Is there anyone who is a person under the law? Everyone is a person under the law not because he is a person with a certain status, age, certain background and so on but the law states that he is subject of attributes of personality, rights (Article 1 of the civilcode). While someone is of rights, others have obligations to respect his rights. So, we all are persons; because, the law has attributed us personality. Many years ago, not all human beings were persons under the law. Only some were subjects of the law while others were objects thereof.

What are sources of right and obligations? There are plenty of sources of rights and obligations. One of them is contractual relationship. We have, at least, two parties in a contract, party creditor and party debtor. So, the law of contract defines the rights and obligations of those parties. Rights and obligations can also be sourced from the operation of the law. Constitutional law can be taken as an example. We have all the rights written down in the constitution with corresponding obligation. But, certain constitutional provisions are too general to give rise to a specific consumable right.So, we are in need of subsidiary legislations that can give rise to rights and obligations without violating the constitutional principles. Let’s assume that a country has no constitution. Is there any law as source of rights and obligations other than the constitution? Property law is another example as source of rights and obligation. Once someone purchases a certain item, then he will be the owner thereof. When thepurchaser enjoys his right of ownership, others will have corresponding duties. Employment and labor law is also another example of source of rights and obligation. The same is true for tax law. We have already entered into a contract with government when we votedin the ruling party to power. It is not, however, a type of contract we talked about under the civil code. Rather, it can be said as a social contract. Rights and obligations can also arise under tort law. If someone trespassed one’s property or if he caused injury against one’s body integrity, he is obligated to pay compensation under extra-contractual liability. The person liable under tort law can be liable because of fault based liability, strict liability(without proving fault) or vicarious liability. The fault can be that of reasonable person or professional. These are the sources of rights and obligations and they are evidences that we are persons under the law; because, the law states that we have attributes of personality, rights and obligations.

What if these rights and obligations are not respected to the prejudice of the interest bearer?

When our claim (in the sense of right) are totally or partially rejected (in the sense of duty upon another person), dispute is inevitable. So, we have to think of dispute resolution mechanisms. But, before we resort to the dispute resolution mechanism, we should characterize the dispute itself whether it is civil or criminal. Needless to say, a single act of a person may give rise to both criminal and civil liability. If somebody deliberately burns down the property of another into ashes, then he will be criminally responsible of willful destruction of property. The owner of the property is also entitled to compensation. Because, injury has been done to his property. So, we can say that a single act can give rise to both criminal and civil responsibility. What is the difference between a criminal and a civil case? In a civil case, the center of attention is the victim. It is up to the victim to initiate the civil process.Ourpurpose in such a case is also to make the victim get compensation. When the case involves a criminal process, the interest at stake is public interestrepresented by government. So, the center of attention is to punish the offender. Of course, when we punish the offender, we may psychologically satisfy the victim. When we come to our point, we may be in need of getting compensation orapology. Admitting fault can even be a satisfactory compensation for the victim. If we identified the difference between criminal and a civil case and if we defined dispute as a rejected claim, how do we respond to a rejected claim of a civil nature?

If possible, the first resolution mechanism is to ignore and avoid the dispute. The second way of settling dispute is use of force. We may go physical at times when we are emotionally tasted. As opposed to this, we can resort to peaceful resolution mechanism. We may directly call the disputant and negotiate or exchange ideas so as to totally or partially settle the dispute in between. We may ask a friend, a relative, a person with authority or any other third party to intervene so that some kind of communication is held with the disputant. Persons with intimate friendship may intervene with their initiative. Ultimately, we may want to taste the law. We may think of taking the case to a court of law. When we go to court, what we do is to litigate the case.litigation is a paradigm for the whole judicial process. It is a process by which parties submit their dispute to a neutral third party called judge appointed by the government who decides the case authoritatively and whosedecision is binding.

We have already said that contractual and extra-contractual relationshipsare among sources of attributes of personality. But, they are still subject to legal principles. We do have contract law regulating contractual relationship. The same is true for extra-contractual relationship.

We can classify laws as substantive and procedural law. Substantive law includes the law of contract, the law offamily, the law of succession, employment and labor law and so on. Substantive law defines rights and obligations. Imagine that an employerfailed to fulfill his obligation towards the employee. The employee wants to litigate the case or to taste the law. So, we may think of procedural law. The function of procedural law is to implement the substantive rights defined under the substantive law. The procedural law is only a tool or a means towards a certain end. The end will be the enforcement of substantive rights and obligations. If an employee is illegally dismissed, the enforcement of the substantive right will be reinstatement and compensation. We have said that our paradigm is litigation before ordinary courts. Litigation is of different parts. There is no such a thing as civil procedure one and two. We are dealing with the anatomy of a single law suit. If we have a case between Asteraye and Bekele, we are to talk about the dispute in between all the way from its commencement to its conclusion at any stage of litigation. To see the different parts of litigation, firstly, we have trial before court of first instance jurisdiction.Secondly, we have appeal before a high court. Then, we have cassation as a last resort. But, between appeal and cassation, we can think of a parallel development, execution of judgment. Whether the Ethiopian Civil procedure is adversarial or inquisitorial, it doesn’t matter as far as the initiation of a civil case is concerned.

What are the different procedural steps in the trial of a civil case? Trial itself in Ethiopia is divided into several stages. The first stage will be the pleading stage.Then, we have the pretrial or first hearing stage. The next will be the stage at which we hear evidence, hearing of evidence or the actual trial which finally culminate into a judgment. Imagine that A has decided to resort to litigation as a way of settling dispute. He has to initiate civil case against his disputant. If we are the legal adviser of A, we ask him the type of transaction he has concluded with his disputant. We may conduct some interview with A; we may look at certain documents exchanged in between. Then, we determine whether the dispute is the one arising from independent contract, tort, and employment contract and so on entirely by focusing on the substantive law that governs the specific relationship or the merit of the case in between. After determining this situation, the first question will be the question of jurisdiction. There are disputes which fall under the jurisdiction of regular courts. There are also disputes which cannot be litigated before any court at any cost. So, we have to determine whether it is the matter for the regular court to decide or

whether it is the matter to be decided by other governmental institution. This is because courts are not the only organs for settling dispute. If we answer this question, then we should determine which court has the jurisdiction thereof. For example, in Addis Ababa, we have overlapping jurisdictions. We have the Kebele Social Courts operating therein. They have certain jurisdictions over cases arising in the city administration. We have municipal courts of the city administration of Addis Ababa. They claim jurisdiction over matters arising herein. Still, we have federal courts claiming jurisdiction over matters arising in Addis. Finally, we have also the state of Oromia courts claiming jurisdictions over some matters of the city. We have already said that civil procedure law helps us to implement the substantive rights. One way of doing this is by telling the competent court of jurisdiction under consideration. If we have identified the competent court, we have to communicate our claims to the court in question. As a claimant, we have to prepare a statement of pleading. It is the civil procedure that determines the content and the form of the pleading. We cannot simply sit down and write the whole story of the case. The civil procedure is only interested in some aspects of the story,particularly, what we call as cause of action. Question such as what is the cause of action?, how do we define cause of action in our statement of claim?, and so on are answered by the law of civil procedure. It tells us how to prepare and organize our statement of claim. The statement of claim filed in a court of competent jurisdiction must be communicated to the defendant. Because, the defendant has the right to defend himselfagainst any suit. We cannot affect the right and obligation of a person without giving him the opportunity to defend himself. If the court has all the elements of jurisdiction and if the plaintiff has cause of action, we should issue summon to be served to the defendant. If the defendant is dully served, he has to come up with his own pleading called statement of defense. Still, the law of procedure determines the content and the form of the statement of defense. When the stage at which parties do exchange their pleadings (written submissions) is over, the court has to adjourn the case for first hearing or pretrial hearing. What the court does at this particular stage is to examine the pleading of both parties and any other documentary evidence annexed to their pleadings with a view to determining whether parties are really at issue. Issue is a point of disagreement between the parties upon which the right decision of the court depends. Let’s assume that parties do have issue, a case to be determined by the law based on substantive right. Thismeans that there is a possibility for a party to win or to lose as long as the point at issue is proved or disproved. The stage at which the court resolves this

dispute is termed as the trial stage. This is the stage at which the court has to hear evidences particularly testimonial evidences of both parties. The court hears evidences on and only on issue framed at the pleading or pretrial stage. We cannot offer evidences on a point which is not framed as an issue by the judge. The law of civil procedure defines what an issue is; it charts out how we are going to examine witnesses as well. It is in the civil procedure code where we find what type of question we are going to ask. Examination in chief, cross examination, reexamination and and so on are defined in the law of civil procedure. If we have done with the hearing of evidence, we have finally to give judgment. Again, the law of civil procedure determines the content and the form of judgment. It regulates what a judgment should contain or what form it should take. These are all the processes.

If a judgment is given, we can say that litigation or trial at the first instance court is over. Any party can challenge the decision of the court with a review of judgment. Review of judgment may take any of the following three forms. It can be reviewed by the court that gave the judgment itself. The law defines what type of mistakes can be corrected by the judge that gave the decision. By doing so, we avoid the possibility of going to a higher court and incurring additional cost in terms of time, energy, money and so on. This is because, we can easily get the same remedy from the one who has committed the mistake.But, if remedy is not available before the court that gave the judgment, we have the right to appeal. On the other hand, an appeal is determined by the law of civil procedure. It is a process by which a party dissatisfied by the judgment of the lower court takes his grievances to a higher court with a view to having the judgment of the lower court reversed, modified, set aside and so forth. But, appeal is different from trial. For example, we do not hear any evidence on appeal. It is entirely prohibited. But, the law of procedure itself allows exceptional grounds where by new evidences can be admitted for the first time in appeal. We cannot bring new issues on appeal. This means that appeal is the review of the judgment of the lower court based on the record of the trial court. New case cannot be developed on appeal. If we found a new case there, then we are committingprocedural irregularities. This situation immediately triggers objection from the other party. When the judgment of the lower court is reversed, modified or even conformed, we are enforcing the rights and obligations of parties under substantive law. The trial court understands the law as far as the dispute between A and B is concerned in a certain way. If the appellate court conformed, modified or reversed the decision, the law is

still being applied. What is being applied is also the substantive law that defines the rights and obligations. When appeal is over, we may still have grievances against the decision of the appellate court. Then, we can challenge it through a different procedure called cassation. Cassation is also entirely different from appeal. It is a process whereby the supreme court in its special division called the cassation division checks whether the judgment of lower courts exhibit basic or fundamental mistake of law. So, litigation is going to be a triangular.

After the conclusion in the trial court of judgment, the party who has won the case has the right to parallellyforce the judgment debtor to comply with the terms of the decision. Here too, we have a number of procedural devices. According to the law of contract, the property of the debtor is the security of the creditor. Creditors have the right to attach the property of the debtor in satisfaction of their claim. But, that attachment is not something that they can do personally and physically on their own. Rather, they have to initiate the judicial proceeding called execution proceeding. The property has to be put under the control of the court. It is the court that regulates the auction process. The execution proceeding protects the interest of the creditor as well as the interest of the debtor. It protects the interest of the former; because, it lays down mechanisms by which the creditor can get his money by attaching and selling the property of the debtor through the assistance of the judicial machinery. The debtor has also certain procedural protection. Even if the substantive law says that the property of the debtor is the security of the creditor, the law of procedure, on the other hand, says that not every property of the debtor is subject to attachment and sale. It is impossible to deny the debtor the fundamentals of life. To this end, certain properties of the debtor are exempted from attachment(404). This is the procedural remedy given for the debtor.

If we mess up with the pleading, or if we do not properly draft our statement of claim, the court will automatically either reject or force us to come up with a proper pleading or we may run the risk of losing substantive right. The same is true for the defendant. If the defendant fails to deny surprisingly, he is deemed to have admitted the statement of claim. The defendant is expected to deny directly and specifically if he intends to do. Any failure will result in loss of substantive right. Lawyers recognize that the outcome of litigation might be affected more by variation in procedure than differences in substantive law. What do we learn from the law of civil procedure?

In civil procedure, we learn many things the most important of which is technics of litigation. Questions such as how do courts determine their jurisdiction?, how do parties plead properly and present their evidence?, what is appeal or cassation?, how do we go about executing a judgment or a decree?, and so on are determined by the technics of rules of litigation. If we commit a substantive mistake, there may be a possibility of correcting it. To determine whether a specific substantive law is the appropriate law or not, we can take time or adjourn the case. But, as far as procedural technics or issues are concerned, we have to have the answer right in the court room. When a party corners us on procedural issue, we must give the answers readily available in our mind.Of course, it may be possible to back track and correct procedural irregularities. But, that is not advisable. Note must also be taken that the public is watching over the litigation. It can be said as the question of boner. The public attendance is the way in which judges are held accountable. We cannot call upon a judge and ask him why he decides a certain case in a specific manner. The main advantage of public trial is to check what is being done in the court room. Mastering those specific rules is necessary; but, it is not sufficient. To correctly apply those specific rules, we need to understand the policy behind those specific rules. So, we go beyond the technics of litigationas far as time and resource allow us. We have already said that in criminal case, the interest at stake is public interest.We do not have to rule out that there is the possibility of public interest in civil litigation. That is why the law allows intervention by public prosecutor for some cases when circumstances justify.

We can say that civil procedure has to functions. We have just said that the civil procedure is a means of achieving something to an end. For every legal dispute Between A and B so long as that dispute arises under tort, contract or operationof the law, we have a predetermined legal answer. The judge cannot go out there to come up with a new solution. All solutions for every type of controversies are already in the law books. So, the function of civil procedure as a means of implementing substantive rights and obligations is to insure that the outcome of the judicial process is consistent with the rules of substantive law. If the civil code says that a person is the subject of rights from the time of birth to death, and if that is disputed before court, the court must be able to reach the already determined answer in the civil code. The second function of procedural law is the corollary of the first one. In the first function our concern is substantive justice. In The second function, our concern is procedural justice, the question of fairness. Am I given a reasonable opportunity to win a favorable judgment? am I given

adequate time to collect my evidence? Am I given the opportunity to litigate the case before an impartial judge or independent institution? Procedure must appeal to both parties, especially for the party who has lost the case. The loser must feel that he was given the opportunity to win the case. He must blame someone else other than the legal process for losing the case. The ingredients for a civil litigation or a judicial process are facts and the law.

Lecture two

In our last section, we have seen the basic skeleton or the life line of a civil process from the time of its commencement to the time of its conclusions 1) before a trial court in the form of judgment and review, two) before a higher court in the form of appeal, and then before another higher court in the form of cassation and parallel proceeding in the form of execution. We have also seen that civil procedure deals with the various technics governing the various civil processes. We also said that the judicial machinery processes facts and the law to reach a judgment.

How does the judicial machinery operate? There are constitutionally established courts equipped with the necessary man power and government budget. The judicial machinery in the form of civil litigation begins with the justice machinery by the plaintiff. The judicial machinery processes basic inputs to the judicial process the best of which are facts and the laws. These inputs provide us with an outcome in the form of judgment. Facts are provided by the parties, party plaintiff and party defendant. The parties plead their claims and defenses supporting those facts to the judicial machinery. In short, facts and evidences are found from the parties themselves. Facts are necessary; but, they are not sufficient. So, we need to have the substantive law governing the facts which a judge can characterize as contractual obligation, extra-contractual obligation or obligation arising under the operation of the law. That is why we feed into the judicial process relevant substantive as well as procedural laws. We use the latter because we cannot apply substantive law without using procedural law as a tool. Unlike facts, laws are basically applicable by the judge. Parties may refer the judge to a certain provision of the law; but, that is not mandatory. Article 80/2 provides that Every pleading shall be written in ink, printed or typewritten on the prescribed paper and shall contain and contain only a statement in a concise form of the material facts on which the party relies for his claim or defense and shall be in a form as near as may be to the appropriate Form in the First Schedule to this Code. Material facts are

provided by the parties; but, we still need the law. We do not expect the parties to tell the judge as to which law deals with the case. Rather, the law has to be provided by the judge. We do not mean, however, judges have to come up with their own laws. The laws are already proclaimed in the form of constitution, proclamations, regulations, directives and etc. so, the roll of the judge is to discover those particular and relevant substantive and procedural laws kept in various books. Of course, parties cannot be at fault to draw the attention of the judge to a specific provision which they think relevant. But, it is not mandatory for the parties to plead the law unless the law requires them to do so as an exception. The judge uses his mind, knowledge, skill of technics and the likes that he acquired during his stay of 5 years at law school. In general, we use facts and laws to come up with judgment.

As to the form and content of a judgment, Article 82/1 provides that The judgment shall contain the points for determination, the decision thereon and the reasons for such decision: Provided that a judgment given in first instance shall also contain a concise statement of the case and a judgment of an Appellate Court shall, where the decree appealed from is reversed or varied, specify the relief to which the appellant is entitled.

The points for determination refer to the issue or the point of disagreement between the parties. The phrase “the decision thereon” refers to the holding of the judge on a given disputed point. The judge has to reason out why he has reached a given decision or conclusion. It should be remembered that an argument has two elements, the premise (major premise and minor premise) and the conclusion. Premises are some established propositions in the form of facts. Berhe has entered into a contract with lemma (premise one). Lemma has failed to pay the price (premise two). Therefore, lemma is bound to pay the price by the application of a given contract law (conclusion).

We’ve already said that one of the functions of civil procedure is to ensure that the outcome of a judicial proceeding or justice machinery in the form of judgment must be consistent with what has already been stated in the civil code or in any other laws. Answers for every legal question are already provided by the parliament. Before a court of law, we can interpret the law; but, we cannot write the law. Not must be taken that valid premises result in valid conclusion and invalid premises result in invalid conclusion. If the facts are not material and relevant, then the judge is not expected to reach a correct decision. People would like to compare the judicial machinery to

any other real factories' machinery. In order to have the product necessary, the machinery must obtain the necessary inputs or raw materials. For example, the machinery must operate at the level of optimal or scientifically determined temperature; there must be added the necessary chemicals to it. Then, it will be possible to get the final product as necessary. If we mess up with any of the ingredients, the product will not be as desired. The same is true with the judicial process.

How do we guarantee the decision of the court? We've already said that the law of civil procedure has two functions. It has to ensure that the judgment is consistent with the rule in the substantive law. Secondly, the process must be acceptable to both parties. In order to effectively operate the judicial machinery and guarantee the decision, we need to have trained man power; as per the constitution, the judiciary has to be independent. The constitution, under its article 78, has declared that an independent judiciary is hereby established. The independence of the judiciary is one of the guarantees for the parties to have correct decision. Correct decision refers to the application of relevant law to the material facts produced by the parties. We say that a judiciary is independent when the constitution declares so. The declaration of the constitution to the judiciary independence is the necessary condition. Article 79/2 provides that Courts of any level shall be free from any interference of influence of any governmental body, government official or from any other source. Imagine that we have a judge presiding over a case constituting facts and laws. In such a case, the judge and the institution as a whole should be independent. The judiciary is part of the government. So, the act of parliament and that of the executive may affect the independence of the judiciary. In general, the judiciary should operate under normal circumstances. The judge should make use of only the facts, the laws and his mind to reach a correct decision. If a government official, government institution or any other third party influences or pressurizes the judge, the judge could be under fear; he may not apply the correct law; he may not be able to appreciate the facts in a proper manner. Then, the outcome will be a wrong judgment. That is why we need an independent judiciary which is not accountable to the executive but directly accountable to the parliament to guarantee the decision of the judge.

The other guarantee is that members of the judiciary must be competent. If a judge is incompetent, it is difficult for him to be independent. We have just seen hierarchical court structures as first instance court, high court and Supreme Court. The message of structuring courts hierarchically is that

lower courts or judges therein are less competent than high or supreme courts or judges therein. The assumption is that as we go up, the competence of courts or judges therein increases. If the judge is not independent, competent or confident enough, any direct or indirect influence may affect the outcome of the case.

Appeal and cassation is also another procedural guarantee for the party affected by the trial court. It is not uncommon to hear some individuals complaining that the judge is not recording the testimony of the witnesses correctly.

What guarantee do we have under the law if the judge is not using his independence and competence correctly? Some judges, no matter how intelligent they are, may not be interested in handling certain issues. Their predisposition may affect the way they appreciate the facts, the law and so on. Articles 31 of the civil procedure code and 27 of the federal courts establishing proclamation provide for principles that guarantee fair hearing. So, we need to have fair hearing as an additional guarantee or procedural safeguard. As a defendant, one must be given the opportunity to defend himself. The court should issue and serve his summon properly. The court must give him sufficient time to collect evidence and bring it to the court room. Assume that someone faced a dispute yesterday. It is not reasonably sufficient time for him to collect evidence, to talk to his lawyer, organize and present his defense to the court this afternoon. The judge does not have to focus on one side ignoring the other side of the case. He must address both parties equally. This fact must be reflected in writing in his decision.

Another procedural guarantee is public hearing.
It is clearly provided under article 260 and the following articles of the civil procedure code so that courts must conduct proceedings in public. The exception is only when the law justifies either to protect the parties, children or when it involves a security issue. In such a case, courts are allowed to hear cases in camera. The advantage to hear cases in public is to make judges accountable. However, in the majority of cases, we can say that trial is not in public for the simple reason that courts have no enough court rooms where the public can gather and attend trial. At times, we conduct two different proceedings. Two judges seating in the same room, one resides over bench one and the other resides over bench two as a result of constraints in rooms. Truly speaking, it is more of a commotion than a trial.

