

Ethiopian Law of Persons: Notes and Materials

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Preface

Ethiopian Law of Persons: Notes and Materials is the outcome of lecture notes and outlines that I had used in due course of teaching *Law of Persons*. This course material has benefited from the suggestions obtained from the panel of assessors: Ato Tadesse Lencho, Ato Mehari Redae, W/ro Martha Belete and Ato Gebregriabher Debeb (November 24th 2005 to February 6th 2006). The material was further discussed at *Subject Instructors' Discussion Forum* and at the *Plenary Discussion Forum of Instructors* (on September 26th 2007) who represented all Ethiopian public and private Law Schools. Introductions and learning outcomes have been incorporated in each chapter pursuant to the suggestions obtained during the discussion with subject instructors.

I have used certain parts of *Law of Persons Sample Syllabus* (with some adjustments) as a General Introduction to the course material (on pages *vi* to *viii*). The Sample Syllabus was approved by the Technical Committee for Legal Education Reform comprised of Law School deans and stakeholders (on December 12, 2005). Very important suggestions such as the inclusion of juridical persons in the syllabus were given during the Technical Committee meeting.

This course material is mainly designed to cater for the needs of law students who are meanwhile expected to read various textbooks of the course including Professor Jacques Vanderlinden's *Commentaries upon the Law of Physical Persons* (HSIU, 1969). It introduces concepts, relevant provisions and principles on Ethiopian Law of Persons and provides review questions that would facilitate the learning process. It also avails extracts from relevant sources targeting at comparative analysis on the various issues relevant to law of persons. The materials under the heading "*Supplementary Reading*" are not requirements for students unless they opt to undertake a deeper reading.

Lawyers may also use the material as quick refresher of the issues, concepts and relevant provisions involved in particular topics.

Acknowledgment

I am grateful to Ato Tadesse Lencho for his comments and suggestions during the first draft of the Brief Notes (54 pages) that was provided to students as a teaching material in February 2004. I thank Ato Fasil Abebe and Miss Elise G. Nalbandian for the cases that they have translated in this book. And, W/t Misrak Aragaw deserves gratitude for having typed some of the extracts incorporated in this book

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GENERAL INTRODUCTION

Law of Persons is a branch of private law and serves as a foundation for many branches of the law such as contracts, family law and others. The course on Law of Persons introduces the concept of personality which is a requirement for entry into and/or the performance of juridical acts. This course material is, *inter alia*, concerned with the definition of natural (physical) persons and juridical persons, acquisition (or the beginning) and end of physical and juridical personality, rights of personality, individualizing and localizing persons by name, residence and domicile, absence, capacity to hold rights, capacity to exercise rights, and organs of protection of persons with lessened capacity.

The general objective of this course material is to facilitate the learning process of law of persons. It targets at assisting students in their efforts towards in-depth understanding and analysis of the laws, concepts and principles which deal with various issues regarding human persons and entities as subjects of the law entitled to rights and entrusted with duties.

Specific Learning Outcomes:

At the end of the course students are expected to be able to:

- a) contrast subjects of law and objects of law;
- b) define physical and juridical persons;
- c) explain juridical personality;
- d) explain the beginning and end of physical and juridical personality;
- e) discuss registration of birth and death in law and practice;
- f) discuss civil rights concerning the body, privacy, action, inaction and others embodied in the Ethiopian Civil Code of 1960;
- g) identify the key constitutional provisions that are applicable to the law of persons;
- h) explain name of persons under the Civil Code and in practice;
- i) explain and contrast residence and domicile;
- j) distinguish between the concepts of holding and exercising rights;
- k) explain categories of persons with various degrees of lessened capacity to exercise rights;
- l) discuss the organs of protection of persons with lessened capacity;
- m) analyze recent reforms (relevant to law of persons) embodied in the Federal and Regional Revised Family Codes;
- n) discuss termination of grounds for lessened capacity;

- o) state the scope of juridical acts that cannot be performed by foreigners;
- p) analyze the declaration, effects and termination of absence;
- q) Analyze and comment on documents relating to law of persons including birth certificates, death certificates, declaration of absence and declaration of death;
- r) appreciate the role of Law of Persons in everyday life and juridical interactions;
- s) synthesize the learning outcomes stated from ‘a’ to ‘r’ in order to propose practical solutions to problems associated with the Law of Persons;
- t) write brief legal opinion based on learning outcome ‘s’;
- u) be convinced that legal issues require thorough attention to the various perspectives that need to be considered.

Suggested Readings

Major Laws

- The Civil Code of Ethiopia, 1960 (Articles 1 to 549)
- The Federal Revised Family Code, 2000 (Articles 215 to 323)
- Revised Family Codes of Regional States
- The Constitution of the Federal Democratic Republic of Ethiopia, 1995 (Articles 13 to 44)
- Selected articles of international instruments as assigned by the instructor

Required reading

- E. Stebek, *Ethiopian Law of Persons: Notes and Materials* (Justice and Legal System Research Institute), 2007
- Jacques Vanderlinden, *Commentaries Upon (Ethiopian) Law of Physical Persons* (HSIU, 1969)
- Robert Allen Sedler, *Nationality, Domicile and the Personal Law in Ethiopia*, Journal of Ethiopian Law, Vol. II, No.1, Summer 1965
- Mehari Redaie, Some Remarks on the Revised Family Code (Amharic), Volume II, 1999 Eth. Cal. (Pages 126 – 147)
- M. Planiol, *Treatises on Civil law*, Volume I, Part I (2nd part), Louisiana State Law Institute, 1959, pp. 243-383
- Others as assigned by the instructor.

References:

- *Introduction to Swiss Law* (Edited by F. Dessenmontet and T. Ansay), 2nd Revised Edition, Kluwner/ Schulthess Publishers, Hague: 1995 (Pages 47 to 59)
- Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law*, (Oxford University Press: London, 1935) pp. 29-54
- Max Kaser, *Roman Private Law*, Hamburg 1962 (Translated from German by Rolf Dannenbring, Durban 1965), Pages 60-79
- Rudolf Huebner, *A History of Germanic Private Law*, The Lawbook Exchange Ltd. 2000), Pp. 61-159
- Others recommended by the instructor.

Cases

- Cases on change of names
- Cases on residence and domicile
- Cases on capacity
- Cases on organs of protection of persons with lessened capacity
- Cases on absence

Demonstration of documents

- Birth certificates, death certificates, application for change of names, declaration of absence and others.

* * *

CHAPTER 1- ACQUISITION OF PHYSICAL PERSONALITY

Introduction

The first chapter of this book deals with the definition of persons and commencement of physical personality. Students are expected to first read the notes and then proceed to the readings. Review questions and case problems can be addressed immediately after the notes and class discussion. Some of the review questions might, however, require a prior understanding of the concepts and principles in the readings embodied in each section. It is to be noted that the supplementary reading on [pages 41 to 50](#) is optional which might be read for further understanding.

Objectives:

At the end of this chapter students are expected to be able to:

- a) contrast physical and juridical persons;
- b) explain the ancient and medieval usage of the term “persons”;
- c) contrast the definitions of “human being” and “person”;
- d) define and illustrate “subject” of law and “object” of law;
- e) explain the issue of personality involved in the *Persons Case* (Canada, 1916);
- f) explain the beginning of physical personality;
- g) define birth, conception and viability;
- h) analyze the scope of application of the concept of viability;
- i) analyze case problems that involve the concepts and issues here-above.

1. Definition: Persons

The word ‘*person*’ traces its roots from the Latin ‘*persona*’ which in its ancient usage of the theatre meant “the mask which covers the figure of the actor.” The mask indicated the role that the actor played, and the audience in effect “recognized the character as soon as it saw the mask.” (Planiol: 243). *Persona* thus designated what we now call a **role or part**.

Under earlier legal systems human beings who *took part* in juridical relations were regarded as *persons* while those who couldn’t perform juridical acts were considered as lacking legal personality. “It is very probable that the scholastic philosophers of the Middle Ages were the first to use the word ‘*persona*’, with all its metaphysical implications, to designate the legal entity. In Roman Law we do not find the expression used in this sense. ‘The admission must be made’, says Maitland, ‘that there is no text [in Roman Law] which directly calls the *Universitas a persona ...*’ ” (Nékám: 50). At present, application of the term ‘*person*’ has gone beyond the sphere of legal entities under municipal laws, and it also applies to entities that have international legal personality.

The words “*human being*” and “*person*” are not interchangeable. All human beings in modern legal systems are persons, and *take part* in legal relationships as subjects of rights and duties. Thus unlike Ancient Roman Law there is no distinction among human beings with regard to legal personality. However, entities other than human beings also *take part* in legally defined relationships as holder of rights and bearer of obligations. Unfortunately, however, the same term is used in Ethiopia (for example “*sewoch*” in Amharic) for two different referents: that is, to refer to ‘human beings’ as creatures and to humans and legal entities as subjects of the law.

In popular parlance “person” denotes physical or natural persons. But in day-to-day social interaction, entities other than natural persons interact among themselves and/or with natural persons Thus the term ‘person’ refers to both human beings and juridical entities. However, unless otherwise designated or unless the context so requires, the word person usually refers to human persons.

Articles 1 to 393 of the Civil Code deal with natural (or physical) persons. And, juridical (or legal) persons (Articles 394 *ff*) are entities other than natural persons that are endowed with legal personality by virtue of the law. The state, territorial subdivisions of the state, ministries, public associations, trade unions, partnerships, companies, etc. are juridical persons from the time of their establishment until they are dissolved and liquidated.

A juridical person usually has a distinct legal existence separate from its members. A case in point (in this regard) is the continued existence of the entities even after the partial or total change of their founding individual members. Such legal entities (either public or private) as stated above are endowed with juridical personality. Same as physical persons, these legal persons have rights and duties; enter into contracts, can sue, be sued and perform various juridical acts. However, it must be noted that there are rights of personality that cannot be exercised by juridical persons, such as the right to vote.

Thus, “*persons*” can be defined as human beings or legal entities that are holder (or bearer) of rights, and “*personality*” refers to all the attributes that have legal protection. The phrase “*subject of rights*” (used in Article 1 of the Ethiopian Civil Code) obviously implies corresponding duties as well, because the rights of any person apparently impose a reciprocal duty on others to observe these rights. For example, a certain person’s rights with regard to the privacy of correspondence or the inviolability of residence presuppose the duty of others to respect these rights. The French version uses the words “*sujet de droit*” (subject of the law), and this clearly includes duties.

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

*

Review Questions

1. Is a child brought to life through cloning a human person?
2. Article 16 of the 1966 International Covenant on Civil and Political rights (ICCPR) provides that “Everyone shall have the right to recognition everywhere as a person before the law.” Explain.
3. Under slavery, birth and viability were not (for some people) sufficient for the acquisition of personality. Explain the statement.

4. Contrast objects and subjects of the law, and give examples not stated in this chapter. Is a newly born child subject of the law?
5. How is the term 'person' defined in your community? Does your community attribute personality to a tribe, a clan, a family or common lineage?
6. How is Roman law different from the Civil Code in its concept of personality?
7. Compare the notions of subject of a sentence (in grammar) and subject of law.
8. Personality in legal parlance involves 'taking part.' Explain and give examples.

* * *

Readings on the Definition of Persons

Definition and Etymology

M. Planiol, *Treatises on Civil law*, Volume I, Part I (2nd part), Louisiana State Law Institute, 1959, pp. 243, 244

Those beings capable of having rights and obligations are called “persons.”

The word “person” is a metaphor borrowed by the ancients from the language of the theatre. *Persona* designates, in Latin: the mask which covers the figure of the actor. It had an open mouth, containing a metallic thin plate, so adjusted that it gave greater resonance to the actor’s voice. ... As there were invariable types for each part in the play, the audience recognized the character as soon as it saw the mask. *Persona* served in this way to designate what moderns call a role or part. And the word passed into current speech.

Two kinds of persons Distinguished

Contemporary legal literature recognizes two categories of persons. They are real persons who are living beings and fictitious persons who have only an imaginary existence. ...

Who are the real persons?

Every human being is a person. This, however, is only true since the suppression of slavery. But only individuals of the human species are persons. Animals are not.

Principal Attributes of Personality

Persons have names which serve to distinguish them from one another. They also have a juridical status, made up of manifold elements, which defines their capacity They alone may have a patrimony and a domicile. ...

*

(Persons in Swiss Law)

(Francois Knoepfler, Caole Zulauf, *Introduction to Swiss Law* (Kluwer Law International: Hague, 1997) Chapter IV, p. 47

In Swiss law, the word “person” is synonymous with being a holder of rights. Personality means all the attributes of a person that are protected by law. It

includes ability to be a holder of rights and the capacity to exercise rights and assume obligations. According to Swiss law, all individual human beings (physical or natural persons) and to a certain extent collectivities –private as well as public - such as corporations and associations (legal persons) have personality.

*

Problems of Terminology (regarding ‘persons’ and ‘subject of rights’)

Jacques Vanderlinden, *Commentaries upon the Ethiopian Civil Code: the Law of Physical Persons*, HSIU, 1969 (pp. 11,12)

Generally speaking the Amharic text does not distinguish between ‘physical persons’ and ‘persons; the former expression is translated by the latter word. This is apparently due to the lack of distinction between a person in the ordinary sense of the word (human being) and the legal sense (*sujet de droit*).

It also does not differentiate between personality and persons. But this does not create major problems. If one speaks of personality and rights inherent in personality or of persons and rights inherent in persons it amounts in practice to the same.

As for the translation of “Attribution of personality” in the title of Chapter I, Section I, it is *The Conferring of Rights on Persons*. This would be quite acceptable if duties were inserted after rights to avoid the idea that the law only confers rights and not duties to persons.

Article 1

The main issue is the translation of the French expression ‘*sujet de droit*.’ The English translation *subject of rights* has led to the question whether persons had only rights and no duties. This is totally misconceived as the idea behind personality is by definition the bundle of rights and duties. It would perhaps be better to say *subject of rights and duties*; this would convey directly the idea behind the French expression that persons are subjected to the effects of the law, while who ever is not a person escapes from that subjection. As for the Amharic translation, it says that persons *have legal rights* from their birth onwards. Such translation is as inadequate as the English one. As in the English text, the idea of duties is skipped over. Thus it would seem better to adopt the following translation: persons *have rights and duties*. The idea of subjection to the law would be absent, but the general idea would be better expressed than at the present time.

Persons (in Roman Law)

Max Kaser, *Roman Private Law*, Hamburg 1962 (Translated from German by Rolf Dannenbring, Durban 1965), pp. 60- 64

The position man occupied within the social community and accordingly within the system of law, changed considerably during the course of Roman history. The early Roman period did not regard man as an individual, but as a member of the group to which he belonged. Of all such groups, the smallest unit, the family, was, side by side with the state which was the largest unit and which included all Roman citizens...

The Roman **family** (*familia*) formed a monocratic **legal unit** consisting of the paterfamilias as its head and the persons subjected to his extensive power: his wife ... and his children (as long as they had not passed out of his power)...

In principle, the grouping into family units within the Roman people was preserved ... until the late Roman Period. Nonetheless, it can be observed that the whole ... history of the Roman family was dominated by its gradual disintegration from the end of the agriculture age. The free individual freed himself from ties of all kinds and attained independence; in this process the social reality often preceded the development of the law. There are two explanations for this progressive individualization: first, the change from peasantry to economic conditions dominated by commerce, trade and monetary economy and secondly, the general sophistication of the ways of life and thought furthered by Hellenism. In the post-classical period Christian influence strengthened the progressive independence of children in power. Certain relics, however, of the old paternal power were preserved even in the late Roman period.

...

Legal personality: Natural Persons

Modern doctrine speaks of legal personality as the capacity to be bearer of rights and duties (*a subject of rights*) and calls him (her) who has this capacity a **person** in the legal sense. Today all human beings (natural persons) have legal personality. Furthermore, certain forms of organizations (associations with legal personality, foundations, the state, etc.) are recognized by law as persons, and these organizations, therefore are called juristic persons. Modern theory has derived the concept of legal personality from Roman sources although the Romans themselves did not arrive at this concept.

...

Whereas legal personality today is conceived of on the basis of liberty of all (humankind) and their equality before the law, the Romans answered the questions of what rights a person should have differently for each group of human beings. Three conditions according to which the legal position of a human being stood out: liberty (*libertas*), citizenship (*civitas*), and the position within the family unit.

*

Persons (in English Law)

Denis Keenan, *Smith & Keenans's English Law*, 12th Ed., Financial Times Pitman Publishing, 1998 (Chapter 8: Persons and the Crown), p. 154

In law a person possesses certain rights and owes certain duties. There are two categories of persons as follows:

a) Natural persons.

These are human beings who are referred to as natural persons. ... Non-human creatures are not legal persons and do not have the full range of rights and duties which a human being acquires at birth. Yet animals may (as objects of the law) be protected by the law for certain purposes, e.g. conservation....

b) Jurisitic persons

Legal personality is not restricted to human beings. In fact various bodies and associations of persons can, by forming a corporation to carry out their functions, create an organization with a range of rights and duties not dissimilar to many of those possessed by human beings. In English law such corporations are formed by charter, statute or registration under the Companies Act 1985 or previous Acts.

* *

Background on the 'Persons' Case (Canada, 1916)

Source: <http://www.sen.parl.gc.ca/ckenny/persons.htm>

What prompted the Case?

[Emily Murphy](#) was appointed the first woman police magistrate in 1916.

On her first day, Murphy was challenged by a defence lawyer who argued since she was not even a person under British law, she could not presume to sit in judgement against his client. Other lawyers repeated this objection.

Later, when various groups recommended Murphy be named Canada's firstwoman Senator, five Prime Ministers, who initially showed a willingness, ended up declining since they could only appoint "qualified *persons*."

The Five

After ten years of trying to find a way to change this interpretation of the law, Murphy's lawyer brother discovered that under a proviso of the Supreme Court of Canada Act, *any five citizens, acting as a unit, had the right to petition the Supreme Court for clarification of a constitutional point.*

Murphy chose four well-respected women (Muir Edwards; McKinney; Parlby and McClung) and in August 1927 they first met to consider the question to present to the Supreme Court. On March 14, 1928, the women asked "Does the word 'person' in Section 24 of the (the law enacted in) 1867, include female persons?"

The Supreme Court's Decision

Just over one month later, on April 24, 1928, the Court announced that the Act did *not* include women. While acknowledging that the role of women had changed since the BNA Act was written, the Court said the Act was to be interpreted in light of the times in which it was written.

Thus, women had been excluded in 1867 and they were to be excluded in 1928. Further, the Justices stated that all nouns, pronouns and adjectives in the BNA Act were masculine, and that was who was meant to govern Canada.

The Appeal

The 5 women persuaded Prime Minister William Lyon McKenzie King to appeal the decision to the judicial committee of England's Privy Council, the highest court of appeal for Canada at the time.

On October 18, 1929, the five Lords of the Judicial Committee broke from tradition to describe the contributions the 5 women had made to Canada. The Lords said Canada was growing and changing, and so must its constitution.

They "unanimously came to the conclusion that the word 'persons' in Section 24 includes members both of the male and female sex." Further, they stated that the exclusion of women from public office was a "relic of days more barbarous than ours."

Outcome

The 'Persons' Case allowed women to become appointed to the Senate of Canada and be members of other federal bodies.

None of the original Famous Five were appointed Senators. The Senate particularly eluded Emily Murphy whose name was rejected by five administrations by the time she died in 1933.

*

INTERNATIONAL IMPLICATIONS OF THE "PERSONS" CASE

VIVIEN HUGHES, CANADIAN STUDIES PROJECTS OFFICER, CANADIAN HIGH COMMISSION, LONDON

NATIONAL ARCHIVES OF CANADA - 17 OCTOBER 2000

... [T]he judgment overturned arguments that had been used by lawyers and legislators for centuries to keep women out of public life. The judgment became the new landmark interpretation of women as persons in English common law throughout the Empire.

The ruling would have been legally binding in all the countries of the Empire - except, curiously enough, in Britain, as appeals to the Privy Council from within the realm had been abolished in the 17th century. Nevertheless, as the Registrar of the Privy Council told me, the ruling would have had "immense persuasive authority" in Britain!

The Persons Case was the vindication of a 60 year battle which had begun in 1867, and during which women in Britain and in Canada had sought - in vain -

for a determination by the courts that they were entitled to hold public office and to enter universities and the professions. ...

After the Persons Case ruling, only Britain and South Africa out of all the countries in the British Empire, excluded women from the Upper House. The British suffragist paper "The Vote", carried an article on 15 November 1929 entitled "Women in the House of Lords - the home country lags behind". ...

By 1929, women were Members of the House of Commons in both Canada and the UK, and women had got full voting rights in both countries. In May 1929, just two months before the Privy Council heard the appeal, 14 women (up from 4) had been elected in Ramsay Macdonald's second government. And Lord Sankey had a new colleague in Cabinet - Margaret Bondfield, the first British woman Cabinet Minister and Privy Councillor.

The judgment of the Privy Council combined with the change in political circumstances, meant that there could be no going back. Never again could anyone argue that women were not persons or could not play their full part in the public life of Britain, Canada, or any other country of the Empire.

Lord Browne-Wilkinson, the Senior Lord of Appeal in Ordinary, who represented the Judicial Committee of the Privy Council at our conference last October, said: "I think we got that one right!" ...

Vivien Hughes (October 2000)

* * *

2. Commencement of physical personality

“The human person is subject of rights from its birth to its death”
(Article 1 of the 1960 Civil Code of Ethiopia)

The words “*human person*” (under Article 1) refer to anyone who is member of mankind; i.e. to anyone who has the distinct features of a human being. Deformities and handicaps are acceptable as long as they are the sorts that could occur through various natural or other misfortunes. But in case the new-born offspring’s variation from the common features of human beings is such that coining some other new word becomes necessary, it can’t apparently be considered a human person.

Physical personality begins from *birth* and lasts until *death*. Birth is thus the beginning of physical personality, and will be briefly discussed below.

2.1- Birth

The term “birth” may create some problems of interpretation. Black’s law dictionary defines birth as “the act of being wholly brought to *separate existence*.” When is a child considered to have a *separate existence*? “In this respect one tends to make a distinction between the complete extrusion of the child from his mother’s womb and the cutting of the umbilical cord. At any rate from that moment on, the child becomes a person in the legal sense of the word and, in the ultimate instance, birth will be established through medical evidence.” (Vanderlinden: 10)

The other issue that needs to be addressed is whether the legal existence of a person begins as of birth without the requirement of viability, i.e. capability to live outside the womb, which according to Article 4 is presumed if the child lives for 48 (forty-eight) hours after birth.

There are two contending interpretations.

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

the child be born ‘*alive*’ and ‘*viable*’, short of which the personality granted shall be annulled.

- The *second* line of interpretation contends that for a child to acquire personality s/he should in all cases be born *alive and viable*. Supporters of this interpretation contend that the sources that Professor Rene David (the drafter of the Civil Code) had used embodied the conditions of *life* and *viability* as prerequisites for physical personality. According to their view, Article 100 “implicitly precludes declarations of birth” if the child hasn’t lived for forty-eight hours.

Many lawyers support the first interpretation because they argue that we can’t resort to interpretation if the law is clear. Article 1 is so clear that the issue of interpretation can in no way arise. And, Article 100 does not implicitly preclude declaration of birth if a child has not lived for 48 hours. In fact, the provision requires declaration of birth notwithstanding (i.e. - even if) the child dies within 48 hours after birth. Had personality not been acquired before 48 hours, there would have been no reason for recording a child who died within this period.

According to supporters of the first interpretation, the birth of a stillborn child (for example), is not declared because it doesn’t acquire personality. On the contrary, the duty to declare birth even if the child has not lived for 48 hours verifies the requirement of recording the personality of the child no matter how short it lived.

2.2- Anticipated personality: Conception and viability

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

*A child merely conceived shall be considered born whenever **his interest** so demands provided that he is **born alive and viable** (Article 2).*

A child is deemed to have been conceived on the 300th day preceding its birth (Article 3). A conceived child may acquire personality while he is still in his mother’s womb provided that:

- a) his *interest* so requires, particularly where the interest of a conceived child requires that he be called for succession (Article 834),
- b) he is born *alive*, and,
- c) he is *viable* (i.e.- capable of living for at least forty-eight hours after birth (Arts. 4/1 and 4/2).

The three cumulative conditions for granting personality to a conceived child are the *interest* of the child, *life* and *viability*. Under the examples stated in the preceding two paragraphs, the interest of the conceived child demands that it be considered a person. However, if a succession devolves upon the child "of which the debts exceed the assets, it can very well be that his personality will not be invoked in that connection" (*Vanderlinden*: 15). This is because the child does not have interest in being called for the succession.

Viability clearly includes the condition of being born *alive*. Yet, Article 2 distinctly states the requirements of being born *alive* and *viable*, most likely because in the case of a stillborn child, the condition of being born alive is not met; and in effect, the issue of viability doesn't arise. If on the other hand, the child who had acquired personality during conception is stillborn, or is born alive but not viable, the personality that was conditionally acquired during its conception is of no effect.

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

*

Review Questions

1. Define a still-born child.
2. Discuss in favour of and against the right to abortion in relation to a married woman and an unmarried woman. Is the fetus part of the woman's body? Or, does the fetus have conditional personality that entitles it recognition as a person provided that its interest so requires it, and if s/he is born alive and viable?
3. Should the condition "where his interests so require" exclusively apply to interests of a proprietary nature such as inheritance?

* * *

Case 1

Translation: Fasil Abebe

A.A. City First Instance
Arada Sub-city Court

File No. 941/94
Hedar 28th 1997 E.C.

Judge: Tewodros Alamrew

Petitioners: W/t. M. Molla, H. Molla, Masresha M., Y., Molla
Respondent: Not present

The court has ordered the joinder of actions brought individually under file numbers 1054/97 and 925/97 dealing with similar issues.

Order

The first petitioner stated that she has through her own mistake been registered in school as being born on Tir 3, 1989. The second petitioner also stated as being mistakenly registered in school as being born on Meskerem 2nd 1994. The third and fourth petitioners have also stated as being registered in school at an age lesser than their real age and that their actual ages are those stated on their birth certificates. They have asked the court to correct the dates given to the school and have attached relevant evidence.

The Court has examined the petitions in relation to the relevant legal provisions and has found that under Article 121 of the Civil Code the Court is authorized to correct records of the registers of civil status. The request of the petitioners is that their age has been mistakenly registered at their schools. It is known that the age of a person is determined by the birth certificate which according to Article 217/1 of the Revised Family Code is given by the Officer of Civil Status. Schools or other institutions can discover the age of a person or other particulars from the records of Civil Status (refer to Article 47/1 of the Civil Code). It is evident that correcting such errors of entry relating to age, place of birth or marriage do not require judicial decision and concerned bodies can refer to the records of Civil Status to make such corrections.

Therefore, the petitioners can present their birth certificates to the schools and ask them to make the corrections. They do not need judicial decision to do so. Under Article 121 of the Civil Code the Court does not have the power to correct such mistakes and has therefore rejected the petition.

...

(Judge's signature)

Review Question:

Assuming that you are the judge in this case:

- a) Will you be convinced that four persons will commit identical mistakes about date of birth upon school registration?
- b) Is it the power of courts to change record of date of birth?

* * *

Readings on commencement of personality

Natural Persons

(Francois Knoepfler, Caole Zulauf, *Introduction to Swiss Law*, Chapter IV, 1995, pp. 47, 48

Personality starts at birth, provided that the child is born alive (i.e breathing and with the heart beating). Swiss law does not require the proof of likelihood of living (viability) (Art. 31 CC).

...

For a lawyer even an unborn child may have a degree of personality, provided it is subsequently born alive (Art. 31 II CC). It would, however, be better to state that under certain circumstances the unborn child has personality.

Legally the moment of conception is not decisive. Among the different possibilities, the most favourable can be chosen since the law gives an advantage to the *nasciturus* (a fetus which has been conceived but has not been born). The child born may choose the date which allows it to benefit from the rights of the *nasciturus*: proof to the contrary is possible.

... In the case of inheritance, the *nasciturus* becomes important (Art. 544 CC).

*

Commencement of Personality

M. Planiol, *Treatises on Civil law*, Volume I, Part I (2nd part), Louisiana State Law Institute, 1959, pp. 245, 246

Ordinary Starting Point

Human personality begins at birth. Until that moment a child has no distinct life. It is, as the Romans said, "*pars viscerum matris.*"

Personality Before Birth

But the child not yet born is already, from the time of its conception, capable of acquiring rights. It is considered, by anticipation, as already figuring as a person. This was thus expressed by Julian: "*Qui in utero sunt intelliguntur in rerum natura esse*" Digest, Bk. I, Tit. 5, Tr. 26. From these words sprang the old adage: "*Infans conceptus pro nato habetur, quoties de commodis ejus agitur.*" Several foreign codes contain a general provision in this sense. The French Code

confines itself to applying the rule to successions (Art. 725) and to donations and bequests (Art. 906).

This anticipated personality, recognized on behalf of the child, may also produce concrete effects. This takes place either where there is a question of acquiring a new nationality, or of the voluntary recognition of natural paternity or maternity, or of a right to an allowance in the case of a workman's accident which happened to its father. Civil Cass., April 17, 1929, D. H. 1929, 298). But this personality is admitted only in the interest of the child, "*quoties de commodis ipsius partus agitur.*" Paul in the digest, Bk. I, Tit. 5, Fr. 7)

Conditions

Two conditions must (be fulfilled) ... for the personality of the conceived child to be recognized after its birth. They are: it must be born alive and be capable of living.

- (1) The child must be born alive. It follows that the still-born child is not deemed to be a person. This rule applies even though its death may have taken place only during delivery and even though it had lived its uteroabdominal life during the period of a normal pregnancy.
- (2) The child must be born viable. (Art. 314-3; Art. 725-2; Art. 906, last section). "Viable" means capable of living, *vitae habilis*. Thus notice need not be taken of the following two categories: (a) Children normally formed, but born before term at a time when the development of their organs is not sufficiently advanced to permit them to live, and (b) monstrosities having no heart or head and whose life ceases the moment the umbilical cord is cut.

Contestations and Proofs

When a child dies shortly after its birth, the question of knowing whether it was born alive and viable may give rise to difficulties. They may be put into two distinct questions:

1. Did the child live? It is deemed to have lived from the simple fact that it breathed, even if it were but for a few instants.

This point is hardly of importance in civil law because if it is verified that the child was not viable no notice will be taken of its birth. It would not have been a person in the eyes of the law. This same point, on the contrary, is of great importance in criminal law. A mother accused of infanticide, in the presence of a child well formed and born in term, often sets up as a defense that it was born dead. The verification of her statement is easily made by an autopsy. The lungs of the child are plunged into a vase full of water. If they float, it is because the child has

breathed. If air had not penetrated them, they fall to the bottom of the vase.

2. Was the child born viable? This question occasionally gives rise to litigation in civil matters. It suffices to suppose that during the short existence of the child (which comprises principally the period of pregnancy) a succession had been opened in the family and that the child was in line to succeed to the deceased. The question of viability must then be solved. Indeed, if the child should be considered to be a person, it would have acquired the succession in whole or in part. In dying, it would have transmitted in its turn the succession to its own heirs, so that its presence may entirely change the succession. The heritage will, according to circumstances, finally go either to the heirs of the child or to the heirs of the deceased, other than the child.

Provisions of Foreign Codes

Certain foreign codes have taken steps to diminish contests on these different points. The German Civil Code exacts solely that the child must have lived (Art. 1). It has been decided in Italy that, in case of doubt, the child born alive is deemed to be viable (Art. 725). In Spain, it must have a human figure and live twenty-four hours completely separated from its mother (Art. 30).

* *

The beginning of (Holding) rights

Rudolf Huebner, *A History of Germanic Private Law*, The Lawbook Exchange Ltd. 2000), Book I: The Law of Persons, pp.42- 45

Birth

Germanic law did not, generally speaking, recognize capacity for rights as beginning before one's appearance as an independent human being; in other words, not until after birth. Certain provisions, however, of the Frankish law would seem to indicate that its original theory attributed to the child in womb a capacity for rights in relation to property. Late, however, German law, like other systems, contented itself with holding pen to such a child the acquisition of rights that would inhere in it in case it should be born alive, and especially the acquisition of a paternal inheritance, - the actual distribution being delayed until the delivery of the decedent's pregnant widow. The medieval law thus realized an idea which the Roman system first formulated in principle; and through modern codes adhered to the Roman system; they gave heed at the

same time to native legal ideas. We find in them also the provision that a curator might be appointed for the "*nasciturus*" during gestation. On the other hand, the moment of birth was decisive of its social status, nationality, and membership in the commune. However, in case a father lost his nobility during his wife's pregnancy, many legal systems did not let this affect the child.

...

Proof of Birth

Birth alive was a precondition to the origin of legal personality. In accord with the formalistic character of Germanic procedural law definite facts were required to be established when the birth of a living child was questioned. According to the South-Germanic systems the proof must be to the effect that the child had opened its eyes and seen the roof-ridge and four walls of the house. In North Germany emphasis was laid upon its filling with its cries the four walls. Often too, a cry of a particular character was required, -e.g. in Westphalia one that could be heard through an oaken plank or a wall. It is Brunner's conjecture that this requirement of the child's cry, found in the whole body of Saxon, Frankish, and Anglo-Norman sources, is connected with the fact that the primitive law required the testimony of men, and in critical cases these could give proof of life only as ear, not as eye, witnesses; since for reasons of propriety men were not allowed to be present at the delivery.

...

Only gradually did it become possible to establish the fact of life by other signs, until here too, with the abolishment of formal methods of proof, foothold was gained for an untrammelled judicial estimate of proof. ...

Viability

Now when we consider that the older Germanic sources laid down the requirement of the child's cry; that the West-Gothic law required that a child, in order to inherit and leave property, must have lived ten days and been baptized; and that the bestowal of a name requisite to the acquisition of full capacity for rights must have taken place not earlier than nine days after birth, - it becomes obvious that Germanic law attached legal consequences to the birth of such children only as proved capable of life. Those brought into the world in so premature a state that they could not maintain life, and monstrosities, that showed no human form, were regarded as incapable of having rights. In this sense the *Sachsenspiegel*, for example, required (I.33) that the child should be "large enough", i.e. born at such a stage of maturity "that it should be capable of living" ("*lihaftich*").

Even after the Reception men held fast in the common law, under the influence of the Germanic legal ideas, to this requisite of vitality, interpreting in this sense

the expressions of the Roman law.... Savigny was the first to take the opposite view; nevertheless, in more recent years the older view has again found champions as against the common law. The modern Territorial systems did not adopt the requisite in question, and in this respect they were followed by the recent German and Swiss civil codes; only the Code Civil (725, 906) retained it.

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Extracts on Birth, Conception and Viability

Jacques Vanderlinden, *Commentaries upon the Ethiopian Civil Code: the Law of Physical Persons*, HSIU, 1969 (pp. 9-17)

Birth

Introduction

Personality normally begins with birth; in this respect, the beginnings of physical and of legal existence are simultaneous: this seems the most obvious solution insofar as human beings are concerned. The rule applies today to all human beings without distinction, although this was not always true. In Roman law, as well as, for instance, in traditional Ethiopian law, human beings could be born in slavery and thus deprived of the status of a person. But as the distinction between the status of the free man and that of the slave tends to disappear, the rule that all human beings are persons by birth becomes more general.

Since the times of Roman law, the definition of birth seems to have been fairly clear: it means the complete extrusion of the child from his mother's womb, whether in a natural way or by an operation like the caesarean section. More recently the idea of the child being born only when he has a fully independent life has led to the conception that the essential factor is complete separation from the mother as manifested most clearly by the cutting of the umbilical cord. Such controversies are fairly theoretical, as the cutting of the umbilical cord follows closely the complete extrusion of the child and there are good chances that doctors who have to ascertain the moment of birth will not differentiate the former from the latter.

In the Ethiopian legal system, birth is sufficient in itself to confer personality; no conditions are laid down in this respect. This differentiates Ethiopian law from many, if not most, other codified systems. In the latter there is either a single or a double condition required for the newborn child to acquire personality: in most cases, he must be born alive; in many others, he must also be born viable.

Insofar as the first condition, that of being born alive is concerned, one does not see clearly the justification for it. If one considers a newborn child, he is either alive or dead at the moment of the extrusion from his mother's womb. If he is alive, there is no problem and he becomes a person in the full sense of the word (unless the law requires the condition of viability). If he is dead at the moment of the complete separation from his mother, he has only lived in her womb for an undetermined period. In fact one may say that the end of his personality was established at the very moment he could acquire it through the complete separation from his mother; death, in a sense, has preceded birth. Thus there can be no question about the fact that he could acquire personality as he has lost it already. In conclusion, it seems obvious that a child, in order to acquire personality by birth, must be born alive. To mention it in the Code seems redundant; still it can be justified by the desire to be perfectly clear and to avoid all possible doubts.

The second condition required by some systems, in that of viability, i.e., of the possession by the child of the aptitude to live. This requirement can be justified by the fact that if, according to all evidence, the child is not going to live, there is no need to give him rights or duties with the inevitable consequences on the pattern of rights and duties governing his next of kin. Originally this applied mainly to premature children who were delivered so early that they clearly had no chance of survival and, in fact, did not survive. It was extended to all kinds of anomalies which could prevent the development of life.

Finally there is a third requirement which is found in some foreign codes or added by foreign courts: the child must have a human figure. This condition tends to eliminate the so-called monsters. It was already known to Roman lawyers and was adopted by most systems derived from the Roman. Here we are confronted with the problem of deciding what separates the human from the monster. The conceptions in this respect change with time and the progress of medical science. There was a time when some Siamese twins were considered monsters and some modern cases, like that of children born without limbs as a result of thalidomide, show us the delicate problems involved in defining monstrosity.

The third condition unlike the two previous ones (life and viability) does not exist in the Ethiopian Civil Code, although one could consider that it is latent in the fact that Article 1 refers exclusively to human beings, thus implicitly eliminating monsters.

Commentary (on Birth)

The origin of physical personality by birth is dealt with in Article 1 of the Civil Code.

The Code does not provide a definition of the word birth. Thus it will be for the Ethiopian Courts to define what the word means in the context of Ethiopian law. In accordance with Black's Law Dictionary, one may say that birth is "the act of being wholly brought into separate existence." In this respect one tends to make the distinction between the complete extrusion of the child from his mother's womb and the cutting of the umbilical cord or independent circulation which symbolize the physical autonomy of the child. At any rate, from that moment on, the child becomes a person in the legal sense of the word and, in the ultimate instance, birth will be established through medical evidence.

Article 1 of the Code simply states that physical persons have rights and duties from the moment of their birth; thus there is no mention of the two possible conditions, which are required in many Codes (the child, in order to be a person, must not only be born, but also be born *alive* and *viable*).

Insofar as life is concerned, it has been mentioned that such a requirement is not of much use; on the contrary viability can be useful as there is no need to give rights and duties to a child, if one can decide at birth that it shall not be able to live as a human being. But the wording of Article 1 clearly omits the two conditions as it omits an explicit reference to monsters.

Against such opinion, it could be argued that the principles laid down in Article 2 insofar as life and viability are concerned are valid for all cases where the birth of a child occurs, without consideration of the problem of conception. But the Ethiopian Civil Code, in Article 1, mentions birth as the only condition for the acquisition of personality. On the other hand the test of viability is only mentioned in Article 2 dealing with the special case of the conceived child and the two following articles refer without doubt to Article 2. Thus close reading of the text seems to favour the absence of a viability condition in the application of Article 1.

However there could be arguments to defend the other opinion, namely that the intentions of the drafter were different from this author's reading of the text. His source is clearly the Draft of a new French Civil Code, and the latter includes the conditions of life and viability. One could also consider other articles, such as Article 100, which implicitly precludes declarations of birth when a child has not lived for 48 hours. These could indicate indirectly that in

all situations where a child is not viable, personality does not exist. Another argument could be the possible difference between the respective situations of the conceived child and of the newly born child, when one applies the viability condition to the former and not to the latter. Practice shows clearly that such a difference would exist in some cases. For example, if a father dies during the gestation of his first child, the latter is his heir, provided he comes to life alive and viable; if the child dies within the 48 hour period (and if his death cannot be attributed to an external cause), he is supposed never to have existed insofar as the succession of his father is concerned. The succession will accordingly devolve to the father's ascendants (assuming that they exist). But if the father dies after the death of the child, the latter being alive at the moment of the death, (he) is an heir without any condition being attached to his rights as such. Then, if the child dies after the death of his father and before the 48th hour, the succession normally devolves to the mother as being the child's ascendant; this, if one does not require the condition of viability from the child acquiring personality by birth. Thus according to whether or not the condition is required, the mother of a child whose death occurs before the 48th hour, and whose husband has died between the birth and the death of the child, will or will not be an heir to her deceased husband. This difference does not seem very logical, although it is the consequence of a straightforward reading of the tests. Of course the resulting illogical situation is another argument in favour of the supporters of the thesis that the condition of viability ought to apply to all children and not only to conceived children.

...

Conception

Introduction

There are cases where it seems that birth is not by itself a satisfactory criterion for determining the attribution of physical personality; the most obvious is the case of a father dying while his wife is expecting a child: the succession of the father opens before birth and the conceived child, not being a person, as he is not yet born, is not taken into account in the devolution of the succession. The Romans were confronted with this problem and decided accordingly that "*nasciturus pro iam nato habetur quotiens de commodo eius agitur*". Disagreements exist as to the true meaning of the rule, but what is sure is that it directly influenced many Western European systems, which grant personality to the conceived child under some conditions. Most of these systems, however, limit the scope of the rule to succession cases (as in the Roman model).

Progressively, however, the courts recognized the personality of the unborn child in other matters. The most important is perhaps the case where someone is liable for the death of a married man and has to compensate for it. Supposing

that the widow was pregnant when her husband died, the conceived child would be as eligible as the mother, for any compensation which the liable person had to pay. If the child were not considered a person, he would not be able to get compensation for his father's accidental death. Thus the rule became general through the action of the courts acting under considerations of equity. Then the legislator took the matter up and the Ethiopian Civil Code follows that trend. As in other systems the benefit of personality is granted to the conceived child on three cumulative conditions: the interest of the child must justify the grant of personality, the child must be born alive and he must be born viable.

On the last two of these three conditions, not much discussion is needed here; the point has been already dealt with in the introduction to the previous chapter. Let us only underline once more that the Ethiopian legislator has followed the French model by adopting the two conditions of life and viability. This is partly illogical. It is obvious that if a viability condition exists, the condition of being born alive becomes useless. No one could ever be viable if he did not live beforehand. Thus it would be rational to omit the condition of being born alive. But the Ethiopian system differs from the French as it establishes a period of 48 hours which is determinate insofar as viability is concerned. By doing so, it tries to avoid at least some discussions resulting from medical expertise.

As for the first condition, it is, as are the two others, inherited from Roman law. Here again, Romanists discuss the exact meaning of the rule, but let us only keep in mind that it was adopted by some modern systems, most often under the sole influence of tradition. There are of course some reasons which are often given to justify the existence of this condition. The most common among them is that the conceived child may not, against his will, be burdened with duties outweighing the advantages of a particular legal situation, while he may certainly be placed, against his will, in a situation where the advantages outweigh the inconveniences. In the former case, he would come into the world with a burden for which he did not ask, while in the latter he would only benefit from the situation. Such an explanation is quite acceptable.

But one can wonder if the conceived child is so different from the newly born child? The answer is clearly that he is not; there is no difference in this respect between a fetus one hour before birth and a baby one hour after birth. Both of them enjoy the same protection: that conferred by the law upon minors, and one does not see why the conceived child should be better protected than the newly born one. It must also be noted that the reference to the interest of the child exist in the source of Article 2 (in this case the Draft of the new French Civil Code) only because it fits better with tradition. The original text of the

draft of the new French Civil Code provided for the grant of personality to conceived children without any reference to their interest; the Reform Commission decided to adopt the text which is that of Article 2, only because it was more in conformity with the Roman maxim. Thus it seems that the conceived child could be granted personality without any reference to his interests. If his tutor involves him in situations where his duties outweigh his rights, the tutor will possibly be liable under the provisions of the Code dealing with the protection of minors; the latter certainly afford sufficient protection to the conceived child.

However, the present system in Ethiopia is that no conceived child can be granted personality if his interest does not require it. As a result, problems will arise as to the exact meaning of the word "interest".

The Civil Code also follows closely the Western European tradition when it fixes the date of conception at the 300th day preceding birth. This number of days was already accepted in Roman law as the longest period during which a child be borne by its mother. The reference was to a period of ten months of thirty days. It has not been challenged since. Still a difference exists here in the sense that many other systems place the date of conception between the 180th and 300th day, while Ethiopian law has decided for a fixed date; this was done for the sake of certainty.

