in the course of its inquiry and examination gathers evidence that establishes death which can be considered certain.

General effects of absence

- The persons who have rights dependent on the death of the absentee, such as, a beneficiary of life insurance or heirs, may enforce these rights “after the judgment declaring the absence has become final as though the absentee were dead” (165/1).
- However, they are required to give a guarantee or security for possible restitution in case the absentee reappears (165/2).
- “Persons who have obligations depending on the condition that the absentee is alive shall no longer be bound to fulfill such obligations” (166/1).
- Yet, the court may require guarantee or security, in case the absentee should still be alive (166/2).
- The following example illustrates this condition.
    - A’s will enables B to inherit the property of the former, under the condition that B makes monthly payment to C’s account as long as C is alive. In case C is declared absent, B is not bound to make the monthly payment he owes to C; but may be required to give guarantee or security to pay the arrears in case of C’s reappearance.

Special effects of absence

- Articles 163, 164 and 167 to 169 state the special effects of judicial declaration of absence.
- "The marriage of the absentee shall be dissolved on the day on which the judgment declaring the absence has become final" (Article 75/a - RFC, Article 163/1 Civil Code).
- Declaration of absence establishes the day when the last news of the absentee was received (160), and marriage concluded by the absentee's spouse after this date is valid.
- Such marriage may be impugned under two conditions, namely: by the absentee himself (163/2), or by the public prosecutor under the circumstances stated under Article 163/3.
- However, the reappearance of the absentee does not affect the new marriage if judicial declaration of absence is used as serious ground of divorce in accordance with Article 670/b of the Civil Code rather than as ground for dissolution of marriage as envisaged under Article 163/1 of the Civil Code (Art. 75/a RFC).

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- The Revised Family Code does not enumerate the grounds of divorce, and declaration of absence can be invoked (before courts) as ground for divorce in accordance with Articles 76/b and 81 of the Revised Family Code.
- The following examples illustrate the distinction:
    - Ato “H” has been declared absent by court and his wife Woizero “W” got married to Ato “H2” (a week after the court’s declaration of absence) believing that her previous marriage with “H” has been dissolved by virtue of Article 75/a of the Revised Family Code (163/1 of the Civil Code). Ato “H” is entitled to impugn/oppose the new marriage upon his reappearance (163/2).
    - If instead Woizero “W” invokes the declaration of H’s absence as serious ground for divorce (670/b) and obtains judgment of divorce, the marriage she concludes thereafter remains valid despite the reappearance of her former husband, Ato “H”. Absence should also be allowed as legitimate ground for divorce under the Revised Family Code that doesn’t state list of causes for divorce under Articles 76 and 81.

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- The second major special effect of absence is related to inheritance to which the absentee would have been entitled.
- Succession devolving on absentee shall devolve on the other heirs or legatees without taking into account the portion which would have been assigned to the absentee (164/1).
- The court may oblige the heirs or legatees to furnish a guarantee or security for safeguarding the absentee's right in the event of his reappearance.
- It must however be noted that the share of an absentee does not devolve on other heirs or legatees if he has descendants because Article 853 of the Civil Code (in conjunction with Article 165) entitles them to "take his place and exercise the rights relating to the succession".

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- The third special effect of absence pertains to the property owned by the absentee.
- According to Article 167, the property of the absentee may be placed in possession of persons who would have been called to succeed in case the absentee had died on the day of the last news.
- Such persons are required to take good care of the property as if it is their own (168/1), and may be obliged by the court to give a guarantee or security (168/2).
- Moreover, they are bound to observe the restrictions against transfer of ownership (169/2) and the duty to invest sums received (169/1) within three months from the date of their receipt.

Termination of absence and its effects

- Articles 170 to 173 deal with termination of absence.
- According to Article 170, declaration of absence shall cease to have effect if:
- a) the absentee reappears; or,
- b) it is proved that the absentee was alive at the date subsequent to the judgment; or,
- c) it is proved that the absentee has died.
- In short, declaration of absence terminates where the absentee is proved to be alive or dead.
- Upon reappearance, the absentee is entitled to recover his property (Art.171/1) in its current condition, i.e., despite depreciation through the normal (168/1) use and enjoyment of the property (bonus pater familias).
- The absentee shall also recover the proceeds of property that has been transferred (e.g. through sale) and the property acquired through the investment of the capital.
- But income derived from the property (171/2) is retained by the heirs and legatees who had taken possession of the absentee's property.