There are two Models of judicial proceeding, adversarial and inquisitorial. We can say that every judicial process aims at the discovery of truth. In a judicial process, we are not trying to establish an objective truth; rather, we try to establish a truth as understood by the law maker in the law books. But, even if any judicial process aims at reaching truth, we do not have a general consensus of how to reach that truth. What is the difference between the adversarial model of reaching truth and that of inquisitorial? The adversarial model is developed by Anglo-American system and the inquisitorial model is developed by the continental system. The distinction between the two basically lays on the role of the parties and the judge in the discovery of truth. The adversarial model is premised on the assumption that parties are in their selfish and best interest. So, they have every incentive to uncover the truth. It is from the fight and contest of the parties at their best interest that the judge can discover the truth. The plaintiff alleges the existence of a contract; the defendant denies the existence thereof. For the judge to discover the truth as to whether there had been contract in between or not, it is upon both parties not only to plead their claims and defenses, but also to supply necessary evidences. In short, in such model, truth is best discovered by the adversarial fight and competition of the parties. It is mainly for the parties to examine witnesses. Examination of witnesses is not basically the duty of the judge. The converse is true in the inquisitorial system.

In the case of the inquisitorial system, the assumption is that parties and their lawyers acting in their self-interest cannot responsibly identify the correct version of the story. The correct version of the story can be obtained by a neutral person called judge. The judge is acting only in the interest of justice. It is this person that discovers the truth. So, the critical role is played not by the parties or their lawyers but by the neutral person, the judge. The other assumption is that it is the roll of the state to meet out both substantive and procedural justice. The state discharges that obligation by appointing its own judge who is independent of both parties. In the inquisitorial system, it is mainly the judge not the parties or their lawyers that examine witnesses. We do not have such things like cross examination, chief examination, and reexamination and so on. The roll of the parties and their lawyers is very limited. A lawyer can only ask the judge permission to examine his own witness. He can also remind the judge that the witness has to be asked questions the latter may have forgotten. Any judicial process, whether it is adversarial or inquisitorial, wants to discover the truth. However, there is no agreement as to the effective

means of discovering the truth. One relies upon the parties and the other relies upon the judge. There are other differences as well. For example, in the inquisitorial system, we do not have the jury system.

It is argued that the design of a judicial process as adversarial or inquisitorial is mainly informed not by the socio-economic organization of the society but by the dominant political ideology. It is the political ideology that determines the judicial or the legal process we need to develop. For example, Anglo-American or common law tradition is believed to have the ideology of conflict resolution as opposed to the ideology of civil law tradition which is policy implementation. The way we organize our judiciary and design our civil or criminal procedure depends upon the ideology of the state. Some states ideologically believe that the roll of government through courts is to resolve a conflict. This means that the state will render the machinery only if the parties initiate it. Conflict resolution model tends to favor adversarial form of litigation. It is up to the parties who are involved in a certain conflict to bring the correct version of the matter to the judge so that the latter can resolve the dispute based on their litigation, evidence and etc. when it is an ideology of policy implementation, the state believes that courts are not only there to resolve conflicts between private parties. They are also there to implement policy of the state. The policy of the state is not only to resolve conflict through procedurally efficient process but also through appropriate substantive justice. The assumption is that we should not lose our substantive right simply because we are not good at the law of civil procedure. In the adversarial system, because we are a party as a dominant player, we must be able to master the process. If we commit certain procedural mistake, then we can lose rights. If the parties are not good at the technics of cross or chief examination, they may lose their substantive rights as a result of their weakness at the process. Substantive rights must not be lost because of procedural mistakes. The adversarial model has the structure of civil procedure code or civil litigation where we have pretrial process, trial and the likes which are then divided into stages. This is not the case with inquisitorial proceeding which is driven by the ideology of policy implementation. The judge keeps on investigating the case until he is satisfied with the truth. However, the difference between the adversarial and inquisitorial models is getting narrower and narrower according to the theory of convergence of legal principles. For example, in 1996, Britain came up with a very fundamental civil procedure in which the roll of the judge has substantially increased from a traditionally passive type of common law judge to a very active managerial type of judge who is not

simply there to make sure that parties are playing by the rules of the game. The same development is happening in the continental system. The roll of the parties and their advocates has considerably increased from traditionally passive parties and lawyers to active ones.

Currently, we have the following formal sources of the Ethiopian law of civil procedure. People who accept the view that the Ethiopian civil litigation prior to 1942 (the adoption of modern courts) was adversarial are committing a historical mistake. Ethiopia is a very diverse country as we all knows. Of course, in the northern part of the country, what is known as “teteyyeqmugget” or “belalibeliha” can be considered as traditional method of resolving dispute which is classically adversarial. If we tend to apply such practice somewhere in Borona, Sumallie or Afar, it would be a real crazy decision.

The constitution is one of the formal sources of Ethiopian civil procedure. It has fundamental procedural rules including rules of jurisdiction and structure of courts. It is the subject of civil procedure to deal with the structure of courts and their jurisdiction. The second fundamental and formal source of the law of civil procedure in this country is the 1965 code of civil procedure. It contains detailed rules or technics of litigation covering first instance, appeal, cassation and execution. The other source of the law of civil procedure is the federal courts establishing proclamation no 2596. This proclamation talks about the structure and jurisdiction of federal courts. It covers a number of procedural matters which are not covered by the code of civil procedure in the current federal arrangement. The Corollary of the federal courts establishing proclamation is local court establishing proclamation. All the nine states do have their own local court establishing proclamation. Therefore, state laws are valid sources of the law of civil procedure. In order to know jurisdiction of first instance courts in Amhara, we are expected to look at the law of Amhara. Another source is the developing practice of precedent. The decision of the federal supreme court rendered by five judges (proclamation no 454/2005) is binding on similar issues of law all over the country. We can also mention other subsidiary sources such as writings of scholars and so on.

What are the salient features of the Ethiopian civil procedure code? The first one is that it was promulgated as an imperial decree not as a proclamation. It was not brought to the attention of the parliament. So, we do not have minutes of the parliament that can inform us on a number of controversial issues covered by the code. Its second feature is related to its

origin. It is the direct copy of the 1908 civil procedure code of India. The third feature is that it is more of adversarial than inquisitorial. Note must be taken that the law of civil procedure of India was transplanted from Britain or common law legal system. We can have a look at the structure of proceeding in our system. We have the pretrial and trial proceeding which is similar to that of the common law system. Article 260 and subsequent provisions state that it is the responsibility of parties and their lawyers to examine witnesses. Starting from article 241, it talks about chief examination, cross examination, first instance reexamination and so forth to be carried out not by the judges but the parties. These are, on the other hand, features of the adversarial system. But, in the absence of the jury system and others, it cannot be said that it is purely adversarial. The other feature of this code is that it is purely western, liberal and democratic civil procedure. The ideas of western liberal democracy are well stated in the code. The liberal features of the code of civil procedure can be put in one or two phrases. It follows the principles of party disposition. The first element of party disposition is party application. By Party application, we mean that it is only the party who is injured by the act or omission of another party that initiates a judicial proceeding. Article 33 provides the same fact that any person capable under the law may be a party to a suit. No person may be a plaintiff unless he has a vested interest in the subject matter of the suit. No person may be a defendant unless the plaintiff alleges some claim against him. The main aim of a civil case is to get compensation. We must be the person entitled to bring the action and get compensationunless the law exceptionally requires. Sometimes, guardian or tutor may bring an action in their name for the benefit of the minor. It is the exception to the principle of party disposition. The second element of party disposition is that a person has an exclusive right to invoke defenses. If someone is a defendant or if he has substantive and procedural defenses under the law, then he must plead those defenses. If he fails to plead those defenses, then he is deemed to have waived his right. Classical example is period of limitation. The judge cannot plead period of limitation (1956/2 of the civil code). A person can even avoid going to court as a defendant in a civil case. The third element of the principle of party disposition is that the party has exclusive right to attack the judgment by way of an appeal. Article 321/1 states that Unless otherwise expressly provided for by this Code or any other law, the plaintiff or the defendant may, on the conditions laid down in this Chapter, appeal against any final judgment of a civil court.We may see that a judgment is wrong. But, if we are not a plaintiff or defendant, we cannot take an appeal even if we disagree with the decision of the court. It

is the principle of party disposition or the principle of individualism. The one who appeals can leave with a wrong judgment. Even, when he appeals, he can avoid or ignore certain grounds of appeal and simply invoke few grounds. The other element of party disposition is that parties have exclusive right to settle their dispute. Once we have gone to court, we can take the case to its final and logical conclusion or judgment or we have an exclusive right to terminate it through settlement. Articles 274 and the following deal with how to terminate a pending court action through settlement. The final feature of this civil procedure code is that it served or endured the three mutually exclusive regimes, the imperial, the communist and the federal regimes. It doesn't mean that it is a perfect civil procedure code. It has a lot of things to be amended. The point is that it has never been amended or systematically revised. The only amendment in the code is that of article 31. Each and every provision of the civil procedure code is not currently applicable. When the country has gone federal with a parallel court system, state and federal, many things have been affected. The constitution, the federal courts establishing proclamation, local courts establishing proclamation and so on have tacitly amended several provisions of the code. Even, the remaining provisions are not fit to a federal arrangement. As it currently stands, it cannot address certain sensitive federal issues such as the issue of res judicata, the enforcement of a decision of one court by another and etc. because, it was designed in a manner suitable to a unitary state. Even there are certain constitutional matters which the code cannot address with its current stand.

Lecture 3. There could be different courts of identical jurisdiction in different places. For example, federal high court is legally established in 7 different places" diredawa city administration, Addis Ababa, Afar region, SNNPR, BenishangulGumuz, Ganbella and Sumalie. What is jurisdiction? It is the legal authority of courts to hear and decide controversies of parties so as to render a binding decision thereon. It is related to the concept of judicial power that we have in the constitution. So, the phrase "judicial power" can interchangeably be used with the concept of jurisdiction. Who has this jurisdiction? What are the elements of jurisdiction? For a court to have full jurisdiction over a case, the jurisdiction under discussion must consist of three elements, A) judicial jurisdiction over a case, B) subject-matter or material jurisdiction and C) local jurisdiction. These elements of jurisdiction must cumulatively exist at a time. Judicial jurisdiction refers to the issue of whether the courts of a certain country, as opposed to the courts of another country, have the power to hear the case. It is understood

to have foreign element in it. Imagine that we may have the court of Kenya, Somalia, Eritrea and Ethiopia. The case may have some connection with all or some of these countries. in this case, it has involved what is called foreign element due to the fact that the defendant or the plaintiff is foreign national. The subject-matter of the transaction that gave rise to the dispute between the plaintiff and the defendant may be related to both countries, Ethiopia and Kenya. Because, the contract was concluded in Kenya; but, performance was expected in Addis Ababa. Therefore, the case touches the jurisdiction of two different countries. Can Ethiopian courts render a binding decision that affects a foreign national as a defendant? These matters are to be determined by the theory of judicial jurisdiction in the subject called conflict of laws. In conflict of laws or private international laws, we usually deal with questions of jurisdiction, choice of laws as it involves the laws of different countries and questions of recognition and enforcement of foreign judgment. Unfortunately, Ethiopia does not have conflict of laws rule. There is No formally proclaimed law in this country so as to address issues of jurisdiction, choice of laws as it involves the laws of different countries and issues of recognition and enforcement of foreign judgment. Needless to say, the civil procedure code has some provisions dealing with the recognition and enforcement of foreign judgment. But, that is the only conflict of law rules we currently have. In any case, in civil procedure, we don’t deal with judicial jurisdiction. It is the domain of another course named as private international law.

subject-matter jurisdiction is basically concerned with competence of courts. We can talk about subject-matter jurisdiction in two respects. 1 of these respects is whether the case is federal or state. From the constitutional point of view, we decide whether it is the competence of federal courts or that of state courts to hear a certain specific case. This is because it is the constitution that determines the competence of federal and state courts. It is horizontal division of power. Once we determined that the case is federal matter, the next question of subject-matter jurisdiction will be to determine as to which one of the federal courts is competent to hear the case. It is mainly an issue of subsidiary legislation such as proclamation 25/1996. Federal courts are structured hierarchically based on their competence. So, we have to determine whether the case falls under the jurisdiction of first instance, high court or Supreme Court. That is why we say subject-matter is the issue of competency. Questions of judicial jurisdiction or conflict of law questions in terms of jurisdiction, choice of law and execution of judgment arise not only as between courts of different

countries but also as between courts of the same country with federal polity. So, conflict of laws is quite important for federal arrangement as well. Can a court of Oromia give a binding decision upon someone who is residing and running business in Amhara?

As opposed to subject-matter jurisdiction, local jurisdiction is not about competence of courts; rather it is about convenience of courts in respect of parties. In short, it is all about the appropriate place of trial. A court may have subject-matter jurisdiction determined based on the nature of the case or the amount of money involved in the suit. Even if the case satisfies the requirements of material jurisdiction, it will not be the end of the story. Rather, we should then deal with the place of trial for that case. When we talked about fundamental procedural rules, we said that the purpose of civil procedure is to ensure that we reach correct decision in terms of the merit of the case. The judgment as an outcome of judicial proceeding must be consistent with the answer already given by the law maker. The second function is to ensure whether the judicial process was fair for both parties especially for the one who lost the case. One way of considering procedural justice is the convenience of the place of trial. Litigation involves cost in terms of time, energy, money and including emotion. If 3 or more courts are of identical material jurisdiction, which of them is offering the most convenient place of trial? Whether a court has the proper venue or not, the rules of civil procedure are very much detailed on this matter (See articles 19-30). Note: do not start with local jurisdiction during exam; do analyze the material jurisdiction in advance.

Stracture of courts. We have just said that the concept of jurisdiction can conveniently be used interchangeably with the concept of judicial power. If jurisdiction is the power to determine a case, then which organ of the state is vested in it? The answer is that those organs vested in judicial power. What are organs of judicial power?? Simple answer is provided under article 79/1 of the constitution. It reads, judicial powers both at federal and state level are vested in the courts. So, it is regular courts that have jurisdiction to hear a case. Do courts have monopoly over judicial power under the constitution?Not at all! There are other organs empowered to exercise judicial power. And not all civil cases fall under the jurisdiction of regular courts. So, jurisdictional questions involve such objections like the court does not have jurisdiction over a certain case as the matter is essentially given not to courts but to other organs. Therefore, we have to determine whether the matter falls under the jurisdiction of regular courts as opposed to other organs exercising judicial power. What organs are out there to

exercise judicial power under the constitution? Article 78/4 reads, Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established. We can infer two messages from this provision. A. judicial power is given both to regular courts and other institutions legally empowered. B. Establishing Especial organs or ad hock institutions which follow especial procedures and take judicial powers away from regular courts or institutions legally established is strictly prohibited. What are these legally established institutions empowered with judicial power? Article 37/1 of the constitution provides with a solution therefor. It reads, Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power. This sub-article shows that courts do not have monopoly over judicial power. Whenever the constitution talks about judicial power, it is not specifically limited to regular courts although article 79/1 at face value seems to exclude other organs that potentially have judicial power. Article 78/5 also gives some hints as to organs which are not part of the regular courts despite exercising judicial power. It provides that Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution. According to this sub-article, there is a possibility for religious and customary courts to exercise judicial power. Good example is the exercise of judicial power of federal and regional sharia courts established by law. They hear controversies and give binding decision even if they are not part of the regular courts. Another example is labor relations board which is an administrative organ even if it exercises judicial power. It entertains collective labor disputes. Courts do exercise judicial power over individual labor dispute by way of trial jurisdiction. We can also imagine tax appeal commission. It hears appeal from the decision of tax authority against the amount of tax due. Even, social courts are administrative organs with quasi-judicial power.

Structurally speaking, currently, we have dual or parallel court system. It is a complete break away from the traditional, highly centralized and monolithic court stracture. How can we establish this dual or parallel court stracture under the constitution? By dual or parallel court stracture, we mean that we have one set of courts for the federal government and another

set for the state. The main source for the establishment of such dual stracture of courts is to be the constitution. Article 78/2 provides that Supreme Federal judicial authority is vested in the Federal Supreme Court. The House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State courts. Sub-article three of the same article provides that States shall establish State Supreme, High and First-Instance Courts. Particulars shall be determined by law. Here, we have the stracture of the Ethiopian judiciary. The constitution itself has established one court. It is the federal supreme court that is constitutionally established. At the apex, we have the federal supreme court which constitutionally has final judicial power over federal matters. But, the parliament is vested with power to establish other federal courts. These federal courts are hierarchically the federal high court and first instance courtup to down. So, we have the following federal stracture, the federal first instance court, the federal high court and the federal supreme court. This is the way they are hierarchically structured based on their competence. The constitution requires the state to establish the state first instance court, the state high court and the state supreme court. They are not structurally related; because, one set is structurally independent from the other. The federal judiciary is within the federal organ and the state judiciary is within the state organ. Because, we have one set for the federal government and the other set for the state government. The federal supreme court is constitutionally established under article 78/2. The constitution delegates the power to establish the other subsidiary federal courts of lower competence and stracture to the parliament by two third majority. These courts are now established in different parts of the country(proc 25/96). By proclamation 322/2003, federal high court is stablished in the following regions, Afar region, SNNPR, BenishangulGumuz, Ganbella and Sumalie. What makes them dual is that we have one set for the federal government and structurally different set for the state government. Again, they are parallel; because, they are structurally separate in the sense that they belong to different governments and they are courts of different governments, federal and local.

Some people argue that the cassation bench affects the parallel stracture of courts.but, truly speaking, what the cassation bench affects is their functional relationship. The fact that they are parallel does not mean that

they are not working together. Because, structurally, they are parallel; but, functionally, they are related. In one set, we have three layered court system, first instance court at the bottom, high court at the middle and supreme court at the apex of the judiciary. Even if they are structurally separate, they are related in many respects; because, as far as they are only Ethiopian courts, they serve the same people. The operate in the same country; and that operation must be free.

The first relationship in between is the one shown under Article 78/2. The constitution establishes supreme federal court and leaves the decision to establish federal high court and first instance court in the regions for the parliament. And it says in the third paragraph of the same sub-article, Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State courts. Even if we talk about structural separation or parallelism or dualism, state courts do exercise judicial power over federal matters. Federal matters arise not only in Addis Ababa and diredawa, but also in any of the states. But, we do not have federal courts in Amhara, Tigrai, Oromiaandharari. Are we to travel to Addis Ababa and diredawa whenever we have got a federal case? Not at all! Because, the constitution delegates state courts the power to entertain federal matters. Which state courts are delegated with federal matters? Article 80/2&4 gives the answer as follows. The former sub-article reads,State Supreme Courts shall have the highest and final judicial power over State matters. They shall also exercise the Jurisdiction of the Federal High Court. The latter sub-article reads, State High Courts shall, in addition to State jurisdiction, exercise the jurisdiction of the Federal First-Instance Court. So, in states where we do not have federal first instance and high courts, federal matters can be decided by state courts. The question is not whether states do have jurisdiction over federal matters when those federal matters arise in their jurisdictional or territorial limit but whether the power to hear federal matters is delegated or concurrent. Conceptually, delegated power is different from concurrent power. A delegated power is subject to revocation while concurrent power is not subject to same. But, the way article 80 of the constitution is worded seems to be controversial. Its title consists of the phrase ” **Concurrent Jurisdiction of Courts”. By concurrent, we mean original; both do have legitimate claim over the matter. One does not exclude the other as they are equally competent to hear. We do not hav the word “delegation” under the title of article 80 or 80/2 that gives the state supreme court the power to assume the jurisdiction of federal high court or 80/4 that**

gives state high court the power to assume jurisdiction over matters falling under the power of federal first instance court . the constitution seems, however, to talk about concurrent power. On the other hand, If we contrast article 80 with article 78 of the constitution, the issue will be that of delegation. Because, it is declared as The House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State courts. Whenever the parliament exercises its constitutional power of establishing federal courts in a certain region, then, the courts of that region will no longer exercise judicial power over federal matters. Federal high courts establishment Proclamation 322/2003 in its preamble states that WHEREAS, the Constitution of the Federal Democratic Republic of Ethiopia Art 78(2), provides that the House of Peoples' Representatives may, by two third majority vote, establish nationwide or in some parts of the country only, the Federal High Court and First Instance Courts it deems necessary, the House of Peoples' Representatives has decided to Establish Federal High Court in the States of Afar, Benshangul, Gambella, Somali and Southern Nations Nationalities and Peoples. Do the supreme courts of these five regions continue exercising judicial power over federal matters? The intention of the law maker is more than clear. Article 3 of the same proclamation provides that Cases pending in the Supreme Courts of the regions mentioned in Article 2 of this Proclamation in accordance with Article 78(2) of the Constitution before the coming into force of this Proclamation shall be heard and decided by the same courts. 2) Notwithstanding the Provision of Sub-Article (1) of this Article; the Federal Supreme Court may decide to transfer cases pending in Regional Supreme Courts to be heard and decided by the Federal High Court. It implies that the delegated power under article 78 is revoked whenever the federal supreme court feels like doing it despite pending during the coming into force of this proclamation. Some people argue that the establishment of federal courts in the state wil not have the effect of denying state courts to exercise judicial power over federal matters. Rather, they still have concurrent original jurisdiction. The issue is going to be the issue of the plaintiff; He has the opportunity to go either to the state supreme court or the federal high court situated in the capital of that state. This argument is forwarded based on the language of article 80 of the constitution which talks about concurrence of power. Needless to say, states do have some

interest in federal matters particularly in those arising from their territorial jurisdiction. Others argue that it is unconstitutional for the supreme court of a state to exercise judicial power over federal matters falling under the jurisdiction of federal high court in the presence of federal high court in the state. Because, article 78 deals with delegation of judicial powers. State courts do exercise judicial powers over federal matters on certain condition, the absence of federal high courts in the state. At the moment federal courts are established in the state, then their delegated judicial power is revoked and state courts lose their delegated judicial power. For those who argue in favor of Article 80, See article 37 and the issue of proper venue.