Commentary (on conception)

Article 2 of the Civil Code extends the definition of birth to the moment a child has been conceived; but such extension is limited by three cumulative conditions.

1. The child must have some interest in the extension

A problem can arise here if one assimilates the word interest to the word rights, as some scholars do.

Restricting personality to the possession of rights without duties would first of all be in contradiction with the notion of personality as being composed of rights and duties. Then, there are cases where the fact of holding rights is bound to that of having simultaneous duties, the balance between the two being highly favourable to the conceived child. This would be the case for instance in matters of succession, where the heir to an estate is bound to pay heavy succession taxes at the same time that he acquires the rights which are part of the estate; without paying these taxes he will not be able to enjoy the rights he could acquire. Thus the acquisition of rights is clearly connected with

corresponding duties. By preventing him from being bound by duties, one would at the same time prevent him from taking advantage of the connected rights. This does not seem to be the purpose of the legislator who used a general word like interest in order precisely to convey a general idea containing the sum of both rights and duties which could be attributed to the conceived child. Thus, to take but one more example, it would be in the interest of a conceived child to be an heir to a succession of which the assets would, by far, exceed the liabilities; in such case he would, at the same time, have rights and duties, but the fact of being considered as a person would be in his interest.

Finally one must insist upon a peculiarity of the personality granted to the conceived child. Such personality is only granted to him in particular situations where his interest so requires. Thus it is not because one decides to consider the conceived child as a person for, let us say, the sake of accepting a donation that it automatically becomes a person until his birth. He is only considered a person for the purpose of accepting the donation and nothing else. As a result, if a succession devolves upon him later on, of which the debts exceed the assets, it can very well be that his personality will not be invoked in connection with that succession while it has been invoked earlier in the case of the donation. Thus, to some extent, he may be considered as a human being but this life lasts only the time needed to assess his rights when his interest so requires.

2. The child must be born alive

Not much needs to be said on this condition. This will essentially be a question to be determined by medical evidence. As already mentioned, a test consists in establishing the existence of respiration by checking the entry of air into the lungs; another one refers to independent circulation. Let us only mention that the condition of being born alive is as essential as the previous one. A child, dead in his mother's womb, will never be considered as having had personality. But it is also true that this condition has no importance as such because of the existence of the viability condition. Obviously if the child has to live for forty-eight hours in order to be considered a person, he must necessarily be born alive. If he is born dead, he will certainly not prove viable.

3. The child must be born viable

Under Article 4 of the Civil Code, the Ethiopian legislator has opted for a solution in which some presumptions are constituted enabling one to determine (in some cases without any possible contestation) if a child is or is not viable.

First, a child who lives for 48 hours is presumed to be a person from the moment of his conception onwards. This presumption is irrebuttable. The only important point in this case is the exact determination of the hour of birth as, once the time has passed, there is no possible rebuttal of the presumption. We will consider this problem subsequently.

Second, if a child dies before the expiry of the 48 hour limit, there is a presumption that he is not viable and the first presumption, that he was a person from the 300th day before his birth onwards, cannot operate. But contrary to the first case, this second presumption is not irrebuttable and can be challenged in court. Again medical evidence will be essential as the party challenging this presumption will have to prove that death is not the result of a deficiency in the child's constitution. These last six words are fundamental for the application of this section of Article 4. They cannot be interpreted at the moment as it will be for the courts, on the basis of medical evidence, to decide progressively what are or are not deficiencies in a child's constitution. Still there are obvious cases where the death does not result from a constitutional deficiency, e.g., if the child is dropped by someone and dies of a fracture of the skull, if he is killed in an automobile accident, etc. If it is proved that death came as a result of something other than a deficiency, then the child can be considered as having been viable.

...

Assuming that the three above-mentioned conditions exist, the date of conception is fixed by Article 3 of the Civil Code at the 300th day before birth. This avoids all discussion about the exact date of conception (which cannot yet be determined by medical evidence). The presumption is declared irrebuttable by the same article and there is, accordingly, no possibility of establishing that a child was conceived more or less than three hundred days before its birth, even if one could prove, for instance, that his parents were separated on that precise day.

However, although the presumption laid down in Article 3(1) is irrebuttable, Article 3 (3) establishes the principle that the rule laid down in Article 3 (1) shall have no bearing on the provisions of the Civil Code dealing with filiation, in the case where the identity of the father of the child is in issue. This seems to refer to Article 743 (Article 128 of the Revised Family Code). It deals with presumptions as to conception in wedlock and fixes the moment of the latter at a minimum of 180 days after the marriage and a maximum of 300 days after its dissolution. Thus according to Article 743, the moment of conception is not necessarily fixed at a certain number of days before birth; it can vary between 300 and 180 days. On the contrary, Article 3 fixes the precise date for the moment of conception. The purpose of section 3 of the latter article is to avoid

what could seem a contradiction between Articles 3 and 743 by reserving the rules laid down in the latter about filiation.

Problems of terminology (regarding viability)

Article 4

The Amharic translation of the French and English word viable is as if it has lived. This in fact expresses an idea contrary to the one expressed in the French and English texts. *Viable* implies that the child is supposed to be able to live in the future, while the Amharic text refers to the past. On the other hand it is obvious that if a child has been living for 48 hours, he can be considered as having lived during that period; in fact he has lived and must not be considered as if he had.

* * *

Case problems and issues for discussion

1. “W” gave birth and her husband died before the umbilical cord of the child was cut. Even worse, the child died a few minutes later while his umbilical cord was being cut. “W” claims to be the child’s heir. Result?
2. Ato “A” died thirty days before his wife “B” gave birth. Two hours after the birth of the child at Gandhi Hospital, the Doctor “C” predicted that the child would die within 18 (Eighteen) hours from the time of its birth. The child was taken home and unlike the doctor’s prediction, he was alive for 30 (Thirty) hours from the moment of his birth, by the time he died having fallen from the arms of a baby-sitter. Ato “A” doesn’t have another child. The issue of the child’s viability and his entitlement to inherit Ato A’s property has caused dispute between the deceased child’s mother and the parents of Ato “A”.
 - a. Is the child viable if he had fallen on a comfortable sofa 30 centimeters from his baby sitter’s arms?
 - b. What if the child fell on the floor and was hit on his skull?
 - c. Would your opinion be different with regard to Woizero B’s claim of inheritance had the child’s father died five minutes after the child was born, and had the cause of the baby's death been illness rather than an accident?
3. Aster was in a coma for two days (at BL Hospital) and was ultimately declared dead by Dr. D pursuant to Art. 108 of the Civil Code. Her husband was making the necessary arrangements to take her corpse home when she unexpectedly regained consciousness. The doctor was surprised and yet reaffirmed his previous declaration saying that Aster had died pursuant to the clinical definition of death. Is Aster a new physical person same as a newly born child?
4. A negligent driver hit a pregnant woman who was expected to give birth within two weeks. The woman survived after weeks in hospital, but she lost her conceived child due to the accident. Has the negligent driver caused the death of a human person? If your answer is in the positive, would your opinion vary if the woman was only two months pregnant when she encountered the accident.
5. Woizero Mulu owns chain of hotels. She was expected to give birth within a few days. Unfortunately, she died in a car accident. The baby was rescued through operation, but was alive for only ten hours.

Medical evidence shows that the adverse effects of the accident caused the death of the child. Woizero Mulu and Ato Mekonnen were living together and had planned to get married soon after the baby's birth. Ato Mekonnen claims to be the heir of his deceased child who, according to Mekonnen, is entitled to inherit Woizero Mulu's hotels and whatever she owns.

- a. Does the issue of viability arise?
- b. If you are of the opinion that the child's viability is required, can he be considered viable by virtue of Article 4/3 of the Civil Code?

* * *

Sample opinion for Case Problem Two; Issues “a” and “b”

*(**N.B.** The following is not an answer key but a sample that is acceptable. And, students are not expected to write a detailed legal opinion as has been written in the sample opinion.)*

Material Facts

- A child is born 30 days after the death of his father.
- Two hours after birth the doctor predicted that the child will die within 18 hours.
- The child survived for 30 hours, and died when he fell from the arms of a baby sitter.

Issues:

- Whether the child is viable assuming that he had fallen under the circumstances stated under “a” or “b”
- Whether the condition of viability arises for acquisition of personality under the circumstances stated under “c”

Relevant provisions:

Articles 2 and 4 of the Civil Code

Legal Opinion

According to Article 2 of the Civil Code, “a child merely conceived shall be considered born whenever his *interest* so demands provided he is born *alive* and *viable*”. The *first* element of this provision is met because an unborn child has the interest of being considered a person where the father dies before the child’s birth. The *second* element has also been satisfied because the child was born *alive*. What remains to be proved is thus the *third* element, namely, the *viability* of the child.

A child is deemed to be viable where he lives for 48 hours from the moment of his birth (4/1). In the case at hand Dr “C” had predicted the child’s life span to be not more than 18 (eighteen) hours from the moment of his birth. This is a professional opinion and not an irrefutable truth. What determines viability is not subjective opinion, but the empirical truth of a child’s death within the time and under the circumstances determined by law.

Moreover, the doctor's presumption has been refuted by the reality of the child's life for an extra period of 12 (twelve) hours. We should thus proceed to examine the merits of the case disregarding Dr. C's prediction.

- a) If the child had fallen on a comfortable sofa 30 centimeters from the arms of his baby sitter on the 30th hour of his birth, the question whether a "healthy" child would have died under similar circumstances, and the lesser stringent issue of whether the child would have lived for 18 hours (or) more from the moment of the accident had he not fallen from his babysitter's arms determine the issue of the child's viability. The words "comfortable, 30 centimeters, etc." seem to imply the non-fatal nature of the incidence. Yet, we should not assume facts because what is "comfortable" to sit on would not be "comfortable" to an infant of 30 hours, particularly if it hits certain delicate organs of the baby.
- b) The question raised under "a" hereinabove, applies to issue "b" as well. The fact that the floor hit the child's skull seems to be a relatively stronger factor as compared to the alternative situation of the child's fall on a sofa.. Yet we need to raise the same questions, i.e., whether a healthy child would die under similar circumstances and whether the child would have died hadn't he fallen.

In both instances, the outcome of the case depends on medical evidence. A child may be presumed to be viable even where he dies in less than 48 hours from his birth if the death is due to an *extraneous cause*. This requires "*proving that the death of the child is due to a cause other than a deficiency in his constitution*" (Art. 4/3). The mother of the child who claims to be the heir of her deceased child thus bears the burden of proving that her child wouldn't have died had he not encountered the accidents stated under the alternative circumstances of "a" or "b".

If Woizero"A" proves (through medical evidence) that a healthy child would have died under similar circumstances, the child is deemed to be viable by virtue of Article 4/3, and in effect, she is entitled to claim the patrimonial rights of the child who had acquired physical personality.

The issue becomes complex if both factors have cumulatively caused the child's death. Both factors are said to have cumulatively caused the child's death if, despite the accident, the child wouldn't have died had he been healthy, and if, on the other hand, the child could have lived beyond 48 hours had he not been exposed to the accident. Such complex issues cannot be resolved at this stage of

the training, because they involve the issue of causation that is a topic under criminal law.

The case also involves issues that fall under Law of Successions, because one may argue that Articles 2 and 834 of the Civil Code envisage situations where succession opens before a conceived child is born. But in the case under discussion, Ato "A" died only thirty days before his child's birth, and successions according to Articles 826, 965 and 987 of the Civil Code had not yet been opened by the time the child was born. This issue as well, is beyond the scope of this course.

*

Question: Write your opinion on issue "c".

* * *

Illustrations

Contributed by Tadesse Lencho (February 2004)

- "A viable child, who sustained prenatal injuries in automobile collision three days before birth, was born alive. It died as a result of such injuries 18 days thereafter." The child was a person. (*Stegall v. Morris*)
- "Infant in 'ventre de sa mere' (in the womb of its mother) about 26 weeks was prematurely born with resulting ill effects because of the mother's injury when negligence of owner caused packed automobile to strike a bus. The mother was riding in the bus." The court held the infant was not a 'person'. (*Mays v. Weingarten*)

*

Assuming that the above two cases occurred in Ethiopia do you agree with the holding of the courts?

* * *

O'Donovan's Problems on Attribution of Personality

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 2 to 8

NB

- Thirty-Five years have been added to the years stated in all hypothetical cases except Problem 6)
- The Ethiopian Calendar and the time with a twenty-four hour clock has been used in O'Donovan's problems.

Problem 1

Woizero Yeshe gave birth to a baby daughter on Maskaram 10th 1995 at 06:00. Ato Wondimu, Yeshe's husband who was a porter at the University rushed to the hospital. Just in front of St. Paul's hospital at 07.00 he was knocked down by a car. The driver who was drunk said that he had been driving at 120 kms. per hour as he was practicing for the Highland Rally.

Six months later, Woizero Yeshe brought suit against the driver claiming damage for herself and for her daughter who was born at 06:00. The driver, Ato Yoseh admitted liability to the widow but denied liability to the child who died on Maskaram 11th at 10.00.

- a) Present arguments for both parties.
- b) Would it make any difference if the child had died on Maskaram 12th at 10.00?

(Read an example of a good answer by a student on pages 31, 32)

Problem 2

Ato Michael and Woizero Messelech were expecting a child in Guenbot. However, before the child was due, Woizero Messelech began to have difficulties and the doctor at (Yekatit 22nd Hospital) told her that she would need a caesarian operation. Ato Michael was worried about his wife and decided to be present at the operation which took place on Miazia 24 at 03.00. Unfortunately, Ato Michael, had a weak heart and the tension of watching the operation caused him to have a heart attack. At 03.30 the surgeon declared him dead and continued the delivery of the child who was born at 04.00.

The child died on Miazia 26 at 6 a.m. When the succession of Ato Michael opened, his parents and his widow contested the inheritance as there was no will.

(NB- Under the Ethiopian Law of Successions the heirs of a person who dies intestate, i.e without having left a will, are firstly his children, but if there are no children, his parents will inherit).

Write a memorandum of legal advice to the judge on the question of who should succeed Ato Michael.

Problem 3

Woizero Aster gave birth to a baby on Tahsas 24 at 02.00. Unfortunately the baby was born without arms and leg and with only one eye. From the moment of his birth, the doctors had to fight for his life and with the help of modern medical science the child lived until 14:00 on Thasas 25. Then, because of a blockage in the mechanism of oxygen tent in which he was, the child dies. The blockage was later found to be due to the fault of the hospital technician who had failed to service the machine correctly.

The child's father had died four months before his birth. The determination of his heirs had not been made as it was known that his wife was expecting a child. Now the question of succession must be decided. Will the child be an heir?

Give an example of medical testimony which would be resolving this problem.

Problem 4

Woizero Amarech gave birth to a baby boy on Hamle 25 at 02.00. The boy was born with a very soft skull and the nurses were warned to take great care in handling him. However one nurse carelessly allowed the child to fall. She said that this was due to the fact that he wriggled a lot in her arms. He died on Hamle 27 at 01.00.

Woizero Amarech was doubly grieved as she had lost her husband lieutenant Yilma on Meskerem 29 just after their marriage. Lieutenant Yilma was accidentally killed in army training.

Woizero Amarech wishes to do the following:-

1. Sue the hospital for negligence in causing the death of her son.
2. Claim to succeed her husband through her son.

Write a memorandum of advice to Woizero Amarech.

Problem 5

Woizero Abebetch gave birth to a child on Hamle 7 at 05.00. She is a widow as her husband died in a brawl the day after they were married. Since then she has been living in a convent where her aunt is in charge. The late birth of the baby was due to lack of medical knowledge on the part of Abebetch's aunt, who gave her niece traditional medicines during her pregnancy.

The baby died on Hamle 8 at 23.00.

The mother wishes to sue the other man in the brawl for damages on behalf of herself and her child for the loss of a husband and father.

Problem 6

Woizero Menen married Ato Joseph on Tahsas 10, 1953. The latter died six months later, when his wife was expecting a baby. A healthy baby was delivered eleven months after the marriage. Some months after the baby's birth, his mother introduced an action to settle the problems of her husband's inheritance. The mother soon realized that, apart from a title of nobility which could be transferred to her son, her husband had only left heavy debts. Thus she decided to claim that title for her child but not to accept the patrimonial elements of the inheritance. The creditors disagree with this attitude and claim that if she refuses to accept the patrimonial elements of the succession she must also renounce the title of nobility. They also claim that such renunciation to the rights of the child would deny his personality before birth.

(Although the title of nobility is no more relevant, assume that you were a lawyer then and) present arguments for both parties.

Problem 7 (omitted)

Problem 8

Child Abebe was born with a serious brain defect. The hospital immediately performed a very expensive operation to save the child's life, but finally it was decided that the child's total life expectancy was probably not more than 40 hours. However, 20 hours after Abebe's birth, while he was being transported to another hospital by ambulance, the ambulance was involved in a traffic accident in which the child was instantly killed.

The child's parents now refuse to pay for the medical expenses incurred in the brain operation claiming that Abebe was never a 'person' under the Civil Code and therefore, they have no obligation to support him.

Write a memorandum of advice to the hospital explaining whether it is possible to recover the cost of the operation.

* * *

An Example of a good answer (by a student): Problem I

Material Facts:

Plaintiff's child was born one hour before the husband and father was killed by a car. Plaintiff is suing the defendant, the car driver, for damages on behalf of herself and her child. Defendant admits liability to the widow but not to the child who died twenty-eight hours after birth.

Issue:

Whether the condition of viability (should be proved as a condition for the child's acquisition of personality whose father was alive while she was born)?

Arguments for plaintiff:

Article 1 of the Civil Code provides that "the human person is the subject of rights from birth to death." The plaintiff's child was born and was alive when the accident occurred. The rights which are the subject of this action arise from the accident. Therefore, the child's rights came to her at a time when she was born ... alive and had legal personality. No condition of viability is mentioned in Article 1. Therefore, since the child was born and (because she was) alive at the time when she received her rights she had legal personality and the question of viability does not apply. Therefore, the plaintiff should recover damages on behalf of her child.

Arguments for defendant:

Article 1 of the Civil Code must be interpreted in the light of Article 2 which qualifies the word 'born' by the words 'alive and viable'. See the French and German Civil Codes.

Viability is defined under Article 4/2 as survival for forty-eight hours and there is only one exception to this rule, that of death due to a cause other than a constitutional deficiency (Article 4/3). Since the plaintiff's child did not survive for forty-eight hours and since there is no evidence that his death was due to an external cause, the child was not viable as is required under Article 4, and did not have legal personality. Therefore, in the light of Article 1, 2 and 4 there can be no recovery on behalf of (the child) since she never had legal personality and is therefore not the subject of rights.

Solution:

Article 1 of the Ethiopian Civil Code simply states that physical persons are the subject of rights from their birth. There is no mention of viability. While it is true that Article 2 mentions this requirement, it is in connection with the special case of the conceived child.[S]ince a close reading of the text seems to favour the absence of a viability condition in the application of Article 1, the child ha[d] legal personality (when her father was killed an hour after her birth).

(From the facts of the case, the child died on her 28th hour of her birth. Yet, the issue of conceived child does not arise, because she was already born and had acquired personality when her father died. Thus, it would not make any difference if the child had died (on Maskaram 12th at 10:00, i.e. fifty-two hours from her birth, because the period of) survival of the child is irrelevant.

* * *

Supplementary reading on birth, conception and viability

Supreme Court, Appellate Division, Second Department, New York.
Dorothy JAMES and Anthony James, Plaintiffs-Respondents,
v.
THE MIDDLETOWN COMMUNITY HEALTH CENTER, INC. and Lynne
Dicostanzo, M.D.,
Defendants-Appellants.
No. 1999-09894.
April 20, 2000.

Orange County Clerk's Index No. 8217/98

...

***2 STATEMENT OF THE NATURE AND FACTS OF THE CASE**

...

Appellants' claim that appellant DiCostanzo failed to address respondent's alleged incompetent cervix, and that said alleged failure caused the April 23, 1998, involuntary abortion of her neonate twins at 21 weeks gestation. Respondents also claim loss of consortium for the loss of "healthy twin fetuses". Respondent-mother and respondent-father thereafter commenced an action against appellants based on medical malpractice (R 15-22). On June 4, 1999, appellant DiCostanzo moved to dismiss the respondents' causes of action in the complaint, pursuant, *inter alia*, to: [CPLR § 3211\(a\)\(1\)](#) as a defense is founded upon documentary evidence, including the medical records (R 25-240) and the Affirmation of Stephen M. Factor, M.D. (R 12-14); [CPLR § 3211\(a\)\(3\)](#) as the respondents do not possess the legal capacity to sue, as there can be no recovery based upon the wrongful death of a stillborn fetus; and [CPLR § 3211\(a\)\(7\)](#) as the plaintiffs' complaint fails to state a claim for which relief can be granted. (R 7-8). *3 Concurrent appellant Middletown cross-moved for summary judgment dismissing respondents' claims (R 254-255). Respondents opposed the appellants' motion ... and conclusory physician's affirmation which sought to characterize the twin fetuses as "briefly alive" for purposes of the instant action (R 280A - 280E). Appellant DiCostanzo replied with a further affirmation of Stephen M. Factor, M.D., which analyzed the respondents' expert's affirmation -- demonstrating that respondents' affirmation was conclusory - and set forth further corroborating analysis in

reply to the respondents' affirmation, establishing that the neonate twins were stillborn, and not born alive (R 292-300).

The court below rendered a decision and order dated September 17, 1999, denying respondents' motions. While the lower court acknowledged that there is no cause of action in New York to recover damages for wrongful death or personal injury on behalf of a stillborn infant (R 5), the court wrongly held that the issue of whether the twin neonates were stillborn was not established by Dr. Factor (R 5). The court apparently concedes that the second affirmation of Dr. Factor was not accorded full consideration in its decision (R 5).

...

The court below correctly acknowledged that if the respondents' twin fetuses were stillborn, the respondents' complaint must be dismissed as "No cause of action to recover damages for wrongful death or personal injury exists on behalf of a stillborn infant." [Broadnax v. Gonzalez, 251 A.D.2d 440, 441, 675 N.Y.S.2d 547 \(2d Dept. 1998\)](#). In New York State, an infant plaintiff has no right of action unless born alive. *LaBello* ?? N.Y.2d 701, [628 N.Y.S.2d 40, 651 N.E.2d 908 \(1995\)](#); [ritzker, 240 A.D.2d 529, 671 N.Y.S.2d 357 \(2d Dept. 1998\)](#). Compare [EPTL § 5-4.1](#).

Additionally, one New York Court, acknowledging that "[t]here is no reported case which defines stillborn, fetal death, or live birth for the purpose of maintaining a wrongful death action," [Kaniecki v. Yost, 166 Misc.2d 408, 411, 631 N.Y.S.2d 500, 502 \(Sup Erie 1995\)](#), applied various New York Court of Appeals decisions regarding said *5 definitions, and held that: ...it is clear that the Kaniecki baby was not born alive. There is no evidence that the child had any independent existence, independent circulation or independent respiration following full expulsion from the mother at 5:24 pm. While there may be evidence of life of the fetus during childbirth, only evidence of life after full expulsion will confer person status upon the fetus enabling the maintenance of a wrongful death cause of action. Under these facts, plaintiffs cannot maintain a wrongful death cause of action. Interestingly, had defendants been more successful in expelling the child prior to 5:24 pm, and if the child had lived, however briefly, before dying, the assertion of a wrongful death cause of action would be permitted. However, the birth effort exceeded the duration of the child's pulse through the umbilical cord. As a result, no wrongful death cause of action may be maintained. [Kaniecki, 166 Misc.2d at 412, 631 N.Y.S.2d at 502-503](#). The court erred, however, in not holding that the twin neonates were stillborn.

A stillborn infant, pursuant to Black's Law Dictionary, includes a child born in such an early stage of pregnancy as to be incapable of living, though not actually dead at the time of birth. Black's Law Dictionary, Sixth Edition, page 1414. This definition of stillborn is consistent with [Public Health Law § 4130\(1\)](#), which sets forth that in order for a birth to be characterized as a "live birth", after the complete expulsion from its mother, a fetus must breathe on its own or show any other evidence of life. [FN2]

Black's Law Dictionary defines a "stillborn child" as:

A child born dead or in such an early stage of pregnancy as to be incapable of living, though not actually dead at the time of birth. Black's Law Dictionary, Sixth Edition, page 1414.

The Public Health Law, consistent with Black's Law Dictionary's definition of stillborn, defines "live birth" as:

[T]he complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles... ([Public Health Law § 4130\(1\)](#).)

***6** The annexed Affirmations of Stephen M. Factor, M.D. (R 12-14, 292-300, which are based upon the relevant Mercy Community Hospital records (R 25-240, 301-302) and Dr. Factor's impressive medical knowledge, training, and experience, sets forth in exacting detail the medical basis for his opinion, to a reasonable degree of medical certainty -- and factually refuting the conclusory statements of respondents' physician's affirmation -- that the twin neonates were unable to breathe on their own, were incapable of living, and failed to show evidence of life (R 12-14, 292-296).

In the case at bar, the Affirmations of Stephen M. Factor, M.D. (R 12-14, 292-300) sets forth the medical basis, to a reasonable degree of medical certainty, that the April 23, 1999, "birth" of the twin neonates does not satisfy the definition of "live birth".

The affirmation of respondents' physician fails to address the issue of agonal reflex activity except for the conclusory statement that "a recorded heart beat for both infants cannot be characterized as merely agonal reflex respiratory activity." (R 280C). Moreover, this expert's affirmation seeks to have the court

rely strictly on an Apgar number scale, without consideration of the interpretation of that scale (R 280C).

Dr. Factor, on the other hand, explains the terms "agonal" (R 292-295), and "Apgar Score" (R 293), applies the facts of this action to those terms, and additionally *7 submits a supporting medical policy statement regarding the "Apgar Score" (R 297-300).

Accordingly, appellants have established that the twin fetuses were stillborn, and thus the respondents' action must be dismissed.

*

65 A.L.R.3d 413

American Law Reports ALR3d

Proof of live birth in prosecution for killing newborn child

Peter G. Guthrie, J.D.

...

Inasmuch as culpable homicide consists in the felonious killing of a human being,[\[FN4\]](#) in criminal prosecutions for the killing of an alleged newborn, particular problems of proof arise, often occasioned, one would surmise, by the lack of disinterested eyewitness testimony as to whether or not the alleged victim was stillborn or born alive and then killed. Since, as one court has expressed it,[\[FN5\]](#) one cannot kill something already dead, the universal rule appears to be that the state, as part of the corpus delicti, must convincingly prove that the alleged victim had been born alive.[\[FN6\]](#)

However, the concept of just what the term "life" connotes insofar as a newborn is concerned presents additional problems. While the courts in a relatively few jurisdictions express the view that "life" is present when a child has reached that stage of development where it is capable of living an independent life as a viable being, thus rendering those being born "live" for homicide purposes, [\[FN7\]](#) the traditional approach appears to be that "life" is not present until the child has been completely expelled from the mother's body and has attained a "separate and independent existence."[\[FN8\]](#) And although it is not always clear whether the courts are trying to explain just what such a "separate and independent existence" denotes physically, or whether they are setting forth elements of proof to be shown in addition to the showing of such existence, there is language expressed in several cases to the effect that "life" is further contingent upon a showing of independent circulation and/or respiration.[\[FN9\]](#) It is to be noted further that in the few

cases considering the question, there appears to be a decided split of opinion as to whether a newborn still attached to the mother by the umbilical cord may be said to possess "life" so as to be the subject of a homicide.[\[FN10\]](#)

....

Defendant was properly charged with murder based on death of infant based upon defendant's shooting of 28-week-pregnant mother after which infant-victim was delivered by emergency caesarean, was placed on ventilator due to underdevelopment of lungs, and died 36 hours later from condition common to premature infants. [People v Hall \(1987\) 134 Misc 2d 515, 511 NYS2d 532.](#)

Where state introduced proof that infant victim was dead and that death occurred under circumstances indicating criminal activity, state was not required to prove infant was born alive in order to establish corpus delicti. [Commonwealth v Meder \(1992\) 416 Pa Super 273, 611 A2d 213.](#)

In a prosecution for killing a newborn baby, the Commonwealth must establish the corpus delicti by proving not only that the baby died, but also that the child was born alive and had an independent and separate existence apart from its mother. [Aldridge v. Com., 44 Va. App. 618, 606 S.E.2d 539 \(2004\).](#)

...

Whether in an attempt to perhaps be more expositive of what a "separate and independent existence" connotes, or in an attempt to set forth other elements to be shown in addition to such existence, some courts, as evidenced by the following cases, have noted that as well as the showing of "separate and independent existence," a showing of independent circulation and/or respiration is to be made.[\[FN14\]](#)

Thus, in [Shedd v State \(1934\) 178 Ga 653, 173 SE 847](#), a physician's statement of opinion that a child breathed after it came into the world was said not to be an unqualified statement of opinion that the child had acquired an independent circulation and existence separate from its mother.

In [State v Winthrop \(1876\) 43 Iowa 519](#), it is said that where a child was born alive and the umbilical cord was not severed, independent circulation was not established and independent life was not possible.

In [Jackson v Commonwealth \(1936\) 265 Ky 295, 96 SW2d 1014](#), the court observed that in an infanticide case it was necessary for the state to prove

affirmatively not only that the child had breathed, because that might occur during birth, but also that it had had a complete and separate existence of its own after birth. The court noted particularly that being born meant that the whole body was brought into the world, and that it was not sufficient that the child breathed in the progress of birth.

In [People v Hayner \(1949\) 300 NY 171, 90 NE2d 23](#), it was stated that in an infanticide prosecution the state was bound to establish that the child had been born alive in the legal sense, that is, that it had been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of the mother's. The court noted that the legal test of live birth, possession by the child of a separate circulation, made irrelevant the question whether the child had breathed or not.

In *Commonwealth v O'Donohue* (1871, Pa) 8 Phila 623, 28 Phila Leg Int 350, it appeared that a post-mortem examination showed that the child was of full term and perfectly healthy, that a hydrostatic test proved that the lungs had been fully inflated showing that the child had made at least one full respiration and that death was caused by suffocation, and that the medical witnesses, who made the post-mortem examination, said that the inflation of the lungs was evidence that the child had had a medical existence, that is, it had breathed during or after birth. However, the medical witnesses were unable to say that the child had had a legal existence, that is, that it had been born in the world alive. The court held that it was necessary for the state to prove affirmatively not only that the child had breathed, since that might occur during birth, but also that it had had a complete and separate existence of its own after birth.

Having noted that within its murder statute, in order to become a "reasonable creature in being," a child must be born alive, and that it cannot be the subject of a homicide until it has an existence independent of its mother, the court in [Morgan v State \(1923\) 148 Tenn 417, 256 SW 433](#), observed that it had usually been said that the umbilical cord must have been severed, and an independent circulation established, and while ordinarily if the child had breathed, this would show independent life, yet this test was not infallible. Sometimes infants breathed before they were fully delivered, and sometimes they did not breathe for quite a perceptible period after they were delivered, the court continued, but generally if the respiration was established, that also established an independent circulation and independent existence.

Stating that independent circulation was proved by breathing but still it was absolutely necessary to prove that a child was completely expelled from its mother, and that after being thus born, it had an independent existence, that is, that the child breathed and its blood circulated independently of its mother, the court in [Wallace v State \(1881\) 10 Tex App 255](#), reversing a conviction of murder, held that nowhere in the facts was it shown that the violence used was

not inflicted after the head of the child was expelled and before a complete birth was established. The court observed that the law required that a person charged to have been killed must be in existence, living with an independent circulation, with all of the vital organs in operation separate from and independent of his mother, before he could be the subject of homicide, and that in the immediate case the evidence failed to establish the independent existence of the child at the time the violence was inflicted, if any. In passing, the court further noted that while the conditions of the lungs could never determine whether the child breathed before or after full and complete birth, nevertheless, independent circulation in its proper sense followed breathing, and that the umbilical cord need not be severed in order to establish a circulation independent of the placenta.

As is illustrated by the following cases, there does appear to be a difference of opinion as to whether, within the meaning of the laws of homicide, a newborn child can be said to have a "separate and independent existence" before the umbilical cord has been severed, even if the child has been expelled alive from its mother.

However, reversing a judgment of conviction of manslaughter of defendant physician charged with having produced the death of a child during childbirth, the court in [State v Winthrop \(1876\) 43 Iowa 519](#), found error in the trial court's instruction to the effect that if a child is fully delivered from the body of the mother while the afterbirth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or an independent circulation has been established, it is a human being on which the crime of murder may be perpetrated. Stating that it followed that where a child was born alive and the umbilical cord was not severed, and independent circulation had not been established, independent life was impossible, the court pointed out that the instruction told the jury that should it find independent life under such circumstances, the jury might find the killing of the child to be murder. Questioning whether a child could have an independent life, while its circulation was still dependent upon the mother, the court said that while the blood of the child circulated through the placenta, it was renovated through the lungs of the mother, and in such sense it breathed through the lungs of the mother and had no occasion during that period to breathe through its own lungs. However, the court continued, when the resource of its mother's lungs was denied it, then there arose the exigency of establishing independent respiration and independent circulation. Noting that a child which has been born but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources, the court stated that there was a radical difference between fetal life and the new life which succeeded upon the establishment of

respiration and independent circulation. Answering its own question as to why, if there was a possibility of independent life, the killing of such a child might not be murder, the court observed that there was no way of proving that such possibility existed if actual independence was never established, and that any verdict based upon such finding would be the result of conjecture.

Thus, in [Jackson v Commonwealth \(1936\) 265 Ky 295, 96 SW2d 1014](#), the court, after noting that it was incumbent upon the state in an infanticide prosecution to prove that the child had had a complete and separate existence of its own after birth, observed that if a child was fully brought forth from the body of its mother and was killed while still connected by the umbilical cord, it was murder.

And see in this connection [Morgan v State \(1923\) 148 Tenn 417, 256 SW 433](#), where the court, having observed that a newborn might not be the subject of a homicide until it had an independent existence from its mother, stated that it had usually been said that the umbilicus must have been severed and an independent circulation established for such independent existence to arise.

And see in this connection [Wallace v State \(1881\) 10 Tex App 255](#), where the court, after observing that in an infanticide prosecution it was necessary to prove that a child had an independent existence, that is, that the child breathed and its blood circulated independently of its mother, further noted that the umbilical cord need not be severed in order to establish a circulation independent of the placenta.

...

§ 5. Viable being

...

Rejecting traditional approaches as to when a newborn child is to be considered to possess "life,"^[FN15] the courts in the following cases have adopted the view that, at least for homicidal considerations, a child is alive when it has reached that stage of development where it is capable of living an independent life as a viable being, and thus, a child in the process of being born may be considered a "live" human being.

Likewise, the court in [Singleton v State \(1948\) 33 Ala App 536, 35 So 2d 375](#), stated that the desired and rational view as to the burden placed on the state in proving that a deceased child was born alive was reflected in *People v Chavez*, supra, wherein it was said that there was no sound reason why an infant should not be considered to be a human being when born or removed from the body of its mother, when it had reached that stage of development where it was capable of living an independent life as a separate being, and where in the natural course of events it would so live if given normal and reasonable care.

Adopting such a view, the court concluded that the state met the burden of proof cast upon it to establish that a day-old infant whose death was caused by its mother had been born alive.

The evidence was sufficient to support the implied finding of the jury that a child was born alive and became a human being within the meaning of the homicide statutes, held the court in [People v Chavez \(1947\) 77 Cal App 2d 621, 176 P2d 92](#), where, although the autopsy surgeon expressed his firm opinion that the child was born alive, he admitted that it was possible that the main factors on which he based his opinion, the inflation of the lungs and the evidence of heart action, could have resulted from the child's breathing after presentation of the head but before the birth was completed. Stating that it was a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense, the court said that there was not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and that normally the child, while still dependent upon its mother, for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life. The court noted that while before birth or removal a child is in a sense dependent upon its mother for life, there is another sense in which it has started an independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being. The court continued by saying that there was no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed, the court went on, and it should at least be considered a human being where it is a living baby, and where in the natural course of events a birth which is already started would naturally be successfully completed. While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being, because some part of the process of birth had not been fully completed. Turning to the immediate case in which a

judgment of manslaughter was affirmed, it appearing that the mother's illegitimate child bled to death following the mother's failure to tie the child's cord, the court said that sufficient evidence supported the finding that a live child was actually born and that it died because of the negligence of the defendant in failing to use reasonable care in protecting its life. A factual question was presented and the opinion of the autopsy physician was evidence which could be considered by the jury, the court went on. Stating that the physician's opinion was that the baby had been born alive and that it had breathed and had had heart action, the court noted that he gave good reason for that opinion, and while he admitted that there could be a possible doubt, his evidence justified the inference that there was no valid ground for a reasonable doubt.

...

Unborn child of defendant, whose blood alcohol concentration exceeded 0.30% prior to delivering child, who presented fetal alcohol effects, was not a "human being," for purposes of statute governing attempted first-degree intentional homicide and first-degree reckless injury. [W.S.A. 939.22\(16\), 940.01\(1\)\(a\), 940.23\(1\)\(a\). State v. Deborah J.Z., 228 Wis. 2d 468, 596 N.W.2d 490 \(Ct. App. 1999\).](#)

...

§ 7[a] Sufficiency of evidence of live birth--Held sufficient

Cases:

...

Eight-month-old fetus born with fluttering heart after automobile accident injured mother by separating placenta from uterine wall was born 'alive' so as to warrant intoxicated driver's conviction for reckless homicide. [People v Bolar \(1982\) 109 Ill App 3d 384, 64 Ill Dec 919, 440 NE2d 639.](#)

In prosecution for first-degree murder, detection of faint heartbeat for brief period was not substantial competent evidence to support jury determination that live birth had occurred, where there was expert testimony that viable fetus, delivered by cesarean section after mother was killed by gunshot, was stillborn and brain dead from anoxia at time of delivery. Thus, conviction for first-degree murder for death of fetus would be reversed since viable fetus is not human being as that term is used in first-degree murder statute. [State v Green \(1989\) 245 Kan 398, 781 P2d 678.](#)

...

* * *

CHAPTER 2 – INDIVIDUALIZING AND LOCATING PHYSICAL PERSONS

Introduction

In chapter 1, we had discussed the definition of personality and the issue as to when physical personality is said to begin. Such concept of personality can only be perceived within the context of time and space. With regard to time, we have already discussed the beginning point of personality and the issue pertaining to its end is yet to be discussed in Chapter 5.

This chapter will take our discussion further and will address the issues of particularizing persons by name, and locating them through residence and domicile. Students are required to read the notes and the readings included in this chapter and address the Review Questions and case problems. As stated in the introduction of the previous chapter, students are not expected to go through the supplementary reading ([pages 103 to 118](#)) but may read it for deeper knowledge.

Objectives:

At the end of this chapter students are expected to be able to:

- a) state the function of names of persons;
- b) explain the requirements of first name, patronymic and family name under the Civil Code;
- c) discuss the gap between the law and practice in the use of family name in Ethiopia;
- d) explain choice of names and forbidden names;
- e) contrast abuse of name and usurpation of name;
- f) discuss the designation of name in Europe's antiquity and middle ages;
- g) contrast the citizenship, domicile and residence of a physical person;
- h) contrast residence and sojourn ;
- i) determine the residence and domicile of a person under various circumstances;
- j) analyze case problems that involve the concepts and issues here-above.

1. Name

Names have the purpose of identifying individual physical persons. They are among the attributes of physical personality. The Constitution of the Federal Democratic Ethiopia considers name as the right of every child. Article 36/1(b) of the Constitution provides that “*Every child has the right to a name and nationality.*” The particular laws that deal with name of physical persons are Articles 32 to 46 and Articles 3358 to 3360 of the Civil Code.

a) Principle:

According to Article 32, every individual has a family name, one or more first names and a patronymic; and they are written in that order in administrative documents.

b) Current practice:

Family names indicate members of a common male-line descent, thereby reducing identity of names. However, family names haven't yet been introduced decades after the promulgation of the Civil Code. Certain laws are meant to induce prospective changes in custom. However, the role of law in social engineering requires pragmatism and synchrony with objective realities. The provisions of the Civil Code on family name haven't been able to alter the Ethiopian tradition of using first names followed by the father's first name (patronymic), a practice that is apparently susceptible to identity of names particularly in view of the current trend of population growth.

The attempt of the Civil Code to introduce family names in the Ethiopian context seems to have failed to take the Ethiopian reality into account. An entirely foreign element has been transplanted without regard to the Ethiopian reality. The introduction of family name was indeed ahead of its time in the 1960 s, but the increasingly growing problems in identity of names require mechanisms such as family names.

There can be certain unique names in our lineage that might not even have meanings, owing to words that are no more in use. Such names of our ancestors can be ideal family names. Despite the shortcomings of the Civil Code in its attempt to introduce an entirely alien concept of family names far ahead of its time, we now need to solve the apparent problems inherent in using first name, patronymic, grandfather's first name etc, because the list is bound to be longer in the decades to come.

Usage of family names was originally a Roman tradition and Ancient Greeks, for instance, used to be designated by a single name. In the Ethiopian context, the various traditions in the designation of names can be synthesized in the introduction of mechanisms that would reduce identity of names. Lack of efforts to publicize the concept of family name is apparent. And, the desire to attach one's first name to a child's name is indeed pervasive, although the name attached as patronymic inevitably disappears from most records after a single generation.

About a decade ago, the common practice was using the first name followed by patronymic; and in our relations with foreign institutions, the patronymic was usually considered as the person's family name (surname). Due to the growing identity of names, the grandfather's first name is currently being supplemented in certain administrative documents. As a result, many foreign institutions face difficulties in recording what they consider as surname.

c) Family name:

- A person born after the promulgation of the Civil Code of 1960 takes the father's family name. If the father doesn't have a family name, the child shall take his father's first name (patronymic) as his family name. (Articles 33/1, 36, 3359/2)
- A child whose father is unknown or a disowned child (33/2) shall have the family name of his mother. The same rule applies where paternity of the child is judicially declared (33/3).
- The manner as to how a person's family name is determined is stipulated in Articles 3358 to 3360, according to which the patronymic, i.e. - the first name of the father (or the patronymic of a senior male ascendant) is taken as family name.
- Family names of married women and adopted children are determined pursuant to Articles 40 and 41 respectively.

d) Choice of first names

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

It is only additional first names (Article 34/2) that are chosen by the mother, or, in her default, by the family of the mother.

e) *Forbidden first names* (Art. 38)

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

f) *Patronymic* (Article 36):

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

g) *Change of names:*

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

h) *Abuse of name*

The fulfillment of the cumulative elements embodied under Article 45 constitutes abuse of name. These elements are:

- using one's own name
- in the exercise of occupational or professional activity
- with the object or effect of causing prejudice
- by harmful confusion
- to the credit or reputation
- of a third person.

i) *Usurpation of name:*

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

* * *

Review Exercises

1. In application forms for US Diversity Visa (DV) the applicant is expected to fill in his grandfather's first name as "*surname*", his father's first name as "*middle name*" and his first name. Assuming that a certain person's first name and patronymic are the only names written in his BS degree, illustrate the difficulties such a person may face in the US with regard to his surname.
2. Ato Tekle loves art and is Maitre Artist Afework Tekle's fan. His son Mamush has a remarkable talent in painting since childhood, and Ato Tekle named his son after the renowned Ethiopian painter. Mamush was thus registered as Afework Tekle when he joined kindergarten. Ultimately, Afework joined the Fine Arts School, and a year after his graduation from Art school, the young Afework organized an art exhibition in concert with his friends. Can Maitre Artist Afework Tekle oppose the signature that reads "Afework Tekle" under every painting drawn by the young Afework?
3. Compare and contrast abuse of name and usurpation of name. Give examples.
4. Discuss potential solutions to the problems related with name. Consider policy issues such as gender in using the family name of the husband.
5. "Court decisions regarding change of names should apply only prospectively with regard to the issuance of documents. For example, a court had once ordered a University to offer a degree using the petitioner's new name. However, the new name was not in use when the petitioner graduated." This was a view forwarded by an academic during a discussion over the issue of change of names. Do you agree with the opinion? Why or why not?
6. Certain persons who go to various Middle Eastern countries change their first names and surnames. Should the issue of paternal filiation be raised to change the name of one's father or grandfather under such circumstances?
7. Can a person change his surname upon conversion to a new religion? Assuming the former heavy weight champion Casius Clay was an Ethiopian when he changed his name to Mohammed Ali, would you have (as a judge) accepted such change of name?
8. Write down customary usages of designating names e.g. Aba Megal, etc.