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- The absentee has the right to claim damages where heirs or legatees infringe the obligations stated under Article 171/1 or 171/2; or where they commit fraud (173/3).
- However, the guarantees or securities shall be extinguished (173/2) upon the lapse of ten years since the date of the last news, established by judgment of declaration of absence (172).
- Where the absentee's death is ascertained, the patrimonial rights and obligations of the absentee "which form the inheritance shall pass to heirs and legatees" (Art. 826/2).
- In effect, heirs and legatees of the absentee whose death is ascertained shall no more be bound by the conditions of guarantees or securities for the property that is subject to restitution (164/2, 168) and by the restrictions embodied in Article 169 with regard to the duty to invest sums received and the restriction against gratuitous transfer of property.

Case 12

- Petitioner submitted a request to the Court through his advocate on Meskerem 29, 1996 (Eth. Cal.) stating that the Respondent is his brother and he has not been able to find him since he left Ethiopia to go abroad in Megabit 1985 and is requesting the Court to declare his bother's (i.e. Ato Y. Dina's) absence. Witnesses have testified that they have not been able to trace the Respondent.
- The Opposing Petitioner has on the other hand presented evidence to the Court dated Ginbot 7, 1984 indicating that the Respondent is living in Germany.
- The Petition states that the disappearance of the Respondent dates from Megabit 1985. Therefore the Opposition Application does not accord with the date stated in the petition.
- The Opposing Petitioner has not proved the present whereabouts of the respondent. The Court hereby declares the Respondent absent in accordance with Article 154 of the Civil Code.
- **Review Question**
- Do the facts in the case indicate the probable death of the absentee?

Case 13

- The Opposing Petitioner stated in a Petition presented to this court on Tikemt 27, 1999 E.C. that a declaration of absence was given by this Court against the Petitioner. And as the Petitioner is presently living in Germany he requested the Court to annul the decision of absence. He has presented his passport as document of identity.
- The Respondent had presented the Petition seeking the declaration of absence of his brother (the current opposition petitioner) because he had not heard of him for 14 years. Ato S. Dina added that he is happy that his brother is found and has no opposition to the annulment of the decision of absence.
- The Court has examined the case and relevant legal provisions. In accordance with Article 170(a) of the Civil Code a declaration of absence can be annulled on the reappearance of the person.
- Ato Y. Dina who was declared absent has now reappeared. The judgment given on Sene 14,1996 E.C. is hereby annulled in accordance with Article 360/2 of the Code of Civil Procedure.
- **Review Question**
- Read cases 11 and 12, and discuss the effects of such reappearance (of an absentee) on property and marriage.

Case problems and issues for discussion

1. It has been five years since Ato “A” went to Australia. His wife Woizero “B” has not heard about him for the last three years. As she was about to obtain declaration of absence from court, Ato “A” made a phone call to her and wished her Merry Christmas, but was unwilling to tell her about his whereabouts and his plans. If Ato “A” makes similar telephone calls every year wouldn’t he be declared absent?

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- 2. Ato “Z” owns a dairy farm. Declaration of absence has been passed against him. Ato “Z” is not married and doesn’t have children. Both of his parents have died, and thus, his brother, Ato A, took possession of Ato Z’s dairy farm. Ato “Z” reappeared four years after the declaration of absence, and claimed the restitution of his property from his brother.
- a) Is Ato “A” bound to return all the increase in terms of cows, calves, etc. that is more than double the number as compared to the number recorded a few days before Ato Z's disappearance?
- b) Can Ato Z claim restitution of the income from the sale of milk and butter after deduction of operation expenses?
- c) In addition to the dairy farm, Ato Z had one hundred thousand Birr, which was invested in shares bought form an insurance company that has been very profitable. Ato “A” has invoked Article 171/2 of the Civil Code and claims that he is entitled to the dividend (that he has transferred into shares). Ato Z, on the other hand, has invoked Articles 169 and 171/1.

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- 3. Reappearance of absentee may impugn the new marriage of his/ her spouse. Or, it may not affect the validity of the new marriage. Discuss, and give examples.
- 4. One of the conditions for the declaration of absence is lack of news for the period stated in the law. Does the source of the news about the alleged absentee matter? Should the news come directly from the alleged absentee?

Thank you!!