The second point in connection with the functional relationship between federal and state courts is the issue of federal review of state decisions which is also very controversial. Article 80 provides that The Federal Supreme Court shall have the highest and final judicial power over Federal matters. . State Supreme Courts shall have the highest and final judicial power over State matters. However, This is not the end of the story again. Sub-articles 3&6 of article 80 are concerned with review of the decision of state courts by federal supreme court. The former sub-article reads, Notwithstanding the Provisions of sub-Articles 1 and 2 of this Article, (a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law.

(b) The State Supreme Court has power of causation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law. The latter sub-article also reads, Decisions rendered by a State Supreme Court on Federal matters are appealable to the Federal Supreme Court. We've just said that State supreme courts exercise jurisdiction over federal matters by way of delegation so long as federal courts are not established in that state and matters arising in the same state fall under the jurisdiction of federal high court. The state high court can exercise jurisdiction over federal matters falling under the jurisdiction of federal first instance court. Therefore, The state supreme court renders final decision over the matter at this level. Because, the party who has lost the case has the right of appeal to the state supreme court. So, the review takes the form of appeal by the supreme court. The idea of sub-article three of article 80 is phrased to sub-article one and two. It reads, Notwithstanding the Provisions of sub-Articles 1 and 2 of this Article, (a) The Federal Supreme Court has a power of cassation over any final court

decision containing a basic error of law. Particulars shall be determined by law.

(b) The State Supreme Court has power of cassation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law. This review also takes the form of cassation. According to the first paragraph of this sub-article, federal matters finally decided by the state supreme courts are subject to review by way of cassation. Are state matters finally decided by the state supreme court subject to review by way of cassation under the federal supreme court? The answer is yes and no. practically, eversince its establishment, the federal supremecourt has been reviewing the final decision of any court in this country. Even, the decisions of the Kebele social courts have been reviewed by way of cassation. Is it a practice pursuant to the law? MuradoAbdo argues that the federal supreme court has constitutional power to review final decisions of state supreme courts over state matters. But, he challenges such arrangement; so, he advises that the constitution should be amended to abolish review of decisions over state matters by the federal supreme court. In the US, the supreme court of America does not review final decision of state supreme courts over state matters unless the issue of the interpretation of the US federal constitution is involved. however, Mehari argues the other ways. He argues that the federal supreme court does not have review of cassation power over state matter. Particulars are determined by law according to the constitution. According to Mehari, proclamation 25/96, under its article ten, precludes the federal cassation division from exercising review power over state matters. The same article reads, In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over 1) final decisions of the Federal High Court rendered in its appellate jurisdiction. 2) final decisions of the regular division of the Federal Supreme Court. 3) final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction. 4) Interpretation of low by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels. The cassation division may however render a different legal interpretation some other time. (Added by Art 2(1) of Proc. No 454/2005). 5) The Federal Supreme Court shall publish and distribute decisions of the cassation division that contain binding interpretation of laws to all levels of courts and other relevant bodies. (Added by Art 2(1) of Proc. No 454/2005). Both have got their own convincing, theoretical and practical arguments. Whether or not

federal supreme courts has power of review by way of cassation over state matters remains controversial even if it is reviewing state matters finally decided by the state supreme court. The points are 1) structurally speaking, the courts are parallel; 2) that parallel stracture does not mean that they are not functionally related. As far as the second point of view is concerned, state courts exercise jurisdiction over federal matters. But, it remains controversial whether that power is delegated or concurrent. Secondly, federal supreme courts reviews final decisions of state courts. There is no problem of reviewing final decision of state courts over federal matters. Because, the federal supreme court has to make sure that the federal laws are interpreted and applied uniformly all over the country. Whether that review power of the federal court extends to state matters remains controversial.

Lecture four. Final decisions over federal matters are subject to review of federal supreme court either in the form of regular appeal(80/6) or in the form of cassation (80/3). Administratively speaking, what is controversial is that whether the final decision of state courts over purely state matters are subject to review by federal supreme courts or not. There are theoretical justifications for and against federal review of final decisions by state courts over state matters. One of those arguments is that state courts are not that much competent and the judges therein are not that much educated. Therefore, if we leave state courts to their own fate, we will ultimately end up in gross injustice committed by incompetent state courts. There are also people who disagree with this justification as an argument. If states do not have strong judiciary, the federal government must build their capacity. It must train the judicial actors of the state; it must probably provide with additional budget for the states so that they develop their own judicial system rather than keeping them weak and incompetent. Some states may even think that they are more competent than the federal courts. State laws are issued by the state parliament. Imagine that the federal Supreme Court reversed the final decision of state courts over purely state matters by applying state laws. Firstly, it is unlikely whether or not judges of federal courts are well acquainted with state laws. Secondly, this may result in some kind of tension between the federal governments wishing to control what is going on in the state and the regional governments wishing to effectively make use of the federal arrangement.

The third point in relation to functional relationship between the two parallel courts is the issue of central supremacy. What is federal supremacy? Is there such a concept of federal supremacy in the Ethiopian

law? Federal supremacy is the situation where the conflict between federal and state laws is resolved in favor of federal laws. State laws must give way to federal laws whenever there is a contradiction in between. Federal institutions are not superior to state institutions (50/8 of the constitution). It reads, Federal and State powers are defined by this Constitution. The States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States. The principle of committee is reflected in this sub-article of the constitution. Imagine that there arises a dispute between leggesse and Aster living in the state of Amhara. Leggesse invokes that there was a regular union between them while Aster denies. On the other hand, the family law of the state of Amhara does not recognize the existence of a regular union while the family law of the federal government stands in sharp contrast with the former. The litigation between Leggesse and Aster was finally brought before the cassation bench of the federal Supreme Court. Can the federal family law take precedence over the state family law? The answer must be found in the constitution. Any relationship between federal and local government is to be regulated by the constitution. Because, both are entities created by the constitution. On the other hand, proclamation 25/1996, under its article 6, provides that 1) Federal Courts shall settle cases or disputes, submitted to them within their jurisdiction on the basis of: (a) Federal laws and international treaties. (b) Regional laws where the cases relate to same. 2) Regional laws to be applied pursuant to sub-Article (1) (b) hereof shall not be applicable where they are inconsistent with Federal laws and international treaties. 3) Where a case brought before them gives rise to issues of Constitutional interpretation, Federal courts shall refer the case to the Council of Constitutional Inquiry prior to giving decision on the matter. If state laws are inconsistent with international treaties, they have automatically to be disregarded. Because, we cannot invoke our domestic legislation to sign line to international obligation. The proclamation also says if state laws are inconsistent with federal laws, the federal laws take precedence over state laws. Do we have the same provision in the constitution? No, there is no clear and specific provision in the constitution that declares federal supremacy. Unfortunately, family law is a bad example for article 6 of proclamation 25/1996 which declares federal laws to take precedence over state laws in the case of disagreement in between. In the first place, there is no such a thing as federal family law. Amazingly, the parliament invoked article 55 of the constitution to proclaim family law. Family law is found neither under article 51 which lists the executive power of the federal government nor under article 55 which enumerates the

legislative power of the parliament. We also have law makers in the two city administrations of Addis Ababa and Diredawa. It is not clear why the federal government acted on behalf of the law makers of Addis Ababa and Diredawa to come up with what is called federal family law. Firstly, on purely state matter, federal government cannot legislate. If the federal government is to legislate on purely state matters, then federal courts must not invoke article 6 of federal courts establishment proclamation and give precedence to federal laws. It is not the business of the parliament to regulate the tension between state and federal laws. It is rather of the constitution.

The beauty of article 6 of this proclamation lies here as follows. There are areas where the federal government and the regional government are competent to legislate due to their concurrent jurisdiction(52/1) of the constitution. It reads, all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States. In the case of concurrent jurisdiction, both can legislate on a certain matter given concurrently. Good example can be the issue of land law. It is clearly provided under the constitution that the state governments can afford to administer land and other natural resources in accordance with Federal laws(52/2(D) of the constitution. So, states can come up with their own land laws that are consistent with federal land laws. In a certain case, if the federal and state land laws are found to be inconsistent with each other, then federal courts must be able to invoke article 6 of the proclamation which doesn’t offend the spirit of the constitution on concurrent jurisdiction. Because, it is concurrent jurisdiction of the two tiers of government given by the constitution. Whenever these governments legislate inconsistently on their concurrent jurisdiction, the very nature of acting together requires federal supremacy.

The last point we need to consider as to the functional relationship between the two systems is the issue of full faith and credit. Article 4 of the US constitution states that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state and the congress may by general law prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof. Do we have similar provision under Ethiopian constitution? State does have legislative, executive and judicial powers. What will happen if a state refuses to apply the law of another state in its courts? In connection with choice of law, a party before a court of the state of Tigraiinvokes the law of the state of Amhara. The judge of the former alleges that he is not bound to apply the

law of the latter in the region where he is. Rather, he wishes to apply the law of tigrai or perhaps the law of the federal government. On the other hand, we have the concept of res judicata which says that an issue finally decided by the competent court will not be relitigated. This is because proceedings must come to an end at a certain point(article 5 of the CPC). The same article /1reads, No court shall try any suit or issue in which the matter directly and substantially in issue has been in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided.

A party who lost the case in the state of Oromia filed the same suit against the same defendant in the state of Amhara. The plaintiff invoked the issue of res judicata as the case has been already litigated and finally decided by the court of state of Oromia. What if the judge declined to hear the objection? A party litigated in the court of state of Oromia and won the case thereby becoming judgment creditor. However, the property of the defendant is located in the state of Amhara. The plaintiff, on the other hand, wants to attach the property of the judgment debtor situated in the state of Amhara. So, he took an authenticated copy of the judgment of the court of Oromia and wanted the assistance of the court in Bihardar for the purpose of execution. The court declined to enforce the judgment of other courts outside of Amhara. What constitutional solution do we have? We do not have a similar constitutional provision of article 4 of the US constitution. What if state courts refuse to recognize the decision of federal courts? What if priority in pendency? Can we litigate the same case pending in another state? Can the defendant be forced to defend to the same case at the same time before two different courts? The constitution does not directly address the question of full faith and credit. Even if the framers of the constitution have missed this issue, the parliament , under article 35 of the federal courts establishment proclamation , provides with the solution thereof. Such article provides that 1) Federal Courts of any level may order that decisions and orders given by them be enforced by Regional Courts. 2) Where two or more Regional or Federal Courts claim or disclaim jurisdiction over a case, the Federal Supreme Court shall give the appropriate order thereon. It is as far as the relationship between federal and local governments is concerned. Constitutionally speaking, Sub-article 1 is to mean that state courts are bound to give full faith and credit to the decisions of federal courts. Are federal courts bound to execute the orders given by local courts? The answer for this question is, however, given neither in the constitution nor in the proclamation under consideration.

What if the judge of the state court failed to be bound by the above article? For these and other types of problems, the solution must have been not in subsidiary legislation but in the constitution itself. Because, it is the constitution not the parliament that created the two tiers of government and the two parallel court systems. A state cannot afford to say no to recognize the decisions of the courts of sister states. Because, next time, other states will retaliate it. The whole point is that they are parallel structurally; but, they are related functionally. Hence, they must smoothly work together.

The division of judicial power in federal Ethiopia.

What rules govern the division of judicial power in federal Ethiopia? Again, this is a constitutional issue. We have agreed that the constitution is one of the sources of the law of civil procedure in this country. We have also structure of courts already determined by the constitution. Still, it must be the constitution that determines judicial power again. Article 50 of the constitution deals with structure of state organs. Sub-article two of the same article reads, The Federal Government and the States shall have legislative, executive and judicial powers. Sub-article 1 of the same article deals with the two components of the FDRE, federal government and state members that constitute the federal polity in the country. They have their own legislative, executive and judicial powers. On the other hand, sub-article 8 of this article states that federal and state powers are defined by this constitution. So long as the constitution hascreated Federal and state organs, it reserved to itself the exclusive right of defining their power again. So, we do not have to look at any source other than the constitution as to division of judicial power while the constitution claiming monopoly power over how to divide legislative, executive and judicial powers. If a state invokes to have a certain power, it must have found that power defined in the constitution. The same is true with the federal government. This is because, the power of any of the two tiers of government is sourced from and only from the constitution. What is the mode of the power division adopted by the constitution? The answer is given under article 52/1 of the constitution which reads all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States. The three modes of division of power are exclusive powers of the federal government, powers falling under concurrent jurisdiction of the two tiers of government and the residual powers which is not given concurrently or expressly to the federal government. Is the constitution relevant for the division of judicial powers

between the states and the federal government? Yes, it is. Because, after creating these state organs, the constitution reserved to it the right to divide powers. The arrangement of dividing power under articles 50-52 is equally applicable to judicial power. Firstly, the power that the constitution tends to divide is not limited to that of legislative and executive but also to that of the judiciary. Secondly, simply by implication, there is no assumption by a federal organ of any power which is not expressly given. The principle of interpretation must be remembered here. So, whenever we have arguments over federal power, we have to define federal power very narrowly so as to limit the federal government within the expressly defined or listed power. Again, this equally applies to courts. Article 51 of the constitution expressly lists mainly the federal executive power; and article 55 expressly lists the federal legislative power. But, there is no article that expressly lists federal judicial power. It seems to be another problem of the constitution. Because, powers that are given to the federal government must expressly be listed. Has the constitution listed federal judicial power? If so, what is federal judicial power?

Lecture 5.

With respect to the division of judicial power, we've pointed out some issues in our previous section. One of such issues we raised is the constitution as the primary perhaps the only source of legislative, executive and judicial powers. Under article 50/8, any power in terms of federal or state is defined by the constitution. This automatically excludes other sources of power even in the case of judicial power. The constitution not only claims exclusivity in terms of defining federal and state power but also it has its own mode of dividing power. When we deal with judicial power, firstly we must look at the constitution. Secondly, we have to apply the same technic that the constitution has adopted. So, we do not have to look a different formula to determine whether a certain case is federal or state. The constitution expressly lists legislative and executive power. But, there is no express provision listing judicial power under the constitution. The maximum that the constitution said with respect to division of judicial power is what we read under article 78-80. Particularly, under article 80, it is proclaimed that The Federal Supreme Court shall have the highest and final judicial power over what the constitution calls as Federal matters. Under the same article (2), it is also proclaimed that State Supreme Courts shall have the highest and final judicial power over what the constitution calls as State matters. So, we can argue that federal and state matters fall within the judicial competence of federal and state courts respectively. What are federal

matters? What are state matters? Of course, we do not have to worry about understanding state matters. Because, if we correctly apply the constitutional formula, something which is not federal is that of state in the form of residual power. Something which is not expressly provided for federal courts is a state matter. Does the constitution define federal or state matter? Not really! Article 3 of the US constitution reads as follows.

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;-- between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed. We can compare it with article 78/2 of the Ethiopian constitution which reads, Supreme Federal judicial authority is vested in the Federal Supreme Court; The House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary. It seems to be counterpart of the US constitution. The constitution provided for the establishment of the federal Supreme Court and vested the parliament with the power to establish other subsidiary federal courts. The constitution has already envisaged a three layered court system. So, the judicial power of

the federal government is vested in the federal Supreme Court, federal high court and first instance court. Unlike our constitution, the US constitution defines federal matters falling under the jurisdiction of federal courts. In our case, the framers of the constitution must have forgotten to define judicial power as expressly as they did for executive and legislative power. On the other hand, it is a must to characterize a case whether as federal or state. Article 78/2 of the constitution is not mandatory for the parliament. It directs the parliament to establish federal high court and first instance court only if it deems necessary. It is remembered that the constitution was adopted on November 29, 1995 two months before the coming into picture of the federal courts establishing proclamation. Can we define federal and state matters in the absence of federal courts establishing proclamation? It may be suggested that the parliament has the power to establish federal high court and first instance court; while establishing, it defines their powers on its way; and then, we can be acquainted with what power federal courts have. Of course, it seems to be one solution. But, what are federal matters in the absence of the federal courts establishing proclamation? What if the parliament does not regard establishing federal courts as necessary? We should be able to tress judicial powers to article 51 and 5 of the constitution. If the constitution innumerate legislative and executive powers, then, we should be able to naturally and logically argue that the federal judiciary extends to matters defined as federal by the constitution under article 51&55. So, Cases which do not arise over matters under articles 51&55 will be by exclusion state matters. Indeed, it is wrong for the parliament to intervene. Because, the state and federal governments are not created by the HPR but by the constitution. When the constitution creates these entities, it is expected that it may define the powers and obligations thereof. It does not delegate the power of defining rights and obligations of federal and state governments to a third party called parliament. Rather the constitution claims that the power of both entities must be defined by itself. When the parliament acted under 78/2 so as to establish federal first instance court and federal high court, the same body must define the jurisdiction of its creations. To define their powers, the parliament must first define what federal matters are. Otherwise, we cannot talk about the jurisdiction of federal first instance court, federal high court and federal Supreme Court. Before we divide jurisdiction among these three layered federal courts, we should in advance demarcate the boundary between federal and state matters. For this purpose, the parliament used article three of the federal courts establishing proclamation.

The same article lays down the principle as follows. Federal Courts shall have jurisdiction over: 1) cases arising under the Constitution, Federal Laws and International Treaties. 2) Parties specified in Federal Laws. 3) Places specified in the Constitution or in Federal Laws. The point is that article three of this proclamation is wrongly placed. The idea may not offend the constitution; but, the business of dividing power between federal and state government should not be left for the parliament which is in turn part of the federal government. The first sets of cases are what Americans call as federal questions jurisdictions. They are cases arising under the constitution, cases arising under federal law and cases arising under international treaties. Federal laws are already defined as laws issued by the HPR under article 55 of the constitution. We should check whether these matters are given by the constitution to the federal government or to the federal courts. Because, the parliament cannot federalize a matter which is not already given to federal government. When the parliament defines federal matters for the purpose of this proclamation, the elements of their definition must tress their source to the constitution. The parliament can elaborate what the constitution considers as federal matters. If the constitution has already given 6 items to the federal government, the parliament cannot upgrade the items to 7 on its own. Because, one of the formulae recognized by the constitution is that for a matter to be federal, it has to be expressly given under the constitution. Federal courts are federal institutions. Their business is to implement and interpret federal policy expressed in the form of federal proclamations, regulations and directives. It is only natural for federal courts to interpret federal laws. So, it is not unconstitutional for the parliament to say that cases arising under federal laws are federal matters.

Constitutionally, it is for federal government to sign and ratify international treaties. On the other hand, international treaties ratified by the Ethiopian government are part and parcel of the law of the land. For this reason, it is natural for federal courts to extend their power to cases arising under international treaties.

The other criterion to be defined as federal matter is that there must be parties specified by federal laws. The identity of any person or any entity involved in a case as plaintiff or defendant determines the nature of the case as federal or state. The question is whether the constitution has expressly federalized a matter simply because the identity of a certain person, natural or juridical, is involved.

The third criterion is that there must be places specified in the constitution or federal laws to characterize a case as federal or state. Cases arising in certain places are federal only because of their location. When the parliament understands federal matters, it has to limit itself to matters defined as federal under article 51 and 55 of the constitution. As per article 50/8 of the constitution, one is not allowed to intervene in the affairs of the others unless the constitution itself mandates. It is to mean we cannot federalize a case if the constitution fails to make it federal. Or we cannot give a matter to state where it has already been given to federal government. Of course, it is possible for the federal government to delegate its power including judicial power to the state. But, delegation seems to be one way traffic. It is difficult to envisage a situation in this constitution where states can delegate their power to the federal government unless federal intervention is mandated by the constitution. Under articles 11 and 14 of the federal courts proclamation, we have matters defined as federal if they arise in Addis Ababa and Diredawa subject to the jurisdiction of social courts and municipal courts therein. It is not expressly stated in the constitution that cases arising in Diredawa are federal matters under articles 51 and 55. On the other hand, even if Addis Ababa is a federal capital, we've agreed that we do not federalize matters by interpretation or implication. Is the law of civil procedure federal or state? States can enact the law of civil procedure if they find necessary. On the other hand, we have federal courts. These courts necessarily need procedural law. Because, they need to have answers for questions of jurisdiction, pleadings, pretrial issues, trial issues, and post-trial mechanisms such as appeal and execution. The law that answers these questions is also procedural law. So, federal government can also enact the law of civil procedure as well. It is not, however, the case in the case of criminal procedure law. This is because the substance of criminal law is a federal matter as per article 55 of the constitution. Article three of the federal courts establishing proclamation separates federal matters from state matters. Article 5 expressly lists federal matters or specific lists of cases falling under federal jurisdiction. The latter article reads, Federal Courts shall have jurisdiction over the following civil cases:

1) Cases to which a Federal Government organ is a party;

2) Suits between persons permanently residing in different Regions;

3) Cases regarding the liability of officials or employees of the Federal Government in connection with their official responsibilities or duties;

4) Cases to which a foreign national is a party;

5) Suits involving matters of nationality;

6) Suits relating to business organizations registered or formed under the jurisdiction of Federal Government organs;

7) Suits regarding negotiable instruments;

8) Suits relating to patent, literary and artistic-ownership rights;

9) Suits regarding insurance policy;

10) Application for Habeas Corpus. We've just seen that under article three, the identity of a party determines a case as federal or state. So, if a federal government is involved as a party of a certain suit, then it is automatically a federal matter. As far as article 5 is concerned, we should make distinction between the two faces of a state. A state has both private and public faces. What article 5 deals with is not about the private face of the state. Rather, it talks about the public face of the state. Because, the federal government is defined in the constitution in terms of federal legislative organ, federal executive organ and federal judicial organ. So, any entity associated with the federal government which cannot be, however, defined as legislative department, executive department or judicial department does not fall under article 5/1 of this proclamation. Rather, in respect to that entity, we

will be required to apply a different regime of jurisdiction. The issue of commercial bank and national bank can be taken as good example. The former represents the private face while the latter represents the public face. To know whether an entity represents private or public face, we should look at the law that establishes the institution. For example, if we look at the law that defines the executive power of the federal government, we find the national bank as an administrative agency reporting to the minister of finance. The state acts in the economy in the form of private face. This is reflected by entities such as commercial bank, Ethiotellecom and etc. is the dispute between a resident of Tigrai and that of Amhara federal matter? Article 5/3 makes a distinction between federal employees and officials acting in their individual capacity and those acting in their official capacity. For those who act in their personal capacity, we apply a different setoff rules. How do we make distinction between a person acting in his individual capacity and another acting in his official capacity? Of course, the time, place, the obligation and the likes may be factors used to make distinction in between. But, the main point is that as a lawyer, we are required to look at the law that establishes the institution and defines the powers and responsibilities of those who run the institution. Cases to which a foreign national is a party are also federal matters. The justification seems to send good message for our counterpart foreign states that their nationals are treated not by inferior state court but by a more competent federal court. I, Yohannes, also believe in another justification. The power to make relation with foreign state and deal with foreign affairs is vested in the federal government. On the other hand, foreign nationals are entities and affairs of foreign states. So, these entities must be treated not by state courts but by federal courts. The issue of nationality is left for federal courts to be federal matter as it is expressly provided under article 55 of the constitution. Because, it satisfies the federal question jurisdiction. We have different types of business organization under the commercial code. We have a single law that regulates these business organizations, the commercial code which is a federal law as per article 55 of the constitution. But, under article 5/6, we have a different treatment of these business organizations. This sub-article says that it is possible to make distinction between federal and state business organizations depending on the place of registration or the jurisdictions from which they obtain their juridical status. Issues of business organization are issues of formation, operation and exit. So, if a business organization which naturally has to be formed under federal law is registered in the state, then the issue of such business organization is not subject to the jurisdiction of federal courts. When there

is a dispute between a company and other third party who is victim of the tort of the company, it is a different issue. It is better to look at not the issues involved but the jurisdictions from which the company obtained its legal personality. We have different forms of negotiable instruments. The most common ones are cheques, bills of exchange and promisory notes. The common characteristics of these negotiable instruments are that they carry an unconditional payment of money. If a person who has the obligation to pay the amount stated in the cheque refuses to pay, then, it becomes a federal matter. Because, cheques, bills of exchange and promisory notes are regulated by the commercial code which is already a federal law. Suits related to intellectual property are vested in federal courts. Because, such cases are already federalize under article 55 of the constitution. Issues related to insurance policy are also federal matters as insurance policy is already regulated by the commercial code. Habeas corpus is a remedy for a person who is illegally detained. Where his detainer is willing to neither discharge him nor willing to bring him before a court of law, habeas corpus shall come into picture. Because, what is at stake is the civil right of the detained.