9. Discuss name as a constitutional right based on Article 36/1(b) of FDR Ethiopia's Constitution by virtue of which "Every child has the right to a name and nationality."
10. Article 24/2 of the 1966 International Covenant on Civil and Political Rights provides that, "Every child shall be registered immediately after birth and shall have a name." Discuss registration of birth in law and practice in the Ethiopian context.
11. Discuss names in the music industry (e.g. Johnny Raga, Teddy Afro ...), pen names, nom de guerre (clandestine names), nick names etc. ... State your opinion whether such names should be binding if they are used in documents?

* * *

Readings on name

Sir Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law* (Oxford, Clarendon Press, 1935), pp. 33, 34

Greater prominence is given in France than in England to the law relating to names.

Christian names (*prenoms*) are conferred by the fact of their insertion in the *acte de naissance*. ... A person's family name (*nom patronymique*) is, of course, in the ordinary case, that of his father; but an illegitimate child takes the (family) name of his mother, unless or until he is recognized by his father.

In strict law a woman does not change her name on marriage, and in a natural act or in a judgment a married couple would be designated, for example, as "M. Paul Dupont, et Mme Celestine Durand, (his wife)". It is not, however, considered improper, and it is the common practice, for a married woman so far to comply with social usage, as to sign with the name of her husband-Celestine Dupont. Since a married woman acquired no right to her husband's name, the courts in general felt no difficulty in enjoining the use of that name by a divorcee. Any doubts on the subject were set at rest by a law of 6 February 1893, modifying the C.C 290, and providing that '*par l'effet du divorce, chacun des epoux reprend l'usage de son nom*'.

A person cannot lawfully change his or her name, save by authority of a Presidential decree. The decision only becomes definitive when a year has elapsed from its publication in the '*Bulletin des Lois*' without any objection being filed before the *Conseil d'Etat*. Serious consideration is given to objections raised by persons already bearing the petitioner's proposed new name. In order to make practical use of his new name, the petitioner must, in reliance on the presidential authorization procure the alteration of the register of his birth.

Proceedings may also be taken before the courts to enjoin the wrongful adoption of a name. A question as to which the courts and the text-writers incline to differ is whether family names are or are not to be regarded as a form of property., the courts leaning to the affirmative, the authors to the negative. The doubt is chiefly of importance for its bearing on the question whether, to support an action for the unlawful use of his name, the plaintiff must prove special damage. If a name is property, then any unauthorized use of it is a trespass (*empietement*) and proof of damage is not necessary. But although the courts have generally used language implying that names are property, they

commonly fortify a decision for the plaintiff by finding that he has no interest which is obviously in danger of being prejudiced, The interest may be purely commercial, but may equally be one touching the prestige and consideration of the plaintiff personally, or of his family. The courts give protection more readily to an unusual than to a common name.

Excerpts on Family Name

Jacques Vanderlinden, *Commentaries upon the Ethiopian Civil Code: the Law of Physical Persons*, HSIU, 1969 (pp. 23, 26)

The (Ethiopian Civil) Code distinguishes between three kinds of names (family name, first name and patronymic and for each of them one has to consider Chapter 2 of Title I as well as the relevance of Articles 3358 to 3360 of the transitory provisions.

...

The family name is the one which is always mentioned first on all official documents concerning a person (Article 32). Whenever the word name is used without specification in Chapter 2 (with the exception of the title), it means *family name*. This clearly results from Articles 33, 39, 40, 41 and 42, where the word *name* is used alone and clearly refers to family name, while names other than the latter are always qualified as first name or patronymic. Consequently one can assume that family names alone are covered by Articles 44, 45 and 46 of the Code.

...

Characteristics of Family Name

The main function of the family name is to unite the family group under one common designation. Although this is not expressly mentioned in the Code, it results from a provision like Article 3360 which imposes the family name on all lineal descendants of a man once he has assumed it. It is the visible legal bond uniting all the members of the lineage. ...

A second character is that names are *extra commercium*. No contract having a family name as an object can be considered as valid under Ethiopian law (Article 40); thus one is not free to give, sell, hire or lend one's name. The only exception to that rule is trade names which are governed by special provisions under the Commercial Code. Thus Article 127 of the (Commercial) Code establishes that trade names are part of the property of traders and Articles 135 to 139 of the same regulate in more detail this question which is fundamental in the identification of commercial persons; but for a person not involved in commercial activities, the law forbids him to dispose of his name.

...

Case 2

File No 6705/98
Hamle 18th 1998 (July... 2006)

Addis Ababa City First Instance
Kirkos Sub-City Court

Judge: Lisanu Mariye

Applicant: L. Ketema
Respondent: Not present

The file has been examined and the following judgement is rendered.

Judgement

In a petition submitted to the Kirkos Subcity Court of Addis Ababa First Instance Court on Sene 29th 1998 (Eth. cal), the Petitioner has requested that her name Woizero L. Ketema be changed to the family name of her husband who is a foreign national. The reason for her petition for change of family name is that she has found it necessary to acquire her husband's family name in the country where the spouses live.

The ID card that the Petitioner has obtained from the Kebele of her place of residence has been submitted as evidence and proves that her name is Woizero L. Ketema. Moreover, the Petitioner has produced a Marriage Certificate that proves her marriage to Mr. K. Robinson.

The Court has examined the petition along the documentary evidence and the relevant legal provisions. Article 32/1 (of the Civil Code) provides that every person shall have a family name, one or more first names and a patronymic. Article 33/1 deals with family name. According to Article 42/1, the change of the family name of a person may be authorized, for good cause, by the court on the petition of such person. In the case at hand, the petitioner has requested to be designated by the family name of her husband in conformity with the custom of the country where the spouses live. The law does not hinder persons from choosing family names and the petition has duly been accepted by this court. ...

The Court has thus found that the reason submitted by the petitioner constitutes good cause and has decided that Woizero L. Ketema's name be changed to Woizero L. Robinson.

...

(Signature)

Review Question

Read Article 40/2 of the Civil Code, and write your opinion whether it was necessary for Woizero L. to go to Court to be designated by the name of her husband.

Case 3

Translation: Miss Elise G. Nalbandian

Decree File No. 775/98

22/10/98 Ethiopian Calendar (July 29 2006)

Addis Ababa City First Instance
Arada Sub-City Court

Judge: Tewodros Alamerew

Petitioner: Woizero B. Kassa

Respondent: Not present

After having examined the case, the following decision has been delivered.

Judgement

On 23 Tirr 1998, the applicant presented a petition regarding her name as she is called both ... (as derived from her mother's name) and B. Kassa (as derived from her father's name). The petitioner therefore requested that she no longer be called by the name ... and further requested that she be called only by the name B. Kassa. In support of the request, witnesses have given their testimony to the Court. Moreover, *Kebele* Identification Card was presented.

The petitioner's witnesses have testified that the applicant's father is Ato Kassa Z.

After carefully examining the request, testimony of the witnesses and the applicable law, the Court has found that the petitioner no longer wants to be called by the name derived from her mother's name. Although this is sufficient reason to change one's family name, the petition has to be supported by evidence. This means that the petitioner has to present evidence that she is actually called by the name of Woizero M.. However, the Court finds that the petitioner has not presented any such evidence and in fact has only presented documents which already identify her as Woizero B. Kassa. Therefore, even though the petitioner is requesting that she no longer be referred to as B. M., she has not presented any evidence that she is being called by this name. As it

is not possible to change a name that is not in use, the Court has rejected the petitioner's request in accordance with Article 42 of the Civil Code.

Order

A copy of the judgement is to be made available as evidence to the petitioner.
The case is closed.

Signature of Judge

Case 4

Translation: Miss Elise G. Nalbandian

Decree File No. 586/98

Tahas 26th 1998 Eth. Cal. (January ... 2006)

Addis Ababa City First Instance
Arada Sub-City Court

Judge: Tewodros Alamerrew
Petitioner: W/rt N. Tekle
Respondent: Not present

After having examined the case, the following decision has been rendered.

Judgement

On 10 Tahasas 1998, the applicant presented a petition stating that the names of her elder sister Woizero A. Tekle and that of her mother Woizero Y. Dejene have been in use as her mother's name. The petitioner requested that the Court decide in her favour and give a ruling so that she would only use the name derived from her mother's name. In deliberating this case, the Court has considered the request in accordance with Article 32 of the Civil Code, according to which a person may have one or many first names and the father's name (patronymic), while as per Article 35 of the Civil Code a person may only have one family name.

A petitioner is required to present reasons that justify the request to change ones' family (or father's) name according to Article 42 of the Civil Code. However, first name can be changed as per Article 43 of the Civil Code. The Court may only consider a request concerning change of name insofar as the name being changed is the individual's commonly used first name or the family/father's name. It follows therefore that changing of a mother's name is

outside the powers of the Court as a mother's name is not used as part of an individuals' commonly used full name. Furthermore, a mother's name is legally recorded in the Records of Birth as per Article 99/d of the Civil Code and as the mother's name is also recorded on the Birth Certificate and all other legal documents can be amended using this certificate. However, this record and certificate may not be amended by the Court and the Court has thus rejected the petition.

...

Signature of Judge

* *

Review Question

Write your opinion regarding the judgements on cases 2 and 3.

Case 5

Translation: Fasil Abebe

File No. 576/99

Tir 14th 1999 Eth. Cal. (January 22, 2007)

Addis Ababa City First Instance
Kiros Sub-City Court

Judge: Dereje Mamo

Petitioner: W/rt Saba Teshome GebreSelassie

Judgement

In a petition dated Hedar 20, 1999 Eth. Cal. (1 December, 2006), the petitioner has requested the Court to decide that her present name Saba Teshome G/Selassie be changed to Saba Firdawek Sinafikew.

Witnesses called by the Petitioner have testified that the petitioner has upto the present time been known by the name of the person responsible for her upbringing, namely, Ato Teshome G/Selassie. The witnesses further stated that the name of the petitioner's real father is Ato Firdawek Sinafikew.

The Court has examined the petition in the light of relevant legal provisions. Article 32(1) of the Civil Code of Ethiopia stipulates that a person shall have a family name and one or more first names. And according to Article 33(1) of the Code, the family name of a person shall be the family name of his father. In the

present state of custom in Ethiopia, there is as yet no practice of using a family name. For this reason, the family name shall be the patronymic i.e. the father's first name by virtue of Article 3359(2) of the Civil Code.

The petitioner is requesting the change of a patronymic. The petition has thus the effect of requesting a change of the family name. According to Article 42(1) of the Civil Code, a change of the family name can be authorized for good cause. The petitioner has requested a change of father's name because the name that she is using is the first name of the man who brought her up, but not that of her father. The court has found that the reason presented by the petitioner can be considered as good cause under the provisions of the Civil Code and it has decided that the petitioner Saba Teshome GebreSelassie shall henceforth be named Saba Firdawok Sinafekew.

Signature of Judge

* *

Review Question: Contrast cases 2, 4 and 5. State your critical comments, if any.

* *

O'Donovan's Problems on Names

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 9 to 20

(NB- Thirty-Five years have been added to the years stated in all hypothetical cases except Problem 11)

Problem 9

- a) Ato Joseph Daniel and Woizero Almaz Bekele have a son born to them on October 5th, 1995. They decide to call him Kebede. What will his full name be in accordance with the Civil Code?
- b) When Kebede marries, he gives the name Solomon to his son. What will Solomon's full name be?

Problem 10

Woizerit Ababa Tadesse gave birth to a son. Under Articles 758 to 761 of the Civil Code Ato Ayele Haile is declared to be the father. Woizerit Ababa decides to call her child Michael.

- a) What will Michael's full name be if the Civil Code Articles on Names are applied?
- a) Is there any way in which Michael can take the name of his father?

Problem 11

Ato Terrefe Adera was born on Megabit 16th, 1950. He now decides that he wishes to conform to the Code and assume a family name. He comes to you asking which family name he should take. He gives you the following information:

His father Ato Adera Seifu is still alive and so is his mother Woizero Ayda Yilma. His grandfather Ato Seifu Mariam died on November 22nd, 1961, and his grandmother Woizero Rabia Girma is still alive. His great grandfather Ato Mariam Tsahafe died in 1958 and his great grandmother died before then.

- a) Which is his family name?
- b) Ato Terrefe's younger brother Elias was born on Pagumen 2, 1955. What is his full name?

Problem 12

The Civil Code gives a variety of different circumstances in which a 'name' can be changed.

What are these? Give a practical example of each.

What is meant by 'name' in this context?

Problem 13

Ato Solomon Tadesse and Woizero Rabia Woldu have a son born to them on the 23 September 2004. The baby is not very strong and is left at the hospital when the mother goes home. Both parents are subsequently killed in a car crash.

The question of naming the child then arises. Both parents of Ato Solomon Tadesse are dead and he was an only child. His father's brother is also dead but his two children are alive and are themselves parents of two daughters. The maternal grandfather of Ato Solomon Tadesse is also dead but his son is alive, (i.e. the brother of Ato Solomon's mother).

Who has the right to name the child?

Problem 14

Ato Tafara Mengistu and Woizero Amarech Jembere became parents to a baby girl on September 7, 1969. They decided to call the baby Mariam Tafara. In the course of his studies in law at the University, Ato Tafara learns that the baby ought to be given a family name. He wished to know if he has broken the law and if so what will happen to him and to his wife.

- a) Advise Ato Tafara
- b) If Ato Tafara should now decide to give the baby a name in accordance with the Civil Code, what would that name be?

Problem 15

Woizerit Alem gave birth to a baby on November 30, 2004. She refused to tell her family who the father of the baby is. She, herself, is illegitimate and has no patronymic. She decides to call the baby Tesfaye.

What will Tesfaye's full name be under the Code?

If Tesfaye wished to assume a name as his family name, may he do so?

Problem 16

Ato Joseph Bekele and Woizero Almaz Daniel became the parent of twins a few months ago. They called the boy Joseph and the girl Josepha.

What will be the full name of:

- a) Joseph?
- b) Josepha?

Have the parents broken the law?

Problem 17

Woizero Bizunesh Tessema (an elderly rich lady of fifty-five) lives by herself since the death of her parents. One night last month she found a baby girl on the doorstep of the house. She has adopted the baby and called her Yeshi.

What will Yeshi's full name be?

Problem 18

Ato Afework Tekle is a senior official in the Ethiopian Foreign Ministry. His hobby is painting. His paintings have so much success among his friends that he decides to hold an exhibition at his house. The exhibition is a great success and he is acclaimed as the founder of a new Ethiopian School of abstract art.

However, he receives a letter from Ato Afework Tekle the famous painter, requesting that he comply with Art. 45 of the Civil Code on the grounds that harmful confusion has been caused. The senior official replies that since his style is so different from that of the painter no confusion is possible. In any case, the painter may benefit from his success.

The senior official then comes to you asking what further steps the painter (i.e. Ato Afework Tekle, the famous painter) may take to prevent him from using his own name.

- a) Write a memorandum on the possible legal action to be taken by the painter.
- b) Present arguments for both parties.

Problem 19

Woizero Membere Hailu is married to Ato Tekle Haile. Ato Tekle says that Woizero Membere must take the name Haile. Woizero Membere does not want to do so. Advise Woizero Membere.

Problem 20

Ato Hailu Ayalew is a famous Ethiopian Marathon runner. He has many medals in Olympics and two years ago, at the age of forty, he decided to retire. This decision was announced in the newspapers and was accompanied by a photograph of Ato Hailu. On that day, Ato Hailu received a telephone call from Robin Banks, an American sports journalist suggesting a meeting for a business conversation. According to Hailu the conversation was as follows:

Mr. Banks: "You may have heard that I have just started a sports cloths factory I would like you to come into the business as an advisor and to lend your name to the enterprise. Your salary will be (Birr 5000) a month. Of course you must not lend your name to any other business. Ato Hailu agreed and the business, both factory and three (outlet) shops became known as the "Hailu Ayalew Marathon Sport Goods."

For some months the business went well. Sweat shirts stamped with a picture of Ato Hailu and bearing the legend "Hailu Ayalew Marathon Sports Goods" were sold all over town. However, the other sports goods have not sold at all. Mr. Banks informed Ato Hailu six months ago that he will have to take a salary cut of (Birr 2500) and that from henceforth the business will be limited to the production of sweat shirts.

Ato Hailu is very unhappy about the cut in his salary. ... He has been approached by Mr. Millions, another American business man, to lend his name to a shoe factory. Mr. Millions has offered a salary of (Birr 6000) a month on condition that Ato Hailu remove his name from the sport business.

Advise Ato Hailu on the following points;

- a) Whether he can prevent Mr. Banks from using his name and portrait for business purposes.
- b) Whether he can recover his full salary for six months.
- c) What will become of the sweat shirts now in stock?
- d) Whether he can make a new contract with Mr. Millions.

* * *

Planiol on Names

M. Planiol, *Treatises on Civil law*, Volume I, Part I (2nd Part), Louisiana State Law Institute, 1959, pp. 252 - 266

1. Historical Survey

In antiquity

Name, among primitive peoples, is something single and individual. Each person has but one name and does not transmit it to his descendants. This usage survived for a long time among some peoples, principally among the Greeks and Hebrews. The Romans, on the contrary, had a well organized system of names. ... Its elements were the *nomen* or *gentilitium*, borne by all the members of the family (*gens*) and the *praenomen* or "first name," personal to each individual. As there were not many masculine "first names," the need was felt to add a third element, the *cognomen*, where the choice was much wider. This practice had a double advantage. It avoided all confusion, and brought out, by the simple announcement of the name, the filiation of the individual. Feminine "first names" not being limited in number, the names of women were composed of but two elements. The *cognomen* was missing.

Personal at the outset, the *cognomen* in time became hereditary and served to identify the different branches of the same *gens*. The triple name of men was, moreover, borne only in the nobility and by the first families of towns possessing the right of Roman citizenship. Persons of humble condition had a single name or, at most, a name made up of two elements.

Single name during the middle ages

The Roman system was introduced into Gaul during the imperial domination. The usage of one name only, however, reappeared there after the Frankish conquest and survived for a long time. The first change discernible in France during the first half of the Middle Ages is the slow disappearance of barbarian names which gave way to names of saints of the Christian calendar.

Reappearance of double names

It was, nevertheless, necessary to avoid confusion between persons bearing the same name. Two different systems were followed. The older appears to have been that of surnames as Pepin the old, Robert the Strong, Hugh Capet, William

the Two-headed. At other times, to the name of the person was added that of his father, the later being put into the genitive. Names of this kind, such as Joannes Rolandi, Petrus Jacobi, are found until well into the fourteenth century.

Reintroduction of the Family Name

Names having thus become double, it required but a step to make one of them hereditary, to re-establish the old Roman distinction between the *nomen* (name of the family) and the *praenomen* (the individual name). The hereditary character of names began again in the twelfth century. Most of these new names are sobriquets taken: (a) from occupations (Lefèvre, Charron, Cordier, Molinier, Tisserand); (b) from physical or moral attributes (Lefort, Gros, Lenain, Camus, Leborgne, Leroux, Legris); (c) from countries of origin (Lenormand, Picard, Dumaine, Breton, Langlois, Lallemand); (d) from places of habitation (Dumont, Dupuy, Dupont, Lacaze, Grandmasion); (e) from functions (Labbé, Sergent, Prévot, Le Sénéchal, Bailly, Chapelain) or from a thousand other circumstances. Many were purely fantastic (Lelièvre, Leboeuf, Mouton, Papillon, Persil, Olivier, Rameau). Almost all nobles bore the name of their seignory: Jacques de Bourbon, Simon de Monfort, Jean D'Armagnac. Finally, the familiar habit of calling a person by his "first name" resulted in many "first names" becoming the names of families.

Old Law

Names remained for a long time outside the domain of the law. Their status was that of a mere non-regulated usage. Changes of name were frequent, principally among persons of humble birth who had grown wealthy and desired to wipe out all trace of their origin. As fiefs were generally in the hands of the nobles and as they bore the names of those estates, the procedure was an obvious one. It was to buy landed property and to substitute its name for theirs. An ordinance handed down by Henry II at Amboise, March 26, 1555, prohibited all persons from changing their name without having obtained letters from the King. It enacted a penalty or a fine of a thousand pounds and punishment for forgery. The same prohibition was repeated by Art. 211 of the Ordinance of 1628, called the Code Michaud. But it was no more possible under the Old Regime than it is today to safeguard the fixity of a name against the machinations of the vain.

Present day elements of the name

The constituent elements of the legal designation of persons are at present but two in number. They are the name, properly so called, or the patronymic name, and the given names. But it is also necessary to say a few words about

sobriquets, pseudonyms, titles of nobility and the use of the preposition “de” meaning “of,” before the patronymic name.

* *

2. Patronymic Names

Definition

A patronymic name is one which does not belong exclusively to a given person. It is common to all the members of the family who descend through males from the same author. This is the hereditary elements of the name. It is the element which shows the affiliation. It is also called the patronymic name or the family name. It corresponds to the Roman *gentilitium*.

The family name was definitively fixed by the decree of Frictidor 6 Year II which forbids changes of name. In order to determine the name of a family in case of doubt, it is therefore, necessary to go back in a direct line and ascertain the exact form of the name in the oldest acts. ...

A. Determination of the names of persons

... Legitimate children take the name of their father. Such is the usage. Article 57 Civil Code refers tacitly to it when it ordains that there be entered to acts of birth only the ‘given’ names conferred upon a child. The drafters of the Code assumed that there could be no question about the family name (that the child) should bear. ...

Since the enactment of the law of July 2, 1907, amending Article 383, the natural child takes the name of the parent who acknowledges it first. ... If both parents acknowledge it at the same time, it takes the name of the father. ... It is, indeed, logical that they take the name of their father or of their mother, according to the ordinary rules. ...

B. Change of name

Voluntary changes

A person may not change his name at will. All alternations of name, either in its composition or in its spelling, is forbidden. Changes of names irregularly made are nevertheless of frequent occurrence. There is no direct sanction to prevent this. Art. 257, Penal Code, amended in 1858, inflicts a fine solely upon those who, in changing their name, seek to assume an honorific distinction.

The courts inflict the penalties applicable to forgeries upon those who sign a name other than their own, but all the elements of forgery are seldom found in these matters. The foregoing sanctions are therefore insufficient. The defect of the present system lies in the facile way of giving a name to a child which really does not belong to its parents. This name, once entered into the registers of civil status, becomes its lawful name. It can only be deprived of this name by a rectification for which nobody ever applies. By a few lines an employee of the mayoralty, who is not always able to test the accuracy of what he is told, transforms the product of a petty trickery into an untraceable title.

Changes by Decree

The change of a regular name should be made, in principle, by administrative decision. The procedure to be followed is governed by Title II of the law of 11 Germinal Year XI. The petition, setting forth the reasons upon which it is based, should be addressed to the Government which renders its decision "in the forms prescribed for regulations affecting public administration," that is to say after obtaining the opinion of the council of state. If the change be authorized, it cannot become executory until one year after the insertion of the decree in the *Bulletin des lois* (Art.6). During this delay third parties may present a petition to the government asking for permission to explain their reasons for opposing the application. The decree may, upon their request, be recalled. After the expiration of the delay of a year, it becomes unattackable.

The effect of the decree is extended to the minor children. Does it apply to the major children or must they petition for a special decree? Upon this point there is disagreement between the adjudicated cases and the rulings of the Council of State. ...

Changes resulting from other Acts

The modification of a name is sometimes the consequence of another act. It then takes place without decree. It is, nevertheless, regular because it has a legal cause. The law of Year XI refers to some of the causes which produce this result when it speaks, in Article 9, of questions of "status" involving a change of name ... Such causes cover researches of paternity and of maternity undertaken for the purpose of establishing the true filiations of a person. Upon their outcome will depend whether or not its name will be changed. The same effect is produced independently of any action at law by the acknowledgment of a natural child, which gives it, at one and the same time, both a filiation and a name.

In all these cases, the change assumes that the name previously borne by the person was not really its name. Judicial research or a voluntary recognition discovers for it its true name, derived from its veritable filiation. There is thus a rectification rather than a change of name.

Adoption

Adoption on the other hand involves a real change. It confers the name of the adopting person upon the person adopted, who adds it to his own, and as a consequence bears a double name (Art. 351, Sec. 1). However, if the adopted person is a natural child not recognized, and who as a consequence bears only a fanciful name, it is permissible, in the act of adoption, to confer on him the family name of the adopting person, and to suppress completely the name given to him in his birth certificate (Art. 351, Sec. 2).

C. Name of woman after marriage

Preservation of the wife's patronymic name

Contrary to the general opinion, marriage does not cause the wife to acquire the name of her husband. Nothing in the law assumes that marriage entails the change of her name, as it does of her nationality. There is, moreover, no reason why it should have this effect, because a name indicates descent. A married woman has, therefore, no name other than that of her family, i.e. her maiden name received from her father. It is by it that she should be designated in civil and judicial acts which concern her. And, in practice, most notaries and other draftsmen of acts observe this rule. But her name should be followed by mention of her marriage and by the name of her husband.

Double consequence

Two consequences flow from the fact that the wife does not acquire that name of her husband and preserves her own. These consequences are; (first), if her husband disavows his wife's child the disavowed child can bear only the patronymic name of its mother, and (secondly), if the wife adopts a child and the husband does not also adopt it, it is the name of the wife and not that of the husband which the adopted child will add to its name (new Art. 351). (See, in a contrary sense, Haute Garonne (Saint Gaudens) Dec. 15, 1926, *La Loi*, March 2, 1927, note by Ed. Lévy). In these two cases, the child was held to bear, on the contrary, the name of the husband, if his name had become that of the wife through marriage.

The Wife's right to use her husband's name

A universal right exists to designate a married woman by her husband's name. This usage may be held to have been recognized by the law of February 6, 1893. ... This does not contradict what has just been said. The wife preserves her patronymic name but she has the right to use her husband's name in all acts of her civil and even of her commercial life. In practice, she often even refers to herself by the "given name" of her husband.

Another usage

The wife's name is at times added to that of the husband. A double name is thus evolved which is borne by the husband as well as by the wife. Madame Moreau-Durand is thus a daughter of M. Durand married to M. Moreau. It goes without saying that this double name is not transmissible to the children. They merely take the name of their father; otherwise, in a few generations, names of interminable length would spring into being. This usage escaped for a time the law-maker's attention. It was mentioned in the law of February 6, 1893, which amended Arts. 299 and 311. ...

D. Nature of the name: Question of ownership

Error of the common doctrine

Is a name a proprietary right? The cases recognize that the patronymic name is the property of the family which bears it (Cass., 16 March 1841, D. 41. 1. 210, S. 41. 1. 532; Cass. Civ., 25 October 1911, D. 1912. 1. 208, S. 1912. 1. 95). Sometimes an attempt has been made to put this idea into a rule of law, but without success; and they never will succeed, for the doctrine of the ownership of names is doubly false: it is so both from the theoretical and the historical point of view.

The right of ownership is the exclusive attribution of a thing to a person. The existence of this right assumes that the thing to which it applies cannot belong, at the same time, to several persons and serve each of them in its entirety. This obtains in the case of most material things. The exclusive enjoyment of them by different persons is the essential condition of their proper utilization. But such is not the case in respect of immaterial things and especially of names. Two persons, and even a greater number, may bear at the same time the same name and each of them draw from it all the advantages and comforts which may be attached to it. The proof that such a thing is possible is that it is so. The same names are met with everywhere, given to persons who have nothing in common. Without doubt, it would be preferable to have enough names to

avoid these repetitions. Languages, however, are not rich enough to furnish such a nomenclature. The ordinary names are not at all numerous. The variable forms of their spelling create a mistaken idea about their real number.

The error is equally great from an historical point of view. The origin of the names of persons clashes inevitably with the idea of property rights. All names have been drawn from the common source of the language and from history. They are the names of characteristics, of occupations, or of nationalities, or the names of a pious or celebrated personage which are bestowed upon a child in order to give it a patron or a model. A name is not an appropriable thing.

The veritable nature of names

A name would moreover be an extraordinary kind of property. It may be for him who bears it more of an obligation than a right. Those who contend that there is a property right in names often reproach their opponents that the latter destroy without asserting what it is. It is easy to answer with criticism. The name is an institution of civil police; it is the obligatory form of the designation of persons. It, however, no more constitutes a subject matter than do the numbers, 1, 2, 3, etc. It is not alienable. The law does not put it at the disposal of the person that bears it. It has not been established in the interest of the person who bears it but of the common weal.

Its transmissible nature by heredity does not prove any better than it is a subject matter of ownership. It has been sometimes said that private persons make a proper use of their names in transmitting it to their descendants. Their reasoning is based upon an error. The hereditary transmission of names is not the work of the will of the father. It is the law which, in order to give general publicity to the fact of filiation, exacts that it be shown by the identity of name. And this is done without any reference to ownership.

Historical origin of the error

It was the concept of the feudal name, that is to say of the name of a landed estate borne by a person, which introduced into French law the theory of the ownership of a name. This manner of designating people according to the seignories owned by them was inevitably bound to bring about the error of confusing the name and the property. When a man took the name of a landed estate which was not his property, he usurped, at least outwardly, the seignories of another. But if the name of a landed estate borne by him who was its owner could thus preserve for him an essential of ownership, how can the

same deduction be understood to apply to such purely personal designations as Charpentier, Dubois, Langlois or Legros?

Interest of the Question

The interest referred to reduces itself to this: If a name is property, it is possible for the person who bears it to have others forced to respect his ownership without being called upon to prove that damages have been caused by usurpation of it. Such is, indeed, the specific nature of ownership. Its enjoyment is necessarily exclusive and the sole fact of the possession of the name by another, constitutes an injury which may be redressed by an appeal to the courts. The cases have not drawn back before such an extreme consequence. This authorizes him who legitimately bears a name to oppose others taking it, without exacting of the plaintiff that he produce proof of any interest whatsoever (Bordeaux, June 4, 1862, S. 63. 2. 6; Paris, Dec. 4, 1863, D. 64. 2. 12, L. 66.1. 435; Paris, Nov. 14, 1925, 27 July 1927 and Nov. 8, 1927, S. 1929. 2. 11; June 20, 1933, S. 1933, 2. 248). If, on the contrary, a name were not the subject matter of a veritable ownership, the plaintiff could not successfully prosecute his case except upon proving that damage had been suffered by him as the result of troublesome confusion.

This is the line followed by the Council of State. It refuses to sanction opposition to decrees authorizing the change of names, except when the opponents produce proof of a serious interest. (Council of State, Aug. 6, 1861, D. 62. 3. 77, S. 62. 2. 351; July 16, 1880, D. 81. 3. 74; Dec. 4, 1896, D. 98. 3. 35; May 24, 1901, D. 1902. 3. 99). Some judicial decisions also assume the existence of damage (Riom, Jan. 2, 1865, D. 65. 2. 17, S. 65. 2. 7; Rennes, April 29, 1880, D. 80. 1. 198; Trib. de la Seine, Feb. 15, 1882, *Gazette des Tribunaux*, Feb. 16, 1882; Trib. Civ. De la Seine, Aug. 1. 1903, D. 1904, 2.4: Cass. Civ., March 6, 1923, D. 1923, 1. 81, note by M. Savatier; Cass. Req., April 14, 1934, D. H. 1934, 235, reasons for judgment). It is, moreover, worthy of note that most claims are made not about patronymic names, properly so called, but about the name of seignories still held by old noble families. ...

* *

3. Given names

Their utility

Given names form the individual element of a name. They serve to distinguish from one another the different members of the same family. The French *prénom* (or given name) differs from its Latin equivalent, the *praenomen*, and admits of

plurality of names. This plurality also helps to avoid confusions, principally in families that take kindly to certain "given names." But it also has its disadvantages. Care should be taken to write them in acts exactly in the order in which they figure in the acts of birth, if it be desired to avoid corrections, which are sometimes difficult.

Plurality of names is not obligatory. The law of Germinal speaks of given names in the plural, because plurality of "given names" is the general practice. It is, however, not rare for a person to have but one given name.

The given name, together with the family name, individualizes a person. The forgery of a given name may be punished penally just as that of a patronymic (Cass. Crim., Feb. 11, 1927; *La Loi*, Nov. 20, 1927).

By Whom and When They Are Given

Given names are conferred by the father, or in his absence, by the person having the right to name the child, the surviving mother, the natural mother, the administrative authorities of the hospital. Names are conferred upon a child at the time of drawing up its act of birth. Otherwise, this formality is carried out at church, at baptism. It is for this reason that given names are often called baptismal names.

It has been held that the courts may order the addition of a given name to an act of birth when it was ordinarily borne by the interested person and is indispensable for identification (Trib. Civ., Valence Sept. 30, 1930, *Gaz. Palais*, May 4, 1930).

Choice of Given Names

Their choice is not entirely free. The law of Germinal 11, Year XI ordains that they be chosen from "the different calendars in use or from the known names of celebrated/persons of ancient history." (Title 1, Art. 1). The list of names of persons is thus sufficiently long. But, in practice, difficulties sometimes arise as to whether the "celebrated person" is sufficiently known or of a date sufficiently ancient to permit of his name being used as a given name. A few years ago, an officer of the Paris Civil Status refused to receive as the given name of a child, the names of *Lucifer-Blanqui-Vercingetorix*. *Blanqui*, it is true, is not known to ancient history, but *Vercingetorix* certainly fulfills all the desired conditions. And, as for *Lucifer*, it is just as admissible as *Gabriel*, *Raphael* or *Micheal*, which are, as it is, names of angels. The greatest fault to be found with these names of rebels and vanquished soldiers is that they would be hard to

bear. The officer of the Paris Civil Status certainly did the child a favor when he saved it from this burden. ...

* * *

Review Questions

1. Contrast the usage of the term '*patronymic*' under the Civil Code and French law.
2. State the evolution undergone from the usage of single names to double names and then to family names in European legal systems, and discuss the short-term and long-term prospects of usage of family names in Ethiopia in accordance with our Civil Code provisions.

* * *

2. Residence and Domicile

In addition to identifying persons by name, persons should also be individually located. *Citizenship*, *domicile* and *residence* identify the location of persons for the purpose of legal transactions.

Citizenship denotes the moral, social and political tie of a person to a State. The State is an entity with an international personality (i.e. - recognition as a result of having defined territory, a relatively stable population, government and sovereignty). Persons owe allegiance to the State, which in return protects their rights within the framework of peace, order, freedom, social harmony and sustained development.

Domicile defines a person's legal tie to a place that has its systems of law. A person can have only one domicile at a time. New domicile is acquired where a person establishes his residence in a new country with the intention to live there (*animus manendi*). Such a person may acquire new domicile without changing his citizenship. A person may be an Ethiopian or a foreigner with regard to nationality or citizenship, and can have Addis Ababa as his domicile.

Residence is more specific and links a person to the particular place where he normally resides. Articles 174 to 191 deal with residence and domicile.

2.1- Residence

a) ***Definition***

“*The residence of a person is the place where he normally resides*” (Article 174). The French version uses the word “habitually” instead of “normally; and the Amharic version that reads “ሰጠው የሚኖርበት ሥፍራ ነው” is apparently a mistranslation.

b) ***Rationale***

The determination of residence is essential for the purposes of marriage (597 CC., Art. 22 of the Revised Family Code), successions (826), contracts (1755/2) and summons (Art.106 of the Civil Procedure Code). It is also essential during elections, for taxation and other purposes.

c) Residence –versus- mere sojourn

Residence is different from a mere sojourn in a certain place for some days or weeks. Thus mere sojourn in a place doesn't constitute residence (175/1). Yet, residence is acquired if a person's sojourn (ጊዜያዊ ቆይታ) is to last or actually lasts for the period stated under Article 175. If a person:

- *intends to stay* at a place (i.e.- at a sojourn) for more than three months, or,
- *actually stays* in such sojourn for more than three months without a prior intention of staying that long, he acquires residence (175/2) in such place.

It should be noted that a sojourn which is intended to last for more than three months is considered as residence from the moment the person starts living in the sojourn provided that he intends to stay there beyond three months.

Illustration:

A person has a villa at the seaside and goes there regularly during his vacation, for a month or so. Such place could be considered a residence for the period, while this would not be true if each period of vacation was spent in a villa rented in a different place.

Vanderlinden, p.34

d) Principal and secondary residence

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

e) Stipulated residence

Residence may be stipulated for the purpose of a specific relationship, business or activity (181). Agreement of the person in whose favour the stipulation is made is mandatory (182).

f) Residence determined by law

Persons without proved residence:

“The place where such person is shall be deemed to be his residence” (176) because a person has to have at least one residence.

Married couple, minors and judicially interdicted persons:

Married couple shall live together in their conjugal residence (Article 640/1 of the Civil Code and Articles 53 and 54 of the Revised Family Code). In addition

to the conjugal residence, a married woman may have her own residence (178/1). Minors and interdicted persons may have residence of their own other than the one (178/2) determined by the guardian for the minor (265) or the interdicted person (Art.362).

Public officials and traders

The place where a public official exercises his functions is considered as his residence (179), and the place where a person carries on trade shall be deemed to be the residence of the trader (180).

g) Special rules of residence

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

2.2- Domicile

a) Definition

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

b) Rationale

The issue of domicile arises when conflict of laws require the determination of the legal system that must be applicable.

c) Unity of domicile:

Unlike residence, one can’t have more than one domicile. A person can have only one domicile at a time (186). Where a person’s place of work differs from the place where he has his family and social life, the latter shall be deemed to be his domicile (185).

d) Change of domicile

The *locality* of a person's previous domicile shall be retained until he establishes a domicile in another place (187).

N.B. The term "locality" in Article 187 implies a wider concept than a specific residence at a particular "place".

e) Domicile determined by law

- Persons whose last domicile is unknown (art. 188) shall be deemed to have domicile at their:
 - normal residence; or,
 - in default of normal residence at their ordinary residence; or,
 - in default of residence, where a person is shall be deemed to be the place of domicile.
- Married couple (189) shall have the same domicile.
- A minor who is not emancipated (190) shall have the domicile of his guardian.
- The place where the interdicted person was at the time of his interdiction (191) shall be considered as his domicile.

* * *

Review Exercises

1. A businessman has rented a villa in Awassa where he casually stays for a day or two whenever he feels like recreating. Is it his residence?
2. Ato "A" donated most of his property to a welfare foundation for the homeless, and became a monk. The only property left is his villa, and the two houses where his two adult sons live in. His wife had died a year ago. His sons, aged 30 and 35, have filed a suit to invalidate Abba A's donation. They were looking for him to serve summons to him, but have been unable to locate him. One day, one of his son's (Ato B) found Abba "A" on the street, and after they exchanged warm greetings, Ato "B" tried to give his father the summons. But Abba "A" refused to cooperate on the ground that he will receive the summons at his residence. Can he?
3. Compare and contrast:
 - a. Residence and domicile
 - b. Residence and sojourn.
4. Ato Abebe has lived in "Kebele X" for four months. In case the law does not entitle him to rights related with elections, is it because he is not regarded as resident of Kebele X? Explain.
5. Assume that Ato Abebe (Question 4) bought the house in which he now lives. Ato Abebe moved to the house on Tikimt 1st. It has been many years since Ato Abebe started to render consultancy services from home. Assuming that you work in the Kebele, when would you consider Ato Abebe as a resident? Tikimt 2nd or Tir 2nd? State your reasons.

* * *

Case 6

Addis Ababa City First Instance
Nefas-Silk Lafto Sub-City Court

File No. 1693/96
Hedar 27th 1997 Eth. C.

Judge: Bezabih Moges

Petitioner: Woizero B. Belay, present
(On her behalf and on behalf of K. Alemayehu and Y. Alemayehu)

Intervening Petitioners: Woizero Y. Tadesse, present
Woizero M. Mammo, present
(On her behalf and on behalf of K. Alemayehu and Y. Alemayehu, aged 13 and 9)

The case was adjourned for decision. The file has been examined and the following decree has been delivered.

Decree

In her petition dated Nehassie 12th 1996 Eth.C., the applicant had requested declaration from the court about the rights of the minors stated above as heirs-at-law of their deceased father (Ato Alemayehu A.) and to be appointed as their tutor. In a petition dated Nehassie 24th 1996 Eth. C., Wozero Y. Tadesse has submitted the same request. Moreover, the second intervening petitioner (M. Mamo) has claimed to be the elder sister of the minors and has claimed to have already been appointed as tutor for her younger brother and sister, and she further stated that she and the minors have already obtained declaratory judgement about their status as heirs-at-law from Awasa Court. She further notified the court that the Awassa Court has also declared the minors as heirs-at-law of their deceased mother. In addition to her petition dated Hedar 9th 1997, the second intervening applicant has attached two pages that indicate the judgement rendered by the Awassa court in Civil File No. 1537/97.

After having examined the case, the court has decided that the case should not be adjudicated in this court because the principal residence (*wanna memoria*) of the deceased Ato Alemayehu A. was Awassa, and thus the case is closed and file is returned to archives in accordance with Articles 826/1 of the Civil Code and Articles 244/2/b and 9/2 of the Civil Procedure Code.

Judge's signature

Review Question:

1. The court invoked Article 244/2/b of the Civil Procedure Code, because decision has already been rendered by another court (*i.e. res judicata*). Assuming that the case had not been brought to Awassa court would you handle the case in Addis if you were the judge?
2. What if Ato Alemayehu had his principal residence at Awassa and a secondary residence in Addis Ababa?

* *

Readings on residence and domicile

Domicile and Residence

Source: Smith & Keenan's ENGLISH LAW, 12th Ed, Denis Keenan, 1998, pp.158- 161

Domicile generally

The basis of jurisdiction and the law to be applied in many matters coming before English courts, i.e. wills, matrimonial causes and taxation, may depend on the domicile of the parties. A person's domicile is the country which he regards as his permanent home, and thus contains a dual element of actual residence in a country and the intention of remaining there. Where a country has within its national boundaries several jurisdictions, the person's domicile must be determined with reference to a particular jurisdiction, e.g. there is no such thing as domicile in the United States of America, though a person may be domiciled in a particular State. England and Wales, Scotland, Northern Ireland, the Channel Islands, and the Isle of Man are distinct jurisdictions within the British Isles. A person must always have a domicile, and he can only have one domicile at a time. It should be noted that the concepts of domicile and nationality are, as appropriate, applied to corporate bodies.

(Domicile of) married women

By (Section) 1 of the Domicile and Matrimonial Proceedings Act 1973, the domicile of a married woman is not bound to be determined by that of her husband, as was the case at common law. She is capable of acquiring a separate domicile in exactly the same manner as her husband. By (Section) 1(2) of the 1973 Act a married woman is treated as retaining the domicile of her husband (as a domicile of choice if it is not one of origin) at the coming into force of the Act unless and until it is changed in accordance with common law rules for determining such change.

Certain consequences regarding jurisdiction in divorce proceedings follow from the general principles enacted by the above section. As a wife can now acquire a separate domicile from that of her husband, jurisdiction is now based upon the domicile of either party in England and Wales at the time of the proceedings or on the ground that either party was habitually resident in those countries for one year before the proceedings commenced. The court has power to stay proceedings where courts in two countries have jurisdiction. This would

prevent, for example, divorce proceedings being taken in an English court and a Scottish court contemporaneously as where the husband had an English domicile but his wife had acquired one in Scotland.

Domicile of Choice

A person, other than a minor under 16, can change his domicile of his own volition. To do so he must be in a new country, and have a 'fixed and settled intention' to abandon his domicile of origin or choice, and to settle instead in the new country.

A person retains his domicile of origin until he acquires a domicile of choice, and since a person must always have a domicile, there can be no abandonment of the domicile of origin unless a domicile of choice is acquired instead. However, having acquired a domicile of choice, a person who abandons it without acquiring a fresh domicile of choice, reverts to his domicile of origin.

The country in which a person resides is on the face of it the country of his domicile. Where it is claimed that a domicile of origin has been changed for one of choice, the onus of proof is on the party claiming that such a change has taken place. Examples of evidence which suggest a change of domicile are oral or written declarations to this effect, letters, wills as in *IRC v. Bullok*, the adoption of a new name, as where a German living in England changes his name to Richmond from Reichman, and application for naturalization, the purchase of land, or a grave, or a home of a business in the new county. It was decided in *Plummer v. IRC* [1988] 1 All ER 97 that it is not enough merely to express an intention eventually to live and work in the new country. Furthermore it was held in *Cramer v. Cramer* [1987] 1 FLR 116 that domicile is not established by an intention to marry a person resident in the new country at some time in the future even where the intention to marry is reciprocated by the other party.