Lecture six.

Under article three of the federal court establishing proclamation, the HPR has defined what it considers federal matters even if the constitution is not clear as to judicial federal matters. When the HPR proposes what it thinks list of federal matters, one of the criteria is the federal question jurisdiction, cases arising under federal laws, federal constitution and international treaty. Article 5 of the same proclamation has come up with short but exhaustive list of cases arising under federal laws. As far as federal laws are concerned, the issues that article 5 has covered are very limited. They include nationality, intellectual property, negotiable instruments and insurance. Not all cases arising under article 3/1 are listed under article 5. What is the status of civil cases arising under federal laws but which are not expressly listed under article 5? In other words, what is the relationship between article 3/1 which gives a broad definition of cases arising under federal laws and article 5 which narrows them? As per article 55 of the constitution, labor law is a federal law. But, it is not expressly listed under article 5. Do state courts apply labor law? Yes, they do have jurisdiction over labor disputes. Is that because it is state matter? Or is that because it is federal matter delegated to state courts? Or is that because of a different

arrangement formulated in the labor proclamation itself? If we stick to the constitution, states do have jurisdiction over federal matters by way of delegation. Are labor matters entertained at a district/high court level? Labor matters in the state are entertained at a district level. Labor disputes are classified as individual and collective labor dispute. This classification has some implication on the matter of jurisdiction. When we classify certain labor disputes as collective labor disputes, we take jurisdiction away from regular court and give it to other legally constituted competent tribunal known as labor relation board. If we classify a certain labor dispute as individual, then we will go to regular courts. So, such classification is not without legal consequence. Assume that Adera is employed in ABC Share Company. Now, he is unlawfully terminated; so, he claims reinstatement and payment of back wages. Which court is competent to see his case if it is a state matter? Is he going to file before a district court or high court? If we look at article 78/2 and article 80/4 of the constitution, we have to go to the state high court. Because, it is a federal matter; hence, it falls under the jurisdiction of federal first instance court. If it falls under the jurisdiction of federal first instance court, then a corresponding regional court to entertain that matter is state high court. That is what the constitution says. But, is that the way labor disputes are resolved under labor proclamation number 377/2003? Under the labor proclamation, Addis Ababa and Diredawa are considered to be regions or states contrary to article 47 of the constitution that lists 9 entities forming the federation. Secondly, for the purpose of the same proclamation, regional first instance courts are the appropriate first instance courts to start individual labor dispute with. When we come back to the point, according to the general principle of article 3/1 of the proclamation in question, in terms of federal question jurisdiction, cases arising under federal laws are federal matters. So, they fall under the jurisdiction of federal courts. Of course, it is possible to insert cases arising over labor law under this article. But, issues involving labor dispute are not found in the special list of article 5 of the same proclamation. Even if these issues are not found under article 5, they are found under the labor law itself. It states that labor disputes arising under the labor law in the states are litigated before regional first instance courts. Note must be taken that for the purpose of labor law, regions are states. But, as per article 78/2 and 80/4 of the constitution, if something is federal and if it has to be entertained by state courts, it has to be before state high courts through delegation. Therefore, the committed fallacy seems to suggest that either labor is not a federal matter or state district courts are as good as state high courts on the eye of the parliament. The parliament enacts so many

proclamations every year. These proclamations become federal laws automatically. There is also a possibility for a dispute to arise under these proclamations. If these proclamations are not listed under article five of the proclamation in question, are they going to be state or federal matters? A plaintiff filed his case that has arisen under article 3/1 with federal first instance court. Defendant with a copy of statement of claim and invited to invoke defense raised preliminary objection pertaining jurisdiction (244 of the CPC). It says that a court which lacks jurisdiction has to close the file. In his response, the plaintiff argued that he did not care whether or not the matter has been listed under article 5 as article three has already federalized it. The defendant, on his part, argued even if article three defined something as federal, another provision in the same proclamation failed to list it as federal matter. In other words, the parliament has changed its mind; hence, the case should not be treated as a federal matter. As a judge, how do we rule this objection? Under article 5, the parliament picked only two transactions out of dozens of transactions regulated in the commercial code. Does it show examples that the parliament gave as federal matters arising under federal laws? Or, is the parliament deliberately limiting federal jurisdiction on these matters only? We have arguments whether article 5 is containing indicative or exhaustive list; whether article 3 is a general provision and article 5 is a special provision; or whether article 3 and article 5 are applicable simultaneously without any problem. It seems that all arguments are correct. But, it does not mean that a case is both federal and state at a time. Secondly, in practice, federal courts decline jurisdiction when they come across cases not expressly listed under article 5 of this proclamation. Even if a case is federal under article three, the parliament may have deliberately left it for state courts. But, when state courts entertain cases which are not listed under article five, they are not going to entertain them pursuant to state law. Because, the cases have already arisen under federal law. What is being affected is the forum. Whenever we talk about jurisdiction, we are basically talking about the forum not about the substantive law that the forum applies. So as to reach a certain conclusion, we should carry out two things. I.e. we must argue in our favor and respond to the potential argument of our opponent.

The other point that must be raise here is the law of diversity jurisdiction. Article 5 of the proclamation states suits between persons permanently residing in different Regions to be entertained by federal courts. If the plaintiff and the defendant are living in the states of Amhara and Tigrai respectively, then any dispute between these two parties is a federal matter

under article five/two. This sub-article is a mere copy from the American constitution. The Americans have traditional justification for federalizing a case that involves two or more states because of the need to protect an out state litigant against local prejudice. If the resident of state B is forced to litigate against the resident of state A before the courts of state a, the fear is that courts of state a may tend to act in a manner that is prejudicial to the interest of state B litigant. In order to avoid such fear, they came up with an apparently neutral forum, federal forum, so that the two parties can litigate on equal footing. The playing ground is equally level for both parties. This fear of prejudice against an outsider is the first justification. The second reason related to the first one is ethnic disparity between the northern and the southern part of the US. This neutral forum is considered to be an investment incentive for the relatively capitalized northern part of the country so that investors would be encouraged to go to the south and do business. Whenever they face a dispute, they do not have to feel the risk of facing local court. Rather, they are going to have their case herd by a neutral federal court. This justification is some kind of incentive and legal protection. We've just said that If the plaintiff and the defendant are living in the states of Amhara and Tigrai respectively, then any dispute between these two parties is a federal matter under article five/two. Can we find this matter under article 51 and 55 of the Ethiopian constitution? If something is missing in the list of federal power, the constitution proclaims that it is residually state power. If such diversity jurisdiction is not expressly listed as federal, then it is automatically for the state. So, what is creating such a problem is not the constitution but the parliament. It is difficult to argue that the constitution is silent on this matter. Because, the constitution has adopted a clear formula by which we find federal powers expressly listed under article 51 and 55 thereof. Firstly, we cannot leave subject-matter jurisdiction to the agreement of the parties. Secondly as far as local jurisdiction is concerned, the issues are not issues of competency but convenience. Therefore, if it is convenient for the parties, they can agree on the forum even if local jurisdiction is as good as element of jurisdiction that must be fulfilled like that of subject-matter jurisdiction.

Subject-matter jurisdiction raises issues of competency at two levels, horizontally between federal and state and vertically among federal courts. Parties can neither federalize nor defederalise a case. I.e. they cannot agree or disagree on subject-matter jurisdiction. Rather, it is a pure question of law that must be answered by the law maker. Because, as per article 78/2 of the constitution, the parliament is empowered to establish federal first

instance court and federal high courts when it deems necessary. The power of establishing these federal courts also includes the power to define their responsibility or jurisdiction. So, subject-matter jurisdiction is not the matter to determine for the parties by agreement.

If it is a power division between federal and state, the only solution that we have must be in the constitution. Because, it is the constitution that determines horizontal division of power between the two tiers of government. then it has to be clearly answered by the proclamation itself. So, unlike questions of local jurisdiction, question of subject-matter jurisdiction, because they raise issues of competence, are not subject to freedom of contract.

The third element of jurisdiction, local jurisdiction, is all about convenience. Almost all the courts, at this stage, do have identical jurisdiction. Let's say that we have a state matter subject to litigation. It falls under the jurisdiction of district courts. In this case, district court A, B, C and D are subject-matter wise competent. Then, the focus will be as to which of those courts is more convenient for the plaintiff, defendant and witnesses as well. At this stage, parties' freedom of contract to choose more convenient court comes into picture. Note must be taken that even in the case of local jurisdiction, freedom of contract is not absolute. Article 19 reads, Without prejudice to the provisions of the following Articles and to such special places of jurisdiction as may be provided for by any law, every suit shall be instituted in the court of the place where the defendant actually resides or carries on business or personally works for gain.

The same article added that a suit against joint defendants may be instituted in the court of any of the places where any of the defendants resides or carries on business or personally works for gain. Imagine that there arises a dispute between plaintiff a versus defendant b who are residents of Amhara and Tigrai respectively. In this case, we may argue that their case is already federalized because of the need to avoid the possibility of local prejudice. If so, do federal courts have a working language certainly known by both parties? What guarantee do we have for the neutrality and impartiality of federal courts better than that of state courts? On the other hand, diversity is already federalized; but, diversity may not always arise in Addis Ababa and Diredawa. Rather, it may arise in the states. In certain states, we do not have federal courts. For example, federal first instance court is not yet established in any of the states. In the case of the above parties of Amhara and Tigrai where there are no federal high courts and

first instance courts, either we have to push those poor guys to travel from northern Ethiopia to Addis Ababa or we must talk about state court entertaining federal matters through delegation. Addis Ababa may not, on the other hand, have local jurisdiction. So, as a remaining choice, either the Amharan or Tigrian court both with local jurisdiction will necessarily entertain the case through delegation. This situation will certainly defeat any idea supporting diversity jurisdiction if argued to have framed to protect parties against local prejudice. Even if we accept its constitutionality, still, we have many difficulties in applying article 5/2. It talks about residents of different states. When do we say that someone is residing in the state of Amhara and not in the state of Tigrai? When do we say that a residence is permanent? What is the difference between domicile and residence? Which concept is this proclamation referring to? Which one has the element of permanency? How many domiciles can we have under Ethiopian law? We can have only one in number. How many residences can we possibly have? We can have two, principal and secondary residence. Which residence does this law talk about? Does it take domicile or resident as a factor? Of course, the law is not talking about secondary residence. Is article 5/2 applicable to juridical persons? A company may be registered in Tigrai and make its principal place of business in the state of Gambella. The same company may encounter dispute with another company working in the state of Gambella. Then, can we federalize their case? What factor can we take to determine its residence, place of business or place of registration? Suits may involve the parties directly; or we can also think of representative suits. The best example is when a tutor brings a legal action in his own name but for the benefit of the minor. Whose permanent residence do we talk about? In order to answer these questions, we must have justifications for the diversity jurisdiction.

Based on policy behind the diversity jurisdiction, we can answer some of these questions. If we think that local prejudice is relevant factor, then, our interpretation must be well informed by the concern of protecting an outer state litigant against local prejudice. I.e. is the representative or the minor exposed to local prejudice? What type of jurisdiction do we talk about? The US Supreme Court has come up with two types of diversity jurisdiction, complete diversity and minimal diversity jurisdiction. Complete diversity jurisdiction refers to suits between two persons permanently residing in different regions. There is complete diversity jurisdiction between plaintiff A and defendant B who are living in the state of Amhara and Tigrai respectively in that there is no intersection in between as the parties are

only two in number. Now, let’s imagine that as joinder of plaintiffs, we have plaintiff one, plaintiff two an plaintiff three. Because, as per article 35, certain individuals can bring a single action against another. Then, on the basis of article 36, we have, as a joinder of defendants, defendant one, defendant two and defendant three. The former are all from the state of Tigrai while the latter are all from Amhara. It is complete diversity jurisdiction as there is no intersection. In the above case, let’s imagine that defendant three is from Tigrai. In this case, there is intersection; hence, there is minimal diversity. For the US Supreme Court, the law of diversity jurisdiction is valid only if it satisfies the requirement of complete diversity in which there is no intersection. For the Supreme Court to arrive that conclusion, the justification was fear of local prejudice. In the case of intersection, the argument is that the state of Tigrai cannot act in a manner that prejudices defendants from the state of Amhara without at the same time extending that prejudice to defendant three from the state of Tigrai. The US constitution talks about all the detail; the Supreme Court has the power to interpret the constitution. How about in the Ethiopian case?

In the first case, it is not constitutional issue; we cannot talk about competence of courts to interpret the constitution. It is a matter of subsidiary legislation upon which courts does have the power of interpretation. So as to interpret this issue well, we have to know the policy behind it. How do we entertain Disputes arising between two residents of Addis Ababa and Diredawa? Is that federal or state matter? It is a state matter if we define regions under article 5/2 not to include AddisAbaba and Diredawa. From the outset, the proclamation does not define region. Therefore, we are required to use the constitution that does not include Addis Ababa and Diredawa in the list of regions. However, if we worry about protecting outer state litigants against local prejudice, then there is the possibility to treat Addis Ababa and Diredawa as a region. Many proclamations consider Addis Ababa and Diredawa as regions. Best example is the labor code.

The other point in relation to diversity jurisdiction is the applicable law on the nature of the diversity jurisdiction. Where do matters of diversity jurisdiction arise, under federal or state laws? In principle, it does arise under state law. If it arises under federal law, we do not need to talk about diversity jurisdiction. Cases arising under federal law are already federal matters under article three and five of this proclamation subject to other controversies. During matters of diversity, questions of the applicable law in civil suits between residents of two different regions arise under state law.

This means, for example, in the above case, we are going to settle the case on the basis of the law of the state of Amhara or Tigrai. As to which law to choose, we have to apply the proper theory of choice of law which is the main subject-matter of the course, conflict of law. In this case, parties can agree on the applicable law.

Lecture 7

The other point to be dealt with at this juncture is vertical division of judicial power among federal courts. What are the criteria to determine whether a certain federal matter falls under the jurisdiction of federal first instance court, federal high court or federal Supreme Court? To determine this, we will deal with first instance trial jurisdiction not the appellate jurisdiction of federal courts. Article 8 provides that The Federal Supreme Court shall have exclusive first instance jurisdiction over the following:

1) Offences for which officials of the Federal Government are held liable in connection with their official responsibility. 2) Without prejudice to international diplomatic law and custom, offences for which foreign ambassadors, consuls as well as representatives of international organizations and foreign states are held liable. 3) Application for change of venue from one Federal High Court to another or to itself, in accordance with the law. As we see from this article, federal Supreme Court does not have first instance trial jurisdiction of its own. The only civil matter that can be considered as the first instance competence of the federal Supreme Court by way of hearing an application is change of venue(sub 3 of 8). The Supreme Court entertains an application and determines whether a petition for change of venue from one federal high court to another federal high court horizontally or from one federal high court to the Supreme Court itself vertically is proper under article 31 of the CPC. Article 31of the cpc provides that

(1) Whenever it is made to appear to the High Court, at any time before judgment, by application of either party that:(a) a fair and impartial trial cannot be held in any court subordinate thereto;(b) that some question of law of unusual difficulty is likely to arise; or(c) that an order under this Article will tend to the general convenience of the parties or witnesses or is expedient for the purposes of justice, the High Court may make an order from which no appeal shall lie to the effect that any suit:(i) be tried by any court not empowered under the provisions of this Chapter to try it but

having material jurisdiction to try the same; or(ii) be transferred for trial by itself.

(2) Whenever it is made to appear to the Supreme Court at any time before judgment by application of either party that there are good reasons why a suit pending in any division of the High Court on circuit should be tried by another division of the High Court, the Supreme Court may order that such suit be tried by such division of the High Court as it shall direct. Under the same article, we have certain conditions to be fulfilled for a person to move a case from one place to the other. For instance, we have federal high court in Afar whose venue is Semmera. A case pends before the high court in Afar. If the venue originally proper turns out to be inaccessible in terms of providing justice, in terms of impartiality, independence of the judiciary and other factors falling under article 31, then we do not have to force the party to litigate his case before such high court situated in Afar. He has the right to avoid this inconvenient forum that denies access to justice. So, he has the right to move his case and take to any other competent high court situated in the country, for instance, to federal high court in Somali. The application has to be filed by a party who is going to benefit from a change of venue to the federal Supreme Court. The federal supreme court transfers the case from Afar to Somali horizontally or if it is interested in it, it can hear the case as a first instance jurisdiction. It is only as a result of the effect of change of venue that the federal Supreme Court can possibly serve as a trial court. Otherwise, no civil case can directly be tried by the Supreme Court. It is not an appeal; because, to talk about an appeal, there must be a prior judgment which has to be reviewed at a higher level. Secondly, it is a pending case; we can talk about change of venue in such a case. We cannot speak of change of venue unless the case is still pending. We cannot talk about an appeal without trial judgment. We must take note of the fact that the only amendment to the code of civil procedure so far is that of article 31 during the early days of the military regime. Sub-article 1&2 of Article 8 clearly define criminal jurisdiction of the Supreme Court. These criminal acts can equally give rise to civil responsibilities. As far as their criminal responsibilities are concerned, they are bound to appear before the federal Supreme Court. What if the victims of those criminal activities want to pursue civil remedies? As far as the civil liabilities are concerned, the victims have to appear before a court of competent jurisdiction which may be either federal first instance court or federal high court depending upon the elements of article 11 &14 of the proclamation.

What are the first instance trial jurisdictions of the federal high court? Article 11 of the proclamation seems to have given the answer thereof. For a case to be entertained before a federal high court, firstly it has to be a federal matter. Both federal high court and federal first instance court do have original first instance trial jurisdiction. To determine whether a case falls under federal high court or federal first instance court, we should, first, look at the pecuniary value of the claim. If the pecuniary value the claim is greater than 500,000, then it becomes not federal matter rather the jurisdiction of the federal high court. Cases falling under article11/2 have nothing to do with the pecuniary value of the claim. Rather, what matters is their nature. Article 11(b) extends the jurisdiction of the federal high court to cases arising from Addis Ababa and Diredawa. That is without prejudice to the jurisdiction of social and municipal courts of Addis Ababa and Diredawa. If a case arises from Addis Ababa and Diredawa and the pecuniary value thereof is in excess of 500,000, then it is the jurisdiction of the federal high court. If a case in the list of under article 11/2 arises anywhere, because of its nature, it is the jurisdiction of federal high court. To determine the pecuniary value or jurisdiction of the claim, we have to look at article 226-228 of the cpc. If a dispute involves private international law, then it becomes jurisdiction of the federal high court. When do we say that a case involves an issue of private international law? We say that there is an issue of private international law 1) when there is a foreign element giving rise to the issue of forum or jurisdiction, 2) issues of choice of law and 3) recognition and enforcement of foreign judgments. If a case involves foreign element in the sense that the defendant is not an Ethiopian national, or the transaction has some foreign jurisdiction or an issue of forum, courts of different countries may claim jurisdiction. An Ethiopian importer imported consumable goods from Kenya to Ethiopia. People who consumed these goods in Ethiopia were all damaged. By way of product liability, the importer wanted to sue the manufacturer, a Kenyan national. At this juncture, not only Ethiopian courts but also Kenyan courts do claim jurisdiction over such case. The lunatic Supreme Court has decided that the fact that a case involves foreign element does not necessarily give rise to an issue of private international law. In the case of choice of law, parties have the right to determine the applicable law by way of freedom of contract or party autonomy. When parties fail to determine the applicable law through their contract, a country’s conflict of law rule may determine whether it is the law of Kenya or Ethiopia is relevant to decide the substance of the dispute. The rules that help us determine jurisdiction are different from the rules that help us to choose the applicable law. The fact that we have

jurisdiction does not mean that we are going to apply the law of the forum. Ethiopian courts may assume jurisdiction because the cause may have sufficient connection with Ethiopia. But, it does not necessarily mean that Ethiopian law governs the contract. Even if the forum is an Ethiopian forum, the applicable substantive law may be a foreign law. If such issues are involved, then federal high court has jurisdiction as opposed to federal first instance jurisdiction. We have rules governing recognition and enforcement of foreign judgment from article 456-461 of the cpc. A creditor who has obtained the favor of judgment in the US may want to enforce the decree against the property of the debtor herein Ethiopia. Then,, the issue is whether Ethiopian courts recognize and enforce such foreign judgment. Is recognition and enforcement of foreign judgment not an issue of private international law? As to the application for change of venue from federal first instance court to another federal first instance court or to the federal high court itself, the same principle that we discussed under article 8/3 are equally applicable here too. We have only two federal first instance courts in Addis Ababa and Diredawa established by proclamation number 25/1996. Court and bench or division are different one from the other. One is not the substitute of the other. A bench is a division in a court. The court that we talk about is the one mentioned under the FDRE constitution. Therefore, it has got its own structure, budget, administrative and judicial personnel. So, we cannot claim to have established a court when we have only a division somewhere. The parliament is said to have established Diredawa first instance court and Diredawa high court. But, the central commander post is situated in Addis Ababa. As we so far know, the federal high court has only one president and vice president in Lideta federal high court. We still have only one president and vice president for federal first instance court. If this happens, one of those courts should be bench and the other the court thereof. Even, in Addis Ababa, there may be so many federal first instance courts. Practically speaking, they all are not courts but divisions. Division is an easy thing that can be dissolved even by a lay letter of the president within few hours. But, it is impossible to do so with courts. Rather, the exclusive jurisdiction over matters of such courts is vested in the federal parliament.

If we want to remove the case from a legally established federal first instance court to another, then we have to ask the federal high court. The federal high court can order transfer horizontally or vertically to itself. If a federal civil matter or cause of action is capable of expressing itself in terms of monetary value in less than 500,000, we tend to take it to federal first

instance court. If it is a federal cause of action that cannot be expressed in terms of pecuniary value, save as cases under 11/2, fall under the jurisdiction of federal first instance court. Habeas corpus is one of the cases that cannot be quantified in terms of money. Divorce and other civil rights are good examples. Whether it is under article 11 or article 14, as far as cases arising from Addis Ababa and Diredawa are concerned, the jurisdiction of federal high court and federal first instance court is subject to the charters of the city administrations of Addis Ababa and Diredawa. There are certain matters arising in Addis Ababa but which fall not under the jurisdiction of federal courts but which are given to other judicial organs of Addis Ababa city administration such as Kebele social courts and municipal courts. Therefore they are totally outside of the competence of federal courts. In addition to the city and the Kebele social courts under article 39 of the proclamation 361/2003, Labor Relations Board, Civil Service Tribunal, Tax Appeal Commission and Urban Land Clearance Matters Appeal Commission are other judicial bodies in the city (article 40). The civil jurisdiction of the city courts includes the followings, (a) suits on possessory right, issuance of permit or land use as relating to the enforcement of the city Master Plan. (b) suits brought in connection with the regulatory powers and functions of executive bodies of the City Government. (c) Suits on fiscal matters set out under Article 52 of this Charter. (d) Suits brought in connection with administrative contracts concluded by executive bodies of the City government or by enterprises under the ownership thereof. (e) Disputes arising between executive bodies of the City Government or between other organs thereof. (f) suits brought in connection with government -owned houses administered by the City Government. (g) Applications for change of name. (h) applications for certificates of succession, marriage and guardianship; (amended by Proc. No 408/2004, Art 2(1)); and i) applications for the declaration of absence and death. We do not have to take that sub-article 1(a) covers every right involving possession, land or any permit. The scope is limited to the enforcement of what they call as city master plan. The city has its own master plan that tells us what to do where we create towers. In relation to that master plan, there could be a dispute of a possessory nature between residents. There could be a dispute with respect to buildings whether they have been erected or constructed having met the requirements of the city master plan. We do have a number of regulatory executive organs such as health regulatory organ, educational regulatory organ and so forth. If one has dispute pertaining these regulatory powers, then it is possible to take it to the city courts. Sub-article 1(h) of article 41

of this proclamation is hereby deleted and replaced by the following new sub-article 1(h) as application for certificate of succession, guardianship and marriage. Even in the case of family matters, not all family matters fall under the jurisdiction of federal courts. Part of the matter is litigated before federal courts and the other side of the case is litigated before municipal courts. It would be nice to come up with a proclamation in which the city courts of Addis Ababa are going to be banned or dismantled forever. In the first place, the jurisdictions of federal courts and municipal courts in the city are not clearly defined. Sometimes, it will be difficult to know for a case where to start and where to end. For example, after one has obtained certificate of succession from city courts, he will go to federal courts to litigate the case. These things are related; hence, they would have come to an end by the same court. In the case of marriage, if the question is related to get certificate of the marriage, we will go to municipal courts. But, if it is related to issue of divorce, we will go to federal courts. On the other hand, personal and family matters including succession are not federal matters under article 55 of the constitution. There is an article in which the author quotes the BPR as an instrumentality to avoid the city courts. Article 50/1 reads, 1) Kebele Social Courts shall have jurisdiction over cases of property and money claimed where the amount involved does not exceed Birr 5000 Birr. We said that if a case arises in Addis Ababa and if its pecuniary value is less than 500,000 birr, we will take it to federal first instance court. But, article 14 of the proclamation 25/1996 subjects this jurisdiction to article 50 of the Addis Ababa charter. Therefore, the jurisdiction of federal first instance court starts from cases whose pecuniary value is greater than 5000 birr. Do the Kebele social court entertain all cases whose pecuniary value is less than 5000 birr? Article 41 of the charter of the Diredawa city administration provides that Kebele social courts shall have jurisdiction over cases regarding property and the money claims where the amount involved does not exceeds 2000 birr. We must make note of the fact that both charters were enacted by the parliament. What is the reason for the difference in pecuniary value of cases entertained by the two social courts? The other interesting provision under article 41 of the charter of Diredawa city administration is that the civil jurisdiction may not, however, include negotiable instruments and insurance claims. The corresponding provision is not found under the Addis Ababa charter. On the other hand, the Addis Ababa Kebele social courts have entertained a case between commercial bank and national Insurance Corporation simply because the case has involved pecuniary value of less than 5000 birr. Can we take a case involving negotiable instrument with 4000 birr to Kebele

social courts? What if a plaintiff claims 4000 birr for the violation of his patent right? Remember the case between Fisihaye Yohannes versus Abaynesh Mekonen.

Lecture 8. Article 12 sets the principle on material jurisdiction. It provides that every suit shall be tried by the court competent to try it under the provisions of this Chapter and shall, unless otherwise provided, be instituted in the court of the lowest grade competent to try it.

A person has a substantive right defined under substantive law. Then, he feels that such substantive right was violated by someone else. he decides to bring the case before court of law. Then, this person must determine whether that specific case is federal or state. Article 12/1 tells us the starting point where we can begin processing a case. It states that if we have determined to bring a lawsuit, we should make sure that we have identified the court of competent trial or original jurisdiction. According to the same sub-article, we must institute the lawsuit in the court of the lowest grade competent to try it. In deed, the court of the lowest grade in the federal judiciary is first instance court. Question

For the purpose of article 12/1, is first instance the only place or court before which we bring a civil suit as a trial court? Not at all! As far as trial matters are concerned, the federal first instance court is the lowest one. But, the federal high court is also a trial court as far as certain matters are concerned. For this reason, we must read article 12/1 in this respect.

Article 7 of the proclamation 25/1996 as to Procedural Laws to be applied by Federal Courts provides that The Criminal and Civil Procedure Codes as well as other relevant laws in force shall apply with respect to matters not provided for under this Proclamation insofar as they are not inconsistent therewith. It is through the operation of this article that we determine that the civil procedure code is an applicable procedural law by federal courts. Are articles 13, 14, 15 and 18 of the cpc relevant for the federal courts? No, they are not relevant for the federal courts. We do not have awradja or woreda gazat courts in the current structure. As far as the federal high court is concerned, article 15 of the cpc has already been replaced by article 11 of the proclamation. Assuming that they are federal matters, matters incapable of being expressed in terms of money under article 18 of the cpc are, at this juncture, the jurisdiction of the federal first instance court. Therefore, the above listed articles are not applicable for federal

courts. Whether or not they are applicable for state courts, we are required to check the relevant state law.

Article 16/1 of the cpc provides that a court shall have pecuniary jurisdiction when the amount or value of the subject-matter of the suit as on the day of the institution of the suit does not exceed the limits laid down in this Chapter for the court concerned.

What is the limit for federal courts? If matters arise in Addis Ababa and Diredawa, we have put the limits of 5000 and 2000 for the pecuniary value of the subject-matter respectively. If the case involves a pecuniary value of more than 500,000 birr, it will be the jurisdiction of federal high court. At what time do we determine the pecuniary value of a claim? Determining the pecuniary value of a claim is relevant for two purposes. One is that the jurisdiction of a court may depend upon the pecuniary value of a case. This is not, however, the case being so every time. Sometimes, a court assumes jurisdiction below its pecuniary limit simply because the law has expressly granted certain matters irrespective of their pecuniary value for certain courts. The second important reason why we need to know the pecuniary value of a claim is to determine the amount of court fee payable under article 215. Article 215 regarding court fees provides that (1) Without prejudice to the provisions of Arts 467-479, no statement of claim shall be admitted under Art. 230 except after payment of the prescribed court fee.

(2) The prescribed court fee shall also be paid upon the filing of a statement of defense containing a counter-claim.

A person who is proved too poor is not bound to pay the court fee. He can claim his rights without paying court fee and he is exempted of doing the same temporarily or until such time he will become rich. There is a certain amount of money to be paid by any claimant whether he litigates certain civil or political right before a court of law. The amount of money to be paid depends upon the value of the claim. As the value of the claim increases, the amount of court fee to be paid also rises to a certain level. We have to determine the pecuniary value of a claim at the time of institution of the suit. What is that time of institution of a suit? The answer is found under article 213 of the cpc. Art.213. - Suit to be instituted by statement of claim

(1)Without prejudice to the provisions of this Code regarding applications and petitions, every suit shall be instituted by filing a statement of claim in the registry of the court.

(2) Every statement of claim shall comply with the rules contained in Arts. 80-93 and 222-236. We have a formally executed statement of claim prepared under article 222 and the followings. So as to initiate the judicial machinery, we have to serve that statement of claim to the court. The department of the court that possesses the statement of claim before it reaches the judge is called the registry. This department takes charge of determining whether that statement of claim is dully drafted subject to the disciplines of 222 and the following. If the registrar is convinced that the statement of claim is properly drafted or if the statement of claim satisfies with the so-called technical inquiry or technical confidence of the statement of claim, then it will refer the claimant to pay court fee on another window. The file will then be referred to the judge after formalities required are fulfilled. Article 214 deals with what the registrar can do when there is a newly filed statement of claim. It reads, without prejudice to the provisions of Art. 229, the registrar shall cause the particulars of every suit to be entered in a book kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the statements of claim are admitted. In general, for the purpose of determining the pecuniary value of a claim, the relevant time is not the time during the trial case but the date we file the statement of claim.

What will be the fate of the jurisdiction of courts if the pecuniary value of the claim changes circumstantially? Despite any economic changes, the law exclude considering other time elements other than the time of institution of the suit. Article 16/4 relating to sub-article 1 provides that where a suit has been instituted in a court competent under the provisions of this Chapter, such court shall remain competent notwithstanding that the amount or value of the subject-matter of the suit increases or is reduced in consequence or changes in economic circumstances. Assume that a person’s claim is related to immovable property. At the time of the institution of the suit, the value of this property was 450,000 e dollars. If it is a federal matter, it falls under the jurisdiction of federal first instance court. But, while the case is still pending, the value of the property increases to 600,000 birr. Despite such a fundamental economic change, it cannot be considered as the jurisdiction of the federal high court. If the court in question ultimately gives a decision thereon, and at the time the court concludes the trial, if the value of the claim is 600,000 e dollars, the party who lost the case cannot challenge the validity of such decision on ground of lack of jurisdiction.

According to article 9 of the civil procedure code, a court cannot give a valid judgment without having the requisite material jurisdiction. Article 9 reads, (1) a statement of claim filed in a court not having material jurisdiction shall be rejected in accordance with Art. 231.

(2) When and as soon as a court is aware that it has no material jurisdiction to try a suit, it shall proceed in accordance with Art. 245 notwithstanding that no objection is taken under Art. 244 to its material jurisdiction.

We have also seen that material jurisdiction depends either on the nature of the dispute or the pecuniary value thereof. This shows that at the time of pending, even if a pecuniary value of a case goes beyond the jurisdiction of the court entertaining the case, no one can challenge the continuity of the court under consideration to render decision on such a suit. We cannot also challenge the pecuniary jurisdiction of the federal high court simply because the value of the claim has reduced below the limit of its pecuniary jurisdiction. If we let the jurisdiction of the court be affected by changing circumstances, then we are injecting insecurity and unpredictability in the judicial proceeding. One of the purposes of the cpc is to have an orderly trial. In order to have an orderly trial, the process must be predictable. We must make note of the fact that the defendant can challenge that the value of the claim is exaggerated or the claim is undervalued (250).

Article 250 provides that where the parties disagree as to the amount or value of the subject-matter of the suit, the court may adjourn the framing of the issues to a future day and issue a commission under Art. 132 or 136. Whenever such dispute arises, the judge before taking any action with respect to framing of issue must appoint a commissioner so as to come up with the value of the property. Determining the value of the claim may not always be easy. What is the value of incorporeal property? The judge should not venture to determine the value of the property personally under article 250. Even if he knows the market value of the property, he should refrain from coming up with the market value of the property on his own.

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

A plaintiff instituted a suit the value of which is 600,000 birr to a federal high court that has pecuniary jurisdiction. The defendant, however,

admitted only part of the claim, the 300,000 birr. According to article 242, it is possible for a judge to give a partial judgment when the claim is partly admitted. Article 242 states that any party may, when the opposite party has given notice by his pleading or otherwise in writing that he admits the truth of the whole or any part of the case of the other party, or has made admissions of fact during the examination held under Art. 241 apply to the court for such judgment or order as he may be entitled to upon such admissions, without waiting for the determination of any other question between the parties and the court may thereupon make such order or give such judgment as it thinks fit. The main purpose of this article is to introduce the existence of partial judgment. A plaintiff instituted a suit the value of which is 600,000 birr to a federal high court that has pecuniary jurisdiction. The defendant, however, admitted only part of the claim, the 300,000 birr. In this case, the federal high court has two options. The federal high court can extend its jurisdiction on the balance even if the balance (300,000 birr) is by far less than its pecuniary jurisdiction. If the high court gives decision only on the three hundred birr in subsequent proceeding, then that judgment is valid and we cannot challenge invoking article 9 of the cpc. But, subject to the conditions of sub-article 3 of article 16, if the high court decides or deems necessary, it can refer the matter to any subordinate court that has material and local jurisdiction. Under the same sub-article, there are conditions for a high court to refer the case to a lower court. The first condition is that the claim must be partly admitted. Secondly, the admission must be at any time before evidence is produced and the amount or the value of the subject-matter of the suit is accordingly reduced. The court may try the suit or of its own motion order the transfer thereof to a lower court even without being requested by the parties. If we have already framed an issue or if we have already herd evidence of both parties, sending the case to another court will certainly offend the principle of immediacy. We have heard the arguments of both parties on issue of law and issue of fact. We know the case better than anybody else at this particular stage. We must force to finish it. Because, we heard testimonial evidences of the case and wrote them down as opposed to a new judge who is going to see it for the first time. Once evidence is heard, the remaining task is only to take time and draft the judgment. So, if evidence is herd, article 16/3 will be out of picture.

What is the justification for sending the case to lower courts? The first justification may be the issue of case load. We said that the whole purpose of the cpc is to have an orderly trial; it is all about efficiency and

effectiveness. We need to reduce the time, energy, emotion and money involved in the trial of a suit. If the judge is, for example, going to continue to entertain the case, the case may have to wait for another one year. But, if the judge finds a lower court to have less caseload than the high court, efficiency requires referring the case to a lower court. Unlike those of federal high courts of Addis Ababa and Diredawa, Judges of a zonal high court will also take into consideration the residence of the parties. Note must be taken that the type of evidence under article 16/3 is mainly testimonial evidence requiring not only transporting cost but also food expenses for witnesses. So, cost is another factor under article 16/3 for a high court to refer the case to a lower court. The rules under the cpc, as much as possible, should reduce the cost of litigation in terms of time, energy, money and emotion.

A plaintiff can unite several defendants (joinder of defendants) in a single action under article 36 of the cpc. The plaintiff may have a single claim or several claims that can be joined in a single action under 217 against all of them. How do we calculate the pecuniary jurisdiction of a court when a plaintiff has plurality of claims against a single or several defendants? The other issue is that there could be many plaintiffs that may qualify for joinder of plaintiffs under article 35 of the cpc. Fulfilling the requirements under article 35 of the cpc, many plaintiffs may bring one or several claims against one or more defendants. How do we calculate the pecuniary jurisdiction of a court when joinder of plaintiffs has plurality of claims against a single or several defendants?

Article 17/1 as to Plurality of claimsprovides that (1) Where one or more plaintiffs have united in the same suit several claims against the same defendant or the same defendants jointly, the jurisdiction of the court shall, except in cases where suits have been consolidated, depend on the amount or value of the aggregate claims.

Consolidation is to mean that there are different suits involving the same parties and involving some common issues of law and facts. In this case, instead of arriving at different conclusions with respect to those common issues of fact and law, it is advisable to consolidate to bring all these different suits before the same court. In default of consolidation, plurality of claims can be aggregated to determine the pecuniary jurisdiction of a court. A plaintiff has a claim of 200,000, 300,000 and 400,000 birr against defendant 1, defendant 2 and defendant three. In this case, we shall add up the three claims the sum of which is equal to 900,000 birr. This will be the

pecuniary jurisdiction of federal high court. Several plaintiffs who owned property jointly may have common claims against the defendant whenever the latter causes damage against their property. In the case of joint ownership, the claims are not several; they are not distinct. In the case of an auto-accident where each passenger can claim personally and severally and where a claim stands independently of the claims of the other, do we talk about aggregation? We can apparently argue that article 17/1 mandates aggregation of all several separate claims to determine the pecuniary jurisdiction of a court. Indeed, it is a very wrong approach to article 17/1. Truly speaking, aggregation is possible only if the several claims article 17/1 talks about are not separate, several and distinct. If it is undivided claim of several persons, we can talk about aggregation. But, in the case of tort or extra-contractual claim where each victim or plaintiff invokes separate claims, we cannot aggregate so as to achieve the end under consideration. Rather, we have to establish the pecuniary jurisdiction of the court with respect to each claim.

Article 17/2 provides that where several claims, are made in the same suit, some of which are principal and some accessory, or where alternative claims are made, the jurisdiction of the court shall depend on the amount or value of the higher principal claim.

If an owner of certain property makes a claim in relation to both accessory and principal, and if the value of the principal is greater than the value of the accessory, then the pecuniary jurisdiction of the court is determined by the value of the higher claim. Article 17/3 provides that where a counter-claim is made, the jurisdiction of the court shall depend on the amount or value of the higher claim, whichever it may be. This provision is controversial by its very nature. A plaintiff brings an action against the defendant in the sum of 500,000 birr. In the same suit, the defendant filed a counter claim in the sum of 550,000 birr and there is no pecuniary limit of the counter claim. It can be greater or less than the pecuniary jurisdiction of the court. In this case, the pecuniary jurisdiction of the court is determined by the value of the higher claim which is the counter claim not the principal one.

Article 236/1 provides that Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant shall in his

statement of deviance give the particulars as to the debt sought to be set-off.

According to this article, in case of set off, the defendant cannot institute a suit of set-off if it is more than the pecuniary jurisdiction of the court. But, that is not the case as far as counter claim is concerned. If the defendant makes a claim of set-off which is greater than the pecuniary jurisdiction of the court, the court will automatically reject the claim even if under substantive law the defendant has the right to claim set off. So, it is advisable for the defendant to take his claim of set-off reducing to the level of the pecuniary jurisdiction of the court. In the case of counter claim, we do not have the same restriction. If the court chooses that of the plaintiff, it has to drop the claim of the defendant. It is denying the defendant the right to access the court. If it chooses that of the defendant, then it is not going to entertain the plaintiff's claim. There is no justification why the law is interested in making distinction between counter claim and set-off. The effect must not be to deny any of the parties particularly the plaintiff to access a court. If someone wants to make a counter claim or set-off, he has to bring it within the pecuniary jurisdiction of the court or he has to bring a separate suit and then land on issues of consolidation if the two cases involves common issues of law and fact. If the two are entirely different issues decided by different courts, it is possible to think of set-off at the time of execution.

Articles 226-228 are related with article 16/2. They tell us how to calculate the pecuniary value of a claim. We have to state the value of our claim in our statement of claim. The value may be actual or market value. If we are not certain about the value of our claim, we have the right to state approximate value thereof. The court will determine the value of that claim through evidence at the time of the trial. The principle is that one should not be denied access to court simply because he does not know the actual value of his claim. According to article 228, we may not be able to calculate the actual or the market value of certain rights. But, still, even if the claimant does not know the actual or market value of his claim, he can state the approximate value of not only property but also rights.