Residence

The residence of a person is important for certain purposes, e.g. liability for income tax, and a person who is not domiciled in the UK may nevertheless be liable to UK tax if he is regarded as resident here in the year of assessment. Furthermore, the jurisdiction of magistrates in matrimonial matters is based on the residence of the parties and not their domicile, as is the right to vote in a particular constituency at an election under (Section) 1 of the Representation of the People Act 1983. On the other hand the jurisdiction of the High Court in matrimonial proceedings is based either on domicile or habitual residence for

one year (Domicile and Matrimonial Proceedings Act 1973, s. 5). Domicile must, therefore, be distinguished from residence.

The term residence imports a certain degree of permanence, and must not be casual or merely undertaken as a traveler. In *Fox v. Stirk* (1970)

* * *

R. S. Sedler on Domicile

Source:

Robert Allen Sedler, **Nationality, Domicile and the Personal Law in Ethiopia**, Journal of Ethiopian Law, Vol. II, No.1, Summer 1965

- Footnotes have either been omitted or incorporated in the text in parenthesis [].

(... *The first part of the article that discusses nationality has been omitted*).

The Meaning of Domicile: Domicile and Residence Defined

A person's residence is the place where he has his habitation; legally, residence means the place where a person normally resides (Civil Code of Ethiopia Art. 174). In Ethiopia, when a person lives in a place for three months, he is deemed to have his residence there (Art. 175/2). While residence may have legal significance for certain purposes, e.g., local jurisdiction, it is not, on the whole, a significant legal contact.

Domicile differs from residence in two respects. First, domicile is a unitary concept; a person may have several residences (Civil Code of Ethiopia, Art. 177/1), but only one domicile at a given time (Art. 186). The latter statement must be taken to mean that he may only have one domicile at a time *under the law of particular state*. As we will see, different states have differing conceptions of domicile. Ethiopia may find that a person is domiciled in Ethiopia in accordance with the provisions of the Ethiopian Civil Code; France may find that the same person is domiciled in France under the provisions of the French Civil Code. With this qualification, however, a person can have only one domicile at a given time. Secondly, domicile denotes an element of permanency; it is the place where a person resides and has established his interests with the intention of living there "permanently" a term which also has different meaning. But we may say as a general proposition that domicile requires residence in a particular place coupled with the intention to live there "permanently".

Domicile under the Civil Code

Article 183 of the Civil Code provides that "the domicile of a person is the place where such person has established the principal seat of his business and of his

interest with the intention to reside there permanently.” We must define the word “permanently” in this context, and it is submitted that “permanently” should mean “for an indefinite period of time.” What may be called a “floating intention to return” should not be sufficient to prevent a person from acquiring a domicile here. For example, let us assume that a Greek merchant comes to Ethiopia, brings his family with him, and invests substantial amounts of capital in a business. He plans to return to Greece when he retires. He should be considered domiciled in Ethiopia, as his intention is to remain in Ethiopia indefinitely.

This interpretation of domicile is buttressed in Ethiopia by the provisions of Article 184 of the Civil Code, which provide as follows:

- 1) Where a person has his normal residence in a place, he shall be deemed to have the intention of residing permanently in such place.
- 2) An intention to the contrary expressed by such person shall not be taken into consideration unless it is sufficiently precise, and it is to take effect on the happening of an event which will normally happen according to the ordinary course of things.

For example, if a person came to Ethiopia to work on a five year contract, intending to leave after the expiration of the five years, he would not be domiciled in Ethiopia though he has his residence here. The intention to leave is sufficiently precise and will take place upon the happening of a definite event i.e. the expiration of the five years. In the case of *Shatto v. Shatto* [Civil appeal No. 784/56, Journal of Ethiopian Law, 199 (1964)], the Supreme Imperial Court construed Article 183 and 184 and concluded that “permanent” meant for an indefinite period of time. The person whose domicile was in question was a “safari outfitter,” carrying on his private business here, and had been resident in Ethiopia for six years. The High Court (with one member dissenting) denied his petition for homologation of divorce on the ground that he was not domiciled here, as he might some day leave the country (he was an American citizen); therefore, it concluded that he did not “intend to live in Ethiopia permanently.” In reversing the decision, the Supreme Imperial Court held that “the majority was certainly wrong to foresee too much the future.” Since he was residing in Ethiopia and has his business here, the presumption of Article 184 applies; in the absence of clear evidence of contrary intention, the presumption was not rebutted, and he was deemed domicile in Ethiopia. To the same effects is the case of *Zissos v. Zissos* (Civil Appeal No. 633/56), involving a Greek national who had lived in Ethiopia for some years and whose business was here.

The approach toward domicile under the Civil Code is vastly different from the earlier approach, at least as evidenced by the holding of the Supreme Imperial Court in the case of *Pastori V. Aslandis* (Civil Appeal, 338/47) decided before the Code. The person whose domicile was in question was a Greek national who came to Ethiopia in 1910. He established a business here and was married here. He made a number of visits to Greece during that time and went there when he was seriously ill; he returned to Ethiopia after he was cured. The court concluded from his testamentary will that he intended it to be governed by Greek law, since it would be valid under Greek law, but not under Ethiopian law, and since he directed that it be executed by the Greek consul in Addis Ababa.

The court held that he was not domiciled in Ethiopia. It said that the test of whether a person acquired a domicile was whether 'he intended to make the new country his permanent home in such a way as to detach himself completely from his country of origin and from its laws and customs and to subject himself permanently, as regards personal law, to the laws and customs of the new country.'" In following what is apparently the British approach, the court emphasized the following:

- 1) length of residence, even though continuous, is not sufficient to establish a change of domicile:
- 2) change of domicile must clearly be proved, and the burden of proof required to show a change from the domicile of origin is greater than in the case of a domicile of choice. The court concluded that there was not sufficient evidence to show that the person has acquired a domicile of choice in Ethiopia. It emphasized that he continued his "Greek way of life" here and thus did not have the intention to acquire an Ethiopian domicile.

The result would clearly be different under the (Civil) Code. He has both his business and his normal residence in Ethiopia. The presumption then is that he was domiciled in Ethiopia. The intention to return to Greece was "floating" at best, and there was no fixed event upon the happening of which he would return to Greece. In fact, he died here. Therefore, there would be no evidence to rebut the presumption that he intended to live here permanently, and today such a person would be considered domiciled in Ethiopia.

Ethiopia's policy, as evidenced by Articles 183 and 184 of the Code and the interpretations the courts have put upon them, favour a finding of domicile when a person lives and works here. This insures that foreigners residing here and having their business or employment here shall be deemed to be Ethiopian domiciliary (in the absence of) a clear and precise intention to the contrary.

On the other hand, the Code does not require that a person must have spent any particular amount of time in Ethiopia in order to acquire a domicile here, as long as the necessary intent is present. Presumably the Ethiopian courts would reach the same result in a case such as *White v. Tennant* [West Virginia Reports, 790, 8 Southeastern Reporter 596, (1888)] as did the American state court that decided the case. The person whose domicile was in question sold his home in State A and moved to a new home in State B with his wife. Previously he had shipped some movable property to State B. He was in State B about a day when his wife became ill. He took her back to State A, where she would stay with relatives intending to immediately return to State B; the wife would return to State B when her health improved. The husband died suddenly while still in State A. It was held by the court in State A that he had acquired a domicile in State B. He has his residence there, was physically present there, and had the intention of living there permanently. There was a concurrence of residence and the intention to live there permanently. Since there is no requirement under the Code that a person have his residence in Ethiopia for any period of time, the same result should be reached in Ethiopia.

Moreover, there is no requirement under the Code that the person have a fixed place of abode in Ethiopia. Under Article 177 of the Code, a person may have several residences. The term “normal residence in a place,” as used in Article 184 should refer to residence in Ethiopia rather than residence in a particular part of Ethiopia. So, if a person lived part of the time in Addis Ababa, part of the time in Gondar, and part of the time in Jimma, staying in hotels in each place, he should be deemed domiciled in Ethiopia, though he does not have a permanent residence in any part of (Ethiopia). (It is to be noted that under Ethiopia’s current federal system, the issue of domicile applies to domiciliary in each regional state or chartered city).

The intention under Article 183 and 184 must be the intention of living in Ethiopia rather than the intention of acquiring a domicile. These sections would prevent a person from acquiring a domicile in Ethiopia simply by renting a room here while actually living elsewhere. Consider the situation presented in a case such as *Kirby v. Town of Charleston* [99 Atlantic Reporter 835 (New Hampshire Supreme Court 1916)]. For legal purposes the party wanted to acquire a domicile in State A. He rented a hotel room there, but never used it and continued to live in his house in State B. It was held that his domicile remained in State B, as he never had the intention to live in State A. The same result would be reached under Article 183 of the Code, since in such a situation there was no intention to live here permanently.

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

(Spouses shall have the same domicile) as long as the marriage lasts unless (one of them) is affected by judicial or legal interdiction (Art.189); it is not possible for (a spouse) to acquire a separate domicile, though s/he may acquire a separate residence (Art. 178). [The recent trend in the United States and in some other countries has been to permit the wife (or the husband) to acquire a separate domicile even during the continuance of the marriage]. An interdicted person retains his domicile at the time of his interdiction, though he also may acquire a residence of his own.

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

The Personal Law

The nature of the problem

In all legal systems certain questions are determined by the personal law. By personal law we mean the law of a state with which an individual has some connection. The court must decide which law determines matters of a person's status - does he have the capacity to marry, what are the rights of his children and the like. The law that determines such questions is called his personal law. In many states personal law determines all questions of succession to movable property. The questions that are determined by personal law are found in each state's rules of private international law, or conflict of laws, as it is sometimes called. It is that law which decides what state's law is looked to for the personal law, e.g., the law of the state of which the person is a national or the law of the state where the person is domiciled.

The problem is complicated in Ethiopia by the fact that at present the private international law has not been codified. The provisions of the draft Civil Code dealing with private international law were not included in the final enactment. Until such time as this codification takes place, the question will have to be determined by case law. Before considering the Ethiopian cases on the subject, let us look at the approaches other nations have taken to this question.

Approaches toward the Governing Personal Law

Three distinct approaches have been taken toward the question of governing personal law, which, for purposes of convenience, may be called the civil law approach, the common law approach and the Latin-American approach.

Civil law countries have by and large adopted nationality as the governing personal law, though some are turning toward domicile. For example, Article 3 of the French Civil Code provides that "the laws relating to the condition and privileges of persons govern Frenchmen, although residing in a foreign country;" and the French rules of private international law hold that the personal law of foreigners residing in France is the law of their nationality. Article 17 of the Italian Civil Code provides that "the status and capacity of persons and family relationships are governed by the law of the State to which the persons belong." To the same effect is Greek law, Hungarian law, Bulgarian law, and the law of many other European countries and countries that employ the civil law.

In examining the reasons for using nationality, we find that such reasons may be historical, may follow from the theoretical nature of the system, or may be quite practical. In commenting on Italian law, one writer observed that the retention of the nationality principle in Italy under the 1942 Civil Code was due to two reasons, one historical, the other political. He points out that the nationality principle was most fully developed by an Italian, Mancini, during the time of Italy's unification. Mancini's thesis was that law is personal and not territorial, that it is made for a given people and not for a given territory. In other words, a person carries his national law with him irrespective of where he resides. Thus in personal matters, national law rather than the law of domicile governs. The political reason, according to the author, lies in the "intensely nationalistic doctrines of more than twenty years under Mussolini." He summarized these doctrines as follows:

"It would be an abdication of sovereignty if a State renounced its right to govern its national who has emigrated; conversely, it would be a violation of the sovereignty of the émigré's nation if the receiving nation should apply to the émigré laws not made for him; finally, legal ties of the émigré with his fatherland contribute to his fidelity to national institutions."

In other words, it was strongly in the interest of Italy to bind Italians living abroad by Italian laws; reciprocity demanded that the same treatment be accorded to foreigners far fewer in number who happened to reside in Italy.

Another author, commentating on Greek law, points out that Greece has a large number of nationals who emigrate to various parts of the world ... and that, therefore, "no reason could be strong enough to lead to the abandonment of the nationality system, the continuation of which was considered as a measure of self-preservation." This desire to control the personal status of nationals residing abroad even takes precedence over consistent adherence to political ideology.

Finally, nations with a large number of nationals residing abroad may fear that the personal status of these persons will be governed by an alien legal system, with alien ideas, particularly as to marriage and the family. One writer, in pointing out why Belgium, The Netherlands and Luxemburg have followed the nationality system, observes child relationships. He says that western states should not accept bigamy or the like as legal for its citizens domiciled in those nations; consequently, it must hold that the personal law should be that of nationality rather than domicile.

It is for reasons such as these that many nations have adopted nationality as the basis of personal law.

The same type of considerations has led England and the United States to adopt domicile as the basis of personal law. Anglo-American conflicts law followed the territoriality theory, first developed by Huber, but given its greatest impetus in later times by the writings of Joseph Story, an American jurist. The essence of the territoriality theory was that the laws of each nation had the force within the boundaries of that nation, but not without. Persons did not carry their national law with them; rather they were subject to the laws of the state where they lived. Consequently, the governing personal law was that of a person's domicile- the place where he was with the intention to remain- rather than his nationality.

Moreover, there were comparatively few Englishmen residing outside of England except for the colonies. And England controlled the legal system in the colonies; thus, she could insure the application of English law to British nationals where she deemed this desirable. Likewise, by using domicile as the governing personal law, the American states exercised control over the large number of foreign immigrants; few Americans are domiciled abroad, even today.

A number of Latin-American states follow a mixed system. Local law is applied to foreigners domiciled there - to this extent they follow the common law approach. However, national law is used to govern the personal relations of their nationals domiciled in other countries. With variations, this approach is taken in Chile, Colombia, Ecuador, Costa Rica, El Salvador, Peru, Venezuela and Mexico. This accomplishes the goal of civil law countries, namely, control of nationals domiciled abroad.

The proposed French Draft on Private International Law, which has not yet been adopted, would modify the traditional approach by providing that foreigners domiciled in France for more than five years would have their status and capacity governed by French law. Frenchmen domiciled elsewhere would continue to be subject to French personal law.

Such approach is suitable, perhaps, for a country having a large number of its citizens domiciled abroad, and a large number of foreigners domiciled there. Still, it can not help but cause ill-will among nations; if a nation believes that personal law should be that of nationality for its (nationals) domiciled abroad, then it should not deny to other (nations) the same control over their citizens that it purports to exercise over its own.

The Governing Personal Law in Ethiopia

As stated previously, there are no statutory provisions dealing with personal law in Ethiopia. In the past, judicial decisions have gone both ways on the question, some holding nationality and others holding domicile to be the basis of personal law. Of the cases dealing with the question that are known to the author two High Court decisions held that nationality was the governing personal law. In *Verginella v. Antoniani* [Civil Case No. 905/50] the petitioner, an Italian ... admittedly domiciled in Ethiopia, sought a decree of judicial separation from his wife. The institution of judicial separation, according to the court, was not known in Ethiopian law. The court held that Italian law should apply and ordered the judicial separation. Its reasons for applying Italian law were as follows:

- 1) the petitioner was an Italian subject;
- 2) the respondent was also an Italian subject;
- 3) the marriage was celebrated in accordance with Italian law;
- 4) there was no provision in Ethiopian law dealing with judicial separation; and
- 5) it was the practice of the Ethiopian courts to apply principles of foreign law in matters between foreigners where Ethiopian law makes no provision for the matter.

This reasoning ignores the fact that the petitioner was domiciled in Ethiopia; moreover, the result of this decision is that the petitioner receives a remedy in Ethiopia that is not available to Ethiopians

Another case to the same effect is *Katsoulis v. Katsoulis* [Civil Case No. 250/51] where the parties were Greek nationals domiciled in Ethiopia. The petitioner sought divorce on grounds of desertion. The court held that the case should be decided according to the national law of the parties and ordered a divorce based on the Greek Civil Code. In the case of *Andriampanana v. Andriampanana* [Civil Case No.441/52] and *Zervos v. Zervos* [Civil Case No. 154/52] the court did not (raise) the question, since there was no conflict between Ethiopian law (the parties were domiciled here) and the law of their nationality; the petitioner was entitled to a divorce under the law of either state. It should be noted that all these cases were decided prior to the effective date of the Civil Code; as we will see, under the Code the courts will not usually take jurisdiction to decree a divorce.

Two Supreme Imperial Court cases, on the other hand, have held that domicile should be the basis of personal law. In *Yohannes Prata v. W/T Tsegainesh Makonnen* [Civil Appeal No. 638/49], the court was confronted with a situation

of an Italian national who died domiciled in Ethiopia. He was married to a woman in Italy and left children by her. He lived with an Ethiopian woman and also left children by her, who would be considered illegitimate under Italian law. Under Italian law illegitimate children cannot inherit from the father. Under Ethiopian law the concept of illegitimacy is unknown. All children inherit equally from the father, as long as paternity is established, and her paternity was admitted. If Italian law -the law of nationality- were applied, the Italian children alone would inherit. If Ethiopian law -the law of domicile- were applied, all children, Italian and Ethiopian, would share equally. The supreme Imperial Court held that domicile was the basis of personal law and applied Ethiopian law. The English version of the judgment states the following:

“Now the personal law may be either the law of nationality of the deceased or the law of his domicile at the time of his death. There is no enacted law in Ethiopia to lay down which of these two laws is to be followed and decided cases have not been consistent in following one law or the other. The recent trend of jurisprudence, however, has been in favour of the law of domicile. In our opinion the law of domicile is more adequate to govern the juridical situations and relationships (caused by the fact that a person) has established his domicile in a particular country without giving up his original nationality; we consider, therefore, that the law of domicile should be the law governing all matters of personal status.”

This case was followed and applied in *Alfredo Pastori v. Mrs. Aslanidis and George Aslanidis* [Civil Appeal No. 338/47], which held that the question of proprietary rights between husband and wife was governed by the law of the matrimonial domicile rather than the law of nationality. [It is to be noted that in (the case cited) the court found that the parties were not domiciled in Ethiopia... Under the provisions of the Civil Code they would now be found domiciled here].

... A prime reason for continental nations employing nationality as the basis of personal law is that they have many more nationals residing abroad than they do foreigners domiciled there and want to control the status of their nationals. In other words, the rule as to governing law is in no small part fashioned on the basis of the interest of the country applying the rule. ... In summary, it is submitted that the courts of Ethiopia should hold that the personal law should be the law of the place where a person is domiciled rather than the law of the state of which he is a national.

There is a collateral question, which relates to the circumstances under which the courts of Ethiopia will take jurisdiction to determine matters of family status such as divorce. The courts have held that they will not take jurisdiction unless one of the parties is domiciled here. In *Hallock v. Hallock* [Civil Appeal No. 249/50], the party seeking a divorce was an American employed by Ethiopian Airlines. He was here on a term contract and was domiciled in the State of Alabama in the United States. He contended that under the law of Alabama residence in the state for at least one year was sufficient to confer jurisdiction on the courts to issue decrees of divorce. The Supreme Imperial Court quite correctly held that what the Alabama courts would do was irrelevant in Ethiopia. The court held that the absence of legislation by Parliament establishing residence as a basis of jurisdiction to divorce, the court would require that at least one of the parties be domiciled in Ethiopia. Consequently, the petition was dismissed. The same result was reached in *Kokkinos v. Kokkinos* [Civil Case 477/52], where the court found that the petitioner was not domiciled in Ethiopia. In a number of other cases, the court, in taking jurisdiction, emphasized that at least one of the parties was domiciled here. It should be pointed out that now the husband must be domiciled in Ethiopia, since under the (Civil) Code the wife's domicile follows that of the husband as long as the marriage subsists (Article 189). Since the courts will take jurisdiction only on the basis of domicile and since it appears that domicile will be the basis of personal law, it follows that in divorce actions only Ethiopian law will apply.

...

Conclusion

In this paper an attempt has been made to discuss the Ethiopian law relating to nationality, domicile and the governing personal law. ... The Civil Code clearly defines domicile and demonstrates legislative intention that foreigners residing here and having their business or employment here shall be deemed Ethiopian domiciliary (in the absence of) a clear intention to leave Ethiopia at a definite time in the future. The recent trend of decisions would indicate that domicile is to be the basis of personal law. ... At such time as private international law is codified, a provision to the effect that domicile is the basis of personal law should be included in the codifications.

* * *

O'Donovan's Problems on Residence and Domicile

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 21 to 30

Problem 21

Ato Fikre is a gypsy who wanders around the country on a horse sleeping where he can and selling carvings. He has no family and never stays in one place more than a few days.

He got involved in a fight with another man in Addis Ababa. The man was from Harrar.

The police want to serve summonses on both men for their part in disturbing the peace.

Advise the police.

(Note that summons must be served on a person at his place of residence).

Problem 22

Ato Seyoum lives in Addis and owns a house in Debre Zeit. He goes there every year on holiday. This year he dies in his house in Debre Zeit.

- a) Where will his succession open? (See Article 826 of the Civil Code).
- b) Ato Seyoum's son Getachew lives with his family. He is involved in a traffic accident in Debre Zeit. Can a summons be served on Getachew in Debre Zeit.

Problem 23

Ato Ali is a shop-keeper whose business is located on Churchill Road in Addis Ababa. He made a contract with Ato Mohammed an importer ... for the monthly delivery of textile goods. In the contract it was agreed by both parties that the goods would be delivered to Ato Ali's house on the Bole Road and that all correspondence would be directed there also.

Ato Mohammed sent a note to Ato Ali's shop on Churchill Road giving notice that there would be delays in the delivery of the goods in the future and advising Ato Ali that it was his right to cancel the contract if he wished. Ato Ali did not cancel the contract but when the goods were delivered he refused to pay the full price for them because of the delay.

Ato Mohammed protested that he had warned of the delay and given Ato Ali the option of canceling the contract. Ato Ali replied that he had ignored the letter as it should have been sent to the Bole Road.

- a) Advise Ato Mohammed
- b) Would it make any difference if Ato Mohammed had not agreed to address all correspondence to the Bole Road?

Problem 24

Ato Abdullah, an Egyptian, has worked in (Dire Dawa) as an engineer for three years. His contract there with a building firm has expired and he has decided to go home to Egypt to look for a job. He has left his house and was on his way to the airport to catch his plane when he was killed in a road accident.

Where will his succession open?

Problem 25

Ato Daniel lives in Addis Ababa for 6 months of the year and in (Debrezeit) for 6 months. He had stores in both places. His wife, to whom he has been married for two months, is from Harrar. After she has lived with her husband in (Debrezeit) for two months, the police wish to serve a summons on her in connection with debts she owed in Harrar.

Ato Daniel's son by his first marriage, Admasu, is 17 and has been in France for 6 years at school. He wishes to be married, but his father will not consent. He applies to the French courts for permission. They wish to know where his domicile is.

Answer the following questions:

- a. Where is Ato Daniel's residence? Domicile?
- b. Can the police serve a summons on Ato Daniel's wife in (Debre Zeit)?
- c. Where is Admasu's domicile/ residence?

Problem 26

Mesfin was born to his mother Angela, a citizen of the U.S. when she was in New York. Mesfin is the son of Ato Kassa Ato Kassa died when his wife Angela was five months pregnant. She went to New York to be with her parents.

Where is Mesfin's domicile?

Problem 27

“L” from Liberia has been teaching pottery making at the Art School in Addis Ababa for two years. His wife and two children are living with his parents in Liberia. “L” sends money to them every month.

Now “L” has met Enkutatash a very pretty Ethiopian Art Student. He has decided to marry her. So he has applied to an Ethiopian court for a divorce.

Before the court can decide whether to grant a divorce to “L” it must first decide whether it has jurisdiction over the question. The court will have jurisdiction only if “L” can prove that his domicile is in Ethiopia.

Advise “L” as to how he can prove the whereabouts of his domicile.

Problem 28

“N” from Nigeria teaches Geography at (Addis Ababa University). He has been there for twelve years and has tenure, which means he cannot be dismissed without very good cause. He gets a job at the University of Ife in Nigeria which makes him very happy as he wants to go home to take care of his widowed mother.

Unfortunately “N” dies on board ship on his way from Ethiopian to Nigeria.

- a) Where will his succession open?
- b) Where is his domicile?

Problem 29

(Omitted)

Problem 30

William Smith, an American Professor (at Addis Ababa University) has lived in Ethiopia for ten years and has tenure at the Arts Faculty. Two years after his arrival in Ethiopia he married Woizero Workitu Ayele an Ethiopian citizen. Their son MacDonald was born a year after the marriage and is now seven years old.

Woizero Workitu is a social worker in Addis Ababa but she has decided to go to the University of London for graduate work. She will leave Addis Ababa next week in order to arrive in time for the start of the academic year.

Professor Smith has been granted study leave by AAU for one year and it is agreed that he will continue at the Arts Faculty thereafter. He will join Woizero Workitu in England in a couple of months. Meanwhile, decision must be taken on the future education of MacDonald. At the moment, the boy is attending school at Lycee Gebre Mariam and his parents are very satisfied with the school. Professor Smith has stayed behind in Addis in order to make arrangements for his son.

- a) If Woizero Workitu decides to divorce her husband, where will the Ethiopian courts consider her domicile to be? Give reasons.
- b) If Woizero Workitu is killed in London before the arrival her husband, where will her succession open? Give reasons.
- c) If Professor Smith and Woizero Workitu die abroad where will MacDonald's residence be? Where will his domicile be?

* * *

Supplementary reading on Residence and Domicile

CJS DOMICIL s 4
28 C.J.S. Domicile § 4

Corpus Juris Secundum
Database updated May 2006

Domicile I. In General

§ 4. Domicile and residence distinguished

West's Key Number Digest

...

While the terms "domicile" and "residence" or "legal residence" are frequently used synonymously, ... "domicile" and "residence" are not, when accurately and precisely used, convertible^[FN24] or identical^[FN25] terms. "Domicile" is a larger term, of more extensive signification,^[FN26] and has been said to be used more in reference to personal rights, duties, and obligations;^[FN27] and residence is of a more temporary character than domicile.^[FN28]

That "domicile" is not necessarily synonymous with "residence" or that there is a difference in meaning between "residence" and "domicile" is shown by the fact that a person may have his residence in one place while his domicile is in another,^[FN29] and that he may have more than one residence at the same time,^[FN30] but, as appears *infra* § 5, only one domicile.

An "address" where mail or other communications will reach a person is not a domicile and may be other than his residence.^[FN31]

* * *

CJS DOMICIL s 11
28 C.J.S. Domicile § 11

Domicile

II. Acquisition of Domicile

West's Key Number Digest

...

Domicile of choice is entirely a question of residence or physical presence and intention, or as it is frequently put, of factum and animus.[\[FN79\]](#) To constitute such a domicile, or to effect a change of domicile, there must appear both an actual residence or physical presence in a particular locality and an intention to remain there or to make it one's home,[\[FN80\]](#) or, as frequently stated, the fact of residence or physical presence and the intent to remain must concur, or be coupled, or be found together;[\[FN81\]](#) and residence without intention or intention without residence is of no avail.[\[FN82\]](#) The same union of act and intent, or actual location in, or removal to, a particular place with intent to remain, has been required for "residence" or "legal residence," or a change thereof, in cases using those terms in the sense of domicile.[\[FN83\]](#)

As soon as a point of time is reached when residence and intent concur, the domicile is obtained.[\[FN84\]](#) It is not necessary that the intention to acquire a new domicile should exist at the time of removal, as the *animus manendi* may be formed afterward.[\[FN85\]](#) Thus, if a person leaves his domicile, and while residing elsewhere forms an intention not to return, but to make his new residence his home permanently or for an indefinite period, he thereby acquires a new domicile.[\[FN86\]](#)

* * *

CJS DOMICIL s 14
28 C.J.S. Domicile § 14

§ 14. Intent in general

West's Key Number Digest

...

While, as discussed supra § [11](#), actual residence in a locality and intention to remain are both essential to domicile, it is frequently declared that domicile,[\[FN7\]](#) or "residence" or "legal residence" as used in the same sense,[\[FN8\]](#) is largely a question, or matter, of intention, in the absence of

fraud.[FN9] It is said that intention is the fundamental or controlling element,[FN10] that it is the crux of the test for domicile,[FN11] that it is a decisive,[FN12] dominant,[FN13] necessary,[FN14] important [FN15] or the key[FN16] factor, and that it is largely determinative of the question.[FN17]

In order to establish a new domicile, the intent to do so must be unqualified and not conditional upon the happening of some future event.[FN18] The intention to make a home must be an intention to make a home at the moment, not to make a home in the future.[FN19]

Change of domicile

The essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere.[FN20] Thus, a change of domicile or residence depends on intention,[FN21] or, as sometimes stated, on a dual intention to abandon the former domicile and to acquire another,[FN22] and a change of residence lacking in the requisite intent to abandon the prior residence leaves the last established domicile unaffected.[FN23] Where a person has two residences, the earlier in time remains his domicile until a clear intention to change is established.[FN24]

Legal or moral duty

The question of domicile or the accompanying intention is not affected by the fact that it was the legal or moral duty of the individual to reside in a given place.[FN25]

Voluntary removal

Intention to acquire a domicile or residence of choice necessarily involves an exercise of volition or freedom of choice,[FN26] and therefore the removal must be voluntary.[FN27] Where a person's stay outside his state of domicile was involuntary and was never intended to be permanent,[FN28] or where there was a forcible change in a person's state of residence,[FN29] there was no change of domicile. However, the bare fact that a person has been compelled to relocate in a particular place does not ordinarily prevent him from becoming domiciled therein.[FN30]

* * *

12 A.L.R.2d 757

12 A.L.R.2d 757 (Originally published in 1950)

American Law Reports ALR2d

The ALR databases are made current by the weekly addition of relevant new cases.

Relationship between "residence" and "domicil" under venue statutes

C. S. Patrinelis

...

In Kennan on Residence and Domicile, the author, after examination of the cases, offers on page 60 the following general definition of domicil: "Domicile is a word used to express the legal relation existing between a person and a particular place or territory. Such relation arises by residence in the place or territory accompanied by intention to remain for an unlimited time, or it is created by operation of law as in case of birth, minority or marriage."

...

...[I]n [Cincinnati, H. & D. R. Co. v. Ives \(1889\) 21 NYSR 67, 3 NYS 895](#), where the defendant was sued in New York County for a misappropriation of plaintiff's funds, a motion for a change of venue having been made by the defendant, who was an unmarried man shown to have taken bachelor apartments in New York County which he occupied with his servant, where he had his mail sent, where he was treated by his physician, where he often slept, where he had visitors and occasionally had breakfast, was denied, although it appeared that he voted in the last election in another city and county where he formerly resided, and had arranged to occupy rooms at a club there at some future time, the court stating that the term "residence" was not synonymous with the term "domicil" in the instant case, within the meaning of a statute requiring certain actions to be tried in a county in which one of the parties resided, and that while the defendant may have retained his domicil in the place of his original residence, this would not prevent his having secured a residence in New York County when the present action was commenced.

See also [Bischoff v. Bischoff \(1903\) 88 App Div 126, 85 NYS 81](#), to the effect that a person may have two or more residences as distinguished from a single domicil, and that if there is an actual residence in the county in which the action is brought, or if there is a domicil therein, the action is properly brought

in such county, although it may also appear that there is another residence in a different county.

...

§ 5. Business interests or employment; decisions treating terms as synonymous

While the pursuit of business interests in a locality may, in the absence of contrary evidence, be some indication of a residence there, it is plain that such evidence is of extremely low character on the question, and in the face of evidence of the type already outlined in the preceding section may be entirely negated.

...[e]vidence of taxpaying, voting, jury duty and residence in a county for at least ten years prior to commencement of an action against defendant, ownership of a home there until the death of his wife, a present residence in an apartment in a hotel, and the maintenance of his horses, carriages, ... in such county, was held sufficient in [Washington v. Thomas \(1905\) 103 App Div 423, 92 NYS 994](#), to show his residence to be in that county, despite evidence that he also maintained an office for the transaction of business in another county where he had a second apartment for occupancy during such business interims. Expressing the view that the word "resided" as used in the statute did not refer to a temporary residence, the court stated: "As so used it means a permanent residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure. It is nearly or quite synonymous with the word 'domicile,' the permanent home and the place to which, whenever absent, one intends to return."

...

§ 7. Public office or employment

...

In a few of the earlier Texas cases dealing with the venue of an action for libel brought by a public officer or employee at a place other than that in which he maintained his permanent residence, where he performed his duties and obligations as a citizen, and where he exercised his right to vote, it was held that the word "resides" under the above statute referred to the actual residence of plaintiff as distinguished from his permanent legal residence or domicile.

...

In [A. H. Belo Corp. v. Granberry \(1928, Tex Civ App\) 9 SW2d 443](#), it was held, in a libel action under a statute requiring that it should be maintained in the county in which the plaintiff resided at the time of the accrual of the cause of action, that the plaintiff, who was a prison commissioner, resided in the county where he occupied a cottage provided by the state, even though he had lived for many years previous to his appointment in another county, where he owned a farm and to which he expected to and did return when he left the service of the state. ...

Party domiciled in one county who spent 7 months in second county doing business there, living in hotel room, had established residence in second county for venue purposes. [Davenport v Harry Payne Motors, Inc. \(1952, Tex Civ App\) 247 SW2d 452](#).

...

§ 8. Imprisonment or confinement in institution

...

In [Owens v. Stovall \(1933, Tex Civ App\) 64 SW2d 360](#), where a venue statute prescribed that proceedings for the appointment of a guardian of a person of unsound mind should be begun in the county in which such a person resides, it was held that a person committed to an insane asylum in a county other than the one in which he had his domicil or permanent residence did not thereby effect a change of residence, both because his removal to the new county was involuntary and because a person of unsound mind was incapable of forming the necessary intent of abandoning his old and acquiring a new domicil.

To the same effect, see [Re Schley \(1938\) 253 App Div 818, 1 NYS2d 306](#), holding that thirteen years' confinement in an asylum would effect no change of residence.[\[FN9\]](#)

...

And in [Barton v. Barton \(1885\) 74 Ga 761](#), where an action was brought against a defendant who was in a penitentiary in a county other than that in which he was, at the time of his conviction, a citizen and resident, it was held that the venue of the action was properly in the county where he had resided before his conviction, since his incarceration in the jail in another county did not constitute a voluntary change of residence.

The following additional authority is relevant to the issues discussed in this section:

...

Residence, by itself, in hospital and nursing home in another parish was not sufficient to constitute change in domicile. [Fuqua v Fuqua \(1975, La App 3d Cir\) 311 So 2d 568](#).

For purposes of the venue statute for transitory actions, the prison inmate "lived" both in the county in which he maintained his domicile and in the county in which he was incarcerated at the time he brought action against a corrections officer, alleging that the officer unlawfully deprived him of certain personal property; but for the fact of his incarceration, the inmate would continue to live at his domicile in a county wherein he would be entitled to bring a transitory action. [M.G.L.A. c. 127, § 32; c. 223, § 1. Bolton v. Krantz, 54 Mass. App. Ct. 193, 764 N.E.2d 878 \(2002\)](#).

...

§ 9. Attendance at school or university

...

As regards a student attending a school or university during a substantial portion of the year, during which time he is in actual residence in the county wherein the school is to be found, only one case has been discovered which deals with the subject of venue in such a manner as to be within the scope of the present annotation. This case, which is [Roof v. Tiller \(1940\) 195 SC 132, 10 SE2d 333, 132 ALR 500](#), concerned an action against a university student to recover for injuries sustained in an automobile accident. The court allowed a change of the place of the trial of the action from the county where the student's parents resided, and which undoubtedly was the student's legal domicil, to the county where the student resided in attending school, and where the accident occurred, assigning as a basic reason for the change the convenience which this change would bring to the witnesses who also resided in that county. The court stated that the provisions of the venue statute that "the action shall be tried in the county in which the defendant resides at the time of the commencement of the action," was amenable to its action, since there was a distinction between a legal and an actual residence.

...

§ 12. Parties to divorce suit

By what is apparently the majority rule the word "reside" or "residence," as used in statutes pertaining to the venue of an action for divorce, is synonymous with "domicil" and denotes the place of one's fixed abode, not for

a temporary purpose alone, but with the intention of making such place a permanent home. This rule has been noted in the (many) cases:

...

Thus, in [Harrison v. Harrison \(1912\) 117 Md 607, 84 A 57](#), it was held that the provisions of the statute that "any person desiring a divorce shall file his or her bill in the court either where the party plaintiff or defendant resides," used the term "resides" in the sense of "domicil," and that a husband who has left a county in which the parties resided to work in another place and which the court found he intended to make his permanent home, in which the wife also took up residence, was sufficient to justify a valid change of domicile to the latter place so as to support venue of the action begun there by the wife. ...

* * *

Determination of a Person's Domicile

Forms

West's Federal Forms §§ 1001 to 1030, 2446 to 2450

The function of the concept of a legal domicile is to associate a person with a particular place for a particular purpose. As Justice Holmes described it: "domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."[\[FN1\]](#) As discussed in the preceding section, one of the rights that is determined with reference to a person's domicile is that of suing or being sued under the diversity jurisdiction of the federal courts, and for that purpose the state citizenship of a natural person is treated as synonymous with domicile.[\[FN2\]](#) In this context, identifying a party's domicile is a federal question that is determined in accordance with federal common law.[\[FN3\]](#) However, "federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies."[\[FN4\]](#)

It is often said that the domicile of a person is the place where he has his true, fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.[\[FN5\]](#) Domicile, therefore, has both a physical and a mental dimension and is more than an individual's residence,[\[FN6\]](#) although the two typically coincide. There are, however, certain classes of litigants who do not reside where they are domiciled but

nonetheless maintain their domiciles despite protracted periods of residence elsewhere. As discussed in later sections, military personnel,[\[FN7\]](#) prisoners,[\[FN8\]](#) out-of-state students,[\[FN9\]](#) and governmental or organizational officials[\[FN10\]](#) clearly fall into this category.

A person has only one domicile at a particular time,[\[FN11\]](#) even though he may have several residences.[\[FN12\]](#) As is discussed generally elsewhere, [\[FN13\]](#) the relevant time for determining the existence of a domicile at a particular location for purposes of diversity jurisdiction is the time that suit is commenced by filing the summons and complaint.[\[FN14\]](#) If removal of a case from a state to a federal court is sought, it must appear that diversity existed at both the time of filing and at the time of petitioning for removal. [\[FN15\]](#) Changes in domicile occurring thereafter are irrelevant.[\[FN16\]](#)

When the domicile of a party is in doubt, its determination requires an evaluation of all the circumstances of the case.[\[FN17\]](#) Factors frequently taken into account include: current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others.[\[FN18\]](#) No single factor is conclusive. Thus, for example, one court has held that when the conditions for a change in domicile have been met, such considerations as the party's continued ownership of property in the prior domicile, the carrying of a driver's license from that state, and her registration to vote there would not affect the result.[\[FN19\]](#)

Nor is the "center" of an individual's "contacts" determinative of the domicile question. In *Broadstone Realty Corporation v. Evans*,[\[FN20\]](#) the defendant owned homes in several states and leased an apartment in New York, the state in which he spent considerable time engaging in business and social activities. The plaintiff, seeking to have the case remanded to a state court for lack of diversity of citizenship, argued that New York was the "center" of defendant's activities. The court rejected this argument and concluded that defendant was a Connecticut domiciliary because there was no showing of a permanent residence in New York. In fact, defendant's family was in Connecticut, he voted there and nowhere else, and he paid personal property taxes to that state.

A party's own declarations concerning his domicile, as is true of any self-serving statement, are subject to judicial skepticism. They are accorded little weight when in conflict with the facts.[\[FN21\]](#) A related principle estops a party from pleading domicile differently in subsequent actions on unchanged facts.[\[FN21.5\]](#) Even formal declarations made for purposes other than the

pending lawsuit, such as in a marriage certificate, voter registration, or school or job applications, are not conclusive.^[FN22] It always is open to a party to impeach these declarations on the grounds that they were mistaken, misinformed, or made on the basis of an erroneous understanding of the controlling legal principles.^[FN23]

Certain factors are more significant than others in identifying a party's domicile, and recognition of this fact has given rise to a number of presumptions. It is assumed, for example, that a person's current residence is also his domicile;^[FN24] a married man is presumed to be domiciled where his wife and family live;^[FN25] and voting in a state raises a presumption of citizenship in that state^[FN26] (although with residency requirements for voting registration greatly reduced as a result of recent Supreme Court decisions, this factor may carry less weight in the future). It sometimes is said that the effect of these presumptions is to shift the burden of proof or, more properly, to shift the burden of coming forward with evidence on the citizenship question.^[FN27]

Another important presumption is that of favoring an established domicile as against an allegedly newly acquired one.^[FN28] The effect of this presumption is to put a heavier burden on a party who is trying to show a change of domicile than is placed on one who is trying to show the retention of an existing or former one. The rule from which this presumption is derived--that a domicile once established continues unless and until a new domicile is acquired^[FN29][p. 535] --represents the conflicts of law solution to the problem of locating an individual who clearly has pulled up stakes with the intention of abandoning his present domicile, but either has not arrived physically at a new one or has arrived but has not yet formulated an intention to remain there.^[FN29.1] The application of this rule in the diversity jurisdiction context usually assures that a party will not be denied access to the federal courts on the ground that he has no domicile and, hence, no state citizenship for jurisdictional purposes.^[FN30]

As indicated above, a natural person normally acquires a domicile voluntarily by residing in a place with an intention to remain there indefinitely. Certain categories of citizens, however, including married women,^[FN31] minors, ^[FN32] mental incompetents,^[FN33] military service personnel,^[FN34] and prisoners,^[FN35] traditionally have been considered legally or physically incapable of freely choosing a place of residence. And, as discussed in later sections, the domicile of members of these groups usually is determined in accordance with special rules and presumptions that take these supposed incapacities into account. Moreover, out-of-state students, as a class, are treated specially because of the presumed temporary character of their

residence at school solely for the purpose of receiving an education. [\[FN36\]](#) Finally, governmental or organization officials, because they often have protracted stays away from the place of their domicile, also receive special treatment. [\[FN37\]](#)

As the foregoing discussion indicates, judicially created rules have attempted to assure that every person has a legal domicile for jurisdiction purposes. [\[FN38\]](#) Thus, it usually should be possible to assign state citizenship to any American citizen who is a party to a diversity suit. But in *Pannill v. Roanoke Times Company*, [\[FN39\]](#) the court refused to accept the legal domicile of a so-called "homeless wanderer" as representing state citizenship for diversity jurisdiction purposes. Plaintiff in that case had been born in West Virginia and had spent most of his life in Oklahoma. After a farm accident left him paralyzed and unable to work, an offer of financial help from a local Elks lodge prompted him to move to California, where he apparently intended to remain permanently. The promised support eventually fell through, however, and Pannill began traveling around the country seeking assistance from the Elks for himself and other disabled members of the Order. It was during this tour that he brought suit in a district court in Virginia claiming California citizenship and invoking the court's diversity jurisdiction. Pannill admitted that he did not intend to return to California but rather hoped to settle in Florida or Texas. Judge McDowell dismissed the suit for want of diversity on the ground that Pannill was not a citizen of any state.

[W]hen * * * domicile exists only by legal fiction, and describes the state in which a citizen of the United States once had his home, but to which he intends never to return, I cannot see that domicile and citizenship are synonymous. * * * Citizenship implies membership in a political society, the relation of allegiance and protection, identification with the state, and a participation in its functions. * * * The theoretical domicile which is equivalent to state citizenship is always one which exists *animo revertendi*. The theoretical domicile which clings to a homeless wanderer, who never intends to return, has its uses * * * but is not, I think, equivalent to citizenship in the sense in which the word "citizen" is used in the Judiciary Act. [\[FN40\]](#)

[\[FNa8\]](#) Charles Alan Wright Chair in Federal Courts, The University of Texas.

[\[FNa9\]](#) Bruce Bromley Professor of Law, Harvard University.

[\[FNa10\]](#) Thomas M. Cooley Professor of Law, University of Michigan.

[\[FNa11\]](#) Robert Howell Hall Professor of Law, Emory University.