Article 9/1 as to want of material jurisdictionreads, (1) a statement of claim filed in a court not having material jurisdiction shall be rejected in accordance with Article 231. Article 231/1 pertaining to Rejection of statement of claim by court provides that (1) The court shall reject any statement of claim submitted under Art 230 where:(a) it does not disclose

any cause of action; or(b) the suit appears from the particulars in the statement of claim to be outside the jurisdiction of the court. Under this article, the judge has to do two things. One is that he has to determine whether or not the case has a cause of action or whether there is a legally recoverable right. Secondly, he has to insure that if the plaintiff does have a recoverable right, whether the court under consideration has the jurisdiction to entertain the case. In short, the two things are determination of the existence of the cause of action and determination of jurisdiction. Even in the absence of the defendant, we can reject the claim of the plaintiff for lack of jurisdiction.

Article 9/2 provides that (2) When and as soon as a court is aware that it has not material jurisdiction to try a suit, it shall proceed in accordance with Art. 245 notwithstanding that no objection is taken under Art 244 to its material jurisdiction. This sub-article is applicable when summon is sent to the defendant and the defendant enters defense containing preliminary objection not related to the merit of the case. The defendant can challenge that the court does not have subject-matter jurisdiction. But, to challenge the jurisdiction of the court is a right not an obligation for the defendant. In the middle of the litigation, if the judge is aware of the fact that the court has no jurisdiction, he has to immediately stop hearing the case. The nature of subject-matter jurisdiction does not allow party autonomy. The court has to tress its subject-matter jurisdiction not to the agreement or consent of the parties but only to the express provision of the law.

Lecture 9

We must make note of the fact that there are matters which fall outside the jurisdiction of regular courts. article 78/4 states that Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established. On the other hand, article 78/5 recognizes religious and customary courts outside the framework of regular courts with the possibility of assuming judicial powers. It reads, Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution. Article 37/1 added that everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of

law or any other competent body with judicial power. We've just said that judicial power is a power to hear controversies and give decision thereon. But, there could be other institutions other than regular courts defined in terms of hierarchical structure so as to exercise judicial powers. How do we determine matters which fall under the jurisdiction of regular courts and those which do not fall under the jurisdiction thereof? Article 37 cum 78/4&5 tell us that judicial power is divided between regular courts and other institutions legally empowered. However, the institutions must not be ad hock courts. They must not follow procedures which are not legally recognized. So, we can say that we have two classes of institutions, courts and quasi-judicial bodies. According to article 79/1 of the constitution , if a certain case is a justiciable matter, it is, as a matter of principle, presumed to fall under the jurisdiction of regular courts. Because, article 79/1 of the constitution states that Judicial Powers, both at Federal and State levels, are vested in the courts. However, other quasi-judicial organs can, as a matter of exception, exercise judicial powers. A plaintiff brought a case before a regular court against a defendant. The defendant, on the other hand, argued that the case in question is a matter to be dealt with by quasi-judicial organ. The boundary showing the matters falling the jurisdiction of regular courts and those falling under the jurisdiction quasi-judicial organs has been gray for both parties. What is our approach as a lawyer?

The first approach is to deal with the relationship between principle and exception. Whosoever argues that a matter is not given to a regular court has the burden of proving his allegation. Because, as per article 79/1, the presumption is, as a matter of principle, in favor of regular courts. Courts do have automatic right to assume jurisdiction over a certain civil matter so long as it satisfies the requirement of justiciability. Therefore, the burden of proof lays upon the defendant. Secondly, assuming judicial power for non-judicial organ is a matter of exception. whenever we have gray point of law as to whether case x falls under the first circle or the second circle, then, it is an axiom that exception has to be interpreted very restrictively and narrowly. This is to mean that we have to tilt the balance in favor of regular courts as opposed to non-regular institutions. Perhaps, the third point relates to the type of evidence that the defendant adduce to rebut the presumption. But, no other evidence is admissible except a law taking judicial power away from regular courts within the meaning of article 78/4. The law, in turn, must be issued by a competent organ taking judicial power away from regular courts through an act thereof. The constitution divides power as legislative, executive and judicial. The power to interpret the law

is vested in judicial organs. But, such power is not vested in only regular courts. Rather, it is also provided with different non-regular organs. The constitution recognizes religious institutions and customary courts as institutions of society. There are still many administrative tribunals or administrative agencies exercising judicial power. The labor relation board, the tax appeal authority and court for civil servants are good examples. We can cite many administrative agencies belonging to the executive department of the government and exercising judicial power. This is because there is a constitutional indication that judicial power can be exercised by other organs. It is, however, only by way of exception. The parliament can exercise its right of taking judicial power away from regular courts through an enactment thereby defining their rights and obligations. But, the parliament must itself be given specific and express power to do so under article 55 of the constitution. The problem, however, comes when the exception tends to become almost the principle. As a matter of principle, judicial power is vested in regular courts. But, courts do not have monopoly or exclusive power over justiciable matters. It is possible for other institutions to exercise judicial power on justiciable matter exceptionally. The parliament is given the power to create those institutions through law. But, it cannot through specific or cumulative acts take the whole judicial powers away from regular courts and vest in the timely created institutions. What is the limit to the parliament for creating those institutions and providing them with quasi-judicial power?

There are grievances in that the executive department is taking many sensitive issues decisive to determine the independence of the judiciary away from regular courts using the parliament with no problem of giving the vote required. Theoretically speaking, there must be a constitutional limitation to the power of the parliament to take judicial power away from regular courts under article 78/4&5 of the constitution. Article 4 of the cpc provides as follows. Art. 4.- Courts to try suits unless barred

Without prejudice to the provisions of the following Articles, the courts shall have jurisdiction to try all civil suits other than those of which their cognizance is expressly or impliedly barred. According to this article, as a matter of principle, every civil dispute falls under the jurisdiction of courts. As plaintiff, we do not have the burden of establishing that a certain case is a matter for regular courts to entertain. They lack jurisdiction only if the law has expressly taken the jurisdiction in question away therefrom. The word “impliedly” in the above article does not seem to be valid. Because, if we are to take jurisdiction away from courts, it should be express and clear.

Otherwise, we tend to assume that as power x is taken from courts, power y is, by implication, taken from them as well. This cannot be taken good as exceptions have to be interpreted very narrowly. The parliament is constitutionally vested in law making power. But, for some technical and unseen issues, it delegates power for the council of ministers to enact laws thereon. The council may, in return, delegate the same power for each minister and other specialized organ such as national bank to enact laws in the form of directives. This delegation is mainly related to close familiarity of the issue under consideration. The same justification should apply as far as empowering quasi-judicial power is concerned. Courts are staffed with lawyers. In the meantime, lawyers are supposed to know the law better than they know economics or accounting. Therefore, if the parliament thinks that a certain case is too technical for a lawyer to understand and render decision or if it thinks that the matter is better decided by other institution not because the matter is so sensitive and involves the interest of the government but the matter itself deserves justice, it must take judicial power away from regular courts and give it to other specialized institutions.

Justiciable matters are matters that we bring to court and obtain judgment decision in our favor. Justiciable matter is not originally a legal concept. Rather, it was a concept developed by American courts; because, they want to understand what a case is all about. For us, it is not only an ordinary legal but also constitutional concept. We have the following doctrines as to justiciability. The idea is that courts can exercise jurisdiction only on actual and real dispute. They are not interested in issuing judicial or advisory opinion. Assume that the property of someone was trespassed or damaged. Can we institute an action on his behalf? Assume that we have concluded a contract of loan. But, the debtor who is spending his money in vain does not seem to pay his debt on the due date. Can we bring an action in the form of mere threat? If so, when are we going to bring the action? Assume also that we have brought an action; the case is still pending. But, in the middle of the litigation, new developments such as merger of rights may substantially affect the position of the parties. Finally, we may also consider certain cases which the law has removed from the perview of courts. Certain disputes are naturally or for the purpose of the constitution, best resolved through non-judicial process. The best way of addressing a certain dispute may rather be through a political process. So, when do we say that a matter is justiciable?

As a principle, a judge interprets the law and tells us the authoritative meaning of law incidentally when he hears case. A judge can tell us his personal opinion upon a certain matter. But, at this juncture, he is not

acting in his capacity as a judge but as an ordinary lawyer. Courts interpret the law and apply that interpretation whenever they get a case. The concept of justiciability is derived from the concept of party disposition or the private nature of the litigation. One of the ideas behind party disposition is that only a person who sustained damage against his legally protected interest can bring an action. Therefore, the first element of justiciability is the doctrine of lotus standing. Article 33/2 provides that No person may be a plaintiff unless he has a vested interest in the subject matter of the suit. For vested interest, there must be a harm for standing. The doctrine of lotus standing is all about who brings the action. The one that brings the action must be the person who is going to benefit from the outcome of the litigation at the end of the day. To this end, there must be a harm or injury sustained against one's legally protected interest. This personal injury principle is suffering certain exception. A person may have the standing to bring an action even if he does not personally suffer any injury. According to article 38 of the cpc, for a class action to stand, the person who brings the action must be member of the group. But, that is no longer the case if we look at article 37/2 of the constitution. It reads, the decision or judgment referred to under sub-Article 1 of this Article may also be sought by:

(a) Any association representing the Collective or individual interest of its members; or

(b) Any group or person who is a member of, or represents a group with similar interests. It is possible to legitimately argue that one can bring a class action or what is called public interest litigation even if he does not personally suffer injury. Injury may be in relation to economic or non-economic interest. This injury must be actual or it has to be eminent. A classic example for eminency is an anticipatory breach of contract. In such a case, we have to bring an action.

There is also the issue of traceability. The injury must be traceable to the act or omission of the defendant. Article 33/3 provides that No person may be a defendant unless the plaintiff alleges some claim against him. If the plaintiff alleges a claim against the defendant, there must be judicial or legal remedy or relief to the injury that he brought before a court of law. Do we have a legally recoverable remedy defined under the law? Sometimes, we may have the law spelling our rights but without stating those who have to respect those rights and remedy for the violation of those rights. In general, all these requirements must be fulfilled for the purpose of standing.

The other element of justiciability is the doctrine of ripeness. Article 80/2 reads, Every pleading shall be written in ink, printed or typewritten on the prescribed paper and shall contain and contain only a statement in a concise form of the material facts on which the party relies for his claim or defense and shall be in a form as near as may be to the appropriate Form in the First Schedule to this Code. The plaintiff has to state only material facts that enables to establish cause of action. The same issue is reflected under article 222. We have to plead a cause of action which is basically dependent on facts. Courts should decline to entertain a case unless there is an actual controversy. If we are going to hear a case which is not yet ripe or matured, the judge is not giving an effective remedy save as an eminent injury.

The other one is the doctrine of mootness. This doctrine is concerned with whether an issue which was originally active and actual is still the same in the middle of litigation. We may have an active and actual case at the beginning of the proceeding. We had lotus standing; the case was ripe. Then, five years into the litigation, the defendant is dead and his rights and obligations are merged to the plaintiff. In this case, the court is not required to render final decision. Because, final decision will not affect the rights and obligations of the parties. We must always take note of the fact that things may undergo changes in the middle of the proceedings. On the other hand, newly enacted laws may affect our rights and obligations. The government may come up with a new legislation while a case is pending and regulate the case which is yet pending. The newly enacted law may declare that all cases pending shall discontinue as of the coming into force thereof. So, it is not necessary for the courts to go ahead and render decision while the case is no longer active. Parties may also settle the dispute while pending the litigation. Article 280 as to Extinction of cause of actionreads, where at any stage of a suit it is proved to the satisfaction of the court that the cause of action no longer exists, the court, shall, on such terms as to costs as it thinks fit, dismiss the suit and record a reasoned order to that effect.

The last doctrine is political question doctrine. As a principle, the judiciary is competent to handle judicial matters. The executive and the legislative are also, as a principle, competent to do their own affairs. Certain disputes may not be required to be settled by courts either for political purpose or for any other. Instead of seeking judicial remedy for both types of controversies, the best way to resolve them is to resort to the political branches of the government rather than the judicial organ. A classic example in this country is the issue of constitutional interpretation given to

the HOF. Certain matters are removed from the cognizance of courts. Rather, they open their way only by means of political solution. The HOF is a political department of the government. We have so many socio-economic rights as clearly defined under article 89 of the constitution. The government has the obligation to provide for facilities so as to protect these socio-economic rights. In the case of failure to maintain these rights, we may want to hold the government accountable. If we sue the government, the lawyer representing the government can raise that This is not, in the first place, justiciable matter. Courts, on the other hand, assume jurisdiction only on justiciable matter. Despite admitting the existence of such constitutional provision, the lawyer may argue that the rights under consideration are available for the citizens by government only when resources permit. They are, by their very nature, achieved progressively rather than over nights. Such matters are better subject to political solution. But, the constitution requires us to come up with a policy or law establishing institutions towards the realization of those rights. These are, somehow, doctrines of justiciability.

Lecture 10. We can sharply contrast local jurisdiction with subject-matter jurisdiction. The sharp contrasts we make between rules governing subject-matter jurisdiction and local jurisdiction are found under article 9 and 10 of the cpc. Whenever we talk about the rules governing venue of courts, it must be kept in mind that we are not talking about whether the courts are jurisdictionally competent in terms of subject-matter or in terms of the pecuniary value of the claim. This question must have been answered at the time we start analyzing local jurisdiction. We must first have answered whether a case involves foreign element or conflict of laws with particular reference to forum and whether it is the judicial jurisdiction of Ethiopian or foreign courts to hear the case. If we have answered the question of judicial jurisdiction positively, then, we have to answer as to which Ethiopian court has that particular jurisdiction. In other words, we must answer whether the case is to be litigated before federal or state courts. Then, if we determine that it is a federal matter, we should still determine as to which federal court has the competent jurisdiction to hear the case under consideration. This is because, we have at least two federal courts with original trial or first instance jurisdiction, federal high court and federal first instance court. So, it might be litigated before federal first instance or federal high courts. If we answer this positively, we should go on determining whether the court we decided to have the subject-matter jurisdiction has local jurisdiction. In other words, we should decide whether

the venue or place of trial in question is convenient for parties especially for the defendant. This indicates that the rules of local jurisdiction are all about the convenience of the place of trial. Courts may seat somewhere; but, their jurisdiction is territorially limited. The rules of article 19 to 30 of the cpc deal with whether the place of trial is convenient or how parties are to choose the proper venue.

There are certain factors we take into account to determine whether a place is convenient or not. Those factors are provided under article 19 of the cpc in the form of principle. The rules of venue help us to allocate judicial business as between courts of similar competency. Many courts, even if they have similar competency, are situated in different parts of the country. For example, at least theoretically speaking, we have seven federal high courts, 5 in the regions and two in Addis Ababa and Diredawa. For instance, if a case, by its very nature is a federal matter and satisfies the requirement of greater than 500,000 birr, all federal high courts in Ethiopia are jurisdictionally competent to hear the case. But, they are not equally convenient for the parties. For this reason, it would be untenable to take parties who are residents of Addis Ababa and Diredawa to litigate their case before the federal high court situated in Samera thereby making them incur both direct and indirect or opportunity costs. That is why we say that rules of venue help us to allocate judicial business as between courts of similar jurisdiction meeting the requirements of article 9 of the cpc but located in different parts of the country. The mere jurisdictional competency is not a sufficient but a necessary condition. The court with jurisdictional competency is also expected to offer a convenient forum for the parties. It must be kept in mind that we are concerned with not only substantive but also procedural justice.

Art. 10.- Want of local jurisdiction

(1) A statement of claim filed in a court not having local jurisdiction shall be rejected in accordance with Art. 231:Provided that a court which has jurisdiction under Arts. 19-30 may not reject a statement of claim on the ground that another court also has local jurisdiction.

(2) Any objection taken under Art. 244 to the local jurisdiction of a court shall be finally decided by the said court and no order made, judgment given or decree passed by the said court may be invalidated unless such an objection was taken and the decision thereon has caused a failure of justice.

According to article 231, the court is required to reject any statement of claim if it does not disclose any cause of action or the suit appears from the particulars in the statement of claim to be outside the jurisdiction of the court.

A court, even if it has material jurisdiction, can decline to hear a case if it lacks local jurisdiction. There is a possibility for the same case to be litigated before different courts. This is well reflected under article 19 of the cpc. Art. 19.- Principle

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

(2) A suit against joint defendants may be instituted in the court of any of the places where any of the defendants resides or carries on business or personally works for gain. There may be three different courts in three different places, where the defendant resides (Worrida A) or carries on business (Worida B) or personally works for gain (Worida ce). These three courts are jurisdictionally competent and they have proper venue to hear the case for the fact that, as per article 19/1, either place of business or place of residence or place of employment of the defendant is presumed to be convenient. In this case, it is up to the plaintiff to choose any of the three courts it deems necessary. In the above case, If the plaintiff chooses the court situated in place of residence, Worida A as a convenient place to litigate his case, then, as per article 10 paragraph two, the chosen court in Worida A cannot decline to hear the case on the ground that other courts in Worida B and Worida C have local jurisdiction.

Article 10/2 shows how rules of local jurisdiction and subject-matter jurisdiction fall apart or they are diametrically opposed to each other. What is the difference between article 9/2 and article 10/2? NB. Preliminary objections are not objections which do not go to the merits of the case or the substance of the decision. Whether or not the defendant has caused damage or whether he is liable under fault liability, strict liability or vicarious liability is the issue of substantive law. But, whether the matter has already decided before a court or not, we do not have to look the substance of the dispute. Secondly, to know whether the court has jurisdiction or not, we do not have to decide first the liability of the defendant.

Under both sub-articles, we have a defendant who wishes to challenge the jurisdiction of the court. If the court has no material jurisdiction, it cannot decide whether or not the defendant is liable. Jurisdictional objection can be raised as preliminary or procedural objection by the defendant. Article 244 consists of lists of preliminary objections that have nothing to do with the substance of the case. One of such objections is objection pertaining to local or subject-matter jurisdiction. If the objection in question is subject-matter jurisdiction, that objection is not subject to waiver. The defendant can, at any time, object to subject-matter jurisdiction of the court. This is because article 9/2 provides that at any point, if the court becomes aware of the fact that it has no subject-matter jurisdiction, the case must automatically be closed. But, as far as local jurisdiction is concerned, the objection relating thereto is subject to waiver. Objection relating to local jurisdiction has to be specifically raised by the defendant. If the defendant failed to raise the objection, it does not necessarily mean that the court has the required local jurisdiction.

Just like it does in the case of lack of material jurisdiction, the court raises it as an obstacle only before summon is sent to the defendant(10/1). If the court unaware of the fact that it has no local jurisdiction sent summon to the defendant, the defendant summoned has to specifically raise the fact that the court lacks local jurisdiction(245). If the defendant failed to raise the objection, it is presumed that the place of trial is convenient for him and he is deemed to have waived his right to raise the objection(244/3). Any preliminary objection that has to be raised must be invoked at the earliest possible time. Article 244/3 provides that Where there are several objections under this Article, they shall all be taken together and any objection not taken at the earliest possible opportunity shall be deemed to have been waived, unless the ground of objection is such as to prevent a valid judgment from being given. We have to plead all the preliminary objections that the case can possibly raise together. From this sub-article, we can understand that we have two classes of preliminary objections, those that can be waived and those that cannot. Lack of subject-matter jurisdiction is a preliminary objection; but, it is non-waivable(9/2). even if the defendant is presumed to have waived it, the court can on its own motion raise and close the file at any time. The same principle does not apply when the court lacks local jurisdiction. Under article 9/2, the consent or the agreement by the defendant cannot make the court jurisdictionally competent for the fact that material jurisdiction is a matter of mandatory law. Under article 10/2, the consent of the defendant does matter. If the

defendant failed to raise lack of local jurisdiction as a preliminary objection, he is deemed to have agreed that the court can offer a convenient place of trial. If the court renders final decision upon the case without having local jurisdiction, the decision cannot be challenged on appeal on the ground that the court lacks local jurisdiction. Because, the court is already jurisdictionally competent. In other words, we mean that lack of local jurisdiction does not affect the validity of a judgment. But, if the court renders final decision upon a case without having material jurisdiction, the decision can certainly be challenged on appeal on the ground that the court lacks subject-matter jurisdiction. Lack of local jurisdiction cannot be a ground of appeal unless it is expressly invoked at the earliest possible opportunity or at the time of filing statement of defense. Assume that the defendant has risen objection arguing that the court lacks local jurisdiction. The court has had to give a ruling under article 245/1.

article 245/1 provides that The court shall decide any objection taken under Art 244 after hearing the opposite party and ordering the production of such evidence as may be necessary for the decision to be made.

The ruling of the court on this preliminary point can be correct or incorrect. The defendant can challenge the decision of the lower court on mistake of law or mistake of fact or both. In this case, if a court assumed local jurisdiction while it lacks, then, it is a clear case of mistake of law. But, even if the court overruled the objection or if the defendant is forced to litigate in a place of trial not listed under article 19 of the cpc, the defendant cannot challenge the decision of the court only on the ground of wrong assumption of local jurisdiction by the court. This is because the decision of the court without having local jurisdiction does not necessarily imply the presence of incorrect decision on the merit of the case. The defendant can raise the wrong decision of the court on local jurisdiction only if he has raised it at a trial level and there is a miscarriage of justice. We can say, for example, there is a miscarriage of justice if the defendant is unable to produce the necessary evidence due to the extreme distance of the court having no local jurisdiction and has lost the case.

Article 112 provides that The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into court such a sum of money as appears to the court to be sufficient to defray the travelling and other expenses of the witness in attending at the court in which he is required to attend, and for one day'sattendance.