* * *

13B FPP s 3613, 13B FPP s 3613
13B Fed. Prac. & Proc. Juris.2d § 3613

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Charles Alan Wright[FNa8], Arthur R. Miller[FNa9], Edward H. Cooper
[FNa10], Supplement by The Late Charles Alan Wright, Arthur R.
Miller,
Edward H. Cooper, Richard D. Freer[FNa11]

Acquisition of a New Domicile

Forms

West's Federal Forms §§ 1001 to 1030, 2446 to 2450

Any person *sui juris* may acquire a new domicile at any time and for any reason. [FN1] A change in domicile typically requires only the concurrence of (1) physical presence at the new location with (2) an intention to remain there indefinitely, [FN2] or, as some courts articulate it, the absence of any intention to go elsewhere. [FN3] When the requisite *factum et animus* occur simultaneously, [FN4] the new domicile is acquired instantly. [FN5] No minimum residence period is required. [FN6]

Despite this seemingly simple and objective test for ascertaining when a new domicile is acquired, the rather subjective element of domicile as being one's "home" remains. [FN7] Furthermore, the concept of citizenship sometimes is equated with affiliation or identification with a state, [FN8] which adds further uncertainty to the application of the test stated above and requires each case to be decided on its own facts. Accordingly, even with a showing that a person is maintaining a new residence of indefinite duration, he may not be held to have changed domicile when he is away from the former home for a limited purpose--for example, to obtain medical care, [FN9] to pursue employment, [FN10] or to serve in an elective office. [FN11] Similarly, residence in a place under legal or physical compulsion, as in the case of military personnel under official orders and prisoners, [FN12] normally will not result in the acquisition of a domicile at that location. [FN13]

Satisfaction of only one of the requirements for acquiring a new domicile is not sufficient.^[FN14] Thus, a definite and sincere intention to make a place one's home at some time in the future is not enough to make that place an individual's present domicile.^[FN15] Illustratively, in *Hendry v. Masonite Corporation*,^[FN16] the Fifth Circuit concluded that even though one of the defendants had received a promotion from his employer's Mississippi office to its Chicago office and had been working in Chicago continuously from the date of the promotion, there had been no change in domicile, as distinguished from the formation of an intent to change domicile. The court noted that the defendant's home, household furnishings, and family remained in Mississippi at the time of service of process in the action and that he had voted as a Mississippi resident after service of process had occurred in one of the cases and eleven days before service in the second case.

Similarly, physical presence does not convert a residence into a domicile when it is not coupled with an intention to remain in the state.^[FN17] In one case^[FN18] the plaintiff, in an action against her former husband for an accounting, had moved to New York from Pennsylvania and resided there for one and one half years, obtained a New York motor vehicle operator's license, automobile registration, membership in the New York Automobile Club, leased an apartment, and secured a New York library card. Nonetheless, the Pennsylvania district court held that she had not affirmatively shown a bona fide intent to establish and maintain a domicile in New York. The basis for the court's conclusion is the following passage:

(1) while plaintiff asserted that one of her reasons for moving was that she had relatives in Buffalo, New York, she remained in close propinquity to her former and present homes, just across the state line in Olean, New York; (2) plaintiff kept her stocks and bank account in Bradford, Pa., in care of her attorney; (3) plaintiff remained on the Pennsylvania voter registration rolls and did not register as a voter in New York; (4) plaintiff continued to pay Pennsylvania taxes, while never placing herself on the New York tax rolls; (5) plaintiff did not work in New York State during her stay and (6) during her stay, plaintiff made sundry trips back into Pennsylvania and to other places. Prior to the filing of this suit and prior to her formal engagement to marry her present husband she saw him socially on frequent occasions, both in Pennsylvania and New York.

Furthermore, little weight can be given to the fact that plaintiff acquired an operator's license and car registration in New York, since non-residents

undertaking extensive stays in New York are obliged by law to obtain those licenses, a fact of which the plaintiff is fully cognizant, as evidenced in her deposition.[\[FN19\]](#)

But a litigant is not required to state an intention to stay permanently at the new residence. Such a requirement would prevent a significant portion of our mobile population from acquiring a new domicile. It is sufficient if the individual intends to remain at the new home for an indefinite period.[\[FN20\]](#) A so-called "floating intention" to move on or even to return to a former domicile at some undetermined future time will not defeat the acquisition of a new domicile for diversity purposes.[\[FN21\]](#)

"However, an intention to return on the occurrence of some event which may reasonably be anticipated is not such an indeterminate or floating intention." [\[FN22\]](#) In *United States v. Knight*,[\[FN23\]](#) the court described the difference between an intention to return upon the happening of a reasonably foreseeable event and a "floating intention" to return at some indeterminate time in the future, in the following manner: "The distinction and difference are that in legal contemplation the first case is a present intent to return and independent of future determination; whereas the second case is a mere present expectation or hope to return, and wholly dependent upon future state of mind." Although the distinction is sound in principle, it does increase the complexity of the determination of jurisdiction.

The problem becomes even more complicated when the choice is not between an allegedly newly acquired domicile and a former domicile but between an allegedly newly acquired domicile and yet another state. Let us suppose that a law teacher with a domicile in Texas accepts a one year visiting appointment at a law school in Michigan. Shortly after arriving to teach in Michigan the professor receives and accepts an invitation to join the faculty of a law school in Massachusetts on a permanent basis the following year. He thereupon sells his Texas Home and procures a Michigan driver's license and license plates for use during the year he will be in that state. At this point the professor certainly no longer is domiciled in Texas and has not yet become domiciled in Massachusetts because of the absence of any physical presence there. Since it would be unacceptable to say that he has no domicile--that is, no state citizenship--for diversity purposes, the most logical conclusion is that the professor is a citizen of Michigan during his stay there, despite his intention to leave at the end of the academic year.[\[FN24\]](#)

When the two required elements of physical presence and intention to remain concur, domicile is established. It will be considered valid for the period during which the new residence continues even if it is abandoned only a short time later.[\[FN25\]](#) The quick termination of a claimed newly acquired domicile, of course, would be evidence that an intention to remain may never have existed.[\[FN26\]](#) But, if a bona fide establishment of a new domicile is proven, the motive for its acquisition and the length of the duration become irrelevant.[\[FN27\]](#)

The tests for the acquisition of a domicile apply regardless of the location of the domicile asserted. Thus, a United States citizen may acquire a domicile in a foreign country under the principles discussed above. Of course, when this happens, the American abroad will not be considered a citizen of any state of the United States and federal diversity of citizenship jurisdiction may not be asserted by or against that person.[\[FN28\]](#)

Similarly, an alien may become a domiciliary of the United States. As discussed elsewhere,[\[FN29\]](#) an alien may sue or be sued in a federal court under Section 1332(a)(2) of Title 28 if the opposing party is a citizen of any state including the state in which the alien is domiciled.

Under the Judicial Improvements and Access to Justice Act it no longer is true that a permanent resident alien may sue or be sued by a citizen of the state in which the alien is domiciled in federal court.[\[FN29.1\]](#) However, once the alien becomes a citizen of the United States it becomes important for diversity purposes to determine in which state he or she is domiciled.

....

When a plaintiff's domicile changes only during the period surrounding filing of complaint, a court not only must weigh the quantity and quality of ties to new domicile but also the bridges to the former domicile that still remain. [Leon v. Caribbean Hosp. Corp., D.C.Puerto Rico 1994, 848 F.Supp. 317](#) (fact that plaintiff expected to return to job in Puerto Rico, did not discontinue utility services on her home, and left her car there illustrated that she has the intention necessary for acquiring a new domicile).

Defendant's presence in Puerto Rico, as well as employment and membership in a church there did not sufficiently prove acquisition of new domicile. Defendant's retention of Virginia driver license, Virginian bank account, health care in that state and failure to submit tax return reflecting

Puerto Rican residence was proof of Defendant's intention to remain in Virginia. [Delgado Ortiz v. Irelan, D.C.Puerto Rico 1993, 830 F.Supp. 68.](#)

...

Plaintiff, who had declared to some witnesses his preference for Michigan and his intention to live there again, but had lived with his family in the same house in Danbury, Connecticut, for more than ten years, "may have had, and probably did have, some floating intention of returning to Michigan * * *. But * * * a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicil." [Gilbert v. David, 1915, 35 S.Ct. 164, 167, 235 U.S. 561, 570, 59 L.Ed. 360.](#)

* * *

CHAPTER 3 - RIGHTS *HELD* BY PHYSICAL PERSONS

Introduction

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

Social, economic and cultural rights require the duty to act towards making the rights available. They are thus positive rights. However, there are rights which are recognized by law, and their non-violation is legally guaranteed and enforceable. Civil and political rights usually belong to this category and the law guarantees non-intervention when a person exercises these rights. The rights that are discussed in this chapter are *rights of personality* and they fall within the category of civil rights, i.e. rights that are naturally acquired by mere fact of birth and the resultant entry into the civil society.

Objectives:

At the end of this chapter students are expected to be able to:

- a) define rights;
- b) contrast negative and positive rights;
- c) identify the provisions of the Constitution and the Civil Code that guarantee rights of personality and constitutional liberties;
- d) discuss rights related to life and the body;
- e) explain right to privacy;
- f) discuss freedom of action
- g) explain freedom of thought and religion;
- h) state the relationship between natural rights and civil rights;
- i) discuss the limits of civil rights;
- j) analyze case problems that involve the concepts and issues here-above.

1- Rights of personality and constitutional liberties

Rights of personality are *held* as of birth (Art. 1), although legally binding acts (e.g. contracts) are *exercised* through a person who is in charge of administering the property of the person with lessened capacity (192-393). It is to be noted that *holding* rights refers to entitlement which may at times require *exercising* it through a guardian or a tutor.

The embodiment of rights of personality in civil law facilitates the implementation of these rights which are also enshrined in constitutional law and other laws. Articles 8 to 31 of the Civil Code deal with *rights of personality*; i.e. - rights of every individual by virtue of physical personality. Article 8 provides “Every physical person shall enjoy the rights of personality and the liberties guaranteed by the Ethiopian Constitution” without regard to race, colour, religion or sex.

Article 25 of the Constitution articulates the principle of equality before the law and entitlement without any discrimination to equal protection of the law. This principle includes foreigners because they are not precluded from this *principle of equality* in all matters (389/1) other than the few specifically identified juridical acts they are not capable of exercising, such as participation in government (389/2) and ownership of immovable property without government permit (390).

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

Moreover, the rights under Part II of Chapter III of the Constitution (i.e. Articles 29 to 44) deal with the political rights that every person is entitled to. The detail of constitutional liberties will be discussed in depth in other courses such as constitutional law and human rights.

It is to be noted that Article 93/4 (c) of the Constitution enumerates the provisions that cannot be suspended nor restricted even at times of a state of emergency. These provisions are Article 1 (nomenclature of the State), Article 18 (freedom from cruel, inhuman or degrading treatment), Article 25 (the rights to equality before the law without discrimination) and Article 39 Sub-Articles 1 and 2 (rights of self-determination).

2- International Covenant on Civil and Political Rights

Article 9/4 of the Constitution recognizes all international agreements ratified by Ethiopia as “an integral part of the law of the land.” Article 13/2 of the Constitution further provides that the fundamental rights and freedoms specified in Chapter III of the Constitution (i.e. Articles 13 to 44) “shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.”

The issue regarding the level of hierarchy that international instruments on human rights have in Ethiopian law doesn't belong to law of persons. It suffices to say that in addition to our domestic laws and the Constitution, international instruments ratified by Ethiopia shall be relevant with regard to rights of personality. The 1966 Covenant on Civil and Political Rights (ICCPR), in particular, has many provisions relevant to rights of personality. Part III of the Covenant (Articles 6 to 27) embodies the following rights:

- right to life (Article 6), freedom from torture, or inhuman and degrading treatment (Art. 7),
- freedom from slavery and slave trade in all their forms, servitude and forced labour (Art. 8),
- right to liberty and security of the person, freedom from arbitrary arrest and detention (Art. 9),
- right of detained and accused persons to be treated with humanity (Art. 10),
- freedom from imprisonment merely on the ground of failure to fulfill contractual obligation (Art. 11),

- liberty of movement and freedom to choose residence, freedom to leave any country including one's own and freedom to return to one's own country (Art. 12),
- the freedom of aliens against expulsion (Art. 13) except for compelling reasons,
- right to equality before the law (Art. 14), and freedom from retroactive application of criminal law (Art. 15),
- right to recognition as a person (Art. 16),
- right to privacy of family, home and correspondence, and protection from against such interference and unlawful attacks on honour and reputation (Art. 17),
- right to freedom of thought, conscience and religion (Art. 18), and freedom of speech and expression (Art. 19),
- freedom from any propaganda towards war, discrimination or hatred (national, racial, religious) Art. 20,
- right to peaceful assembly (Art. 21) and freedom of association with others (Art. 22),
- right to marry, found a family and the equality of rights and responsibilities of spouses (Art. 23),
- right to every child to protection by his family, society and the State (Art. 24/1), and acquire name (Art. 24/2) and nationality (Art. 24/3),
- right and opportunity to take part in the conduct of public affairs (Art. 25/a), right to vote and right to be elected (Art. 25/b), and the right to have access to equal public service in one's country (Art. 25/c),
- right to equality before the law and equal protection of the law (Art. 26),
- the right of members of minorities to practice their culture, to profess and practice own religion, or use their own language (Art. 27).

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

3- Rights of personality under the Civil Code

Rights of personality and constitutional liberties are *extra-commercium*; i.e. - they are not subject to legal transactions (Art. (9/1). Moreover, “voluntary limitation imposed on the exercise of such rights and liberties shall be of no effect unless it is justified by a *legitimate interest*” (9/2). This provision has the purpose of protecting persons from their own harmful decisions and acts.

“Legitimate interest” is referred to as “*les lois et l’ordre public*” (law and public order) in the French master text. The drafter’s original French version and the words "ተገቢ ለሆነ ለማህበራዊ ጥቅም" (legitimate social interest) in the official Amharic version may help us in interpreting “*legitimate interest*” that may justify voluntary limitation on one’s rights of personality and constitutional liberties.

In addition to the enumeration of rights of personality and constitutional liberties, the law further avails remedies in case of violation of these rights. A person may demand the cessation of any unlawful molestation and is entitled to seek damages under extra-contractual liability (Art.10).

The general principles under Articles 8 to 10 are applicable to the individual rights stipulated under Articles 11 to 31. The rights of personality embodied in Articles 11 to 31 are:

- Rights concerning the body (Articles 18-22, 25, 26)
- Rights concerning privacy (Articles 11, 13, 27 to 31)
- Freedom of action, thought, religion, silence, etc. (Articles 11, 12, 14 to 17, 23, 24).

3.1- Rights concerning the body

These rights protect the integrity of the human body during a person’s lifetime (both against others and against himself) and also safeguard the body after death.

- According to Article 18/1, “The act by which a person disposes of the whole or a part of his body shall be of no effect ... where such act is to be carried out *before (his) death* ... (and) if such act (causes) a *serious injury* to the integrity of the human body.” The exception to this rule is an act accepted by medical practice (18/2).
- Promise for the disposition of one’s body in whole or in part before or after death is revocable (Art, 19/1).

- A person may refuse to submit himself to a medical or surgical examination or treatment (20/1). The two exceptions are:
 - a) Laws or regulations providing for physical examinations, compulsory vaccination or similar measures in the public interest (20/2);
 - b) The power of the guardian to submit a minor or interdicted person to an examination or treatment beneficial to the incapacitated person's health (20/3).

- The following are effects of refusal to submit to examination and treatment that do not involve any abnormal or serious risk:
 - a) The person "forfeits the right to avail himself of the illness or infirmity which the treatment could have prevented, eliminated or lessened." (21) A case in point is the forfeiture of the right to seek damages for physical injury while the subsequent damage could have been averted by treatment which the victim refused to undergo.
 - b) The court may consider as established the facts which the examination was meant to ascertain (22). For example, a person charged of knowingly transmitting AIDS to a woman may refuse to submit to examination. However, the Court can consider the status of the accused as AIDS Positive.

- A person who has the capacity to make a will (i.e. - including a minor over 15 years of age –Art. 308) has the right to prescribe the conditions of his funeral (Art.25). In case, however, the deceased has left no prescriptions, the spouse or relatives may prescribe conditions of the funeral (Art. 26).

3.2- Rights concerning privacy

The Civil Code provisions that stipulate rights of privacy protect persons against illegal searches and secure the inviolability of a person's dwelling place and correspondence. Rights of privacy also include a person's rights against public exhibition, reproduction and sale of his photograph or image.

a) The right against illegal searches

By virtue of Article 11, no person shall be subjected to search except as provided by law. The first part of this provision prohibits the restriction of freedom against search, except in the cases provided by law, and its latter

part forbids illegal searches. Articles 32 and 33 of the Criminal Procedure Code regulate searches on the person himself or his premises.

b) The inviolability of domicile

“No one may enter the domicile of another person against the will of such person; neither may a search be effected therein except in the cases provided by law” (Article 13/2). The term “*domicile*” under Article 13 should impliedly include residence. The French version uses “*la demeure*”, meaning ‘*dwelling house*’ so as to include both residence and domicile. Articles 604 and 605 of the 2004 Criminal Code (same as Articles 571 and 572 of the 1957 Penal Code) use the term domicile in its wider interpretation.

c) Inviolability of correspondence

The contents of a *confidential* letter shall not be divulged without the consent of the author (31/1). The two exceptions are: *first*, it may be produced in judicial proceedings; and *secondly*, it can be produced where the addressee has legitimate interest (31/2).

The term “*confidential*” seems to include all letters that are in closed envelope even if they are not marked confidential. Violation of privacy of correspondence by a person to whom it is not addressed (i.e.- an act of deliberately opening a closed letter or envelope that encloses “correspondence, telegrams, business papers or private communications, or a packet, parcel or consignment of any kind ...”) is punishable under Article 606 of the Criminal Code.

d) Inviolability of a person’s image

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

Exception with regard to reproduction (Article 28):

Consent of the person is not required if reproduction is justified by:

- notoriety of such person,
- public office,
- requirements of justice or the police, or,
- facts, events or ceremonies (that are) of public interest or which have taken place in public.

According to the literal reading of Article 28, these exceptions are applicable to reproduction of images and photographs, but not to

exhibition and sale. However, Article 29/1 avails sanctions against the exhibition or sale of image without consent except in the exceptions referred to in Article 28. Thus (unlike Vanderlinden's commentary on page 52, second para), Article 29/2 renders the exception under Article 28 applicable to exhibition and sale of image or photographs as well.

Sanctions against exhibition or sale without consent (Article 29):

- Except for the exceptions allowed under Article 28, a person whose image is exhibited or offered for sale without his consent may demand that such acts be stopped.
- Damages (29/2) may be awarded. And moral damages (29/3) may also be awarded if the act doesn't cease immediately when cessation is demanded.

The spouse, or in default, the relatives stated in Article 30/2 can invoke the sanctions under Article 29 if the exhibition or offer for sale of image is prejudicial to the honour and reputation of a deceased person. However, the sanction under Article 29 doesn't include reproduction of image. Nevertheless, as long as reproduction of image without consent (27) is forbidden, the sanctions of cessation and damages are self-evident.

3.3- Freedom of action, thought, religion, ...

Every person is free to exercise any activity which he deems proper to his calling (i.e.- occupation) or leisure provided that the rights of others , morality and the law are respected (Art. 16). A typical example with regard to respect for the rights of others is the right of a spouse who may "in the interest of the household, object to the carrying on of a given occupation or activity" (Article 645). Another general principle in addition to the one embodied in Article 16 is the non-restriction of freedom except in cases provided by law (Article 11).

These provisions, i.e. Articles 16 and 11 serve as a general framework for freedom of action, thought, religion, silence, etc ... that are embodied under Articles 12, 14, 15, 17, 23 and 24.

a) Freedom of residence

The right to freely establish one's residence wherever it is suitable and change the place of such residence is embodied in Article 12/1. Any undertaking to reside in a particular place is void (12/2). And, "the undertaking of a person not to reside in or not to go to a particular place shall be of no effect" (12/3) unless it is justified by legitimate interest.

b) Freedom of thought

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

c) Freedom of religion

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

d) Marriage and divorce

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

e) The Right to keep silent

“Any admission or manifestation of the will obtained by methods causing *molestation to the personality* shall be of no effect” (Art. 23). The Amharic version uses the words “*physical pressure*” instead of “molestation of personality” and thus seems to be narrower in scope than the English version. The phrase “*molestation of personality*” in the English version apparently accommodates moral pressures as well.

f) Professional secrecy

The right to professional secrecy is respected (24/1) if revealing such facts is betrayal of the confidence placed in a person by virtue of his profession. However, professional secrecy cannot be invoked against the duty to report offences against the State and the Armed Forces as required under Articles 254 and 335 of the Criminal Code.

It is to be noticed that the domains of rights of personality and constitutional liberties are not mutually exclusive. As can easily be observed, from the brief discussion, here-above, rights of personality are embodied in the Constitution, international human rights instruments and the Civil Code. What needs to be realized is that the inclusion of a given right in the Constitution, in addition to its embodiment in the Civil Code, renders it stronger because as stated in Article 9/1 of the Constitution:

“The Constitution is the Supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.”

Readings on rights of personality

Man as the holder of rights

(Rudof Huebner, *A History of German Private Law*, Book I: The Law of Persons (2000), pp.41- 42

Our present-day simple and perspicuous arrangement of the law of persons, based on recognition of every human being as a holder of rights, belongs only to a modern period of civilization. German law, in its beginnings, like other systems, by no means treated all human beings as legally equal. To many classes it utterly denied all legal worth, to others it attributed only a partial worth. Only gradually was this primitive view overcome. With it there disappeared contrasts and distinctions which had once possessed profound significance in social life, above all that division into estates that characterized the medieval world. Even the Christian doctrine of the moral equality of men could not overcome this, -albeit far-seeing spirits like Eike von Repgow recognized the legal equality of all men as a tenet of religion and morality, justifying this by the fact that God had created man in his image and had given salvation to all equally through his martyrdom.

The doctrine of the Law of Nature first carried this view to final triumph. Under the dominance of its ideas serfdom was abolished, the feudal class division of society into estates were swept away, and the legal equality of different religious faiths established. The principle of the equality of men or of citizens, which found express adoption in many German constitutions in limitation of foreign models, was established without restriction within the field of private law: every man is a person in the legal sense, a subject of rights, i.e. "capable of appearing as the holder and bearer of rights". Hence the modern State, in Germany as elsewhere, banished slavery utterly from its soil, and in the more modern codifications it was explicitly provided that foreign slave should become free the instant they should set foot within the boundaries of the State. The limitations in this respect still retained in the Prussian "*Allgemeines Landrecht*" of 1794 ... were shed by a special statute in 1857.

In this case, therefore, development came, by way of exception, through statutory simplification. Yet, it should not be forgotten that this realization of formal legal equality accompanied a steady deepening of economic contrasts, and that culture, particularly, has in most recent times created social divisions which at least equal in actual importance the one-time division between the free and the unfree, -although, perhaps, this new contrast is itself about to lose its distinctness. ...

The Rights of Man

Thomas Paine, *The Rights of Man* (1791), Penguin Classics Reprint, 1985, pp. 67 -69

... Man did not enter into society to become worse than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of his civil rights. But in order to pursue this distinction with more precision, it will be necessary to mark the different qualities of natural and civil rights.

A few words will explain this. Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

From this sort of review, it will be easy to distinguish between that class of natural rights which man retains after entering into society, and those which he throws into the common stock as a member of society.

The natural rights which he retains, are those in which the power to execute is as perfect in the individual as the right itself. Among this class ... are all the intellectual rights, or rights of the mind: consequently, religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. They answer not his purpose. A man, by natural right, has a right to judge in his own cause; and so far as the right of mind is concerned, he never surrenders it: but what availeth it him to judge, if he as not power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right.

...

But it will be first necessary to define what is meant by a constitution. It is not sufficient that we adopt the word; we must fix also a standard signification to it.

A constitution is ... is a thing antecedent to a government, and a government is only the creature of the constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. ...

* *

John Locke, *The Second Treatise of Government* (1890) § 87, 135, 136

...

Man being born, as has been proved, with a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man or number of men in the world, has by nature a power not only to preserve his property –that is, his life, liberty, and estate – against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others as he is persuaded the offense deserves, even with death itself in crimes where the heinousness of the fact in his opinion requires it. But because no political society can be, nor subsist, without having in itself the power to preserve the society, there and there only is political society where every one of the society members has acquitted his natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. ...

...

Though the legislature ... though it be the supreme power in every commonwealth ; yet:

First ... (its power) is limited to the public good of the society. It is a power that has no other end but preservation, and therefore can never have a reign to destroy, enslave or feignedly to impoverish its subjects. ... The rules that they make for other men's actions must, as well as their own, and other men's actions be conformable to the law of nature. ...

Secondly, the legislative or supreme authority cannot assume to itself a power to rule b extemporary, arbitrary decrees, but is bound to dispense justice, and to decide the rights of the subject by promulgated standing laws, and known authorized judges. ... [M]en unite into societies that they may have the

united strength of the whole society to secure and defend their properties, and may have standing rules to bound by it by which everyone may know what is his. ...

* *

Liberty

John Stuart Mill, *On Liberty* (1859) Parts I and IV with omissions

...(Liberty) comprises, *first*, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive senses; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects; practical or speculative, scientific, moral and theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. *Secondly*, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them *Thirdly*, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.

...

What then is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society?

Each will receive its proper share, if each has that which more particularly concerns it. To individuality, should belong the part of life in which it is

chiefly the individual that is interested; to society, the part which chiefly interests society.

...(E)very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be found to observe a certain line of conduct towards the rest. The conduct consists, *first*, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and *secondly*, in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavour to withhold fulfillment.

Nor is this all that society may do. The acts of an individual may be hurtful to others As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.

* * *

Case problems and issues for discussion

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

Jodie and Mary are conjoined twins. They are conjoined at a circular pelvis. One of the twins, Mary, has a flaccid, useless heart, no working lungs and an underdeveloped brain. She can suck, kick and open one eye but may not have consciousness.

Her body mate Judie is bright, alert and sparkling. Mary's life depends on Jodie's heart and lungs, and the strain will probably give Jodie heart failure and kill both in three to six months.

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

2. Ato "A" has a wife and seven children aged three to seventeen. He has no means of supporting his family. He came across a certain opportunity and agreed to sell one of his kidneys to a patient Mr. B, who is quite familiar with such underground practices in his country. While Dr. X was undertaking the due preparation for the kidney transplantation, Mr. Y (who is Mr. B's business adversary) intervened and invoked the inviolability of Ato A's integrity of body pursuant to Article 18 of the Civil Code.
 - a) Can Mr. Y succeed?
 - b) How do you see the legality of blood donation? Would your opinion be different with regard to sale of one's blood for blood transfusion?
3. Why do you think are rights of personality not subject to legal transactions?
4. While Ato X was about to enter into the premises of the Tax Office, he was asked to be searched. He refused to submit to the search invoking the right not to be searched. When he was refused entry, he said that he has come to the Tax Office to perform his duties as a taxpayer, and now that he has been denied entry without being searched, he should not be subject to penalties for failure to declare income and pay on account. Write your legal opinion.
5. Discuss the legality of eye donation enforceable after the donor's death?
6. Explain the concept of natural rights stated by Thomas Paine and John Locke?
7. State situations where liberty, according to John S. Mill, cannot be restricted.

Judge rejects Monroe claim to photographer profits

Posted Sat May 5, 2007 9:46 pm AEST

A US federal judge has ruled that Marilyn Monroe's right to a cut of the profits from those who photographed her died with the actress in 1962.

The legal dispute centred on the iconic images of the blond actress posing with her skirt blowing up, captured by the photographer Sam Shaw during the filming of *The Seven Year Itch* in 1954.

Judge Colleen McMahon ruled the Monroe estate cannot claim Monroe's publicity rights because any rights the actress failed to assert during her life "were extinguished by her death."

"Ms Monroe could not devise by will a property right she did not own at the time of her death," Ms McMahon said.

Rights to Shaw's pictures, which are featured on a T-shirt sold by the discount retailer Target in America, are controlled by the late photographer's estate.

In 2005, the Monroe estate filed a complaint saying that Monroe's "right of publicity" was violated because the T-shirt used her images for commercial gain.

The complaint was filed in Indiana, where a post-mortem right of publicity is recognised.

But the case was moved to a US District Court in New York, which does not recognise a post-mortem right of publicity, because New York was Monroe's legal place of residence, according to court papers.

...

-Reuters

Review Question

8. Assume that the same factual situation has happened in Ethiopia, write your legal opinion to solve the issue of post-mortem right to publicity.

* * *

O'Donovan's Problems on Rights of Personality

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 31 to 40

Problem 31

Woizero Workitu has taken a job as a cook in the house of Mrs. Smith. When hiring Workitu, Mrs. Smith told her that she must move to a house near to that of Mrs. Smith so that she would be available for late night parties. Workitu agreed and moved very near to the Smith house.

Now (the rent of Workitu's house has been raised) and Workitu cannot afford to continue living in such an expensive area. She asked Mrs. Smith to increase her salary to pay the rent. Mrs. Smith refused and warned Workitu that if she moves far away she will lose her job. Workitu has found a house five kilometers from the Smith house. Mrs. Smith has said that this is too far away.

Advise Workitu whether Mrs. Smith can dismiss her for failure to live near her house.

Problem 32

Ato Tadesse joined a religious order. ... At that time he was required by the order to sign an agreement to abide by the rules of the order. Rule 16 provides:

"All brothers of the order will live a celibate chaste life. All brothers agree never to marry. All brothers agree that this rule applies regardless of future eventuality and even in cases where a brother is no longer a member of the order."

Ato Tadesse, while still a brother, met Woizero Mulunesh. He has fallen in love, wants to leave the order and marry Mullenesh.

Advise Tadesse whether he is still bound by the agreement he signed and in particular by Rule 16 of the rules of the order.

Problem 33

Ato Yohannes is accused by Woizerit Zenebech of being the father of her illegitimate child. Ato Yohannes denies the accusation. ... Woizerit Zenebech has brought a paternity suit against Ato Yohannes. The court has requested that both parties and the child be given blood tests. Woizerit Zenebech has

agreed to blood tests for herself and her child. However, Ato Yohannes has refused to undergo such a blood test.

Advise Ato Yohannes on the consequences of his action.

Problem 34

Ato Berhanu made an agreement to donate one of his kidneys to Ato Tadesse. Ato Tadesse is suffering from a serious kidney disease and if he doesn't get a transplant he will die. As part of the agreement, Ato Tadesse offered Ato Berhanu a job at his house as a gardener.

Now Ato Berhanu is unwilling to undergo the operation for the removal of his kidney. Furthermore, he says his religion does not permit such donations. Because of Ato Berhanu's refusal to donate the kidney, Ato Tadesse has dismissed him from his job as a gardener.

Ato Berhanu comes to you to know if he can get his job back under the agreement.

Advise Ato Berhanu.

Problem 35

(Omitted)

Problem 36

Ato Berhane Mengistu suffers from a serious disease of the kidneys. His doctors agreed that, if he did not have a transplant, he would die.

One evening Ato Berhane met Ato Asrat in a bar in town. Ato Berhane told Asrat of his problem. Ato Asrat agreed to donate one of his kidney's to Ato Berhane in exchange for a sum of (Birr 50,000).

The operation was performed but was unsuccessful. Ato Berhane is now in critical state of health.

Ato Asrat wishes to recover his (Birr 50,000) but Ato Berhane's wife has refused to pay.

- a) Advise Ato Asrat
- b) What would be Ato Asrat's legal position if he had revoked the agreement before the operation?

Problem 37

Woizerit Semeitu is a sixteen year old high school student and very pretty. One day, she noticed that people were pointing at her in the street and laughing. (And) also, at school the other students behaved in a very strange manner. She asked a friend what the matter was. For an answer her friend took her to the Piazza and showed her a big notice on which her photograph was shown. On investigation Woizerit Semeitu found that there were at least fifteen such photographs of her, advertising lipstick called “kiss me”.

As a result of the ridicule and insults to which she was exposed by the advertisement, Woizerit Semeitu became very ill. She was in hospital for three weeks and the medicines and subsequent treatments combined with the hospital bill came to (Birr 5,000). ...

Advise Woizerit Semeitu.

Problem 38

Ato Girma received a letter from a business associate through the post. The letter was marked ‘confidential’. Yet, Ato Girma considers that it is relevant to the proceedings of bankruptcy presently underway in connection with his company’s affairs.

Advise Ato Girma as to whether the letter may be produced in court.

Problem 39

Ato Merid and Ato Mengistu are lawyers in Debre Zeit. They have been established there for twenty years and have the biggest legal practice. Recently they have been so busy that they have decided to take on a junior associate to help him. However, they are worried that the associate may soon leave the firm taking the best clients with him so they have inserted a clause in the contract of employment which reads as follows:

“The junior associate agrees that should he leave ... Merid and Mengistu, Advocates, he will not set up legal practice within thirty kilometers of Debre Zeit.”

You have been offered the job of junior associate with Merid and Mengistu. Do you think (that) the restriction in the contract of employment will prevent you from setting up your own firm of lawyers in Debre Zeit at later date?

Problem 40

Woizero Ababa who is seventeen years old has a twin sister Woizero Bekelech who suffers from a disease of the kidneys. The doctors who attend Bekelech have told her parents that unless she gets a kidney transplant within the next three months she will die. The parents have decided that Ababa should donate one of her kidneys to her sister and that Bekelech should undergo a transplant operation.

Both Bekelech and Ababa have refused to undergo the operation. Bekelech has refused because she has been converted to a religion which prohibits all medical attention and believes in the natural state of the body.

Ababa has refused because her husband Ato Kassa has forbidden her to undergo the operations as he fears for her health. Ababa herself would like to help her sister.

Some publicity has been given to the case through the newspapers. The matter came to the notice of the Ethiopian Herald through a lecture given at the University by doctor Tadeski, A Russian Surgeon, who advised the performance of the transplant. His lecture entitled "Some problems of kidney transplants" dealt in part with the difficulty of finding donors. He referred to Ababa and Bekelech as examples of a case where a perfect donor was available and yet neither party was willing to undergo the operation. Since then the newspapers have published photographs of the two girls and have hounded them with undesirable publicity.

The parents of Ababa and Bekelech, Ato Deneke and Woizero Almaz have been most upset by the publicity and by their daughters' failure to cooperate with them.

Write a memorandum to the parents explaining the legal issues.

* * *

Case 7

Computer File No. 306000
Tir 30, 1998 Eth. Cal.

Federal High Court
Addis Ababa

Judge: Mustafa Ahmed

Plaintiff: W/ro Sophia V.
Defendant: Addis Ababa Hilton

The Court has rendered the following judgment after having examined the case.

Judgment

In a Statement of Claim dated Ginbot 6th 1996 Eth. Cal (May 14th 2004), the plaintiff invoked Article 27 of the Civil Code according to which the photograph or the image of a person cannot be “exhibited in a public place, reproduced nor offered for sale without the consent of such person.” The plaintiff claimed that the defendant has displayed her photograph for commercial purposes and that the latter has procured a profit over Birr 1,000,000 (One Million Birr). Woizero Sophia sought payment of the damage that she claimed to have incurred. She claimed that the damage is equal to the profit obtained by the defendant. The plaintiff has produced *Selamta* Magazine (published by Ethiopian Airlines) and secondly menu of Addis Ababa Hilton in which her picture has been published.

The defendant noted that the case involves extra contractual liability and it submitted preliminary objection based on Article 2143/1 (c) of the Civil Code which bars tort claims that have not been instituted within two years from the time of alleged damage. With regard to the merits of the case, the defendant responded that *Selamta* Magazine is published by Ethiopian Airlines as an illustration to a text written on Ethiopian traditional food, and it has no relation with its publication. According to the defendant, Article 27 of the Civil Code protects privacy, whereas the plaintiff’s picture was taken while she was at work in public thereby rendering the claim unacceptable.

Regarding the act of the defendant in using the plaintiff’s picture in its menu, it contended that the plaintiff cannot object the act because the picture was taken while she was serving traditional coffee in the course of her employment, thereby rendering her claim inappropriate. And in the alternative, the

defendant argued that silence of the plaintiff over a long period of time after the publication of her picture implies acceptance.

The defendant further contended that Article 27 of the Civil Code entitles the applicant to claim the cessation of the exhibition of her picture in accordance with Article 29/1. Article 29/2, argued the defendant, allows compensation only when equity so requires and if the court finds that the defendant has obtained profit whereas the display at issue is only meant to indicate the traditional coffee ceremony at Addis Ababa Hilton.

According to the defendant, its principal business objective is accommodation, food, drinks, swimming pool, etc., and not traditional coffee ceremony. It added that, even in that regard, its customers are not attracted by the plaintiff's picture, but by the quality of coffee. The other argument was that the plaintiff has not produced evidence regarding the alleged profit; Nor has she incurred moral or material damage; And instead, the plaintiff has obtained fame and popularity.

The Court considered the arguments forwarded by both parties based on relevant provisions. The issues examined by the Court are:

- a) Whether the case is barred by prescription
- b) Whether the defendant has obtained profit from the display of the plaintiff's image
- c) Whether the plaintiff has incurred damages
- d) Whether the claim is supported by evidence.

(Decision of the Court has been omitted).

* * *

Review Question

Write a legal opinion on the issues "b", "c" and other issues that are related with Articles 27 and 29 of the Civil Code.

* * *

CHAPTER 4 – LESSENERED CAPACITY

Introduction

As discussed in the preceding chapter, every person without distinction *holds* rights of personality. By virtue of Article 1 of the Civil Code, such entitlement to rights of personality starts as of birth; and under exceptional circumstances rights such as successions can include the conceived child, provided that its interest so requires and if the conceived child is born alive and viable (Arts. 2-4, 834).

There may be exceptions to the principle of *holding* of rights upon birth. For example, the constitutional right to vote and to be elected (Article 38 of the Constitution) is *held* by persons who have attained the age required by law. Aside from such exceptions in the realm of constitutional liberties (which clearly require a certain level of maturity and experience), every person *holds* the rights of personality embodied in the Civil Code.

However, there are restrictions in the *exercise* of these rights by minors, insane persons, etc. even if they *hold* all civil rights from the moment of birth. We should thus make a distinction between *holding* rights and *exercising* them. A person who holds rights and exercises them is said to have the capacity to enter into legal relations, while a person who holds rights, but exercises them through a guardian or tutor is referred to as *a person with lessened capacity*.

Objectives:

At the end of this chapter students are expected to be able to:

- a) discuss holding rights and lessened capacity to exercise rights;
- b) explain acts that can't be performed by minors and the effects thereof;
- c) contrast notorious and non-notorious insanity
- d) discuss the effects of notorious insanity on juridical acts
- e) contrast grounds and effects of judicial and legal interdiction;
- f) explain the grounds for the termination of the various forms of lessened capacity;
- g) state the functions of the organs that protect persons with lessened capacity;
- h) discuss the termination of functions of organs of protection;

- i) state the juridical acts that cannot be performed by foreigners,
- j) analyze case problems that involve the concepts and issues here-above.

* * *

1. Capacity to *exercise* rights and duties

1.1- General principles

a) *Capacity is the rule and incapacity the exception*

Article 192 provides that “Every physical person is *capable* of **performing** all acts of civil life *unless he is declared incapable by the law*”. In other words, everyone has the *capacity to exercise the rights he holds* unless he is within the group of persons whom the law declares *incapable* of performing juridical acts on their own, i.e.- without being represented by a guardian or a tutor.

b) *Capacity is presumed unless proved otherwise*

A person’s capacity to exercise juridical acts is presumed (196/1), and anyone who invokes the issue of incapacity bears the burden of proof (196/2). In our day-to-day transaction we don’t usually consider the condition of “capacity” in every interpersonal relationship and upon each juridical act unless it is apparent as in the case of most minors. Capacity is thus presumed unless proved otherwise.

c) *The deprivation in the exercise of rights is not absolute*

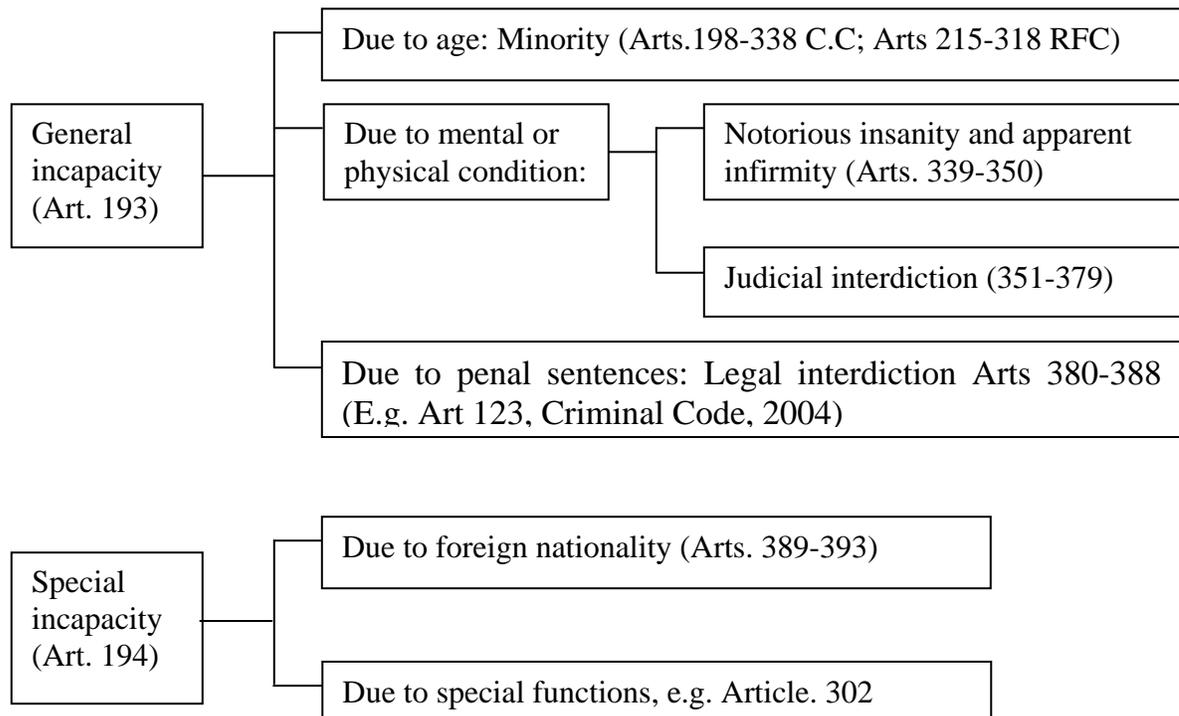
It must be noted that the words “unless he is declared *incapable* by the law” under Article 192 do not denote *absolute* incapacity or *total* disability to perform any act of civil life. Juridical acts (i.e. - acts that entail legal consequences) are merely a very small fraction of the large multitude of acts of civil life in a person’s day-to-day activities, relationships and endeavours. Despite a person’s incapacity to **perform** juridical acts, the exercise of his rights and performance of his duties remain unaffected in most domains of civil life, other than juridical acts that require prudent and rational decision. Of course, the incapacitated person is not deprived of **holding** these rights; but instead, he is merely required to **exercise** them through a guardian or tutor. In short, the capacity to exercise rights is *lessened* under certain circumstances; and the entitlement to these rights is not completely deprived.

d) The prohibition of renunciation and voluntary restriction of rights

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

1.2- Categories of lessened capacity

(N.B. The provisions cited are from the Civil Code unless stated otherwise)



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

1.3- Purposes of lessened capacity

Rights are *held* by every person from the moment of birth, and these rights, according to Article 8, are enjoyed by everyone regardless of race, colour, religion or gender. But the direct *exercise* of certain juridical acts (such as legally binding contracts) requires a certain level of maturity, mental condition and the like. The law duly lessens such rights of certain groups of persons on the basis of their status of minority, notorious insanity, apparent infirmity, judicial interdiction and legal interdiction for the following reasons:

- a) To protect incapacitated persons from others who may take advantage of their inexperience, inferior judgment, etc.; and to protect these persons of lessened capacity from their own erroneous decisions and acts that could be detrimental to their interests.
- b) In the case of legal interdiction, the incapacity has the purpose of protecting society from offenders.

* * *

2. Minority

N.B. - The Articles cited with regard to minority are from the Revised Family Code (RFC) of 2000, and an alternative version based upon the Civil Code has been attached as Annex I because the Civil Code provisions on minority are still applicable in regions that have not yet adopted Revised Family Codes.