It is unbearable for a party from Shiraro to produce 5 witnesses before a federal high court in Addis Ababa covering the expense thereof. For this reason, the party may lose the case and there may be miscarriage of justice. But, in the case of lack of subject-matter jurisdiction, the defendant can for the first time raise it not only at the level of appeal but also at the level of cassation.

We can conclude that rules of proper venue are procedural; and rules of subject-matter are jurisdictional. Characterizing a certain issue as procedural or jurisdictional has its own legal consequence. If a certain issue is characterized as procedural, disregarding to commit an error with respect to that issue may not affect the validity of the decision of the court. But, if the issue is jurisdictional, then that judgment may not stand right or may be denied of enforcement if we take it outside the territory of Ethiopia. Assume that there are three or four defendants joined in a single action under article 36 of the cpc. It is also known that there is an agent-principal relationship among them. Therefore, we must have some fairness for them. By fairness, we mean that the person for whom venue is perfect under 19/1 must adequately represent the interest of other co-defendants. In this case, A suit against joint defendants may be instituted in the court of any of the places where any of the defendants resides or carries on business or personally works for gain.

Lecture 11. Art. 20. - Defendant residing abroad

(1) Where the defendant resides, carries on business, or personally works for gain abroad, the suit shall be instituted in such court in Ethiopia as the plaintiff may choose, unless it relates to immovable property which the defendant owns in Ethiopia, in which case the suit be instituted in the court of the place where such property is situate.

This provision is clearly related to non-resident defendant. Under sub-article 1 of this article, even if we have a defendant, the law is stated in such a general form without drawing a line whether the defendant is an Ethiopian or a foreigner. This sub-article talks about rules of venue when a defendant is a foreigner or the case involves a foreign element. We do not have to try to answer whether Ethiopian courts can exercise jurisdiction over a foreign national when the issue is the issue of forum by having a look at article 20. Because, Articles 19-30 are concerned only with convenient place of trial. These rules do not answer whether Ethiopian courts do have judicial or subject-matter jurisdiction. In case we have got a dispute with an

Ethiopian national or a foreigner not residing, carrying on business or working for personal gain, then, as a plaintiff, we are given a forum shopping right. The plaintiff is not required to worry about whether or not the venue is convenient for the defendant who has nothing to do with Ethiopia. Rather, he is advised to file his case before a court with competent jurisdiction and which is geographically much closer to him. We must make note of the fact that the right of the plaintiff is limited to choose any of courts of competent jurisdiction. Assume that plaintiff x who is a resident of Hawasa has a dispute with a foreign national falling under the jurisdiction of federal high court. The plaintiff, according to article 20 of the cpc, is also entitled to choose any court of competent jurisdiction. Can this plaintiff file his case before the Supreme Court of SNNPR? Now, we can have two probable answers for the question under consideration. Some people may argue that the case in question cannot be filed before the supreme court of SNNPR for the fact that proclamation 322/2003 has established federal high court in the region. This is because the effect of establishing federal courts in the regions is to revoke the delegated jurisdiction. Other people who argue that the constitutional arrangement is not delegation rather concurrence can choose the Supreme Court to hear the case.

Sub-article 2of article 20 provides that (2) where the defendant is a foreigner not residing, carrying on business or personally working for gain in Ethiopia but he owns movable or immovable property in Ethiopia the suit may be instituted in the court of the place where such property is situate.

As in the case in this sub-article, the dispute has nothing to do with the movable or immovable property owned by the accused foreign national. The assumption is simply that if someone owns movable or immovable property, there is likelihood that wherever the property is situated, there could also be other persons, his agents or representatives that could act on his behalf and protect his interest. It is a matter of protecting the due process right of the accused foreigner even if he is not in Ethiopia. The difference between the two sub-articles is that in the case of sub-article 1, the defendant does not have any property either movable or immovable in Ethiopia. Hence, plaintiff can go to any court of his choice to file his case subject to the rules of jurisdiction. In the case of sub-article 2, the defendant has certain property either movable or immovable; but, the case has nothing to do with the property under consideration. If the dispute is related to immovable property, we shall be referred to article 25 of the cpc and if the dispute is related to movable property, we shall be referred to article 27 of the cpc in

case it involves tort. Or, we have article 24 if the dispute is related to contract. Art. 21. - Suits against the State

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

We can realize the difference if we contrast a state under article 21 and an individual under article 19/1 of the cpc as a defendant. Under article 19/1, the convenience is mainly sought for the defendant. Under article 21 however, when the state is a defendant, the convenience is sought for the plaintiff for the fact that the state is everywhere and is more powerful than an individual. Whenever there is a dispute with a state, the law says that the plaintiff can bring the suit to the court of competent jurisdiction of the place where he resides or carries on business or personally works for gain. If we even consider the cost, it is possible for the state to mobilize its resources and deploy its personnel to any court to represent its interest. , Of course, it is possible to argue that it is an adversarial procedure which assumes equality of resources between parties. But, truly speaking, nobody can have the same power as the state.

Article 22. - Suit against body corporate (1) Suits against a business organization shall be instituted in the court of the place where the head office or branch against which the suit is made is situate.

The position of the law, in this sub-article, seems, however, somehow ridiculous. Body corporates that are state owned enterprises are now reorganized in the form of corporations. For example, state owned enterprises such as ELPA, Ethiopian Airlines, Ethiopian Insurance Corporation Aare now reorganized in the form of a share company and owned by different organs or ministries. If it is a corporate body, assuming that it has the capacity to bring and defend a suit in its own name, we can file the suit to court of the place where the head office is situate. If ELPA caused damage against a property or a person, the plaintiff, wherever he resides, is required to bring his case to the court of the place where the head office of ELPA is situate, Addis Ababa. Luckily, the plaintiff can also bring his case to the court of the place where the branch against which the suit is made is located. In Ethiopian law, branches do not have independent juridical personality akin to their parent office. People can do business with

branches; and the business we do with those branches may give rise to certain legal controversies. But, as per sub-article 1 of article 21, we cannot directly bring the suit against the branch. Because, substantive law does not allow it and procedure enforces only what is out there in the substantive law. We can bring the suit against the corporate body to the court of the place where not the head office but the branch with which we have done the business is located. We cannot name the branch as a plaintiff or a defendant although it is not uncommon to see some branches of commercial bank to be named as defendant or plaintiff. Article 33/1 of the cpc provides that any person capable under the law may be a party to a suit. We cannot name an individual or institution as a defendant unless the law has provided it with the capacity to enter into juridical act. Article 22/2 provides that (2) Suit against an association committee, trust or endowment shall be instituted in the court of the place where such association committee, trust or endowment was formed or, where such association committee, trust or endowment requires by law to be registered, at such place of registration.

If the entities under this sub-article need registration, we can plead the suit to the court situated at the place of registration. But, if they do not require registration, we can plead the suit to the court situated at the place of formation. Article 22/3 provides that (3) Suits regarding the liability of an officer of a body corporate may be instituted in accordance with the provisions of this Article or those of Art. 27 (1) which in turn refers us to article 19.

If we bring an action against the director or manager of a corporate body in his managerial capacity or capacity as a director as opposed to his individual capacity, since the suit against the manager in his managerial capacity is related to his activities in the company, what is actually being litigated is for the interest of the company. Therefore, we can bring the action before a court situated at the place where the headquarter or the branch of the company is located; or we can bring the suit before a court of the place where the defendant manager resides, carries on business or works for gain (19/1 of the cpc. If we tend to bring an action against 2 or more directors of a company, we can file the suit pursuant to article 22 or article 19/2 of the cpc.

Art. 23. - Suits regarding successions

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

Suits concerning a succession which is being liquidated can be brought before a court of law situated in the place where the deceased had his last resident. Because, it is presumed that the deceased might have had his property where he has lastly resided. There are a number of possible suits of succession listed here and there under the substantive law. We may go to court in order to obtain certificate of heirship, get somebody appointed as a liquidator by court, in the case of petitiohereditatus and so forth. So as to hold of the deceased's property as an heir, we may have to go to two or three courts. We have to go to one court to get certificate of heirship and another court to have a liquidator appointed and still to another court to claim and get approval of heirship.

Article 24/1 states that (1) Suits regarding contracts may in the discretion of the plaintiff be instituted in the court of the place where the contract was made or was to be executed, unless some other place is mentioned in the contract. As we see from the above sub-article, there are two places, place of formation and place of performance. In order to determine place of formation and place of performance of the contract, we have to have a look at the contract. Parties are to specify place of formation and place of performance of their contract. In the absence of express agreement in the contract, place of performance **shallbetheplacewherethedebtorhadhisnormalresidenceatthetimewhen thecontractwasmade (1755/2). What is unique is the forum selection close under sub-article 1 of article 24. Parties may bring a suit to the court situated at place of formation, place of performance or at a third place which is neither of the above ones. It is the effect of forum selection clause in the contract. It is also a dispute resolution clause in the contract in which parties agrees upon a specific jurisdiction using their party autonomy. This agreement is, however, subject to restriction akin to any freedom of contract. For example, parties could not agree upon courts at the third place if the courts therein have no subject-matter jurisdiction. Forum selection clause is applicable only when the third court is jurisdictionally competent but lacks local jurisdiction. Had it not been for the agreement of the parties, we could not bring the suit before the third court only because it lacks not material but local jurisdiction. The place is not any of the places we find from article 19 to 30 of the cpc.**

Article 25. - Suits regarding immovable property

(1) Notwithstanding any provision to the contrary, other than Art 31 suits for:(a) the recovery of immovable property with or without rent or mesne

profits;(b) the partition of immovable property;(c) the determination of any other right to, or interest in, immovable property; or (d) compensation for wrong to immovable property.shall be instituted in the court of the place where such property is situate.

We can generally classify civil actions into action in realm and action in personum. The major difference lies on whether we are pursuing a person or a property. If the relief we are claiming targets the property, it is said to be an action in realm. As a principle, we do not claim anything from the person of the defendant. It is to mean that judgment from the court is to be executed not upon the person of the defendant but on the property. In the case of action in realm, the judgment is to be executed against the property. Article 25/1 is all about action in realm and sub-article 2 of the same article is all about action in personum. Under the first sub-article, we have a public policy or mandated provision of the law that does not allow any form of derogation not withstanding that there is any agreement to the contrary. We've just seen that the basic principle of local jurisdiction or rule of venue is the convenience of parties. In the case of article 25, the only court that has local jurisdiction with respect to suits falling under sub-article 1 of article 25 is that of the place where the property is situate. The first suit under sub-article 1 is the recovery of immovable property with or without rent or profit through possessory action. For example, a case falling under sub-article 1(a) can be the case of lease contract that has expired some years ago. After the expiration of that agreement, the defendant may not be willing to hand over the property to the plaintiff. His possession is illegal as far as he is not allowed contractually or by operation of the law. Secondly, even, before the expiration of the lease contract, the defendant may fail to pay some arrears of the rent. Of course, Rent is relevant only if there is a contract. The defendant may continue unjustly benefiting the property after the end of the lease agreement. In this case, what we are going to charge for in relation to the period after the end of the lease agreement is mesne profit. Article three of the cpc defines mesne profit as mesne profits" of property shall mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by such person. The suit may also be related to partition of the property. This type of suit may involve, at least at the time of execution of judgment, physical examining of the property. A judge cannot think about partition of a property on a paper. Therefore, the judge or whosoever is implementing the terms of the decree

is required to go to the place in person to effect partition of the property. The suit may be related to the determination of any other right to, or interest in, immovable property. We can think of a bundle of rights that may be created over a property. Usufruct, servitude, ownership right and so forth are good examples. If the suit is related to such rights, the action must be brought before a court of law situate at the place where the property is located. There could also be third parties affected by the process. Such third parties are usually situated where the property is located. Secondly, immovable property is normally expected to be registered at the place where the property itself is located. Whenever a dispute arises in relation to such property, the dispute may be solved by looking simply at the record of the property. A suit may be instituted in relation to compensation for wrong done to immovable property. In order to measure the extent of damage and the amount of compensation, we may need to personally and physically travel to the place where the property is located. Potential witnesses are also available at the place where the property is located. All these involve some kind of contact with the immovable property itself. In such a case, the only court that has local jurisdiction is the court located at the place where the property is situate.

Article 25/2 provides that (2) Where in a suit to obtain relief regarding, or compensation for, wrong to immovable property held by or on behalf of the defendant, the relief sought can be entirely obtained through his personal obedience, such suit may be instituted either in the court of the place where such property is situate or in accordance withthe provisions of Article 19.

This sub-article talks about the relief that can be obtained from the person of the defendant. So as to claim the relief, the plaintiff is at discretion as to before which court the defendant should be brought. If the court where the property is situated does not have material jurisdiction, the judge should automatically reject the case (article 9). Of course, it is difficult to think that there may be places where no competent courts are found.

Article 27. - Suits regarding wrong to persons or movables

(1) Suits for compensation for wrong done to persons or to movable property may be instituted in the court of the place where such wrong was done or in accordance with the provisions of Article 19 of the cpc.

Whenever a wrong is done to person or property, we institute an action in a court of the place where the wrong was committed or we shall determine the court before which we bring an action pursuant to article 19.

Article 28. - Suits regarding bankruptcy

Suits regarding bankruptcy shall be instituted in the division of the High Court on circuit in the TeklayGuezat in which the principal place of business

of the bankrupt is situate. It seems to be better to forget about the high court under the civil procedure code. Currently, apart from the cpc, we have rules governing high courts of federal government and those of state government. What is the principal place of business of a company? Is that place of registration? Is that place where the company undergoes the bulk of its business activities? The principal place of business is relevant because of the fact that creditors are potentially available at the place where we do business. It is possible to file our bankruptcy protection before a court of competent jurisdiction at the place where that bankrupt business is located. Is bankruptcy federal/state matter? We must take note of the fact that it arises under the commercial law. It is not, however, listed under article 5 of the proclamation. Whether it is federal or state matter is determined if the suits relate to business organizations registered or formed under the jurisdiction of Federal Government organs (article 5/6 of the proclamation). Therefore, if the bankruptcy is related to a business organization registered by a state organ, then it will be a state matter. If the opposite happens, it will be a federal matter. Assume that we have a bankruptcy case in Addis Ababa. Are we going to file before first instance court/high court? If we look at article 11 of the proclamation, we do not have any provisions that have to do with bankruptcy. Article 14 of the same proclamation also states that suits which can be quantified in terms of money can be litigated before first instance court. Finally, as per article 228 of the cpc, if it is difficult to come up with an actual pecuniary value of our claim, then we can think of the estimated pecuniary benefits thereof. Is there any pecuniary benefit for a debtor who files for bankruptcy protection? Bankruptcy occurs when the total asset of the debtor is less than the total liability of same. Practically it is the federal first instance court that hears case relating to bankruptcy. If one challenges us under article 228 of the cpc, what will be our response? Is there any pecuniary benefit gained from bankruptcy?

Article 29. - Several causes of action

Where a suit is based upon several causes of action arising in different places, the suit may be instituted in any of the courts having jurisdiction by reason of one of such causes of action. Assume that we have a sale contract, a loan contract and a service contract all of which are causes of action arising in different places. Then, we bring all these causes of action under article 217 as joinder of causes of action. Even if all claims arise from different transactions save the cases under 218 and 219, article 217 allows us to avoid multiple suits against the same defendants or defendants jointly liable by bringing a single action. According to article 29 of the cpc, we do

not have to worry about establishing proper venue for each cause of action. If we have proper venue on one of the causes of action, we can drag the local jurisdictions of the other causes of action to one. But, the court entertaining causes of action under article 217 or 29 must establish subject-matter jurisdiction on each of the claims taken separately. The fact that the court has local jurisdiction on one of the claims means that it has local jurisdiction on other claims. However, the fact that the court has material jurisdiction on one of the claims does not mean that it has subject-matter jurisdiction over the remaining claims.

Article 31. - Change of venue

(1) Whenever it is made to appear to the High Court, at any time before judgment, by application of either party that:(a) a fair and impartial trial cannot be held in any court subordinate thereto;(b) that some question of law of unusual difficulty is likely to arise; or(c) that an order under this Article will tend to the general convenience of the parties or witnesses or is expedient for the purposes of justice, the High Court may make an order from which no appeal shall lie to the effect that any suit:(i) be tried by any court not empowered under the provisions of this Chapter to try it but having material jurisdiction to try the same; or(ii) be transferred for trial by itself. The only provision of the cpc amended formally and directly by proclamation 84/76 is that of article 31. This proclamation introduces nothing except that it says that article 31 of the cpc is repealed and hereby replaced by the following new article 31. It simply replicated all the substances of the former article 31 of the cpc except two points. The phrase, “at any time before judgment” under the former article 31 of the cpc is replaced by another phrase “at any time before evidence is taken”. According to the amended provision, change of venue is possible only if an application therefor is filed before the court takes or hears evidence. The venue may be any place mentioned under article 19 to 30 of the cpc originally thought to be convenient. By way of so many reasons, the venue may not be convenient as intended by the law or by forum selection clause of parties in their contract. In this case, if we satisfy the conditions under article 31 of the cpc, we can change the venue from one court to the other (articles 8 and 11 of the proclamation 25/96). Change of venue is a procedural devise by which we maintain our right to independent, impartial and competent judiciary. If the court is no longer independent or competent to hear the case not because the law has changed but because the subject-matter of the dispute has raised some questions of unusual difficulty, we will apply for change of venue before evidence is produced. If evidence is

produced, the only remaining task is to render final judgment. The first condition for change of venue is that when a fair and impartial trial cannot be held in any court subordinate thereto. In such a time, cases must be removed and heard before another court. The second requirement is that when some question of law of unusual difficulty is likely to arise. The availability of this requirement seems to be relevant only in those days where massive legal transplantation was existing with no sufficient and competent legal professionals. But, in these days, we have enough legal professionals that are able to understand and interpret the law. The other condition is that when an order under this Article will tend to the general convenience of the parties or witnesses or is expedient for the purposes of justice. It is related to the concept of forum non-convenience. A clear example is a plaintiff abusing his right to choose a forum under article 19/1 of the cpc. The concept of forum non-convenient was developed in the context of private international law in which a plaintiff in bad faith chooses a forum not convenient for him as well as for the defendant despite the fact that there is another forum convenient for both. The judge who understood the bad faith of the plaintiff will dismiss the case. But, under article 31 of the cpc, the judge does not dismiss the case but transfer it to another court which is more convenient for both parties. We can beat article 25 if we satisfy the conditions under article 31 of the cpc. If we think that a fair and impartial trial cannot be held, we are required to make distinction between institutional problems and problems related to the individual judge. If we are fearful that we are not getting impartial hearing particularly as a result of the judge, the remedy will be withdrawal of the judge (27 of the proclamation). Article 27. Withdrawal of Judges

1) No judge of a Federal Court shall sit in any case where:

(a) He is related to one of the parties or the advocate thereof by consanguinity or by affinity;

(b) The dispute relates to a case in which one of the parties is a person for whom he acted as tutor, legal representative or advocate;

(c) He has previously acted in some capacity in connection with the case or the subject matter of the dispute;

(d) He has a case pending in court with one of the parties or the advocate thereof;

(e) There are sufficient reasons, other than those specified under sub-Article (1) (a) to (d) hereof, to conclude that injustice may be done.

2) The judge concerned shall withdraw as soon as he is aware that he should not sit, in accordance with sub-Article (1) hereof, and shall be replaced by another judge. The judge has to step down if matters listed under sub-article 1 are there. Or, if he is ignorant of those matters, we have to bring them to his attention and force him to resign. The applicant should make sure that he is not abusing the process. The application for withdrawal of judge is made not to any court but to the judge himself (28 of the proclamation). Where a party makes an application under Article 28 hereof without good cause the court may, in addition to dismissing the application, impose a fine not exceeding Bin five hundred birr (29 of the proclamation).

Lecture 12. A case may be filed before different courts at a time. Or, different cases involving common grounds may be litigated before different courts of competent jurisdiction at the same time. The biggest risk is that courts under consideration may come up with inconsistent decisions. We need to avoid such types of problem by looking at the rules of priority, rules of pendency, and rules of consolidation. Article 7.- Priority

(1) One and the same civil suit may not be instituted in more than one civil court.

(2) Where a suit may be instituted in any one of several courts, the court in which the statement of claim was first filed shall have jurisdiction and the suit shall be pending in such court. What is the purpose of filing a case with the same cause of action against the same defendant before different courts at a time? If it is said, it serves the purpose of abusing the process; it serves as an effective means of harassing the defendant. Other than these negative

purposes, we cannot think any legitimate justification for so doing. When people are not certain about the jurisdiction of courts, they may be tempted to file a case before different courts. Though, jurisdictional law does not allow parties to do so for different purposes. For one thing, filing a case before different courts is a waste of resources. Secondly, there is a risk of arriving at inconsistent decision if both are equally competent to hear the case. One court may decide in favor of the defendant and the other court in favor of the plaintiff. However, these inconsistent decisions cannot be enforced. When the same case is filed before different courts, the court in which the statement of claim is in advance filed will finally have jurisdiction to entertain the matter(7/2 of the cpc). The defendant who is supplied with the second summon should raise such filing of the same suit before another court as a preliminary objection. The judge is not expected to know whether or not the same suit is pending elsewhere. A plaintiff filed his case before federal high court in Afar. The same person filed the same case before federal high court in Sumali. In this case, the defendant who is summoned to appear before federal high court in Sumali must object to the jurisdiction of the court; and the court must subsequently strike out the case in favor of the first court. For the principle of priority to come to picture, in the first place, both courts should be equally competent. Not only in the case of lack of subject-matter jurisdiction, if the second court lacks local jurisdiction, still it has to drop the case not because of article 7/2 but because of article 10/1 for the fact that courts must have subject-matter as well as local jurisdiction to hear a case. Article 8.-Pendency

(1) No court shall try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted civil suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such civil suit is pending in the same or any other court in Ethiopia having jurisdiction to grant the relief claimed.