2.1- Definition and effects of minority

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

2.2- Juridical acts that can be performed by minors

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

a) Guardianship and tutorship

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

b) Receiving income from work

From the age of fourteen onwards, the minor himself shall receive the income deriving from his work (Art. 263/1 -RFC). By virtue of Article 263/2 (RFC), the minor “may freely dispose of such income in accordance with the law, after making contribution to *his own maintenance*.” The original Amharic version reads “ለራሱ ቀለብ የሚሆነውን ለአሳዳሪው ክፍል በኋላ...” meaning “after having given his expenses of maintenance to his guardian” The condition that reads “in accordance with the law” renders this provision subject to other provisions (such as Articles 292 and 293 -RFC) that regulate the act of disposing of income by the minor.

c) Receiving income from donated or bequeathed property

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

d) Acknowledging a child

A minor shall personally make declaration to acknowledge that he is the father of a child (Art. 134/1 -RFC). Where the acknowledgment is made without the guardian's authorization, the minor can revoke such acknowledgment as long as he is a minor and within one year following his attainment of majority (140/2 -RFC). Such right of revocation can

only be exercised by the minor himself and not by his representatives or heirs (Art. 140/3 –RFC).

e) Acts of everyday life

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

Acts such as loan (Art. 290 -RFC), lease (284 -RFC), and compromise involving an amount more than *one thousand Birr* (Art. 288 -RFC) cannot be performed by the tutor without the authorization of the court. And the tutor cannot thus authorize the minor to perform such acts.

f) Will, marriage and being adopted:

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

g) Other juridical acts:

A minor has the right to bring an action in court as stipulated under Articles 300, 160/1 and 161/1 of the Revised Family Code. Moreover, the tutor shall consult the minor (aged fourteen or above) in all important acts concerning him (Art.291/1 -RFC). The right to be consulted is of course a fundamental right although it can hardly be considered a juridical act.

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

Juridical acts of a minor performed within the limits of his power are valid and binding. Minority can't thus be invoked to invalidate such acts. The issue of invalidation arises only where the minor acts in excess of his powers. Article 299 (RFC) provides that “The juridical acts performed by a minor in excess of his powers shall be of no effect”. The literal reading of this provision renders the contract *void* from the very beginning (*void ab initio*), while a careful contextual

interpretation in light of Article 300 (RFC) and other provisions clearly shows that juridical acts performed by a minor in excess of his powers are *voidable* (i.e.-subject to invalidation) and not null and void even prior to their invalidation.

Void contracts are *of no effect* from the very beginning. A strict literal interpretation of Article 299 (RFC) is inconsistent with the relatively specific Article 300 (RFC) which reads: “The nullity of juridical acts performed by the minor may be applied for only by the minor, his heirs, or his representatives”. This renders juridical acts of a minor (that are beyond his powers) *voidable*, i.e.-capable of being invalidated, only upon the request of the minor, his heirs or representatives. Had such contracts been *void* as per the literal reading of Article 299 (RFC), any party could have been able to declare that the contract is null and void from the very beginning.

However, request for invalidation (on the ground of incapacity) cannot be made by the party who has contracted with the minor nor any other party other than those stated under Article 300 (RFC). This clearly indicates that the contract remains valid unless the minor, his heirs or representatives apply for invalidation. This renders juridical acts of a minor in excess of his powers *voidable* (Art.300 - RFC), and not void in spite of the misleading reading of Article 299 (RFC).

a) Exceptions where contracts with minors are not invalidated

Acts of everyday life shall remain valid “...where the other contracting party *could in good faith believe* that the minor had received the authorization to conclude them and *has not taken advantage* of the inexperience of the minor” (Article 301/1 -RFC). This provision can’t be overstretched and be made to apply to juridical acts other than *acts of everyday life* (Arts. 292, 293 -RFC)), because the contracting party is not presumed to believe that the minor is authorized to perform an act that is beyond the tutor’s power of authorization.

Payment made to a minor remains valid “to the extent of the enrichment which remains to his benefit on the day when the action of invalidation is instituted” (Art. 302/1 -RFC). Or else, the payment is null, subject to the minor’s duty to make repayment (302/2 –RFC).

There is thus a fair balance of “protection” and “liability”. Although the law has devised a shield (protection) to minors, it is meanwhile precautionary against unfair advantages under the guise of minority. Such a balance is essential if, in the words of T. L. Dowson and E. W. Mounce

(Business Law, 1968: 131), “...legal protection is to be used ... as a shield and not as a sword.”

b) Reinstatement, extra-contractual-liability and damages

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

However, it must be noted that mere false statement of the minor that he is a major doesn't deprive him of his legal protection (Art. 304/1 -RFC). Nor does such a statement constitute fault (304/2 -RFC) entailing extra-contractual liability.

2.4- Termination of minority

By virtue of Article 310 (RFC), the lessened capacity of the minor shall cease upon his attainment of majority (i.e. –eighteen years) or upon being emancipated. And, pursuant to Articles 311 to 314 (RFC), emancipation of a minor results from marriage or explicit emancipation.

a) Emancipation due to marriage

Article 7/1 of the Revised Family Code (RFC) prohibits both genders from concluding marriage before the attainment of the full age of eighteen years. As exception to this stipulation, Article 7/2 (RFC) enables the Minister of Justice to grant dispensation of not more than *two years* upon the application of future spouses, or the parents or guardian of one of them, for serious cause.

This provision is an amendment to Articles 581 and 607 of the Civil Code which allow marriage for a woman upon her attainment of fifteen years. Article 7/2 of the Revised Family Code which substitutes Article 581/2 of the Civil Code creates the possibility of marriage for the man or the woman since their attainment of *sixteen years*, under the circumstances stated under Article 7/2 (RFC) .

The dispensation is granted both under the Civil Code (581/2) and the Revised Family Code (Art.7/2) thereby rendering marriage possible before the attainment of majority. Such marriage emancipates the minor

by virtue of Article 311 of Revised Family Code and Article 329 of the Civil Code. The Revised Family Code hasn't yet wholly substituted the family law provisions of the Civil Code of 1960 because it is up to the regions to adopt the new Code at their own pace.

b) Explicit emancipation

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

c) Effects and irrevocability of emancipation

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

* * *

Case problems and issues for discussion

1. Compare and contrast:
 - a) General and special incapacity
 - b) Judicial and legal interdiction

2. At the age of 16 (sixteen), Abebe won a lottery prize. He lives in Addis Ababa with his remote relative. His father is dead and his mother lives in the countryside far from Addis. He kept this fortunate event secret and collected his prize misrepresenting himself as a person of 19 (Nineteen) years of age through a forged ID card.
 - a) Can Abebe's mother invoke his minority and demand repayment if Abebe has squandered the money?
 - b) If instead the National Lottery Authority discovers Abebe's minority and is informed that Abebe has put the money he received in a savings account at the Commercial Bank of Ethiopia, can the National Lottery Authority invoke Abebe's minority to have the money blocked until Abebe attains 18 (eighteen) years of age or until he is represented by a tutor?

3. Lily, a beautiful girl, was married at the age of 16, but divorced six months later. Soon after her divorce, she sold most of her property to a neighbour (Woizero X) intending to go abroad. Her plan didn't materialize and she wants to invalidate her contract of sale by invoking minority. Can she?

4. "A" is twelve years old and works as a *listro* for his livelihood. Should A's tutor be with him to receive and manage the income payable to "A" from his services?

5. The father and the mother of a child are in deadlock with regard to the school their son is to be enrolled. How can the problem be resolved?

* * *

Case 8

(Translation: Fasil Abebe)

Addis Ababa City
First Instance Nifas Silk/Lafto Sub-City Court
Addis Ababa

FileNo. 1147/98
Date Hamle 12/1998 E.C.

Judge: Etagegnehu G/Hiwot

Petitioner: W/ro J. Shanko

Opposing Respondent: Not present

The case has been examined and the following judgment has been given.

Judgment

In a Petition dated Miazia 16, 1998 E.C., the petitioner stated that she is the neighbor to the grandparents of a minor child on whose behalf she is submitting the present petition. Thirteen years ago, a certain W/ro S. Wolde had two children -namely M. Wolde and the present child - from an unknown father. Their mother concluded marriage with Ato F. Gudo and started to live with him. She gave the children to her parents. After the death of the mother on Yekatit 3, 1995 E.C. the husband submitted a false petition to court under File Number 102991/95 to be appointed tutor/guardian of the child and his petition was accepted on Hamle 30, 1995 E.C. whereby he took possession of a house and other property which belonged to the grandparents of the children and has expelled the children from the house.

The petitioner stated that Respondent Ato F. Gudo was appointed tutor/guardian of the child, H. Wolde by falsely alleging that he is his father and he has been reaping the fruits of property which belongs to the children. Since the child is now 16 years old the, Petitioner has requested the Court to declare the emancipation of the child under Article 312 of the Revised Family Code, Proclamation No.213/2000.

The Court has considered the pleading of the Petitioner and the testimony of the witnesses. They have testified that the stepfather of the children has failed in his responsibility and the child has ended on the street with no one to care for him. His younger sister M. Wolde who is only 14 years old was also expelled and is

living with relatives. The Petitioner has in the last 3 years started to take care of the present child for humane reasons. The stepfather is renting the house and using the proceeds for himself alone.

The Petitioner is poor and blind but has been taking care of H. Wolde after she found him on the street. The stepfather had been beating the child and accusing him of theft to have him detained by the police. The child is now working as taxi assistant and pursuing his education.

The Court has considered the case. The Revised Family Code No.213/2000 Art.312 provides for explicit emancipation and says “Where a minor has attained the age of 14 years his guardian or his tutor or any interested person may apply to the Court for emancipation.”

The Petition is based on this text of the law and is presented in the interest of the child. The stepfather of the child became the tutor/guardian by falsely saying he is his father in order to get some material benefit and has inflicted suffering on the children.

The power of tutor/guardian conferred on Ato F. Gudo on Hamle 30, 1995 E.C. is hereby annulled. Testimony has been given in Court that the child has reached the age of 16 years, the Court has thus concluded that his emancipation will be in his best interest and has hereby declared the child emancipated.

Order

It is hereby ordered that all parties informed of the appointment of Ato F. Gudo as tutor/guardian on Hamle 30, 1995 E.C. shall be informed that his appointment has been annulled by this Court.

Signature of Judge

* *

Review Questions:

- a) Would emancipation be in the best interest of the child if there were options to substitute another tutor?
- b) What if ‘H. Wolde’ imprudently sells every property immediately after his emancipation?

* *

3. Insane and infirm persons

(The provisions hereunder are from the Civil Code of 1960)

The third Chapter under Title II, Book I of the Civil Code is entitled “Insane Persons and Infirm Persons”. The provisions under this chapter (i.e. - Articles 339 to 379) classify insane and infirm persons into two groups, namely those who are not interdicted and those whose interdiction is pronounced by court. The latter, i.e.-judicial interdiction is discussed in the next section (No. 9).

3.1- Insanity that is not notorious

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

- who cannot understand the importance of his actions
- as a result of being insufficiently developed (i.e.- retarded development, mental disease or senility).

The *two cumulative elements* in the definition of insanity pertain primarily to the mental condition of the person, and secondly to his inability to understand the importance of his actions.

In appropriate cases, persons who are feeble-minded, alcoholics, persons who are habitually intoxicated and prodigals shall be entitled to the protection given to insane persons (339/2). An interpretation *a fortiori* seems to enable us consider that habitual intoxication can accommodate drug addicts although they are not expressly included owing to the non-existence of the problem as an issue of public concern when the Civil Code was enacted in 1960.

Juridical acts performed by an insane person are not invalidated on mere grounds of insanity unless the insanity is notorious (347/1, 341, 342). Yet, the insane person can invoke *defects in consent* (1696-1710) on account of his insanity (347/2). This remedy can be invoked only by the insane person himself and not by his heirs or his creditors (348).

There are two exceptions (Art. 349) where heirs or creditors may invoke defects in consent on account of insanity, namely:

- a) where the terms of the contract clearly reveal insanity (349/1), or,
- b) where the judicial interdiction of the person has been demanded.

The English version of Article 349/1 is not as clear as the official Amharic version that reads “... የውል አድራጊው የአዕምሮ ጉድለት ከተደረገው የውል ቃል የሚታወቅ እንደሆነ (በቁጥር 348) የተደነገገው ደንብ ተፈጻሚ አይሆንም”.

3.2- Notorious insanity and apparent infirmity

Legal protection is given to a person whose insanity is *notorious* (publicly known) or whose infirmity is evident (343).

a) Definition of notorious insanity (341)

A person is notoriously insane where:

- he is an inmate of a hospital or an institution for insane persons or nursing home by reason of his mental condition (339)
- for the period for which he remains an inmate.

The three cumulative elements of the definition are being an inmate, the mental condition of the person and the duration of the legal protection.

In rural communities of *less than two thousand inhabitants* the insanity of a person shall be deemed notorious, where his family or those with whom he lives watch over him and restrict his liberty of movement due to his mental condition (342). The figure two thousand is merely meant to indicate communities where the inhabitants have a relatively closer relationship that enables them to know the mental condition of an insane person (346/2) who lives in their commune or in an adjacent commune.

However, the Amharic version of Article 342 reads “... ከሁለት ሺህ የሚያንስ ... (i.e.- in rural communities of *not less than two thousand inhabitants*)”. This is obviously a mistranslation, because unlike the English version it requires two thousand or more inhabitants.

b) Apparent infirmity

The Civil Code defines infirmity under Article 340, according to which, an infirm is deaf-mute, blind, etc. who as a result of his condition can't take care of himself or administer his property. This definition embodies two cumulative elements, namely, the *physical condition* of the person and the resultant *inability to take care of oneself or administer property*.

Infirm persons are given legal protection only where they “invoke in their favour the provisions of the law which afford protection to those who are insane” (340). In other words, an infirm person is not availed with the protection unless he demands for it.

The Civil Code doesn't list situations where an infirmity may be considered apparent. The court may thus take notice of the apparent visibility of the infirmity or receive medical evidence.

c) Juridical acts of notoriously insane and apparently infirm persons

Juridical acts performed by a notoriously insane (343/1) or apparently infirm (343/2) person may be invalidated upon the request of that person, his representatives or his heirs. Their acts are subject to invalidation (344) on mere ground of notorious insanity or apparent infirmity.

Parties who had *in good faith* concluded contracts with notoriously insane or apparently infirm persons are entitled to damages caused by the invalidation (345, 346). Moreover, the notoriously insane person is extra-contractually liable (2027-2161) and is bound by obligations resulting from unlawful enrichment (2162-2178) as though they were of a sound mind (350).

Unless otherwise provided by law, Article 2030/3 requires assessment of fault on the basis of good usage or reasonable standards of good conduct for the purpose of extra-contractual liability *without regard to the age or mental condition of the person concerned*.

* * *

4. Judicial interdiction

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

4.1-The phases involved from application to appeal

a) Application for interdiction

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

b) Examination of the application

The court is required to see the person whose interdiction is applied for (354/2), and where his personal appearance is impossible, the court may have the condition of the insane person examined by delegating one of its members or by appointing an expert (354/3). Before its pronouncement, the court should be convinced that interdiction is necessary (354/1).

c) Judgment and registration of interdiction

Where the health and interest of the insane person (351/1) or his presumptive heirs (351/2) so require, the court may pronounce interdiction. The same reasons justify the pronouncement of interdiction with regard to infirm persons (351/3, 340). The court may define the scope of the interdiction in its judgment (371/1) and can authorize the interdicted person to do certain acts himself (371/2). Articles 356 and 357 stipulate the requirement and procedures of registering judgments of interdiction and any judgment modifying the effects of interdiction.

d) Retroactive effect of judicial interdiction

The condition of insanity obviously precedes the date of application and judgment. In other words, the person who is entitled to apply for the interdiction of a certain person would not file his application to court unless he invokes the condition of insanity. The court can thus “declare that the insanity of such person was publicly known since such date as may be fixed in the judgment” (352/1). But the date fixed in the judgment should not precede that of the application for interdiction by more than two years (352/3).

e) Appeal

Article 355 enumerates the parties who may appeal *against a judgment of interdiction*. The literal reading of the provision seems to exclude the right (of the person who has filed the application) to appeal against the court’s refusal to pronounce interdiction. But the Amharic version that reads “... ለግዴታ ላይ ስርዓት ላይ ስርዓት ላይ ስርዓት ...” (i.e. - against a judgment with regard to interdiction”) is broad enough to allow appeal against the court’s refusal to pronounce interdiction.

4.2- Acts that may be performed by judicially interdicted persons

- a) The judicially interdicted person can contract *marriage* if he is authorized by court (369) upon application by the interdicted person or by his guardian.
- b) The personal consent of the interdicted person and his guardian are required for requesting divorce or end an irregular union (370).

- c) The action to disown a child “may, with the permission of the court be instituted by the interdicted person ...” (370/2, 791/1).
- d) The judicially interdicted person can acknowledge paternity with the permission of the court (749).
- e) The concurrence of the interdicted to certain acts of the tutor (371/3) may be made a requirement.

The juridical acts that can be performed by judicially interdicted persons are relatively fewer as compared to the acts that are allowed to be performed by minors. Nevertheless, the court may authorize the interdicted person (371/2) to do *certain acts* himself. The words “certain acts” seem to refer to the authorization of acts other than those stated above, because Article 371 becomes redundant if it is interpreted to refer to acts already enumerated in the provisions that precede it, i.e. Articles 369 and 370.

4.3- Juridical acts in excess of the interdicted person’s powers

Acts that are performed by an interdicted person in excess of his powers shall be invalidated upon application by the judicially interdicted person, his representatives or heirs (Article 373/1 *cum* 314). In the case of marriage, however, Article 369/3 allows any interested party, other than the ones stated above, to apply for the nullity of the marriage contracted by an interdicted person, without prior authorization by court.

And apparently, third party in good faith who is not aware of the interdicted person’s disability is entitled to damages caused by the invalidation of the contract (Articles 374, 375).

4.4- Withdrawal of judicial interdiction

Application for withdrawal of interdiction may be made by the spouse, by any relative (by consanguinity or affinity) or by the public prosecutor (Articles 377/2 *cum* 353/1). It may also be made by the guardian or tutor of the interdicted person (377/3).

Pronouncement of withdrawal of the interdiction shall be made by court (378) where it appears that:

- the causes of the interdiction have ceased,
- and that the interdicted person can conduct himself and administer his property by himself.

The disability of the interdicted person shall cease upon the court's pronouncement of withdrawal of interdiction (377/1). The withdrawal shall have the same effects as the emancipation of the minor (Art.379 *cum* 333) in all matters that concerns the care of his person and the management of his pecuniary interests.

* * *

5. Legal Interdiction

Unlike the other varieties of general incapacity, the rationale behind legal interdiction is not to protect the incapacitated individual, but instead, to protect society from the legally interdicted person.

According to Article 380 "a person interdicted by law is one from whom the law withdraws the administration of his property as a consequence of a criminal sentence." Pursuant to the same provision legal interdiction is determined by penal laws. Article 123 (c) of the 2004 Criminal Code *inter alia* (among other things) deprives an unworthy offender of "his rights to exercise a profession, art, trade or to carry on any industry or commerce."

The rules governing judicial interdiction apply in cases of legal interdiction (381). The acts that the interdicted person is not entitled to perform are subject to invalidation upon request by the interdicted person, the person who has contracted with the legally interdicted person, or by the public prosecutor (387/2).

The words "*of no effect*" in Article 387/1 seem to imply the act's being void from the very beginning (*void ab initio*). Article 382/2 on the other hand, stipulates for invalidation upon request by the appropriate party, and in effect seems to render the juridical act of a legally interdicted person voidable rather than void.

However, one can strongly argue in favour of considering juridical acts of a legally interdicted person as *void* on two grounds. First, the act can be considered as though *its subject matter is illicit*; and secondly, unlike the other grounds of general incapacity, the nullity of the juridical act may be requested not only by the interdicted person ... and the public prosecutor, but also by the person with whom the legally interdicted person contracted (Art. 387/2).

The rights of the legally interdicted remain unaffected in relation to his person (i.e. marriage, divorce, acknowledgement of a child and disowning a child).

Thus, he doesn't need a guardian, but only a tutor for his proprietary interests. This feature considerably distinguishes legal interdiction from the other kinds of general incapacity. Legal interdiction ceases when the interdicted "has undergone the punishment for the duration of which the disability is to last" (388).

* * *

6. Organs of protection

The organs embodied in the Civil Code in order to protect, represent and care for minors, judicially interdicted persons and legally interdicted persons are the guardian, tutor, co-tutor, tutor ad-hoc, family council and the assistant tutor. Courts also play a significant role as an organ of protection.

Only some of these organs of protection are needed for certain categories of lessened capacity. It must also be noted that the Revised Family Code of 2000 does not include the co-tutor, family council and assistant tutor among the list of organs of protection for minors.

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

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

The **guardian** shall determine the residence of the minor (Art. 256 -RFC), watch over the health of the minor (257 -RFC), and direct and supervise the minor's upbringing and social contacts (258, 259 -RFC). The guardian shall also ensure that the minor be given education (260 -RFC) and administers a certain income necessary for the minor's care (261, 262 -RFC). According to Articles 358, 362 and 363 of the Civil Code, the guardian of the judicially interdicted person undertakes analogous tasks.

The **tutor** is in charge of the *pecuniary interests* of the minor (Arts. 269 to 298, RFC), the judicially interdicted or the legally interdicted person, and administers the incapacitated person's property with due prudence and honesty (Arts. 319-327, 358, 366, 367, 383 and 384 of the Civil Code).

The guardian of the minor is at the same time the tutor (231/1 -RFC). The exception to this rule of joint responsibility are: appointment of a tutor by a parent retaining guardianship (232 -RFC), appointment that indicates a separate function (233, 231/2 –RFC) and separation of the functions (226 -RFC).

The minor's guardians and tutors are his parents (219 -RFC). One of the parents shall exercise these functions in case of death, incapacity or unworthiness of the other parent (220/1 -RFC). The functions are performed:

- by the mother where the father of the child is unknown (220/2 -RFC),
- by the person appointed by mutual consent or by court in the case of divorce (221 -RFC),
- by a testamentary guardian or tutor appointed by a parent's will (222, 223 -RFC),
- by persons determined by law where the conditions above do not exist (225 -RFC), and
- by persons appointed by court (227 to 229, RFC).

As regards *judicial interdiction*, the court that declares the interdiction shall in all cases appoint the guardian and the tutor. According to Article 359 of the Civil Code, "No person, other than the spouse, the ascendants and descendants of the interdicted person, shall be bound to retain the function of guardian or tutor ... for more than five years." *Legally interdicted persons*, as stated earlier, do not require guardians, and the tutor in charge of administering the property of the legally interdicted person is appointed by the court (Art. 383, Civil Code).

In addition to guardian and tutor there may also be a *co-tutor* appointed by court (Art. 219, Civil Code). By virtue of Articles 220, 221 (Civil Code) and 234, 235 (RFC), a *tutor ad hoc* shall be appointed by court where there is conflict of interests between the tutor and the incapacitated person, or if there is conflict of interests between several minors represented by the same tutor (235 –RFC).

6.2- Family council and assistant tutor

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

significant pecuniary issues are involved in particular, the family council is entitled to direct and supervise the activities of the tutor.

In regions where the Revised Family Code has not yet been adopted, the family council of a minor is normally comprised of the direct ascendants, brothers and sisters (of age) of the minor (241). If the council doesn't comprise four members or in case of divorce, the family council is constituted pursuant to Articles 242 to 246. The family council of a judicially interdicted or legally interdicted person "shall consist of his ascendants, his brothers and sisters who are of age, his spouse and his descendants who have attained majority (360, 385).

One of the members of the family council or a third party (261) may be appointed as an assistant tutor. The *assistant tutor* represents the council in receiving the accounts of the tutor, assists the tutor "in the performance of the acts specified by the family council," convenes the family council, and replaces the tutor (at the latter's request) when a particular act involves the tutor's conflicting interest.

6.3- Termination of functions of organs of protection

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

- a) When the incapacity ends;
- b) When the incapable person dies;
- c) Where a person exercising the function dies, is declared absent (215), becomes incapable, unworthy or is removed;
- d) If a new person is appointed to substitute the function of the previous person.

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

* * *

Case problems

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

* * *

Case 9
(Translation: Fasil Abebe)

Federal First Instance
Lideta Midib Court
Addis Ababa

FileNo. 54237
Date Tikimt 9, 1998 E.C.

Judge: Shukria Mohammed
Petitioner: Ato T. Demissie
Respondent: Not present

The case has been examined and the following judgment has been given.

Judgment

In a petition dated Sene 21st 1997 Eth. C., the Petitioner stated that his wife W/o R. is suffering from mental illness and is unable to take care of herself or of her property. He has requested the court to pronounce judicial interdiction so that proper measures may be taken for her care.

The Petitioner has produced his marriage certificate and evidence from a Medical Board attesting to the impairment of the mental health of his wife.

The Court has summoned and interviewed Woizero R. and has observed the mental condition of Woizero R. Moreover, the Court has been able to verify that the lady is suffering from mental illness from the attestation of the Medical Board of St. Paul's Hospital. The court has therefore pronounced the judicial interdiction of Woizero R. and has appointed her husband Ato T. Demissie as her tutor.

The case is closed, and returned to archives.

Signature of judge

* *

Case 10

(Translation: Fasil Abebe)

Addis Ababa City Appellate Court
Addis Ababa

File No. 01756
Date: Hidar 14/1997 E.C.

Judges: Mekibib Bogale, Kalkidan Zeleke, Mulumebate Tiulahun

Appellant: Ato Mengistu W/Gabriel not present
No respondent

Judgment

This case was presented to this Court by way of Appeal dated Tikimt 29/1997 E.C. against the judgment of the lower Court made on Tikimt 15/1997 E.C. under File no. 233/97

The statement of claim made to the lower court by the plaintiff requested the appointment of the plaintiff as tutor for his uncle who is mentally ill. After examining Article 41 of Proclamation Number 361/95 and its amendment under Proclamation Number 408/96, the court decided that it has no jurisdiction to make the appointment requested.

After having examined Article 2/1/g of Proclamation Number 408/96 this court has found that this provision does not forbid the appointment of tutor for adults and the provision is not solely applicable to minors. Therefore, the lower court has erred in concluding that it has no power to make such an appointment. This court has therefore reversed the judgment of the lower Court and has remanded the case in accordance with Article 343/1 of the Code of Civil Procedure in order for the lower Court to consider the evidence and make the appropriate decision.

Signature of Judges

* *

Review question

If you were a judge which position would you take? The lower court's or the appellate courts?

* *

Case 11

(*Translaton: Fasil Abebe*)

Addis Ababa City
First Instance Nifas Silk/Lafto Sub-City Court
Addis Ababa

File No. 233/97
Date: 15/4/97 E.C.

Judge: Bezabih Moges

Petitioner: Ato Menghistu W/Gabriel G/Mikael

Respondent: Not present

The case has been examined and the following judgment has been given.

Judgment

In a Petition dated Tikimt 12/1997 E.C. the petitioner has requested this Court to appoint him tutor to his uncle Ato W/Ghiorghis G/Mikael Uqbaselassie who, because of old age and mental illness, is not capable of managing his own affairs.

The witnesses have testified supporting what has been stated in the Petition. Moreover, a letter written by Ammanuel Hospital on Tikimt 17/1997 E.C. verifies that Ato W/Ghiorghis, Card No. 119/97, suffers from mental illness

The court has through the testimony given and the documentary evidence presented been convinced, and has appointed Ato Menghistu W/Gabriel G. Mikael the tutor of Ato W/Ghiorghis G/Mikael Uqbaselassie.

...

Signature of judge

* *

Review question

Assuming that Ato W/ Ghiorghis has closer relatives than the petitioner, what would you do as a judge? Would your decision be different?

* *

O'Donovan's Problems on Lessened Capacity

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 41 to 71

- **Minors: Problems 41-59**
- **Insane persons and Judicial Interdiction: Problems 60-68**
- **Legally Interdicted Persons: Problems 69-71**

MINORS

Problem 41

Ato Hagos made a contract with Admassu. At the time of making the contract Admassu said he was over eighteen. Now Admassu claims to be a minor and says he has a birth certificate to prove it.

...

Advise Ato Hagos ...

Problem 42

Tadesse is a three year old orphan. His paternal grandfather is aged seventy. All his other ancestors are dead. Tadesse's father's only brother has eight children. His mother's eldest sister is abroad with her husband, a diplomat. His mother's younger sister is aged seven.

Which of these people will be Tadesse's guardian. Who will be his tutor?

Problem 43

Tamerat's father, in his will, appointed his lawyer Ato Ammanuel as tutor to Tamerat. When Tamerat's father died, Ato Ammanuel took over the functions of tutor. Tamerat's maternal aunt is his guardian. Ato Ammanuel owns property adjoining that of Tamerat in Jimma. It is impossible for Ammanuel to continue administering both pieces of land as there has been a continuous dispute in the area over water rights and Ato Ammanuel's interests in the matter are different from Tamerat's.

What should Ato Ammanuel do?

Problem 44

Tamiru is a fifteen year old orphan due to the death of his parents in a recent car crash. Tamiru feels he is old enough to look after his own affairs and does not need a guardian or tutor.

Explain the legal position to Tamiru.

Problem 45

Eyassu was a minor who had inherited a considerable amount of money from his grandfather. At the age of sixteen he made a will providing for the distribution of the money to certain specified charities in the event of his death. He died later that year. The persons who would inherit in the absence of a will (if Eyassu had died intestate) seek to have the will declared invalid for incapacity.

Is the will valid?

Problem 46

You are a lawyer in private practice in Addis Ababa. One of your clients ... has asked you to draft his will. In the instructions he gives you, he names you as tutor to his two minor sons on his death. You object to this nomination on the grounds that you have never considered the matter and are not sure whether you wish to assume the responsibility. (Your client) then suggests that you write a memorandum outlining the advantages and disadvantages of assuming office of tutor.

Do so.

Problem 47

Yoseph, who is eight years old, lived with his parents in Addis Ababa. His parents were killed in a motor car accident last week. His only surviving close relations are:

- a) A paternal uncle (who lives in Harar) and who has only seen Yoseph once many years ago;
- b) A maternal aunt who lives in the Sudan where she runs a children's home. She and Yoseph know and like each other;
- c) A maternal grand father of whom there is no news for three years but who is thought to be living somewhere in Bale.

At the moment Yoseph is being looked after by Ato Lakew who was Yoseph's father's best friend. Ato Lakew is Yoseph's godfather. He has two children of his own who are great friends with Yoseph. Ato Lakew would like to become Yoseph's guardian.

Advise Ato Lakew.

Problem 48

(Omitted)

Problem 49

- a) Ato Ali is the tutor of Mulugeta a sixteen-year old minor. He was appointed under (Art. 222 of the Revised Family Code). Mulugeta's paternal grand father bequeathed (buildings) to Mulugeta with instructions that the income ... was to be used to send Mulugeta to school in England and that any surplus income was to be used (for social welfare). Mulugeta went to school in England when he was twelve years old. Now he is sixteen and wishes to return to Ethiopian to go to school here. Ato Ali does not know whether he may permit this.

Advise Ato Ali.

...

- (b) Mulugeta's maternal grand father bequeathed (Birr 10,000) of stocks to Mulugeta. In his will he named Woizero Negat as administrator of this property. Woizero Negat is Mulugeta's aunt. She has been receiving a regular income on behalf of Mulugeta from the stocks, but as Mulugeta's needs are all taken care of from his paternal grandfather's will she was not sure what she should do with the money so she left it in a current account at the Commercial Bank. The family council has accused her of not acting in the best interest of Mulugeta.

Advise Woizero Negat.

- (c) Both Ato Ali and Woizero Negat want to know what their duties will be on the emancipation of Mulugeta.

Problem 50

Fifteen-year-old Lema often bought school supplies in the neighborhood stationery store. Sometimes his father, David, would go with him and once he said to Mebratu, the store-owner, that he permitted Lemma to manage his own affairs. After some time, however, David found that lemma was wasting time and money gambling with his friends and he forbade him to spend money again for a year. He told Lemma that he was no longer authorized to manage his own everyday affairs. Lemma did not agree to this and he took some money from his father's clothes one night and bought an expensive book from Mebratu When David discovered this, he was very angry and took the book, which was slightly damaged ..., back to Mebratu and demanded that the money

Lemma paid be returned. He based this demand on the argument that Lemma was a minor and that the contract was therefore subject to invalidation.

Advise Mebratu.

Problem 51

At the end of the rainy season Dawit wanted to buy some new clothes. He had a good job for a sixteen-year-old and thought he could repay a loan. He therefore borrowed (Seven Hundred Birr) from a money lender after his father had given him a written authorization to borrow. Dawit did not show the authorization to the money lender as the latter made no enquiry about his age. Dawit bought the clothes but now he does not want to pay the money back to the money lender on the ground that the contract of loan is invalid.

Advise the money lender.

Problem 52

A 17 year-old boy, Girma borrowed (Birr 10,000) from the father of a friend saying that he was starting a business exporting Ethiopian art to Europe. The lender, Ato Adera knew that the boy was a minor, but he believed in his business ability as Girma had already made a success of a bicycle hire business. Also Girma's father was a well-known art connoisseur and critic and the boy had traveled with his father on expeditions abroad. Girma went to France to make contract with art importers there, but while he was there he had such a good time that he spent all the money. He wrote and informed Ato Adera that he had changed his mind about the business and had decided to attend art school.

Ato Adera wants to get his money back.

Advise Ato Adera.

Problem 53

A seventeen year old girl Bekelech was injured by a car driven by Melaku. Melaku's insurance company agreed to compensate Bekelech who was given (Birr Seven Thousand). Bekelech spent the money on an educational course in typewriting. When she reached the age of eighteen she told Melaku that the compensation was invalid as she was a minor and that he must pay again.

Advise Melaku on his liability to pay.

Problem 54

Assefa and his brother Gebre wanted to buy soccer uniforms and so went to the Novice Sport shop and asked to buy one uniform each. The storekeeper asked how old they were and they both answered: "Eighteen years old, sir."

The storekeeper repeated; "you are both eighteen?"

"Yes sir," said the boys.

The store keeper sold them the uniforms thinking them to be eighteen. In fact Gebre was sixteen and Assefa was seventeen.

In the first soccer game they played, Assefa's and Gebre's uniforms were badly torn. They took them back to the sport shop and demanded their money back on the grounds that they lacked the capacity to make the contract.

Advise Assefa and Gebre on their legal position.

Problem 55

Ato Wondimu is a tailor in Harrar. He made an agreement with Sacha a visiting French sixteen-year-old 'pop star' who was on a singing engagement at the Ras Hotel. Under the agreement, Wondimu provided new suits ... for Sacha and his accompanying band of four players. The suits cost (Birr One Thousand) each. When Wondimu went to the Hotel to collect the money Sacha refused to pay on the grounds of his age.

Advise Ato Wondimu.

Problem 56

Ato Demmeke owes a grocery store which he runs with his son Elias, now aged seventeen, who, in addition to serving as assistant to his father, is often left in charge of the store while his father is away on other business. One month ago Elias bought a bicycle from Ato Hailu for (Birr Nine Hundred), but this has since been stolen. Elias now purports to repudiate the transaction with Ato Hailu on the ground he was a minor and wants his money back. Ato Hailu insists that Elias looks at least eighteen or nineteen and could even be mistaken for twenty.

Advise Ato Hailu. Would it make any difference if Elias told his father beforehand that he was going to buy a bicycle?

Problem 57

Paulos went to Motor Company and said he wished to buy a car. Although Paulos was only seventeen he looked a good deal older due to an iron deficiency which has caused his hair to turn grey. Also he has a lot of money due to his speculations on the stock market which he had engaged in with his

father's consent. The Motor Company quite reasonably took Paulos for a man of thirty.

Paulos decided to buy a fiat sport car, second hand ... and he paid a deposit of (half the price) and took the car away. As he was leaving the garage, Paulos failed to notice that the car was in reverse gear. He put his foot hard on the accelerator and crashed into a wall behind. The back half of the car was damaged extensively, as was the wall.

Paulos left the car in the garage for repair and returned there later. The manager of Motor Company told him he would have a bill ... for repairs. Paulos said he no longer wanted the car and demanded the return of his deposit. The manger returned (half the deposit) saying that the rest was for the repairs. Paulos said he was entitled to a full refund due to his age.

Advise the manager of Motor Company.

Problem 58

Ato Rezene has been the tutor of Ruth a minor for the past six years since he was appointed by her father. Now Ruth has reached her eighteenth birthday. Ato Rezene is handing over her affairs. Ruth considers that Ato Rezene has been neglectful of her business matters and wants to sue him for failure to invest her capital and for mixing his own property with hers.

Advise Ato Rezene of the procedure in handing over to Ruth her affairs and of his liability for mis-management.

Problem 59

(Omitted)

* *

INSANE PERSONS AND JUDICIAL INTERDICTION

Problem 60

(Omitted)

Problem 61

Ato Habte was confined to a lunatic asylum because he was subject to fits of insanity. During one of his sane periods Ato Habte escaped. He met a man,

with whom he became friendly, in a bar. The man offered to buy Habte's (car for Birr 40,000). Habte agreed and signed a contract of sale which was witnessed by the barman and other people present.

When the man took over the (car) Habte's brother, who is also his heir, objected. He said the ... Habte was not only drunk but also insane when he sold it. Unfortunately Habte spent some of the money on a ten-day drinking bout in which he entertained everyone he met. The rest of the money has disappeared, either lost or stolen; Habte doesn't remember.

Habte is now back in the asylum. His brother wants to nullify the sale of the (car).

Advise Habte's brother.

Problem 62

Woizero Mulatwa is well known in her small village as a drunkard. When she feels she needs a drink she will do almost anything to get the money for it. One night she agreed to sell her (oxen) to someone who returned home from Addis. The price was not very good, but Woizero Mulatwa did not care as she wanted the money

Now that she is sober again Woizero Mulatwa has changed her mind. She does not want to leave her (oxen). However Ato Girmachew ... has already made plans (regarding the oxen).

Advise Woizero Mulatwa whether she can nullify the sale.

Problem 63

Bekele lives in a small village near Endeber. Since childhood his family have regarded him as being rather odd. He is somewhat deaf and as a result seems slow thinking. He very rarely leaves the family compound and if he does he is accompanied by one of the family.

One day when Bekele was alone in the house Ketsela came to buy some goats. Bekele sold them at a quarter of the true price. When the family returned they were very angry and ask your advise as to whether they have a legal remedy against Ketsela.

Advise the family.

Problem 64

Ato Gabriel Gebre is a brilliant if unworldly man. He is also very rich. Sometimes he is a little absent minded about money and loses it, or gives it away, or permits himself to be robbed. This is because he is thinking about higher things he says. However, he allowed his wife to take him to court for judicial interdiction. His wife was appointed tutor and guardian. She now has complete control over all finances. For a while Ato Gabriel was happy to be free from business concerns. However, he has recently learned that his wife is expecting a child from her lover and that she has been spending all the money on this man.

Ato Gabriel also wishes to make a contract with Ato Asrat, who does not know of Ato Gabriel's interdiction.

Advise Ato Gabriel on the following points:

1. Should he tell Ato Asrat of his interdiction?
2. Can he get his money back from his wife?
3. Can he repudiate his wife's child?

Problem 65

Ato Tesfaye was declared judicially interdicted under Article 331 of the Civil Code because of his blindness (in 1999). Under Article 332 the court declared that (1997) should be fixed as the date of his infirmity. In (1998) Ato Tesfaye made a five-year-contract to teach Braille typing in a school for the blind. He has been teaching there for a year and a half and the school has spent approximately Birr 20,000 on equipment and teaching materials to facilitate Ato Tesfaye. Ato Tesfaye now wishes to leave the school and alleges that Art. 373 of the Civil Code permits him to do this. The school comes to you for advice on whether Ato Tesfaye may leave and on whether the school can recover the money spent on equipment.

Write a memorandum of advice to the school.

Problem 66

Ato Tefara was born a deaf-mute and was declared an interdicted person under Article 351 of the Civil Code, on the application of his parents when he was sixteen years old. Now aged thirty-five, and a very successful businessman despite his handicap, Ato Tefara wishes to have his interdiction withdrawn. He comes to you for advice on the following points:

- a. Whether there is any business advantage or disadvantage for him in being interdicted.
- b. Whether there would be any advantage in having the interdiction withdrawn.
- c. The procedures for withdrawal of interdiction.

Problem 67

Ato Demmeke is a wealthy man and is considered in his family to be a little eccentric. Three years ago he gave up running his shoe factory and employed a manager, saying that he had decided to go to University to study. Eighteen months ago he announced to his wife and six children that he had given the factory to a poor man he met on the street since his studies had convinced him of the evils of wealth. When his family objected Ato Demmeke said, "We have lived in splendor long enough. If you are not careful I shall give away all my other possessions as well." These possessions include two houses, three cars, valuable assets in stocks and shares, furniture etc. The family was afraid to interfere lest he carry out his threat.

The factory is now owned by the poor man. The manager left for a better job and the new owner made no attempt to keep him on a high salary. Since then the factory has run down and production is now almost at a standstill. Many of the workers have been sacked.

Lately, Ato Demmeke, who is the best student in his philosophy class at the university has been lecturing his family on socialism. They are afraid that he means to carry out his threat to give away everything. Also they received a delegation from the factory workers asking if there would be any possibility of the family taking charge of the factory again.

Elias, Ato Demmeke's son of seventeen comes to you for advice on the question whether the factory can be taken back by the family and whether they can stop his father from giving away all his possessions.

Advise Elias.

Problem 68

Woizero Cristina was interdicted by the court last year on application of her husband who found it impossible to prevent her from spending money all over town.

The registrar of the High Court received a notice from the (lower court) of Woizero Cristina's interdiction. However due to the pressure of work he has failed to keep the register up to date and Cristina's interdiction is not registered.

Cristina has now run up credit for Birr 5000 in a department store. Her husband has refused to settle the account.

- a) Advise the registrar of his liability.
- b) Does it make any difference whether the department store checked the register or not?

* *

LEGALLY INTERDICTED PERSONS

Problem 69

Ato Hailu was sentenced to life imprisonment for a political offence ... and was legally interdicted. He escaped from prison in Addis Ababa and sought political protection in Somalia. His extensive property in Ethiopia is under administration of a tutor. The tutor now wishes to give up his office as tutor. Ato Hailu wishes to make a new will and he also wishes to appoint a new tutor to send him the income from his property.

Advise Ato Hailu on the following points:

- a. Whether the tutor may resign and whether Ato Hailu may appoint another.
- b. Whether Ato Hailu may make a will and whether Ethiopian law or Somalian law will govern the making of the will.
- c. Whether a new tutor may send Ato Hailu the income from his property.

Problem 70

Ato Wegayu is the tutor of Ato Yimam who was convicted of embezzlement and sent to prison for five years. Ato Yimam was also legally interdicted. Recently Ato Yimam, although he knew what legal interdiction means, sold some of his property to another prisoner. This illegal act of Ato Yimam has given a great deal of work to Ato Wegayu. Ato Wegayu wishes to give up the office of tutor.

He has been tutor for three years.

Advise Ato Wegayu.

Problem 71

Ato Yimam is a legally interdicted person. Ato Demmeke is a judicially interdicted person.

Explain the difference in their legal status.

Explain why one kind of interdiction is different from the other.

* * *

Readings on Lessened Capacity

Incapacities

Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law*, (Oxford University Press: London, 1935) pp. 36-37, 41-43

Aliens

... . Speaking very generally, the position of an alien in France is not very different from that of an alien in England; while he cannot exercise public rights, which are necessarily attached to citizenship, he can invoke the protection and may exercise the rights derived from private law. Certain rights and capacities which might seem to belong to private law are, however, not so regarded, and are withheld from him. Such is the capacity to act as witness to a notarial act or to a will.

Article 11 of the Code provides that 'aliens enjoy in France the same civil rights as are or may hereafter be granted to Frenchmen by treaty with the nation to which the alien belongs. The apparent rigour of this provision has been attenuated in numerous instances by statute, and by judicial decision. The courts distinguish between private rights derived from the *jus gentium*, which all foreigners enjoy and those derived from the *jus civile*, which they enjoy only on terms of reciprocity. Rights of property, and rights derived from marriage and paternity, belong in general to the *jus gentium*. But the legal *hypothec* (legal regime) of minors and married women are regarded as belonging to the *jus civile*, and are consequently not exercisable by aliens. A modern example of statutory discrimination is furnished by the Rent Restriction Acts, the advantages of which are, in certain cases, not available to foreigners.

...

Infants

'An infant is a person of either sex who has not completed his or her twenty-first year. Generally speaking, an infant can be a party to no act in the law. ... [T]he minor must (except in the case of marriage) be *represented* for such purposes by his guardian.

To this general rule there are various exceptions, of which the following are the most important.

An infant may take *measures conservatoires*, such as the registration of a deed, or the interruption of prescription; he may contract for reasonable necessities; he may, if 16 years of age, make a will disposing of not more than half his estate; and he may recognize an illegitimate child. ...

The general incapacity of an infant is much restricted in effect by the rule that he cannot claim to have his contract set aside upon the sole ground of his minority; he must also have suffered *lésion - minor non restituitur tanquam minor, sed tanquam laesus* (C.C.1305,6). A contract is *entaché de lésion* if it is improvident and imprudent; and the question whether it is so is a pure question of fact, into which the Court of Cassation will not enter. But an infant can always repudiate and treat as invalid a payment made to him, except in so far as his debtor can prove that at the time the action is brought, some or all of the money paid can still be identified or traced among his assets. (C.C. 1241).

Though the practice is not common, it is possible for an infant to be emancipated, either by his parents, or if he is an orphan, by the family council. The parents can take this step when the infant is 15, the family council when he is 18. An infant is emancipated *ipso facto* by marriage.

The emancipated infant acquires a general capacity to enter into all contracts of administration as, for example, to grant leases not exceeding nine years in duration. He is no longer able, in respect of such contracts, to procure their rescission on the ground of *lésion*; but 'obligations which the emancipated minor may have contracted by way of purchase or otherwise are reducible in case of excess; and the courts shall take into consideration, in this regard, the minor's fortune, the good or bad faith of the persons who have contracted with him, and the utility or inutility of the expenditure in question' (C.C. 484). For contracts which are not deemed to be acts of administration, the infant requires either the assistance of the *curateur* (who now replaces his guardian), or the approval of the family council (C.C. 482 ff.). An emancipated infant may be authorized to engage in commerce, and when so authorized he acquires, for all acts relating to his business, the full capacity of an adult.

Other Cases of Incapacity

Lunatics

The mere fact of lunacy or imbecility is of course a sufficient ground for avoiding contracts or other acts entered into by the lunatic or imbecile; but if the sufferer has been 'so found', and placed by judgment under interdict, no other evidence of his incapacity to contract is required. A person under

interdict is provided with a *tuteur*, and his legal status is assimilated to that of a minor. Criminals undergoing sentences of a certain degree of severity are placed *ipso facto* under interdict, and provided with a tutor (Code Pénal 29); and their acts are voidable at the instance of any interested party.

The law provides a status of minor incapacity for (a) mental defectives, and (b) prodigals, who may be placed under the supervision of a *conseil judiciaire* (who is a counsellor, not a council).

- a) Mental defectives, *les faibles d'esprit*, are persons whose mental inadequacy falls short of lunacy and imbecility. The class has been held to extend to habitual drunkards, to very old persons, and even to the very deaf.
- b) A *prodigue* is a person who, owing to the disorder of his mind or of his morals, dissipates his fortune by excessive and foolish expenditure. Professional litigants have been caught in this net.

A person who has been placed under the tutelage of a *conseil judiciaire* is incompetent, without the latter's *assistance*, or formal approval, to litigate, to compromise, to borrow, to receive, and give a valid exchange for, a *capital mobilier*, or to alienate or hypothecate his property.

* * *

Mehari Redae on Organs of Protection of Minors

የተሻሻለውን የቤተሰብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች (ቅጽ ሁለት) ገጽ 126-147
በመሐሪ ረዳኢ (ረዳት ፕሮፌሰር)፣ 1999 ዓ.ም.

(Translation: E. Stebek, Fasil Abebe,)

The appointment of the guardian and the tutor

... The human person is the subject of rights from birth to death. A minor (who holds these rights) shall not be allowed to exercise them himself but through representation. As the appointment of such representatives is a juridical act, it cannot be exercised personally by the minor himself. Until the minor reaches the age at which s/he can himself perform juridical acts, it is important to address the issue as to who can exercise these acts on behalf of the minor and the modalities of their appointment.

The representatives of the minor are referred to as the guardian and the tutor. Their authority may derive from the law, from a testamentary disposition or from judicial decision (Articles 219- 225 RFC). The authority primarily emanates from the law because Article 219 RFC provides that “the father and the mother are during their marriage jointly guardians and tutors of their minor children”. The 1960 Ethiopian Civil Code had also embodied a similar provision (Art. 204 CC). Article 276/1 of the Civil Code had provided that “where the father and the mother are both vested with the functions of guardians, the latter alone shall exercise such functions.” In other words, the function of guardianship was entrusted on the father as long as he was alive. This provision contravenes the constitutional principle regarding the equality of the spouses during matrimony. Article 276 of the Civil Code has not thus been incorporated into the Revised Family Code.

In case of death of one of the spouses or inability to exercise these functions due to various reasons, the other parent shall exercise the functions (Article 220/1 RFC). This indicates the entitlement of the father and the mother as tutors and guardians. However, the practice was different under the customary law of Ethiopia prior to the Ethiopian Civil Code. “If the father dies without designating a tutor or a representative for his children, the mother shall not be denied of this function provided that she has the capability and consents thereto” (Book of Ethiopian Old Judgments, No. 321, *emphasis added*). This stipulation at least indicates two elements. As long as the father is alive he

alone exercised the functions of guardian and tutor and did not share these functions with the mother. And secondly, these functions did not as or right devolve onto the mother, but she was entrusted with the functions only after the confirmation of her capability and her consent. This was thus among our previous laws that granted inferior status to women.

If parents of the minor are divorced, the Revised Family Code allows them to designate the guardian and the tutor by agreement. Where there is no such agreement, the court pronouncing the divorce appoints the guardian and the tutor (Art. 221 RFC). Pre-Civil Code Ethiopian law provided that “if the married couple divorce after having a child, the child shall stay with the mother until age of three years. From the age of three years to seven years the child shall stay with the father, and after that the child shall choose the parent with whom s/he wants to stay.”¹ Although this provision had the merit of being clear and easy to implement, it lacked flexibility to allow decisions taking the interest of the particular child into account because the law had rigidly determined age limits.

As stated earlier, the surviving parent assumes the function of guardian and tutor upon the death of the other parent. But, if the surviving parent dies before the child reaches majority, the appointment of the guardian and tutor shall be based on testamentary disposition of the surviving parent.² If no such disposition is available, the law provides for other persons to fill these functions according to a certain priority³. The law gives priority to grandparents of the child, and in their absence to the brother or sister of the child if they have attained majority. In their default the functions devolve on the uncle or aunt of the child. If, after the application of these provisions, the child is still without a guardian or a tutor, the court shall make appointment among persons who may not even be relatives of the child.⁴ This shows that the law requires utmost efforts with a view to avoiding the possibility that a child remains without a guardian or tutor. This is because they are considered as useful *organs of protection* of the interests of the child.

It is to be recalled that the Civil Code also had list of priorities in the designation of a guardian or tutor.⁵ However, it had given priority to relatives

¹ 37th Ethiopian Book of Old Judgments No. 94/196

² RFC Art.222

³ RFC Art.225

⁴ RFC Art.227

⁵ CC Art.210

on the paternal line before relatives on the maternal line. It further gave priority to uncles and aunts in preference to brothers and sisters who had attained majority. The Revised Family Code has opted to discontinue this sequence. Under the Revised Family Code, there is no distinction between grandparents of the paternal or maternal line, because they are equally the child's grandparents. And, brothers and sisters who have attained majority are now given priority over an uncle or aunt based on the premise that the former are believed to have higher concern to the child.

Although the hierarchy stated above in the designation of guardians and tutors is generally applicable, it may not invariably apply irrespective of particular circumstances. The order envisages the interest and welfare of the child, and in case it is believed to be prejudicial to the interest of the child, the court shall not be obliged to pursue the sequence.

In this regard, there was a case that was adjudicated by the Federal First Instance Court and then appealed up to the Federal Supreme Court.⁶ The facts are the following.

Parents of six-year-old child born outside wedlock died within a year of each other. The father died first and the mother had assumed the function of guardian and tutor. Upon the death of the mother, the latter's brother, i.e. uncle of the child, submitted a petition to the Court requesting to be appointed guardian and tutor.

The brother and sister of the child in the paternal line opposed this petition on the ground that they legally have priority for appointment. The Federal First Instance Court accepted the opposition and allowed the sister to be guardian and tutor of the child.

The child's uncle lodged an appeal at the Federal High Court against the lower court's decision stating that he is the one who provides the child with maintenance allowance and that the child is under the care of her Godmother. He further stated that the child has never lived with her brother or sister and that they have obtained judicial declaration as heirs of their deceased father without including the child. The appeal also confirmed the sale of a car which was part of the patrimony under succession without due regard to the interest of the child. The respondents on the other hand stated that they protested the

⁶ Civil Case Appeal No.20461

guardianship and tutorship of the appellant when the latter started succession proceedings at court for the appointment of liquidator of succession.

The Appellate (High) Court reversed the decision of the lower court on the ground that there would be conflict of interest between the child and her sister if the tutorship is to be accorded to the sister of the child solely based on proximity of relationship. On the other hand, the appellant ... has been providing maintenance allowance to the child for five years and has looked after her, and there is no conflict of interest between the appellant and the child. The Court thus cited Article 226(4) of the Revised Family Code and decided that the upbringing, well-being and interest of the child can best be served if the appellant (uncle of the child) continues to take care of the child as her guardian and tutor.

The case was further taken on appeal to the Federal Supreme Court. The Supreme Court confirmed the decision of the Federal High Court and reiterated the reasoning of the High court. ... The Federal Supreme Court concluded that although the High Court decision doesn't seem to be in conformity with the literal reading of the Revised Family Code Provision which recognizes the proximity of brothers and sisters than an uncle, the decision was appropriate because it is in conformity with the spirit and purpose of the law.

Functions of the Guardian and the Tutor

It is to be noted that these two functions would not necessarily require two different persons in all cases. Instead, the law in principle bestows these functions on a single person.⁷

The functions of guardianship and tutorship are tuned towards the optimal interest of the minor. In short, the child is believed to have three major interests. The first interest involves the *welfare* of the child and secondly, there is the need to take care of *pecuniary interests* of the child. And finally, the provision of a legal representative to perform juridical acts on behalf of the child is important. The legal representative is the guardian or the tutor depending on whether the acts are related to the welfare and upbringing of the child⁸ or the child's pecuniary interests.⁹ It is not always easy to distinguish

⁷ RFC Art.231 (1)

⁸ RFC Art.216 (1)

⁹ RFC Art.216(2)

between issues that come under *welfare of a child* and *pecuniary interests*. This is why they are in principle carried out by the same person.

Basic features of guardianship and tutorship

It seems helpful to identify three major features of guardianship and tutorship. *Primarily*, they are gratuitous functions¹⁰ that involve free discharge of services. Of course, the law provides for payment of (modest) allowance in case the functions of guardianship or tutorship take a big part of the time of the person in charge (RFC Art. 250/2). Nevertheless, the payment is made from income of the child and not from his/her assets and should not exceed one third of the income.¹¹ It should thus be underlined that these functions, in principle, constitute free service.

Secondly, the functions are not only voluntary, but are also obligatory¹² because the person appointed for the task is required to assume it. Such persons can apply to court to be relieved owing to particular difficulties, but are not permitted to abandon the duties. They are also required to carry out the duties until a new person is appointed.¹³

The *third* feature of guardianship and tutorship is that they are personal functions which do not devolve onto the heirs of the guardian or the tutor.¹⁴ In other words, in case a guardian or tutor of a minor dies, the heirs of the latter are not expected to assume the functions of the deceased. Instead, they are required to inform the persons designated by law to assume the guardianship and tutorship, in the absence of which they should notify the court so that it can make new appointments.¹⁵

Accountability of the guardian and the tutor

The responsibility requires optimum care and the person in charge as guardian and tutor must act like a *bonus pater familias* with regard to the welfare and property of the minor. To this end, the law has devised schemes that ensure the appropriate performance of these functions. For example, Ethiopia's pre-Civil Code customary law had the following:

¹⁰ RFC Art.250 (1)

¹¹ RFC Art.250(3)

¹² RFC Art.237

¹³ RFC Art.240

¹⁴ RFC Art.251

¹⁵ RFC Art.252

“Where the father of a minor dies without a testamentary disposition regarding the appointment of guardian or tutor, the mother or relatives on the maternal or paternal line may submit duly signed request to the Court so that the person stated in their petition can be appointed. The court shall then require such person to appear to court, submit guarantees and confirm under oath that the money, property and agricultural produce of the minors will be secure, and that their income will be deposited in court.¹⁶

The Civil Code had also provided that “Within forty days of assuming his functions, the tutor shall proceed to draw up an inventory of the value of the property of the minor in the presence of reliable witnesses chosen, if possible from among members of the family council”.¹⁷

Under the Revised Family Code, it is provided that within two months from assuming his functions, the tutor shall draw up an inventory of and value the property of the minor in the presence of three witnesses.¹⁸ The tutor is also entrusted with the duty that he shall not mix his property with that of the minor.¹⁹ All these constitute the legal framework for the requisite diligence, transparency and accountability in the administration of the minor’s property.

The guardian shall take care of the welfare and in particular the education, health and social relations of the child. Where necessary, s/he is allowed to administer disciplinary measures on the child.²⁰ While the guardian performs these functions, there may be instances where assistance of a third party such as the police, kebele administration or the court becomes necessary. For example, there may be a child who has reached 16 years of age and who may violently oppose the supervision of the guardian; or the child might have altogether abandoned home. In such instances, assistance from the police or kebele administration may be crucial. The Revised Family Code avails the guardian

¹⁶ 13th Ethiopian Book of Old Judgments 373/354

¹⁷ Civil Code Art.281(1)

¹⁸ RFC Art.270 (1)

¹⁹ RFC Art.272

²⁰ RFC Art.258. Article 267 of the Civil Code had provided that the guardian “may inflict light bodily punishment on the minor for the purpose of his education”. (Emphasis added). According to contemporary thought, any bodily punishment (light or grave) doesn’t have significant impact on positive behavioural development other than the risk of instilling fear and anxiety in the child’s personality. The Revised Family Code has thus omitted the phrase “light punishment” and it has limited the guardian’s measures to be merely disciplinary. This excludes the possibility of corporal punishment.

with the legal basis to obtain such assistance.²¹ However, there was no such provision in the Civil Code.

The tutor appointed to a minor is subject to sanctions of liability in addition to the restrictions stated earlier. If acts performed by a tutor in excess of his/her powers cause damage, the tutor may be civilly liable for any damage resulting thereof. Moreover, there are cases where the acts may be invalidated.²² The Civil Code and pre Civil Code Ethiopian law had similar rules. The following is an example from the old law:

“Any act of sale or testamentary disposition of the property of the minor by the tutor *shall be of no effect* irrespective of whether the tutor is the minor’s mother, father, relative or a person not related to a minor.²³

Moreover:

“Where a person, after having been appointed as tutor and representative of a minor whose parents have died, commits breach of trust by causing damage to the assets or property of the minor, he *shall be relieved from tutorship and shall be civilly liable for damage.*²⁴

This shows that there was a strong protection scheme in the administration of property of minors even in our previous laws, according to which breach of duties entailed accountability and invalidation of acts performed beyond mandate.

Before we wrap up this chapter, we shall here-in-below discuss the mechanisms by which the functions of guardian or tutor are terminated. In general, termination may emanate from two major grounds which may be due to acts of the guardian or tutor, or secondly reasons which may be attributable to the minor.

Termination of the functions of Guardian or Tutor

Termination due to acts of a Guardian or a Tutor

The *first* ground is an application made by the guardian or the tutor to court requesting to be relieved of the function.²⁵ The Court will consider the

²¹ RFC Art.255

²² RFC Art.309(1)

²³ 107th Ethiopian Book of Old Judgments No. 316

²⁴ 107th Ethiopian Book of Old Judgments No. 320

²⁵ RFC Art.238

difficulties encountered by the applicant. In principle, however, the functions are obligatory and, the court does not easily accept the petition. The other possibility of termination, on the basis of petition to court, is that a person who has reached the age of 65 years or a soldier in active duty irrespective of office age can be relieved of these functions except as regards his or her own children.²⁶ This is made by a petition to a court.²⁷ It is to be noted that this is an exceptional rule which is subject to narrow interpretation.

The *second* reason is removal by the court.²⁸ If the guardian does not provide the minor with sound education or in case the tutor administers the property of the minor badly, the court can remove them. The *third* reason is lack of legal capacity to hold these functions.²⁹ ... (A case in point) is judicial interdiction as a result of physical or mental impairment of the guardian or tutor.

The *fourth* reason is where the unworthiness of the guardian or tutor is pronounced by a court.³⁰ According to the 2004 Criminal Code, “the court may make an order depriving the criminal of his family rights, particularly those conferring the rights of parental authority of tutorship or guardianship.³¹ The guardian or tutor who has been subject to such punishment will be relieved of these functions.

The *fifth* reason is the death of the guardian or the tutor.³² Death brings legal and physical personality to an end. The heirs are given limited rights to exercise certain functions in the interest of the deceased. The heirs, however, cannot inherit the functions of guardian or tutor.³³ Therefore the functions of the guardian or the tutor terminate upon death.

Termination of the functions due to reasons attributable to the minor

The *first* reason is the attainment of majority of the minor.³⁴ It is assumed that the minor will not make unreasonable decisions thereafter. But at which age

²⁶ RFC Art.239

²⁷ Does the word “soldier” include the police or the militia? We believe that it should not. The latter occupations are civil in nature and do not oblige the person to go far from his home. They should not thus be considered as military activities.

²⁸ RFC Art.245, 246

²⁹ RFC Art.243

³⁰ RFC Art. 244; Criminal Code (Proclamation No. 414/2004 Art.123(b)

³¹ 2004 Criminal Code Art.123(b); RFC Art.241(2)

³² RFC Art.241(2)

³³ RFC Art.251(1)

³⁴ RFC Art.310 (a)

should majority be established? The law states “a minor is a person of either sex who has not attained the full age of 18 years”.³⁵ Thereafter, the guardian and the tutor become superfluous.

The *second* reason is emancipation of the minor.³⁶ Emancipation means the child is considered to have reached majority before he attains the age of 18.³⁷ This can be first through marriage,³⁸ or through a court decision.³⁹ Although the law does not permit marriage before the age of 18 years,⁴⁰ the Ministry of Justice may, for serious cause, and on the application the future spouses or the guardian of one of them authorize marriage starting at the age of 16.⁴¹

After the child has reached the age of 14 years, he or she may be granted emancipation by court decision.⁴² The guardian or the tutor or interested third person may submit petition to the court.⁴³ The court shall emancipate the child if the reasons given are in the best interest of the child. The age of 14 has been used because it is also the age at which the child can get gainful employment. It should be noted that emancipation by marriage will remain valid even after the dissolution of the marriage.⁴⁴ Likewise, court decision of emancipation will remain valid and cannot be withdrawn.

The *third* reason of termination is the death of the minor. After such event the welfare of the child is no more relevant and there will be no need for a guardian. Moreover, there would be no need for a tutor as the property of the minor passes to his/her heirs.

* * *

³⁵ RFC Art.215

³⁶ RFC Art.310 (b)

³⁷ RFC Art.313

³⁸ RFC Art.311

³⁹ RFC Art.312

⁴⁰ RFC Art.7(1)

⁴¹ RFC Art.7(2)

⁴² RFC Art.312 (1). Under Article 330(1) of the Civil Code, the minimum age for emancipation was 15 (fifteen) years. The age has been lowered to 14 years ... because under Ethiopian Labour Law, 14 (fourteen) years is the minimum age for concluding an employment contract.

⁴³ The meaning of “interested person” is indicated in volume I of this (i.e. Ato Mehari’s) Book”

⁴⁴ RFC Art.314

Supplementary reading on lessened capacity

Extract on minors, mental health and prodigals

Rudolf Huebner, *A History of Germanic Private Law*, The Lawbook Exchange Ltd. 2000), (Pages 54-61)

...

Age

Youth and old age are... not merely physical distinctions; they always involve legal differences, also. And the law can take account in various ways of differences of age.

Youth

(1) *The Older Law*

Age periods

In contrast to the later variety of vital periods recognized by the law, men recognized in primitive times only one division: that between maturity and immaturity, "just as they divided the day into halves of morning and evening, corresponding to the ancient assumption of but two seasons of the year, summer and winter." Below this limit stood the minors, those "within or under their years"; they passed it so soon as they came "to their years", to years of discrimination, of discernment, of self-consciousness, to "*anni intelligibiles*" or "*discretionis*"; which coincided with their attainment of puberty. The dooms still maintained, on the whole, this primitive view.

It seems that among the Germans, as also e.g. among the Romans, no precise moment was originally assigned at which the transition from immaturity to maturity was realized. This took place according to individual development. "The oldest rule is probably one which counted no years, but measured the outward signs of physical power; as the child was judged by its cry, speech, and the blowing out of a candle, so perhaps the man was judged by his ability to swing the spear, or slay the enemy, or in other ways". Nevertheless, the attainment of majority by no means effected, of itself, the removal of all the limitations theretofore placed upon minors. In particular, it did not put an end to paternal authority. On the contrary, this was ended only by a formal declaration of majority by the father; or what was most common, by the son's

desertion of the paternal household and establishment of his own. The grant of arms was, rightly considered, no emancipation. Only for fatherless youths was it so; in their case, unless they voluntarily submitted themselves to a further period of guardianship, the grant of arms and majority were coincident. In other cases the able-bodied sons still remained under the authority of the family head. Where there was sex-guardianship, i.e. where women were subjected through life to the tutelage of a man ..., the contrast of minority and majority existed only as to the men.

Among Germanic peoples, however, fixed limits for the attainment of majority were adopted at an early period and thus a free appreciation of each individual case was replaced by a routinary rule, -- which, indeed, in this particular matter, the law cannot dispense with, even in its ripest development.

The ages fixed for the attainment of majority, as these prevailed among the different Germanic racial branches, according to earliest reports, were in all cases strikingly early. This is a phenomenon that appears among all undeveloped peoples. It can perhaps be explained by the fact, already referred to, that paternal power was usually continued, and that where that was not the case there might be a voluntary continuance of guardianship; and that, in general, the prevailing simple conditions of life could not make any great demands upon the maturity of the individual. The earliest date to be found within the whole extent of Germanic legal sources is the tenth completed winter, which is spoken of in the old Kentish law, and which, with the addition of a year and a day, is still to be found in the Ditmarsh law of the 1400 s. Among most of the Germanic racial branches the twelfth completed year of life was the age-division, -- it was so with the Salic and Chattish Franks, Frisians, Lombards, Saxons, Anglo-Saxons, Alamanians, probably among the Bavarians, and originally among the Visigoths, Norwegians, and Icelanders. Among others, the completed fifteenth year was the limit, as among the Ripuarian Franks, Burgundians, and the later Visigoths (to all of whom, perhaps, the Roman date of puberty of fourteen years served as a model); and also particularly among the West Franks in their later period, among the later Norwegians and Icelanders, and in the "Libri Feudorum."

While these early age-divisions of the primitive law remained in force among a few racial branches, --as in the Saxon Territorial and feudal law, in the law of Groningen, Gelders, and Holland, -- the age limit was later raised by most of them. In Germany the limit of eighteen years was widely prevalent. It is found in many town laws (e.g. in those of Lubeck, Hamburg, Goslar, Brunswick, Strassburg, and in the Ditmarsh law of 1567), and was established by imperial legislation for the electoral princes in the Golden Bull. Along with it we find

the twentieth year, as in Augsburg; and the twenty-fifth, e.g. in the Schwabenspiegel (G. 54, 5). In short, a great diversity prevailed regarding the age of majority, and in all lands, --alike in Germany, in the Netherlands and in Italy; while in France and in England the age-limit was variously fixed for different classes, and not infrequently the sexes too were differently treated. A rule pre-limit of twelve years was retained as the beginning of majority, but another was introduced at the end of the twenty-first year, up to which voluntary guardianship remained possible. Heusler justly remarks that there was no inconsistency of principle between this and the other legal system (mainly of South Germany), for these also recognized the possibility of prolonging the period of guardianship. The difference was that the latter, at an early date, postponed the age of majority to a later year, and therefore did not need expressly to distinguish the second age-limit that became customary in the Saxon law. In Saxon legal phraseology children under twelve years of age were characterized as "under their year", and those between the twelfth and twenty-first years as "under their days"; in which connection Jacob Grimm makes the acute remark that even yet our speech is wont to count childhood by years and old age by days: "we speak of 'years of childhood' and 'days of old age.' ... Time becomes ever more precious with advancing age, in youth it is unheeded."

However, despite the introduction of an age of majority it remained true that only by the child's desertion of the paternal house, in the case of sons, by the establishment of their own household; in that of daughter, by their marriage, was paternal authority displaced. Accordingly, only "free" boys, i.e. boys whose fathers were dead, became self-governing as soon as they attained "their years"; otherwise majority merely had the consequence that the father of a grown child, if it wished to leave his house, was no longer able to hinder this. Moreover, despite the introduction of a fixed limit to the tutelary period, it was, as before, not infrequently necessary to take note of "the physical probative signs", for "until far into the Middle Ages only the fewest people knew with exactness the year of their birth or even their birthday." Thus the Sachsenspiegel tells us (I, 42, § 1): "if the age of any man is not known, then if he have hair in his beard, and below, and under each arm, it shall be known that he has attained his years" ... As a last means of proof the oath of one who asserted his majority was decisive.

Legal Status

As regards the *legal status of minors*, although Germanic law denied them full judgment, the power to distinguish between good and evil, it by no means

treated them as lacking all capacity for legal action. On the contrary all persons “under years”, even the smallest children, were regarded by it as having such capacity; herein contrasting sharply with the Roman law, according to which “infants” were without capacity for legal action. To be sure they could not undertake those jural acts for which express self-government was requisite, e.g. --acts in court, disposition of their persons, and so on; and further it was possible for them to revoke within a certain time after attaining majority all acts, although such in themselves as they were capable of performing. Heusler calls attention to the fact that the dangers which this rule might in some cases have involved for young persons were lessened by the circumstance that the guardian held the property of his ward, and could thus prevent ill-considered acts; as also by the fact that third parties would certainly hesitate to have dealings with minors, inasmuch as they must expect that the transactions might, after years of uncertainty, be voided by the, minor on his attaining majority.

(2) Development since the Reception.

While the Reception (of Roman law) did not lead to a complete displacement of the native by the Roman rules, it did result in a far-reaching influence of these rules upon the former.

In the first place the period of “*infantia*” was everywhere interpolated; whereas the English law, for example, has held to the old Germanic view, and even to-day knows, in principle, only one divisional line between minority and majority. At the same time, even in the older German law distinctions already appeared within childhood: with seven years the child began to learn; the church, too, permitted from seven years onward ordination into the priestly office. But now, in imitation of the Roman law, the seventh completed year of life sharply divided children wholly without capacity for legal action from minors merely limited in such capacity. On the other hand the Roman distinction between “*impuberes*” and “*minors*” attained no importance in Germany; all minors above seven years, whether or not they had passed the age of puberty of twelve or fourteen years, being treated alike. Their juristic acts remained for the time in suspense, --as had formerly those of children under seven years, --and bound only the other party; they were incapable of being parties to an action; the privileges of “*restitutio in integrum*” and the bar of the thirty-year prescription period allowed in their favor, in imitation of the Roman law, were again abolished in modern times. As regards the moment of attaining majority, the Roman divisional period of twenty-five years also attained common law validity in Germany; the Schwabenspiegel, as already motioned, had earlier adopted it. Side by side with this, however, the limit of

eighteen years maintained common law authority in the case of the high nobility save in Mecklenburg, where it was nineteen, and in a few princely houses in which it was twenty-one. All these rules have remained unchanged as regards the houses ruling to-day, and those dispossessed in 1866, though not as regards the other families of the high nobility. Unlike the common law the Territorial systems held fast to the native age periods. The Prussian "Landrecht" adopted that of twenty-four years. So also the Austrian Code, by virtue of which this age-limit still exists in Austria. In recent years, however, the term of twenty-one years has attained the widest prevalence in Germany, after having earlier found general recognition in France as a result of the Revolution and the Code Civil, and also recognition within the regions of French law in Germany. The close of the whole development was reached in an imperial statute of February 17, 1875, which fixed that period for all Germany. The new Civil Code (§ 2) has also retained it, whereas the Swiss Civil Code (§ 14) makes majority begin with twenty years. Moreover, the newest German law has also retained the period of "*infantia*" of the Roman law: it treats children under seven years as wholly incapable of juristic acts (BGB, Art. 104, 115, 828, 1), while it attributes to minors of over seven years a limited (§107-111), and under certain circumstances even an unlimited (§ 112-113), juristic capacity. On the other hand the provision is new that paternal authority ends in all cases with majority (§ 1626; similarly, the Swiss Civil Code, § 273).

Declarations of majority

In view of the early age of attaining majority under the older law, there could scarcely exist any need of allowing earlier the rights of majority. From the 1200 s onward, more frequently from the time of Charles IV, and under the influence of Roman legal ideas, the emperors, the imperial courts-palatine, and Territorial princes had occasionally conceded to individual minors the rights of majority. Along with the Roman period of majority of twenty-five years, there was also received in Germany and in France the institute of the "*venia aetatis*", though this was substantially modified in the Territorial systems. It could be attained with eighteen years; it was granted either by the Territorial prince or by the court of wards. The latter principle has been adopted by the new Civil Code (§ 3), subject to variant regulations of State law (EG, § 147). Beside this majority, conferred by explicit declaration, many of the earlier legal systems also recognized one tacitly established, namely by marriage. Accordingly to them the principle held, "marriage emancipates" ("*Heirat macht müdig*"), without the husband's powers being thereby affected. This principle attained a common law validity in French customary law; it is found similarly in almost

all systems of Dutch law; the English law knows only this form of “*venia aetatis*.”

In Germany, where it had remained quite unknown to the rural legal sources, it has fallen more and more into desuetude since the end of the 1700s; men even disputed whether common law authority was not rather to be ascribed to the opposite Roman principle than to it. According to the new Civil Code an end of minority and guardianship is involved neither in marriage nor in the assumption of a public office (to which similar effects were formerly often attributed). On the other hand, the Swiss Civil Code (§ 14) has raised the old view of the German law again to honor, according acceptance to the principle “(Marriage emancipates) -Heirat macht münding” in its original proverbial conciseness.

Further Age Periods

Although the limits of majority, and after the Reception of childhood, were and are by far the most important of divisional age-limits, there are a few others that can be of importance in private law, -- and save with such we are not concerned. In general the course of development has been to do away with these special divisions and to make decisive in all things the limits of childhood and minority. Capacity for *betrothal* was not attached in the old Germanic law to any definite age. It began according to the Canon and the common law at seven years; according to most of the particularistic systems only later, and in part of these simultaneously with capacity for *marriage*. This last, which to be sure by no means put an end to the parental right of consent, was originally included in the general right of self-control (“Mündingkeit”), and was therefore acquired at an astoundingly early age.

Later it was raised in varying manner, by an imperial statute of February 6, 1875, to the twentieth or (for women) the sixteenth year. On the other hand the new Civil Code (§ 1303) makes such capacity coincident in the case of men with majority, lowering it for women to the sixteenth year, as the Swiss Civil Code (§ 96) does to eighteen years. Capacity to act as guardian, which was once often distinguished from majority, was made to coincide with this in the common law, and this rule has become general German law since the imperial statute of 1875. Capacity to make *negotiable paper* was formerly not acquired with majority, but has ceased to be distinguished from this since the German Bills of Exchange Act (1849). *Testamentary capacity* was very generally associated under the common law with the Roman ages of puberty of twelve and fourteen years.

Under the modern particularistic systems it was generally acquired from the fourteenth, sixteenth, or eighteenth year onward. The new Civil Code (§ 2229, 2) gives to a minor of sixteen years capacity to make a will, except in holographic form; he can make testamentary dispositions in the form of a

contract of inheritance only with his spouse (§ 2275, 2). The Swiss Civil Code (§ 467) also makes the eighteenth year determinate in this connection, but requires absolute majority for the conclusion of a contract of inheritance (§ 468). Finally, the new Civil Code recognizes a special age-division for the incidence of *tort liability*, in as much as it does not recognize such responsibility on the part of children and youths of from seven to eighteen years, unless at the time of committing the harmful act they possess the discrimination necessary to perceive their responsibility (§ 828, 2). Each case is therefore determined upon its merits, even though this cannot be so naively done as once, when children under seven years were tested by holding before them an apple and a coin, -- if they reached for the apple they could not yet be held accountable for their acts.

Old Age

The older German law attributed also to old age an influence upon capacity for legal action. "To paganism life seemed nothing without bodily health and full use of all limbs." Accordingly, he who because of his age was no longer entirely sound in body was also regarded as no longer a legal member of the community. In accord with a cruel and widely disseminated primitive custom, belated traces of whose influence are still discernible; as children incapable of life were exposed, so the old were buried alive or drowned. There is no longer mention of such practices among the Germans of historical times. But old people who had attained an age "boven ire dage" (Above their days), --i.e. had reached sixty years of age, --were freed of many obligations. They were no longer bound to take oaths, since they were no longer able to defend their oaths with arms. They might again put themselves under guardianship, thereby sacrificing their legal independence. Modern law has in general abandoned this view. Nevertheless, even to-day the attainment of old age, which was taken by the common law to be reached with the seventieth, and in the modern Territorial systems and also in the new Civil Code with the sixtieth, year of life, -- does produce certain legal consequences, especially the right to decline the assumption of a guardianship (BGB, Art. 1786, 1. 2; similarly the Swiss Civil Code, § 383, 1).

* *

Sex

Although law has been compelled at all times and in all places to place distinctive values upon the different periods of life, the history of human culture shows us that a like compulsion has not been felt as regards the difference, equally fixed by nature, between the sexes. The position of women

in the law of the Germanic people was, indeed, during a long time, notably different from that of men. A woman was worth less than a man; the new-born child was regarded more highly if it was a boy. But this unequal treatment has more and more given way, at least within the field of private law, until finally to-day in answer to one of the most insistent demands of modern legal consciousness; the equality of man and woman has within that field been fully realized.

(I) The legal position of women among early Germanic peoples.

-- If we contemplate the conditions of the primitive Germans as they are revealed to us by the oldest direct testimony and as they can be inferred from later accounts, -- leaving unconsidered the difficult question as to possible or probable prehistoric relations, -- it is evident that the legal status of women, among the early Germans precisely as among other civilized people in the earlier stages of their development, was in striking contrast to the important and highly respected part played by her in economic and social life.

The wife cared, with the husband, for the family. If he drove the plow, it was she who was particularly active in caring for the livestock; she was the housekeeper, she was responsible for the training of the children, she prepared the clothing and the food. And never did the German regard women as mentally inferior; on the contrary he very commonly bowed to women as to superior beings. They were active as priestesses, seeresses, surgeons, and nurses. Yet, despite their lesser physical strength they took part, often enough, as warriors in battle. One need recall to mind only the role of women in the marches and battles of the Cimbrians and Teutons, and the Walkyries, the shield maidens, of whom there were historic counterparts in the North as late as in the Viking age. History and saga have tales to tell also of vigorous women rulers. The Germanic ideal of woman, to which they held true through changing times, was on one hand, in the words of a recent Scandinavian scholar, "the blond and radiant woman, bringing to men peace and gentleness", but on the other hand the warrior woman.

But this high estimate of the female sex, the account of which by Tacitus, though indeed idealistic, is nevertheless fully confirmed in its essentials by the poetry, religion, and history of the early Germans, by no means accorded with the legal status of Germanic woman.

The family law of the Germans at their entry into history was unquestionably of a patriarchal character, that is, one that rested upon the power of the family head over the persons belonging to his house, and which was substantially limited to that; and this involved the consequences that not only the daughters

of the house but also the married women were subjected to that power of guardianship, and were therefore wanting in legal independence, or, as it was called, self-mundium or self-representation. But what is more, mature unmarried women (of whom indeed there were probably always but few, for in the eyes of the people of that time a life for women outside marriage had in general no purpose or meaning) and widows were under the mundium of male relations. Women were thus subjected throughout life to the legal authority of other persons. This relation, known to-day as sex-guardianship, must be taken as the starting point of the historically demonstrable evolution in the legal status of women; for the contrary view, represented by Ficker and Opet, which assumes an original legal equality of women and men rooted in prehistoric conditions of "mother-right", is lacking in conclusive proofs in the sources. Although among the Franks, for example, the independence of women was recognized in many directions, and true sex-guardianship appears not to be found at all in the Anglo-Saxon sources, one must assume that in these racial branches, as among the Bavarians, Burgundians, and Goths, the old conditions had been overcome at an early date. Sex-guardianship was most sharply developed among the Lombards, perhaps because the military character of political organization was with them most strongly developed. The Saxon and Frisian sources likewise show strong traces of the institute. Of the Scandinavian legal systems the Swedish shows sex-guardianship in greatest development.

The reason for this legal treatment of women can only have lain, in the last analysis, in the physical weakness of the female sex, which, in an age when public and private law were not yet separated, was bound to influence the legal status of women in every respect. Despite all Walkyrie ideals Germanic women were generally regarded as incapable of bearing arms, notwithstanding that in case of necessity they had known how to support the men in battle. And since the community was constituted by the totality of arm-bearing persons, they could not be independent members of the community; they were incapable of serving in the army, and therefore also in the courts—for he who would participate in the popular court must be able to bear arms, since the procedural contest might at any moment be transformed into a warlike combat. Consequently, women were excluded from public life; in a legal sense they were but members of a household community that was represented in external relations by its head. This had prejudicial effects, also, upon their capacity for legal action under the private law. They had originally no capacity for proprietary rights; for according to the legal notions of antiquity, to which representation was unknown, whoever was to hold property was bound also to administer it; that is, he must be able to perform juristic acts, which in turn

required capacity to sue and be sued. Inasmuch as a judicial character was retained longest in the case of juristic acts involving realty, the proprietary incapacity of women was also longest preserved in respect to such property. Proprietary incapacity involved incapacity to inherit: "the right to inherit is either denied to all women by the oldest statutes or is limited." And even after their status in this branch of the law improved, "they were still postponed, for the most part, to men in rights of inheritance, either in that they were excluded by males of equal (if not by those of more remote) degree, or in that they received lesser shares than such; or again, in that they were treated thus, generally, in the distribution of the heritage, or were discriminated against only as respected particular classes of property." Their inferior rights of inheritance lasted longest in respect to real property.

The peculiar legal status of the female sex found visible expression in the fact that *wergelds* and *bots* of women were, under most of the folk-laws, different from those of men. But only the West-Gothic law assigned to them, in most periods of life, lower tariffs than to the men. The law of the Almans and Bavarians assigned them higher sums; and this for the reason, as the Bavarian folk-law (§ 4,29), that they were unable to bear arms, "quia femina cum armis se defendere nequiverit"; for which reason this favor was also denied them once they had taken personal part in a combat, "quod inhonestum est muliebribus facere." This thought recurs in the dooms, in whose phrase women who challenge a man to battle "scorn manhood." The enactments of the Lombard king Rothari fixed a sum for killing a matron, woman, or maiden that exceeded by a third the *wergild* of a man. In the laws of the Franks and Anglowarns, a *wergeld* threefold a man's was set upon women of child-bearing age; in the Almanian law the "mulier" enjoyed double that of the "Virgo", doubtless because a woman during her child-bearing years possesses the greatest value to society. On the other hand, the Saxon folk-law distinguished the woman who had not yet borne children by a double *wergeld* and *bót*, while it set only the ordinary sums for one that had already borne children. If the pregnant woman was assured a higher *wergeld* (a price set upon a person's life on the basis of rank, etc) along with other advantages that were accorded her by many later legal systems, this had its reason in her greater needs of protection. Equal tariffs for men and women are found in the other Frisian sources whereas most of the more modern ones favor women with higher *bóts* and *wergelds*, and some also give special protection to the pregnant.

(II) The Medieval Development.

The lifelong dependence of women upon their arms-bearing male relatives could become less complete only as the importance of the sib declined, and an

independent State power developed that took into its own hands the protection of the weak; and, moreover, only as the close connection between the capacity for bearing arms and for attending court began to relax. As regards the first requisite, the influence of the Church, which contributed to give prominence to the protective duties involved in guardianship, was certainly important. The restrictions placed upon women's capacity for legal action were thereby mitigated.

Sex-guardianship, though it persisted, as such, for the time being in most parts of Germany, took on an altered character. No longer based upon the inability of women to bear arms, it was transformed into a protection by court, which was manifested only in certain judicial acts which women, because of their ignorance of business, were forbidden to execute, — as e.g. the [judicial] livery of seisin. Moreover, whereas the nearest paternal collateral relative was formerly, by virtue of the relationship, the guardian of an unmarried woman, who was thus subject of a legal wardship, the woman herself later came to choose a guardian, whom not even entrusted with the office once for all, but was chosen only for the particular transaction demanding his co-operation. Thus the institute completely lost, as is readily understandable, its one time importance, and it is therefore not surprising that in many regions it was wholly done away with even in the Middle Ages.

An equality of women with men in private and procedural law was by no means realized, however, by this recedence or disappearance of sex-guardianship. It is true that in the course of the Middle Ages women became capable, practically everywhere, of holding land, --indeed, very commonly also of holding fiefs. But in Germany, at least, they nevertheless remained postponed to men throughout the law of inheritance: they were incapable of acting as guardians and of making testamentary dispositions; and their testimony in court was also less highly valued than that of men. ... However ... the Law-Books ... could not prevent the ever increasing prominence of women in economic life. Especially in urban industries they played a not unimportant part. In many craft-gilds they were received as independent members with full rights of fellowship, e.g. as wool weavers and linen weavers and as tailors; this was particularly true of the widows of deceased masters. ... In the second half of the Middle Ages tradeswomen acquired unlimited capacity for legal action. ...

(III) The Modern Development

... The German General Commercial Code and the German Industrial Code recognized the unrestricted capacity of women engaged in commerce and

industry to perform juristic acts and to sue and be sued (though it is true the Commercial Code required the husband's consent to the wife's assumption of the status of a tradeswoman), and the German Code of Civil Procedure recognized the full capacity of all women to sue and be sued. Thus there remained in effect in Germany, of limitations upon the feminine sex in private law, only the postponement in inheritance in the case of feudal estates, peasant land-holdings, and land-holdings of the high nobility, the limited capacity for exercising guardianships' the incapacity within the regions of the French law to take part in family councils; and incapacity for feudal tenure.

German law as it exists today has done away even with most of these few limitations. The Civil Code recognizes no difference between man and woman as respects capacity to act as guardian or participate in family councils. Similarly it accords to every woman ... unrestricted capacity to perform juristic acts, thereby ending the restrictive rule of the old Commercial Code. It gives to the mother parental powers along with those of the father; recognizes women equality with men as witnesses An earlier marriageable age and the rule respecting the widow's year of mourning (§1313) have been recognized and continued, and are the sole consequences of a woman's sex (in the field of private law).

* *

Health

(I) Physical Health

The Older Law

As men reasoned in primitive times, a perfect physical constitution was a necessary precondition of full capacity for legal rights and action, for from its lack they inferred mental weakness. And so long as every member of the legal community was bound to be capable of bearing arms, he was in fact prevented by bodily infirmity from participating in legal transactions.

Badly crippled and deformed persons had therefore only a limited capacity for rights. ... Their relatives, however, were bound to care for and maintain them, so that some capacity for rights was after all accorded to (them).

In the same class belonged lepers: they retained ownership, it is true, in property acquired by them before the appearance of the disease, but were incapable of further acquisitions. Indeed, the malady originally dissolved their marriage. They were compelled to live apart from all mankind, – which requirement was based upon the precept of the Mosaic law (3 Mos. 13, 46); they

were incapable of litigation, testamentary disposition, inheritance, and the contraction of liabilities. Their lot improved only with time. The Church interested itself in them; entrusted their care to the bishops; forbade the dissolution of their marriages; founded hospitals for them; and in the beginning of the 1100's founded a special order, of St. Lazarus, for their support. Leprosy gradually disappeared, beginning in the 1400's; since the 1600's it has ceased to be a plague in the greater part of Europe.

The blind, the deaf, and persons without hands or feet, were incapable of inheriting under the harsh theory of the older time, at least in feudal law.

Even persons only temporarily victims of a physical and contagious disease were, as a consequence of the views referred to, obliged to suffer a limitation of their capacity for legal action. In particular, the law denied them unrestricted dispositive power over their property. They were obliged to secure the assent of their legal heirs-apparent for dispositions both of immovable and of movable property. Hence the frequent tests of strength that the medieval law prescribed in order to render unquestionable one's unimpaired bodily vigor, and therewith one's unlimited dispositive capacity. A man must be able to swing himself without aid, armed with sword and shield, upon his steed, or turn with the plow a certain piece of land; a woman must be able to walk as far as the church, etc. ... Above all, testamentary gifts from the sick bed, when one was conscious of speedily approaching death, were on this account either forbidden or similarly associated with certain tests of physical strength: for example, a gift was permitted of only so much as the sick person could hand out over the bedstock. In this connection there was the additional consideration, as the gloss of the *Sachsenspiegel* expresses it (I. 52, § 2), that "...he who gives away his goods when he is 'broken' and no longer able, give away, not what is his, but give what is his heirs".