We have a different animal under article 8/1. What is the difference between article 7/1 and article 8/1? In both cases, the second court should strike out the case at issue. The basic difference lies upon the case at issue. Under article 7, we have the same case to be litigated before different courts. Ada wants to claim against Bada a sum of 10,000 birr arising from a sale contract. This case has been pending before court first. Ada filed the same suit before court second except changing the name of the court. This situation is the one entertained under article 7 of the cpc. Under article 8 however, the cases to be litigated before different courts are not the same. In the first suit, ada claims some interest against bada arising from a

certain transaction. In the second suit, it could be bada claiming against adda not necessarily adda claiming against bada. The two cases are not identical; but, they have something in common. The issues in the first suit are directly and substantially the same as the issues in the second suit. What is an issue? According to article 247/1, Issues arise when a material proposition of fact or of law is affirmed by one party and denied by the other. From this statement, we can say that issue is a point of disagreement. What do we mean by directly and substantially at issue? In the first place, even if article 247 gives broader definition for the term issue, we do not have to take that every disagreement between parties constitutes an issue. Article 246/1 provides that after preliminary objections, if any, have been decided, the court shall ascertain upon what material propositions of fact or of law the parties are a variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

A dispute arises between a husband and a wife. The husband, in his statement of claim, alleges that the wife is an ugly woman. In her statement of defense, the wife, in turn , alleges that she is a beautiful lady ever lived on earth. Is the court going to frame this as an issue and give decision thereon? Not at all! Such type of case cannot be regarded as an issue upon which the right decision of the court appears to depend. By directly and substantially in issue, we refer to a point which we have to necessarily frame and resolve in order to give a decision. Note must be taken that there has to be two cases for us to talk about article 8 of the cpc. In the second suit, we should thoroughly observe what party b and party a have stated and denied respectively. We should subsequently compare whether the issues in the first suit have directly and substantially appeared in the second suit. If they are the same or have something in common, then, the first requirement to invoke article 8 is fulfilled. The presence of common issue of fact or common issue of law is only a necessary requirement under article 8. The second requirement is the suit to be between the same parties, or between parties under whom they or any of them claim. If parties of the first suit got involved in the second suit with or without changing their position in the first suit, the suit is said to be between the same parties ; hence, it satisfies the same party taste. There is also a possibility in which the second suit appears between individuals who derive their right from the original parties. This could be by way of succession, subrogation and etc. what is being litigated is the right derived from the original parties which amounts to be the same issue. The original parties or the parties who derive

their right from the former may also be litigating under the same title. In the first case of adda versus bada, adda brings the action in his personal capacity by alleging that bada has violated some of his rights. In the second suit, adda and bada must still act in their personal capacity. If any of them acts in a different capacity (as tutor or guardian), the same title taste cannot be satisfied. Is it mandatory to involve at least one of the original parties in the second suit to satisfy the same title taste and requirement of pendency? Regarding the question as to what the solution is and as to which court should hear the case, pendency is not as simple as priority. In the case of priority, the second court has to simply drop the case. But, for cases under article 8, it may not be necessarily the solution thereof.

Article 8/3 provides that (3) Where the matter in issue is also in issue in a suit pending in another court or is so closely connected with a suit pending in another court that it cannot properly be tried separately the provisions of Article 11 or 244 and 245, as the case may be,shall apply.

Adda is the seller who sold a certain commodity to bada. Adda, as a seller, is entitled to full purchase price. However, bada paid only 75 percent of the price. Adda brought an action against bada before court cada. As soon as bada is sued by adda for failure to pay full purchase price, he brought an action against adda before the same court or before another court dada. In this suit, bada argued that even if he admits the conclusion of the contract, he is not subject to full liability for failure to pay full purchase price for the fact that the commodities delivered are defective. This situation reminds us that the debtor has the right to proportionately reduce the performance of his obligation when the creditor fails to discharge his obligation under the same transaction. Adda denies that the commodities are defective at the time of the transaction; and he argues that they meet the requirement of general commercial purpose. We should remember that issue is an allegation made by one party and denied by the other. So, in this case, the issue is whether the goods are defective or not. This issue is directly and substantially in issue with the previous suit. Bada can claim specific performance of the contract, damage and so forth before a court. These cases are not the same one being claimed by the seller against the buyer and the other being claimed by the buyer against the seller. They are the same parties. They are acting under the same title in both suits. In both suits, both parties participate as a seller representing his own interest. The cases are litigated before the same bench of the same court and no problem if it is litigated before different courts. A party can bring counter claim; but, counter claim is brought at the moment he serves his statement of defense

(234). Submitting a statement of defense is subject to a certain period. This counter claim can serve as a defense in the first suit; or if it is not raised as a counter claim in the first suit, it can serve as a ground for a cause of action in the second suit. If the defect is included as a counter claim in the first suit, then we do not have to talk about pendency. Imagine that the first court decided in favor of the seller arguing that there is no defect. The second court decided in favor of the buyer invoking that there was latent damage that cannot be identified with normal examination. This situation affects the predictability of procedures or the judicial process and sends a wrong message to the public. If the suits involve common issues of fact or common issues of law or if they are closely connected in terms of legal issue, factual issue, or evidences adduced in relation to those issues, we entertain them through consolidation under article 11 or pendency can be raised as a preliminary objection which leads to striking out of the second case (244&245). Before jumping into striking out the second case simply because the two suits have common issues of law or fact and pending before different divisions of the same or different courts, we should think of the first remedy, consolidation.

Art. 11.- Consolidation of suits(1) Where two or more suits or appeals are pending between the same parties in the same court, in which the same or similar questions of law or fact are involved, the court may, of its own motion or on the application of either party, order a consolidation of such suits or appeals on such terms as it thinks fit.

(2) Where two or more suits are pending between the same parties in different courts, in which the same or similar questions of law or fact are involved, or where two or more suits pending between the same parties in different courts are so closely connected that they cannot properly be tried separately, either party may, at any time before evidence is taken in any of such courts, apply for an order that such suits be consolidated.

(3) An application under sub-art. (2) shall be made to the High Court, where the suits are pending in courts which are all subordinate thereto, or to the Supreme Court, where one or more of the courts in which the suits are pending is a division of the High Court on circuit.(4) The court to which the application is made shall, on granting the same, direct by which of the subordinate courts the suits shall be tried. Parties may disagree on the existence of a certain fact or the interpretation of the law in relation to that fact. Even if they may agree on the fact, they may disagree on the legal characterization of that fact. A plaintiff states a certain fact and wants to

characterize it as an employment contract. Defendant admits the same fact; but, he wants to characterize that fact as an independent contract. Cases involving a common issue of fact or law may be litigated before the same court, federal first instance court in Addis Ababa and federal first instance court in Diredawa. These cases may also be litigated before diametrically different courts. The best solution in such a case is consolidation. Under sub-article 1, the application for consolidation may be made by the party or the judge who knows both cases pending before the same court. Under sub-article 2, when two or more suits between the same parties are pending before different courts, either party may apply for consolidation. But, the application must be served before evidence is taken. If evidence is taken, the remaining task is writing judgment. In this case, the solution will rather be to take the two judgments for appeal to the appellate court.

Article 8/2 provides that (2) the pendency of a suit in a foreign court shall not preclude the courts in Ethiopia from trying a suit founded on the same cause of action.

Ethiopia cannot give way to other courts if a case has already been filed before a court in another country. Assume that a plaintiff filed his case before federal first instance court. The same plaintiffs filed the same case before Tigrai high court to entertain the case by way of delegation or concurrence. If the defendant invokes the issue of priority, do you think that the Tigrai high court should dismiss the case under article 7/2? Assume that there are two cases which are federal matters pending one before federal court and the other before state court. If all the requirements of article 8 and 11 are fulfilled, can we think of consolidating? If yes, which court is to drop the case? In other words, do we apply article 8/2 in a federal arranged polity like in Ethiopia? We must take note of the fact that Even if no court is foreign to Ethiopia, the courts belong to different jurisdictions. On the other hand, the law of civil procedure is designed for a much unified system of courts.

Lecture 13. Article 33.- Qualifications

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

What are the requirements for a person to be a party in a suit? One of the requirements is capacity. Whosoever is a person under the law can bring and defend an action in his own name and for his own interest. At this

juncture, we are talking about two important points. The first point is the capacity to bear rights and obligations or the question of whether or not x is a person under the law. The second point is the capacity to prosecute or to conduct judicial proceedings. A natural person is the subject of rights and obligations as of his birth and if his interest requires, personality may begin before birth. But, not all persons who are the subject of rights and obligations may have the capacity to conduct judicial proceedings. How do we prove that we have the capacity to bring judicial proceedings? Everyone is presumed to be capable under the law to bring judicial proceeding. The burden is upon the other party to prove that we are incapable to bring judicial proceeding. Capacity under article 33 is also applicable for juridical persons. How do we prove that they are capable under the law? In order to prove that juridical persons are capable under the law, we must look at the enabling legislations such as establishment proclamations and regulations by which they are created. Are all juridical persons created by the law maker/the council of ministers? Not at all! Not all juridical persons are created by proclamations, decrees, regulations and so forth. Good examples are business organizations. Business organizations have no establishment proclamations or regulations; rather, they are registered by an appropriate state or federal organ. And whenever they are required, they point out their registration certificate in order to prove their juridical personality. We can still think of other juridical persons which are neither business organizations nor part of the administrative organs. Associations and NGOs are good examples. They obtain their juridical status by being registered under the new societies and charities proclamation. We shall ask them to produce their registration certificate in order to prove their juridical status and the capacity to bring a case before a court.

The other requirement for a person to be a party in a suit is that parties must have vested interest. Article 33/2 provides that (2) No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.

This requirement shall equally apply for both parties owing to the fact that the defendant must also have vested interest in defending the suit. Parties in a suit must have vested interest or the standing. We should ask whether there is personal injury or not on the part of the plaintiff before he directly brings an action in his own name. Should always there be personal injury to qualify as a plaintiff? No, for example, if we look at article 11/1&2 of proclamation number 300/2002 of the country's environmental protection, we do not have to have vested interest requirement of article 33/2 of the cpc. This means that we do not have to suffer personal injury. We do not

have to be suffocated by carbon mono oxide in that particular vicinity to bring an action. The law, for public policy reason, allows a person whether or not a resident of the vicinity to have the standing. We have the controversial provision of article 37/2(b) of the FDRE constitution dealing with class action. It provides that the decision or judgment referred to under sub-Article 1 of Article 37 may also be sought by: (b) any group or person who is a member of, or represents a group with similar interests. Class action was recognized under article 38 of the cpc in 1965 and elevated to a constitutional status in 1995. Even if it was possible to easily amend or totally drop class action under 38 and 37 of the cpc, now, it requires constitutional amendment to do so. Article 38&37 of the cpc can even be amended by the ministry of justice and not even by the parliament. A traditional class action is to be brought by a class member. Persons with similar interest may qualify for a class action subject to other requirements. For a class action to stand, the person who is to bring the action must be member of the class itself. But, recent developments in the law of class action have changed this requirement. It can be used as a means of vindicating the rights of marginalized section of the society without being member thereof. For example, certain NGOs may be certified or allowed by governments to bring an action on behalf of children, women, disabilities etc. in the traditional class action, we have to personally suffer the injury. But, in a modern class action, we may not even be required to be member of the group or personally suffer the injury in order to bring action on its behalf. This fact shows that there is a possibility to bring a suit even without suffering personal injury or having vested interest in the suit. We must take note of the fact that article 33/2 represents the private nature of civil proceeding in this country or the principle of party disposition. According to party disposition, only those who suffered personal injury can bring action to claim compensation. The principle of article 33/2 is, however, subject to the above and other exceptions. There may be some situations in which government can bring an action simply because some individuals suffer injury. We should think of certain situations in which public prosecutor can intervene under article 42. We can still think of the issue of bankruptcy. Because of public interest at stake, even if the creditors of the bankrupt debtor fail to file bankruptcy, public prosecutor can initiate the bankruptcy proceeding. It would be reasonable if individuals and other corporate bodies can bring an action in their own name for the benefit of others so long as article 37 of the constitution is enshrined in such a manner for the purpose of increasing access to justice. Secondly, the defendant is given the right to invoke res judicata whenever several persons bring an action in their own

name for the benefit of others. Some individuals may not even know that they have suffered an injury for some type of learning is necessary to know some injuries by their very nature. In western countries, unlike ours, everyone has access to free legal aid or to the one financed by the government. Everyone is educated; hence, he is well presumed to know law. This is not, however, the case in our country. Whenever a law is enacted, it is presumed that everyone would know it. But, in a society where individuals can neither write nor read, this assumption does not seem to work effectively. For these reasons, it would be tenable for other individuals to bring an action in their name for the benefit of someone who is not in a position to vindicate his right. Vested interest can be talked about well not in our country but in western states. Article 33/3 provides that (3) there must be judicial or legal remedy or relief to the injury brought before a court of law.

We have just said that there must be an injury. The injury for the plaintiff has to be actual or potentially eminent. The injury has also to be redressable; there must be some judicial remedy for the injury under consideration. Ultimately, the injury must be tressable to fault of the defendant. Did the plaintiff inter into a contract with the defendant? Is the plaintiff prosecuting the defendant as a tort-feasor? The plaintiff must claim something from the defendant; that claim must arise from a legally recognized relationship. This means that the defendant must have some vested interest to defend and premised on a legally recognized relationship. We can also make mention of representation under article 34 in which a person (tutor and guardian) can bring suit on behalf of others. If a person cannot bring and defend an action in his own name, we have to talk about something else, representation. For example, as per article 34 of the cpc, a person under disability may sue or be sued through his legal representative. In this case, the legal representative of the person under disability has no vested interest; he simply brings and defends an action for the benefit of another person. The party to the suit is the person with disability not the representative. Because, the representative has no vested interest and the only interest he has is to effectively represent the person in question and collect the money. This is one of the exceptions to article 33/2 of the cpc. However, legal representative must not be confused with lawyer or attorney. Article 34/2 provides that where a person under disability is not represented by his legal representative, the proceedings shall be stayed until a legal representative is appointed in accordance with the relevant provisions of the Civil Code.

Disability may arise from age or court declaration, judicial or legal interdiction. Pending the appointment of the representative, the court has to suspend the suit if a suit is to be instituted by a person with disability in

his own name. article 34/3 provides that (3) Without prejudice to the provisions of the following Articles, bodies corporate may be represented in accordance with the relevant provisions of the Civil or Commercial Code, as the case may be.

A corporate body can be represented by its manager or by a person to whom the manager delegates his power to represent the company or the association. Article 34/5 provides that In all suits concerning property administered by a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not be necessary to makethem parties to the suit unless the court otherwise directs.

This one talks about unincorporated or unregistered bodies; we cannot think of enabling legislations for the fact that they are not corporate bodies. Such entities can be represented by trustees, executors or administrators. Classic example can be the inheritance of the deceased. In this case, only the trustee, executor or the administrator can represent the beneficiaries and there is no need to include the latter in the suit unless the court states otherwise. The property is not something with juridical personality; so, it cannot be named as plaintiff or defendant unless it is a property with specific destination or endowment. Note must be taken that not all business organizations do not have juridical personality. At least, joint venture does not have legal personality. How do we bring or defend an action in the case of partnership agreement in which the firm does not have independent legal status? Read article 44 and subsequent provisions.

Article 35.- Joinder of plaintiffs

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

There are different forms of joinder devises. They can basically be joinder of parties or joinder of claims. The common principle in all these joinder devices is the interest or the purpose to avoid multiple suits between the same parties where the claims are related and where the evidences are going to be more or less the same and to minimize the cost of litigation. It is, therefore, procedural efficiency that we wish to enhance through joinder device. There are at least two or more persons to talk about

joinder of plaintiffs. These persons must have the right to relief. The right to relief refers to a cause of action or remedy for breach of one's right. Whether they have the right to relief or not is determined by the substantive law. Secondly, their right to relief must exist jointly (joint owners or creditors or undivided claim), severally or with alternative. By severally, we mean that the right to relief of a plaintiff may exist to be independent of the right to relief of other plaintiffs. In the case of creditors, the claim may go to either creditor A or creditor B on the basis of the court decision. Apart from these primary requirements, the right to relief must arise from same transaction or series of transactions. The suit must have at least one common issue of fact or law. These are the basic two requirements for joinder under article 35. Transaction may be narrowly defined as contract or certain dealing between persons. Transaction for the purpose of article 35 can, however, mean any occurrence or any circumstance or any incident or any event or omission to do which can be characterized as contract or tort. An incident may also result in chain of effects or transactions. Good example is uprising broken out herein and spread all over the country. All the plaintiffs can bring separate individual suits. But, if all these suits have something in common, they can join it. Each taxy passenger in a taxy has a contract of carriage with the owner or jointly with the driver and the owner. In this case, there are at least 11 contracts different from each other. Unfortunately, there occurred an auto-accident in which the whole passengers are injured. Each of the injured has a right to relief. But, the right to relief does not exist jointly. Each can claim compensation severally. This right has arisen from the same transaction, an auto-accident. If the right had arisen from the contract, it would not be from the same transaction. Because, no one has consulted the other to inter into such contract with the taxy driver. So, we should not relate transaction to things very narrowly. We can at least point out common issue of law or fact with respect to the liability of the crime. The owner or the driver is liable for all passengers in the same way. In this case, these plaintiffs can qualify as joinder of plaintiffs under article 35. It is not, however, mandatory; if they want, they can institute their suit individually.

lecture 14. art. 36.- Joinder of defendants

(1) All persons against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, may be joined as defendants where, if separate suits were brought against such persons, any common question of law or fact wouldarise.

(2) The plaintiff may join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on the same contract including parties to negotiable instruments.

(3) Where a suit concerns property administered by several trustees, executors or administrators, all such persons shall be made parties to a suit against one or more of them, provided that trustees, executors or administrators outside Ethiopia need not be made parties unless otherwise ordered by the court on an application being made under Art 43.

(4) Where the plaintiff sues for the recovery of immovable property free of occupants, such occupants, whatever their title, shall all be made parties to the suit.

(5) Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants so that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all the parties.

(6) It shall not be necessary that every defendant be interested as to all the relief claimed in any suit against him.

Joinder is permissive; it is not something to be imposed mandatorily upon parties whose rights arise from same transaction or series of transactions or whose separate suits can enjoy a common question of law or fact. The sameness issue we read through article 35 is limited to the source of the right to relief in terms of transaction or series of transaction. It has nothing to do with the requirement of that parties must have the same identity of cause of action. Plaintiff 1 may have a contractual right to relief or cause of action while plaintiff 5 may have a tortious cause of action. Article 36 tells us situations under which persons are joined as defendants in a single action. Plaintiff may have one claim or several claims against many defendants. In tort, those who are responsible to make the same damage good are jointly and severally liable. A victim damaged by the employee can claim from both, the employee and the employer, who are responsible to the same damage. The basic requirement under article 36/1 is the existence of common issue of law or fact. Under article 36/1, it is not a requirement that the liability of the defendants arise from the same transaction or series of transactions. This article follows the most liberal approach to joinder of defendants. The problem is that it is difficult to give an example in which there could be common issues law or fact without having common or elated transaction. The point is that the plaintiff can bring separate suits against several defendants if the liability can involve at least one common issue of law or fact.

Sub two is in relation to contracts. Negotiable instruments are transferrable by their very nature. This transferability may give rise to different liabilities. Suit against joint and several debtors or joint and several debtor and guarantor also fall under this sub-article. Sub-article three involves a property or estate administered by several persons. The persons are jointly and severally liable with respect to the property they administer provided that they are all in Ethiopia. The language in this case seems mandatory. They are also liable to the extent of the amount they administer. If one of them is outside Ethiopia, and if the plaintiff wants to make him party to the suit, he can use article 43 to that effect. Under sub article three, parties are necessary not indispensable. Sub-article 4 is about mandatory joinder. Joinder can be permissive or mandatory. Under sub three, joinder is mandatory; but, a missing party cannot be said indispensable. Under sub four, joinder is mandatory; the logic is that we do not have to evict someone from his immovable property without fair hearing as a result of the value given to immovable property. Hence, the party seems to be indispensable. Sub-article 6 may be explained by the following example. Two or more defendants may be joined for the same or different claims. Defendant 1 may not be interested in the claim against defendant two. The fact that a defendant is joined in a single suit does not mean that he has to be interested in the defense or the claim of others. Sub-article 6 of article 36 must be read with article 37/1(b). as to Judgment for or against one or more parties, article 37 provides that Judgment may be given :(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Article 39 states that 1) No suit shall be defeated by reason only of the misjoinder or nonjoinder of parties and the court may in every suit deal with the matter in dispute so far as regards the rights and interest of the parties actually before it.

(2) any objection on the ground of misjoinder or nonjoinder of parties shall be raised at the earliest possible opportunity and any objection not so raised shall be deemed to have been waived.

Sub-article 2 must be read with article 244/3. What if some persons have wrongly joined without satisfying the requirements? If plaintiff joins two or more defendants without fulfilling the requirements of article 36, it is said to be misjoinder. This triggers preliminary objection by defendants. Article

40/2 states that (2) The court may at any time, of its own motion or on the application of either party and on such terms as it shall fix, order that the name of any party improperly joined as plaintiff or defendant be struck out and that there be added the name of any person who ought to have been joined as plaintiff or defendant or whosepresence is necessary for the determination of all the questionsinvolved in the suit:Provided that no person shall be added as plaintiff without his consent.

If there is a missing party under article 35or 6, the court can join him. In the case of non-joinder, the court, on its motion, or on the application of the parties, can order someone to join the suit. The proceeding is defective; butt, the point is that misjoinder or non-joinder cannot defeat proceeding. If we relate it to article 244 and 39, the nature of misjoinder or non-joinder is procedural not jurisdictional. The appellate court is not to hear appeal on ground of misjoinder and non-joinder.