(2) The Later Law

Already in the Middle Ages, however, the idea developed that physical sickness should not, of itself, affect legal capacity; a view to which King Liutprand gave statutory effect, and which was later especially advocated by the church with an eye to the numerous gifts made to it for the good of the givers' souls. The "*Kleines Kaiserrecht*" (Little Book of Imperial Law) gave expression to it with the striking words: "*der sin gut gibet, der gibt des mit dem mut und nit mit dem libe*" (2, 36), — "he who gives his goods, gives through his spirit and not with his body."

At the same time these limitations upon the dispositive capacity of persons physically sick, and physical tests, persisted down into modern times in many legal systems, – e.g. in the law of Württemberg, Lübeck, and Lüneburg; and in feudal law, consistently with its military character, the acquisition and inheritance of fiefs was very generally permitted to the able bodied only. German law in its latest form no longer knows any general influence of bodily conditions in the private law; in case of necessity, only, the decrepit, blind, deaf, and dumb may be placed under guardianship, at their own instance or without such request. The Civil Code (§1910) also permits, in such cases, the institution of a curatorship. Finally, specially prescribed formalities exist as regards the juristic acts of the blind, deaf, and the dumb.

(II)- Mental Health

(1) The Older Law

In earlier times insight into the nature of mental ailments and their various degrees was very slight. Typical of the native attitude of the old Germanic law is the passage of the Icelandic Gragas according to which he was treated as mentally afflicted who could not tell whether a saddle lay upon a horse properly or reversed, and whether he himself was sitting with his face toward the horse's head or tail. Naturally, then, the treatment of such invalids – who were designated by such expressions as “geck”, “rechter dor”, “Sinnloser man” (“booby”, “downright fool”, “idiot”) – was not in the least determined by medical views. They were regarded as bedeviled, or as criminals; and against them men proceeded with exorcisms and imprisonment. A gentler view finally came to perceive their need of protection, founded hospitals, and, especially, placed them under guardianship; which in turn limited in another way their capacity for legal action.

(2) The Later Law

With the Reception (of Roman Law), the Roman distinctions, supplemented by those of the Canon law, found adoption in Germany: insanity (“Wahnsinn”), which renders one incapable of any juristic act whatever, but may be interrupted by “*lucida intervalla*” (lucid intervals); feeble-mindedness or idiocy ... which only in its extreme degrees resulted in complete incapacity for action, and otherwise only in a limited incapacity like that of “*impuberes*” above seven years of age; finally, mere intellectual limitations which might be considered in individual cases in order to avert prejudicial consequences. These indefinite categories were variously readjusted in the later Territorial systems according to the ability, for the most part scant, of the jurists of each period to utilize in

the law the progress of medical science. Most important of these developments was a peculiar judicial process of interdiction, which received its final form in the present Code of Civil Procedure (§§ 645 *et seq*). Interdiction, so long as it continues, effects incapacity for action without regard to lucid intervals. In addition to interdiction on account of such mental disorder as results in incapacity for juristic acts, the Civil Code ... recognizes an interdiction on account of feeble-mindedness which places the interdicted person under the disabilities of infants (§§ 6 , 104, 114). Besides insane persons, who are interdicted and subjected to guardianship, those persons are also incapable of juristic acts who are permanently in a condition of morbid mental disorder that renders impossible their free volition (§ 104).

(II) Prodigality

(1) The Older Law.

The medieval law already knew an interdiction of prodigals, which very generally assumed a form certainly somewhat drastic. For young spendthrifts, especially in the cities, were not infrequently simply locked up for the betterment of their habits, or were banished. Subjection to guardianship also frequently occurred, however; being decreed either at the instance of the next relatives or of the authorities, officially, in order that such persons might not, as paupers, become a burden on the towns. A definite part of his property was customarily left at the free disposition of the ward; in respect to the rest he was incapable of legal action.

(2) The Later Law

The Roman "*cura prodigi*" was further developed in harmony with older native principles, but without producing a wholly consistent regulation of the institution. The present Civil Code has followed the Austrian, Saxon, and Hamburg law by postulating as an element in the conception of prodigality the condition that the spendthrift exposes himself or his family to want, whereas the Prussian "*Landrecht*" accepted as sufficient an unjustifiable and continual squandering of his property. A person put under guardianship as a prodigal has a limited legal capacity as in the case of infant (§ 114). The Swiss Civil Code (§ 370), going still farther, has introduced an interdiction on the ground of incompetent management of one's affairs, — the precondition to which is not culpable incompetency (prodigality), but simply bad management.

* *

Guardianship of Dipsomaniacs

Guardianship of habitual drunkards is an innovation of the present Civil Code. The Swiss Civil Code has also adopted it (§ 370).

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* * *

Excerpt on prodigals

Alexander Nékám, **The Personality Conception of the Legal Entity**, Harvard University Press, 1938 (page 29)

“ ... It is true that in most of the modern systems, whenever the question of administration of the rights attributed to the normal, fully grown individual is raised, it is generally found that the person whose interests have been regarded by the law as important enough to be protected is at the same time entrusted with the protection and administration of those rights, as one who presumably is best fitted for such a task. But even in these cases we must distinguish clearly between such person as the beneficiary of socially protected interests – that is, as a subject of rights – and the same person as the administrator of them. This is clearly shown by legal institutions, frequent in most modern systems, where the administration of the rights belonging to a fully grown and otherwise normal individual is taken away from him, not because the correct use of these rights towards the purpose to which they were given by the system has been imperiled by his administration of them. Such is the case, for instance, of the prodigal in French law. Here the administration is taken away because the lawmaker thinks that the purpose for which these rights were given, that’s to say, his own well-being as conceived by the community and thereby the maintenance of his social importance, are better protected if his rights are administered by somebody else.

... .

* * *

CHAPTER 5 - END OF PHYSICAL PERSONALITY

Introduction

The endpoint of physical personality is obvious. It is to be recalled that Article 1 of the Civil Code states *death* as the end point of physical personality. There are, however, cases where *death is probable, but not certain*. Such cases involve the issue of *absence*.

Unfortunately, many courts are currently lenient in rendering declaration of absence, and they seem to undermine the core issue that need to be proved to justify declaration of absence. Indeed, there seems to be more focus on lapse of the period stated in the law (since the last news from the alleged absentee), although the facts of the case may not lead to an assumption of probable death.

Objectives:

At the end of this chapter students are expected to be able to:

- a) state the grounds for end of physical personality;
- b) define absence;
- c) explain the grounds for and procedures of declaration of absence;
- d) discuss the general effects of absence;
- e) explain the specific effects of absence;
- f) contrast declaration of absence and judicial declaration of death;
- g) analyze case problems that involve the concepts and issues here-above.

1. Probable death of a person: Absence

There are cases where the death of a person is *not certain but probable* in view of his disappearance for a long time without news about him. The uncertainty of his death or his being alive creates problems with regard to the execution of rights that depend on his death (such as the interest of heirs and legatees) or as regards the performance of obligations that are dependent on his being alive.

Declaration of absence thus fills the gap of this uncertainty through mechanisms such as granting certain rights to heirs and legatees, and meanwhile securing the right of the absent person in case he would reappear. Probability of death should be the ground for the judicial declaration of absence. However, courts seem to be lenient in declaring absence mainly focusing on lack of news from the person that is alleged to have been absent.

1.1- Declaration of absence

a) Conditions, application and jurisdiction

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

b) Publicity

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

c) Inquiry

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

d) Declaration of absence

- The court shall declare absence “where the *death* of the absentee *appears to be probable*” (157/1).
- In making its decision, the court shall have regard into all the circumstances of the case, and it particularly considers whether the absentee has appointed an agent for the administration of his property (157/2) and whether there are possible causes that have impeded news from him (157/3).
- The court is required to declare the absence *a year after the date of application* where the absentee has disappeared for five years or more prior to the date of application and no news have been heard following publicity (159). It would have been more reasonable if the time for the court’s declaration of absence had started from the date of publicity rather than the date of application, because the time between publicity and declaration of absence can be very short if, for example, publicity is made many months after application for the declaration of absence. This problem can be resolved by utilizing Article 158 that allows the court to postpone its judgment for a year or postpone the effect of its judgment for a year after its delivery.
- In its declaration of absence, the court shall establish the day when the last news of the absentee was received (160) based on the evidence submitted.

e) Declaration of death where the absentee’s death is certain

If the evidence that has been gathered by court “establishes *in a manner which may be considered certain* that the absentee is dead, the court to which the application for the declaration of absence was made, may deliver a judgment declaring the death of the absentee” (161).

Article 111 applies to cases where an application is made to court requesting declaration of death of a person who has disappeared under such circumstances that his death is *certain* although his remains have not been found. However, Article 161 applies where the applicant initially invokes *probable death* and the court in the course of its inquiry and examination gathers evidence that establishes death which can be considered certain.

N.B. - The absence of a specific provision that deals with appeal against judgment with regard to declaration of absence inevitably creates problems of interpretation.

1.2- General effects of absence

Declaration of absence will affect those *whose rights depend on the death* of the absentee and those whose *obligations* toward the absentee *depend on his being alive*.

- The persons who have rights dependent on the death of the absentee, such as, a beneficiary of life insurance or heirs, may enforce these rights “after the judgment declaring the absence has become final as though the absentee were dead” (165/1). However, they are required to give a guarantee or security for possible restitution in case the absentee reappears (165/2).
- “Persons who have obligations depending on the condition that the absentee is alive shall no longer be bound to fulfill such obligations” (166/1). Yet, the court may require guarantee or security, in case the absentee should still be alive (166/2). The following example illustrates this condition.

A’s will enables B to inherit the property of the former, under the condition that B makes monthly payment to C’s account as long as C is alive. In case C is declared absent, B is not bound to make the monthly payment he owes to C; but may be required to give guarantee or security to pay the arrears in case of C’s reappearance.

1.3- Special effects of absence

Articles 163, 164 and 167 to 169 state the special effects of judicial declaration of absence.

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

ground for dissolution of marriage as envisaged under Article 163/1 of the Civil Code (Art. 75/a RFC). The Revised Family Code does not enumerate the grounds of divorce, and declaration of absence can be invoked (before courts) as ground for divorce in accordance with Articles 76/b and 81 of the Revised Family Code. Of course, an issue would arise whether divorce (under the Revised Family Code) can be requested in relation to marriage that has already been dissolved due to declaration of absence. At this juncture, Article 670/b of the Civil Code can serve for the purpose of conceptual understanding. The following examples illustrate the distinction:

Ato “H” has been declared absent by court and his wife Woizero “W” got married to Ato “H2” (a week after the court’s declaration of absence) believing that her previous marriage with “H” has been dissolved by virtue of Article 75/a of the Revised Family Code (163/1 of the Civil Code). Ato “H” is entitled to impugn the new marriage upon his reappearance (163/2).

If instead Woizero “W” invokes the declaration of H’s absence as serious ground for divorce (670/b) and obtains judgment of divorce, the marriage she concludes thereafter remains valid despite the reappearance of her former husband, Ato “H”. Absence should also be allowed as legitimate ground for divorce under the Revised Family Code that doesn’t state list of causes for divorce under Articles 76 and 81.

- The second major special effect of absence is related to inheritance to which the absentee would have been entitled. *Succession devolving on absentee* shall devolve on the other heirs or legatees without taking into account the portion which would have been assigned to the absentee (164/1). The court may oblige the heirs or legatees to furnish a guarantee or security for safeguarding the absentee’s right in the event of his reappearance. It must however be noted that the share of an absentee does not devolve on other heirs or legatees if he has descendants because Article 853 of the Civil Code (in conjunction with Article 165) entitles them to “take his place and exercise the rights relating to the succession”.
- The third special effect of absence pertains to the property owned by the absentee. According to Article 167, the property of the absentee may be placed in *possession* of persons who would have been called to succeed in case the absentee had died on the day of the last news. Such persons are

required to take good care of the property as if it is their own (168/1), and may be obliged by the court to give a guarantee or security (168/2). Moreover, they are bound to observe the restrictions against transfer of ownership (169/2) and the duty to invest sums received (169/1) within three months from the date of their receipt.

1.4 - Termination of absence and its effects

Articles 170 to 173 deal with termination of absence. According to Article 170, declaration of absence shall cease to have effect if:

- a) the absentee reappears; or,
- b) it is proved that the absentee was alive at the date subsequent to the judgment; or,
- c) it is proved that the absentee has died.

In short, declaration of absence terminates where the absentee is proved to be *alive or dead*.

Upon *reappearance*, the absentee is entitled to recover his property (Art.171/1) in its current condition, i.e., despite depreciation through the normal (168/1) use and enjoyment of the property (*bonus pater familias*). The absentee shall also recover the proceeds of property that has been transferred (e.g. through sale) and the property acquired through the investment of the capital. But income derived from the property (171/2) is retained by the heirs and legatees who had taken possession of the absentee's property.

The absentee has the right to claim damages where heirs or legatees infringe the obligations stated under Article 171/1 or 171/2; or where they commit fraud (173/3). However, the guarantees or securities shall be extinguished (173/2) upon the lapse of ten years since the date of the last news, established by judgment of declaration of absence (172).

Where the absentee's death is ascertained, the patrimonial rights and obligations of the absentee "which form the inheritance shall pass to heirs and legatees" (Art. 826/2). In effect, heirs and legatees of the absentee whose death is ascertained shall no more be bound by the conditions of guarantees or securities for the property that is subject to restitution (164/2, 168) and by the restrictions embodied in Article 169 with regard to the duty to invest sums received and the restriction against gratuitous transfer of property.

Case 12

(Translation: Fasil Abebe)

Addis Ababa City
First Instance Kirkos Sub-City Court
Addis Ababa

File No 492/96
Date Sene 14, 1996 E.C.

Judge: Fekadu H/Mariam

Petitioner: S. Dina (Present)

Respondent: Y. Dina

Opposing Petitioner: W/ro A. Tessema – Not Present

The case has been examined and the following judgment has been given.

Judgment

Petitioner submitted a request to the Court through his advocate on Meskerem 29, 1996 (Eth. Cal.) stating that the Respondent is his brother and he has not been able to find him since he left Ethiopia to go abroad in Megabit 1985 and is requesting the Court to declare his brother's (i.e. Ato Y. Dina's) absence. Witnesses have testified that they have not been able to trace the Respondent.

The Opposing Petitioner has on the other hand presented evidence to the Court dated Ginbot 7, 1984 indicating that the Respondent is living in Germany.

The Petition states that the disappearance of the Respondent dates from Megabit 1985. Therefore the Opposition Application does not accord with the date stated in the petition.

The Opposing Petitioner has not proved the present whereabouts of the respondent. The Court hereby declares the Respondent absent in accordance with Article 154 of the Civil Code.

...

Signature of Judge

* *

Review Question

Do the facts in the case indicate the probable death of the absentee?

Case 13

(Translation: Fasil Abebe)

Addis Ababa City
First Instance Kirkos Sub-City Court
Addis Ababa

File No. 492/96
Date: Hedar 15th 1999 E.C.

Judge: Dereje Mamo

Opposing Petitioner: Ato Y. Dina-
Represented by Advocate Dilnesaw Tadesse
Respondent: Ato S. Dina – Not present

The case has been examined and the following judgment has been given.

Judgment

The Opposing Petitioner stated in a Petition presented to this court on Tikemt 27, 1999 E.C. that a declaration of absence was given by this Court against the Petitioner. And as the Petitioner is presently living in Germany he requested the Court to annul the decision of absence. He has presented his passport as document of identity.

The Respondent had presented the Petition seeking the declaration of absence of his brother (the current opposition petitioner) because he had not heard of him for 14 years. Ato S. Dina added that he is happy that his brother is found and has no opposition to the annulment of the decision of absence.

The Court has examined the case and relevant legal provisions. In accordance with Article 170(a) of the Civil Code a declaration of absence can be annulled on the reappearance of the person.

Ato Y. Dina who was declared absent has now reappeared. The judgment given on Sene 14,1996 E.C. is hereby annulled in accordance with Article 360/2 of the Code of Civil Procedure.

...

Signature of Judge

Review Question

Read cases 11 and 12, and discuss the effects of such reappearance (of an absentee) on property and marriage.

Case 14

(Translation: Fasil Abebe)

Addis Ababa City
First Instance Nifas Silk/Lafto Sub-City Court
Addis Ababa

File No. 713/98
Date: 17/4/97 (Eth. Cal.)

Judge: Etagegnehu G/Hiwot

Petitioners: 1. W/ro Bogalech Beka
2. Ato Bahru Gudeta
3. W/ro Muluwerk Gudeta

Respondent : Not present

The Petitioner in a petition dated Yekatit 3/1998 E.C. has stated that her son Ato Sileshi Gudeta who is the brother of the second and third Petitioners has left home and never returned. The Addis Ababa First Instance Court has given judgment of absence on Tir 1998 E.C. under file No. 080/98.

The Petitioners have submitted their request to be declared heir to the absentee. The witnesses of the Petitioners have testified supporting the Petition.

The Court has examined the petition along with the evidence and the law. The petition has been supported by the witnesses. Article 165/1/2 of the Civil Code regulates the consequences of absence. The Petitioners who are the mother, the brother and the sister of the absentee have presented a valid request. The court however has ordered the petitioners to submit sufficient securities in the case of the reappearance of the absentee to the extent of the property now owned by the absentee.

Order

The petitioners should bring valid estimate of the property of the absentee after which this Court will issue this order.

Signature of Judge

Review Question

Certain courts accept such requests without requiring petitioners to furnish adequate securities in case of the reappearance of the absentee. If you were the judge, would you require securities before the issuance of order that would enable petitioners to be placed in possession of the absentee's property?

Case 15

Addis Ababa City
First Instance Nifas Silk/Lafto Sub-City Court
Addis Ababa

YT/M/No. 902/98
30/02/99 (Eth.)

Judge: Tewodros Alamerrew

Petitioners:

1. Ato Zelalem Tiruneh
2. W/ro Meseret Tiruneh
3. W/ro Selamawit Tiruneh
4. W/ro Meaza Tiruneh
5. W/ro Minteamer Tiruneh
6. W/ro Amsal Tiruneh

Respondents:

1. Ato Yohannes Tiruneh
2. W/ro Ejigayehu Tiruneh
3. Ato Dilnesah Tiruneh

After having examined the case, the following judgment has been rendered.

Judgment

On 8 Tir 1998, the petitioners presented a petition regarding the disappearance of the first and the second respondents who have been missing from since 1976 E.C. and whose whereabouts are unknown. Moreover they stated that the third respondent has been missing since 1985 E.C. after having left home and never returning thereafter. The representative had been residents of Gullele Sub-city, Kebele 06. The petitioners claim that they have been looking for the whereabouts of the respondents, but in vain. The petitioners have requested the Court to render declaration of absence regarding the respondents.

The witnesses of the petitioners have testified that the respondents now reside in the United States of America. They have also testified that some of the respondents have children in the USA thereby not intending to return to Ethiopia.

The Court had ordered that the alleged absence of the respondents be published in the Addis Zemen Newspaper and this was done on issue number 151 on Yekatit 1, 1998. No one has responded to this announcement.

The court has examined the petition and the testimonies of the witnesses in light of the law. By virtue of Article 157 of the Civil Code, a court shall declare absence where the death of the absentee *appears to be probable*. However, the Court has noted that the respondents now reside outside this country and the way they live is also known. The court has not been able to declare absence of the respondents even if it has been over two years since they went abroad, because their whereabouts is known and their news is being heard.

Therefore, the court has not accepted the petition for declaration of absence based on Article 154 of the Civil Code because it has been confirmed that the respondents are alive.

Order

A copy of the decision is to be made available as evidence to the applicant, and case has been closed..

Judge: Tewodros Alamerrew

Review Question

Critically contrast cases 11, 13 and 14 with regard to the issue that ought to be proved before a court renders declaration of absence.

* *

Readings on Absence

Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law*, (Oxford University Press: London, 1935) pp. 35, 36

A person is said to 'absent' in the legal sense when he has disappeared in such circumstances that it is uncertain whether or not he is still living. No period of time, however prolonged, is deemed, by itself, to create a conclusive presumption of the death. "Absence" is terminated only by proof either that the absentee is living or that he is dead.

The legal consequences of absence consist in the various measures which it becomes lawful to take to protect the interests of the absentee himself, or of his eventual successors. Three stages are to be distinguished: (1) a first period, of *absence presume*, prior to the pronouncement of a judgment *declaratif d'absence*; after such judgment there follow (2) the period of *envoi en possession provisoire*, and finally (3) the period of *envoi en possession definitive*.

During the first period it is open to all (interested parties) to move the court to direct measures of a purely conservative character. The judgment (of declaration of absence), which cannot be given until at least five years have elapsed since news was last received from the absentee, has for its effect to permit the presumptive heirs to cause the absentee's will to be opened, and to authorize all persons having rights contingent on his death to demand to be placed in possession of these rights. This possession remains provisional in character for a fifth of the income if he returns within fifteen years, and for a tenth if he returns after that time, but less than twenty years from his disappearance.

* *

Review Question

Compare and contrast effects of absence under Ethiopian and French law with regard to income (during the period of absence) from the property of the absentee in the event of his reappearance.

* *

Extract from Vanderlinden:

Jacques Vanderlinden, *Commentaries Upon (Ethiopian) Law of Physical Persons* (HSIU, 1969), pp. 125 - 131

...

Absence

Introduction

Absence as a legal institution is justified by the necessity of dealing with situations where a person cannot be considered as being dead, but where it is likely that such is the case. This occurs easily in large countries, like in Ethiopia, where communications are not always easy The purpose of the law in such situations is double: on the one hand, to enable possible heirs or legatees of the absent person to benefit at least from the income of the property which will normally, if absence is followed by death, devolve upon them; on the other hand, to guarantee the rights of the absent person in case the latter should reappear.

In some legal systems, there is a more elaborate procedure for such cases, such as the one which provides for the appointment of a representative of the absent person at a first stage of the declaration of absence. Such representative functions until there is sufficient reason for the court to presume the absentee's death and thus to declare his absence. This seemed unnecessary to the drafter of the Ethiopian Civil Code on the grounds that if a representative had to be appointed, this should be considered under the general provisions on agency. Thus absence, under the Civil Code requires only certain conditions of time and publicity since the last news of the absent person has been received; once these conditions are fulfilled, the question of the procedure is very much within the discretion of the courts.

The effects of absence are very similar to those of death, but for the fact that absence is considered a temporary situation in which the absent person can reappear and be reinstated in all his rights and duties at any moment; this justifies special measures of protection for his patrimonial interests.

If the absent person reappears, absence comes to an end and this is also true once it is established that the absent person is dead. The results are of course totally different in each case.

Commentary

Section I – Declaration of Absence

A declaration of absence as organized in the Ethiopian Civil Code (Article 154), originates in two related facts:

- the disappearance of a person, i.e., the fact that he is no longer seen by other people; and
- the complete lack of news about that person for a minimum of two years.

If such situation exists, any interested person may apply to the court of the place where the person who has disappeared had his principal residence (or his residence, if he only had one). The court shall have jurisdiction to consider the problem and possibly to declare the absence. The law does not limit to any extent the nature of the persons who can apply to the court; it is sufficient for the applicant to have some interest in the declaration of absence. Thus he can be a guardian or tutor, a representative, a parent, an heir, a creditor, etc...of the absent person.

As soon as the application is made, the court shall prescribe its publication in the manner and place which the court think most appropriate. The publication is mandatory in the place of the last principal residence (or of the residence, if he only had one) of the absentee; it is totally within the discretion of the court in other places (Article 155). As the court is free as to the means of publicity it would normally include oral or visual means such as radio, television, etc., apart from the more clerical means, such as the posting of notices.

The court may also order (again this is not mandatory, though probably necessary) that an inquiry be made, with the assistance of the public prosecutor, in all places where the court considers it to be useful and, in particular, where the absentee had his last (principal) residence and where his presence was noticed for the last time (Article 156).

All these preliminary actions lead to the declaration of absence by the court; such declaration can be mandatory or within the discretion of the court, depending upon the case.

It is mandatory, under Article 159, if:

- the application to the court is made after a minimum of five years has elapsed since the disappearance; and

- there has been no news of the absent person following the publicity prescribed by the court upon the application.

The Code does not prescribe any period of time between the first publication of absence and the declaration. Yet this seems an important point to the author as the publicity is an important, if not more so, than the application to the court. It seems that it would have been preferable to compute the delay within which the court must declare the absence (i.e., one year) from the moment of the first publicity rather than from the moment of the application. Yet if the two mentioned conditions exist, the court must declare the absence one year after the date of the application.

If the two above-mentioned conditions are not met the court has to consider the probability of the death of the absent person, and if such death seems probable, it shall declare the absence (Article 157). Such decision is entirely within the discretion of the court, but it must consider two particular sets of circumstances: the possible appointment of a representative by the absent person prior to his departure, and the factors which might impede the arrival of news from the absent person. Within these limits, the final decision lies with the court, provided that it meets the basic requirements of a thorough and extensive enquiry.

Yet, in these cases, the court is not bound to deliver judgment immediately; it can either postpone its decision for a year or provide for the enforcement of the judgment only after the lapse of a year. (Article 158).

In all cases, whether the declaration is mandatory or not, the court shall, in its judgment, establish the day when the last news of the absentee was received; this is a capital point as this date will be the chronological point of reference for all effects resulting from the declaration of absence (Article 160)

Under Article 161, the court (to which the application for a declaration of absence has been made) may also deliver a judgment declaring the death of the absentee (this judgment differs from that declaring the absence) in the case where such death seems certain (and not simply probable, as in Article 157). This again will be within the discretion of the court on the basis of the available evidence. The latter is the only case where legal death results from something other than the end of physical life. In such case, the provisions on absence will not apply.

In the last article of the section devoted to the declaration of absence (Article 162), the Code solves a problem which has no direct bearing on absence, that of the payment of the costs resulting from the application.

If the application succeeds and absence is declared, the costs shall be chargeable to the estate of the absentee; if the application is dismissed, they shall be borne by the applicant who required the declaration of absence from the court. This is a fairly equitable solution which may also serve as a deterrent for anyone tempted to apply too rapidly to the courts for a declaration of absence; if there are insufficient grounds for such application, the only result will be that the applicant will incur the costs.

Section II – Effects of Absence

The effects of the declaration of absence can be divided into two categories: the general effects and the particular effects. But before dealing with them, one must point out that the effects which will be discussed are only those of a simple declaration of absence; if the latter is accompanied by a judgment declaring the death of the absent person, one must consider all the consequences resulting from death under the various headings of the Civil Code.

1. General Effects

A declaration of absence affects all those rights and duties whose enforcement depend upon the death or existence of the absentee.

Insofar as rights are concerned (Article 165), persons who have rights dependent on the death of the absentee may enforce them as soon as the judgment declaring the absence becomes final and effective. The Code only refers to the fact that the judgment has to be final and effective. The Civil Code only refers to the fact that the judgment has to be final, which seems to refer to possible appeals from the judgment. But, even in the case where an appeal from the judgment has been confirmed (in such case the decision is final), it does not mean that it is necessarily effective, as the court may have postponed the effect for a year under Article 158. But once the judgment is final *and* effective, the rights can be enforced; such would be, for instance, the case for all rights conferred to persons in whose favour the absentee had concluded an insurance contract.

But absence is not death in the full sense of the word, and, accordingly, the exercise of these persons' rights is somewhat limited in the sense that the court

may require a guarantee or some other security against the eventual reappearance of the absentee. This guarantee *must* be provided before the rights are enjoyed and covers only things which could be subject to restitution.

Insofar as duties are concerned (Article 166), persons who have duties whose performance is bound to the fact that the absentee is alive, shall no longer be bound to perform such duties; this would, for instance, be the case for all contracts in which the personality of the other party is of paramount importance for the conclusion of the contract. But the possibility of the absentee's return is taken into account and persons who claim to be relieved from their duties may be obliged by the court to provide a guarantee or some other security. As in the previous situation, this is an option which can be taken by the court within its own discretion.

The Code does not consider whether absence justifies the assumption of duties whose performance depends on the condition that the absentee be dead, such as for example, all duties imposed by law on various people concerning the minor children or the estate of a dead person. It seems that the provisions of Articles 165 and 166 can be extended to such situations and that such duties will have to be performed in the case of absence. In the same way, possible rights depending upon the fact that someone is alive could cease to be enforceable if he was declared absent. This would be the case in the example already mentioned of the contract *intuitu personae*; just as one would not be bound to perform one's obligations towards the absent person, one would not be able to have one's rights enforced against the heirs of the same.

2. Special Effects

The special effects of absence considered in the Code are concerned with the problem of marriage (Article 163), succession (Article 164) and property (Articles 167-169).

The marriage of an absentee is dissolved on the day on which the judgment of absence becomes final and effective ... For all practical purposes (although the Civil Code does not mention it), it seems that the provisions of Articles 683 to 689 (dealing with the liquidation of pecuniary relations between spouses in the case where one of them dies) shall apply. As for personal problems (Articles 683-689 are exclusively concerned with patrimonial problems); it seems that the declaration of absence has the effect of lifting the obstacle set by Article 585, which provides that a person may not contract marriage if he is bound by a previous marriage; the declaration of absence frees the spouse from his existing marriage and enables him or her to remarry. Generally provisions regulating

conditions of remarriage will apply, in particular the one laid down by Article 596 as to a period of widowhood. The starting point of this period of 18 months shall be the date of the last news as determined by the court.

The only limitation to the power of remarriage is that the absentee can always impugn the validity of the subsequent marriage when the reappears: the same right is granted to the public prosecutor on the conditions that he proves in an indisputable manner that the absentee is alive on the day when he institutes the action in dissolution. Thus one may say that the marriage of the previous spouse of an absentee is always subject to a ... condition: the reappearance of the absentee.

The same principle exists concerning property which could devolve by succession upon the absentee after the date of the last news (Article 164). If a succession opens after that date and if the absentee would have had some rights in the succession had he been present, these rights will not be considered in the devolution of the succession; the portion of the estate which would have been assigned to him shall be attributed to the other heirs of the deceased. The latter include the State in the case where the deceased has no heir other than the absentee. But one may wonder if the State could be obliged to provide a guarantee or other security in order to safeguard the rights of the absentee, as is the case for all other heirs under Article 164 (2). As this is not an obligation but only an option (which lies entirely within the discretion of the court), it is likely that the State will escape such obligations.

Finally one has to consider the future of the property belonging to the absentee at the moment when the last news has been heard; the principles are very similar to those already considered in the previous paragraphs. At the first stage the devolution and partition of the state takes place (Article 167). If there is a *will* left by the absentee, (it) shall be opened "at the request of any interested party". The wording of this article seems confusing. Why indeed should there be a request from an "interested" party to decide upon the opening of the will? Should not the liquidator of the succession be responsible not only for a systematic search for a will, but also for the opening of the will (under Articles 956, 962 and 965 of the Code) and also, should not 'whosoever' (and not only any "interested" party) make a declaration regarding the existence of a will (under Article 963)? The answer to such questions seems to be affirmative if one carries on the analogy between absence and death. In that sense, it would have been preferable to omit the words "at the request of any interested party" or to replace them by the words "as in the case of death". Once the problems of devolution are settled, the property can be partitioned and the heirs and legatees put into possession of their respective shares.

But this does not mean that these persons have become the full owners of the property of the absentee. Their rights are limited by the Code under Articles 168 and 169 which subject them to four duties:

1. The way in which they can enjoy the absentee's property is not absolute; they must act as would a good "*pater familias*". This is a clear reference to the French legal system where the idea of the "*bon pere de famille*" is set up as a standard in many circumstances, more especially in the case of the obligations of the lessee in a lease contract. In the Ethiopian context, it will be for the courts to determine progressively what is meant exactly by a good "*Pater familias*". A general guideline in this respect could be the attitude of a normally diligent and careful (person); it does not seem that an obligation of particular care is considered here.
2. If the property is made up of sums of money, these must be invested within three months of the moment they are received. This allows the possessor sufficient time to decide which investment is best for the money he has received.
3. The property of the absentee cannot be transferred to another person by gratuitous title, *unless* the possessor wishes to establish the children of the absentee; this is the only case where gratuitous disposition is allowed. There will be no counterpart in the absentee's estate for the sums the possessor will have disposed of gratuitously, but such counterpart will exist in the estate of the absentee's children.
4. The last duty of the possessor is not a mandatory one; it can be imposed upon them by the court and entirely at the court's discretion. As in other cases where persons benefit from absence, the court may oblige the possessors to give a guarantee or security for all things which would be subject to restitution in case the absentee should reappear; such surety or guarantee must be provided before the possessor is authorized to enjoy these things.

A last point in connection with the effects of absence is that the drafter of the Code has deliberately not mentioned the moment when the effects of absence begin; thus such moment can vary according to the case. It may for example, be the day of last news (insofar as the beginning of the period of widowhood is concerned), or that when the judgment of declaration becomes final or effective (insofar as transfers of possession are concerned). No fixed rule exists on this matter.

Section III – Termination of Absence

Absence can be terminated by two circumstances: either ascertainment that the absentee is alive, or that he is dead (Article 170).

The life of the absentee is established most satisfactorily by the reappearance of the absentee. In the same manner that, under Article 5 (2), the best way of proving the existence of a person is to produce him, the reappearance of the absentee is definite evidence that he is alive. But this is not indispensable to the termination of absence. It can also be proved (by all means of evidence, provided they prove acceptable to the Court) that the absentee was alive on a date subsequent to that of the judgment declaring the absence. What matters here is not the date of the last news but the date of the judgment. Prior to the judgment there must have been a period of two years without any news at all (Article 154). It follows therefore that termination of absence will be affected by news received after the judgment of absence.

It can also be established to the satisfaction of the court that the absentee was dead on a date different from that received by the court as being that of the last news; thus what matters here is the date which has been established by court, in the judgment declaring the absence as the date of last news. If it coincides with the date of death there is no problem; if it does not, one will have to reconsider possible problems of succession in the light of the date of death. But it must be noted that a discrepancy between the date of last news and the date of death cannot be established by anyone after ten years have elapsed since the date of last news was established in the judgment of absence. Once such delay has elapsed, it is only the absentee himself (provided of course that he is alive) or a special attorney (which he has appointed *after* the date of the judgment declaring the absence) who can establish the date of death as being different from that of the last news (Article 172). The requirements that the attorney be a special one, i.e. appointed for that purpose explicitly and that the appointment be made after the date of the judgment, are there to ensure beyond all doubt that the absentee did not die on the date of the last news as established in the judgment of absence. This is the result of a need to protect, after a period of ten years, those in possession of the absentee's property. Without proof provided by the absentee or by his special attorney, the persons who have been put in possession of the absentee's property may act as having the right which justified them being placed in possession. They are no more limited by the provisions of Articles 168 and 169 (Article 173).

Under Article 171, if the absentee is alive, the consequences are well defined. The basic principle is that the absentee is reinstated in all his patrimonial rights and duties as they stand when he reappears. This includes property which may have been acquired as a result of the obligation to invest sums of money (see Article 169) and all sums of money which have not yet been invested, whether they were originally in this state or are the proceeds of an onerous transfer of some of his original properties. The consequence of this principle is that the income of the property remains the property of the heirs of legatees which have received such income. What he recovers is his property and not the possible results of his heirs' or legatees' activity. Finally, it is at this stage that the law provides for some control on the activity of the possessors of the absentee's estate. If they have failed in their duties either by not complying with their legal obligations (e.g. under Article 168 and 169) or by committing fraud at the expense of the absentee, the latter will be entitled to claim damages from them. These are the only circumstances under which an action by the returning absentee is possible. No action is possible in the case where, for instance, the heirs or legatees have made mistakes in their administration which do not violate their legal obligations or cannot be considered as fraudulent.

If it is established that the absentee is dead (on the same or on another date as that of the last news) the consequences are much simpler. Death provides for the regularization of the situation resulting from the judgment of absence. Only one problem can arise and that is when the date of last news and that of death do not coincide; in such case, the devolution of the succession will be reconsidered in the light of the date of death. If there is no such discrepancy, the persons who have been placed into possession of the property of the absentee will act from then on as if they were fully entitled to the succession of the deceased (Article 173) and will become heirs or legatees in the full sense of the word. As a result, all guarantees or securities which they could have provided at the request of the court shall be extinguished and they shall not be bound any more by the provisions of Articles 168 and 169.

PROBLEMS OF TERMINOLOGY

There is no real problem of terminology in connection with absence. The only difference between the Amharic and the English or French versions of the Code is that, section 3 of Article 157 in the latter (version) has been incorporated in section 2 in the former; this however does not alter the meaning of the provision.

* * *

Case problems and issues for discussion

1. It has been five years since Ato “A” went to Australia. His wife Woizero “B” has not heard about him for the last three years. As she was about to obtain declaration of absence from court, Ato “A” made a phone call to her and wished her Merry Christmas, but was unwilling to tell her about his whereabouts and his plans. If Ato “A” makes similar telephone calls every year wouldn’t he be declared absent?
2. Ato “Z” owns a dairy farm. Declaration of absence has been passed against him. Ato “Z” is not married and doesn’t have children. Both of his parents have died, and thus, his brother, Ato A, took possession of Ato Z’s dairy farm. Ato “Z” reappeared four years after the declaration of absence, and claimed the restitution of his property from his brother.
 - a) Is Ato “A” bound to return all the increase in terms of cows, calves, etc. that is more than double the number as compared to the number recorded a few days before Ato Z’s disappearance?
 - b) Can Ato Z claim restitution of the income from the sale of milk and butter after deduction of operation expenses?
 - c) In addition to the dairy farm, Ato Z had *one hundred thousand* Birr, which was invested in shares bought from an insurance company that has been very profitable. Ato “A” has invoked Article 171/2 of the Civil Code and claims that he is entitled to the dividend (that he has transferred into shares). Ato Z, on the other hand, has invoked Articles 169 and 171/1.
3. Reappearance of absentee may impugn the new marriage of his/ her spouse. Or, it may not affect the validity of the new marriage. Discuss, and give examples.
4. One of the conditions for the declaration of absence is lack of news for the period stated in the law. Does the source of the news about the alleged absentee matter? Should the news come directly from the alleged absentee?

* * *

O'Donovan's Problems on Absence

Katherine O'Donovan, *Problems in the Law of Persons*, Haile Selassie University (AAU), 1971, Unpublished, Problems 72 & 73

Problem 72

Woizero Yeshi was married in 1988. She lived happily with her husband Ato Abiyu for 6 years. One day Ato Abiyu left the house in the evening saying that he was going out to get a box of matches. Since then nothing has been heard from him. Woizero Yeshi was very upset for many months. She visited all her husband's cousins (but in vain. After some years, one of Ato Abiyu's relatives) alleged that he had seen someone on the street who looked like Ato Abiyu.

This person was accompanied by a woman and two small girls who resembled Ato Abiyu. Woizero Yeshi was most worried to receive this news. However, in the spring of 1996 she met Ato Girma, a charming, rich man. Ato Girma and Woizero Yeshi wish to get married.

Woizero Yeshi asks you for advice on the question of whether she can have her husband declared absent and also as to what she should do with her husband's property.

Advise Woizero Yeshi.

Problem 73

Ato Janos disappeared and there was no news of him for six years. After he had been (absent) for four years a judgment declaring his absence was given to his wife. Ato Janos reappeared two years later saying that he had been abroad. However in the meantime his wife had divorced him under Civil Code Art.670.

Ato Janos claims to impugn the divorce under Art.163 but his wife Woizero Zawditu does not wish to return to him.

- Advise Woizero Zawditu, (who lives in a jurisdiction that still applies the Civil Code).
- (Does it make a difference if she was resident of Addis Ababa where the Revised Family Code is applicable?)

* * *

2. Death

Physical personality comes to an end upon death. The term “death” in the Civil Code refers to “physical” death, and under exceptional circumstances the term may refer to declaration of death by court in accordance with Articles 111 and 161. The concept of “civil death” that existed during Europe’s Middle Ages considered persons such as monks or criminals sentenced to life imprisonment as civilly dead in view of their alienation from juridical interactions.

Physical death marks the end of rights and duties (Article 1) of the human person. Articles 5 and 47 deal with proof of death, and neither provision defines death. This seems to be deliberate, because the drafter might have thought that it would be prudent to leave the definition of death to medical science that is yet in the process of development.

The provisions that deal with death are mostly concerned with proof (Articles 5 and 47), record of death (Articles 104 to 110) and judicial declaration of death (Articles 111 to 116, 161). Article 5 provides that the party who alleges that a particular person is dead bears the burden of proof in accordance with Article 47 that requires proving death through records of civil status (47/1) or by means of acts of notoriety or possession of status (47/2).

Articles 104 to 110 mainly stipulate particulars of records of death (104) and the persons bound to declare death where the deceased dies at home, at another person’s house, in a hospital, a hotel, prison, or active military service (Arts. 106-109) or if a corpse of a person is found outside a dwelling place (110).

Judgment declaring death may be given by court having jurisdiction (112) where an interested party applies for such judgment in case a person “has disappeared in such circumstances that his death is *certain*, although his corpse has not been found” (111). A typical example that illustrates this is the case of a person who has boarded a plane but whose corpse hasn’t been found due to an explosion that rendered the discovery of corpses of many passengers impossible.

The court may give collective judgment where several persons perish due to disasters such as shipwreck, air disaster, earthquake, landslide, etc. (Art. 113). And, any interested person may obtain individual extracts from the collective judgment (114). If it is not possible to assert the actual date of death, the court “shall fix the presumed date of the death (or deaths) having regard to the presumptions drawn from the circumstances of the case” (115/1). This presumption may be rectified only under the conditions stated under Sub-Articles

2 and 3 of Article 115. In case the person whose death has been declared by court reappears (116), the judgment shall be annulled.

* * *

Extract on Death

Jacques Vanderlinden, *Commentaries upon (Ethiopian) Law of Physical Persons* (HSIU, 1969), pp. 123,124

Death

Introduction

In the same way that the beginning of legal personality generally coincides with the beginning of physical personality, the end of physical personality means the end of personality before the law; this is the principle recognized in the Ethiopian Civil Code, as it is in most, if not in all, modern legislations.

It is also true that physical death is the only way through which personality, i.e., the holding of rights and duties, can be completely brought to an end (apart from the case where death is established by the court as a result of a procedure in order to have absence declared); there is no reference, in the Ethiopian legal system, to such institutions as civil death which were general in Western Europe in the middle ages and in modern times. Civil death applied then, for example, either to people entering monasteries or to criminals sentenced to prison for life. Monks and nuns were declared dead as soon as they entered into monastic life and criminals were so declared by the court decision sentencing them for their crimes. The effect of such action or sentence was, in all respects, equivalent to physical death. The same was true in systems where slavery existed; as soon as someone became a slave, he ceased to be a person and became a thing, and thus his legal existence was brought to an end. Civil death has now disappeared from most, if not all, legal systems, as it has in Ethiopia.

The main problem about death are problems of evidence, the more because medical science is progressing daily and because it is more and more difficult, in some cases, to declare definitely that someone has ceased to live. Quite rightly the Ethiopian legislator has not ventured into the delicate definition of this complex physical phenomenon. On the contrary, he has assumed that the

judges will turn to physicians whenever a problem arises as to the existence or the absence of death.

Commentary

Article 1 of the Civil Code deals with the problem of the end of personality by death when it states that human persons hold rights and duties until they are dead; this is the only relevant article on the matter apart from Article 5 dealing with problems of evidence.

Thus personality, which begins with birth, ends with death. There is no legal definition of this physical phenomenon and we will have to rely upon medical evidence for this purpose. Thus problems may arise with the development of modern medical techniques, especially in cases where a person has been clinically dead for some period of time (usually a very short one) and then revived artificially. If clinical death (i.e., the disappearance of all signs of life) means death in the sense of Article 1 of the Civil Code, one should logically admit that the artificially revived person is no more a person in the legal sense of the word, as his personality ended with his clinical death. Furthermore, he can no more be a person again (in the legal sense of the word), as revivification is certainly not birth. This means in practice that one will have to wait until death is finally declared, which means that burial (in one form or another) has been authorized by the medical authorities, before considering a person as dead for the purpose of the Civil Code.

If physical death cannot be established, personality before the law does not cease, except for the special case where a judgment declaring death is issued as a result of a declaration of absence (Article 161). This requires not only the complete procedure of the declaration of absence (see *infra*, chapter II), but also evidence collected by the court, which is sufficient to consider as certain that the absent person is dead.

If such evidence exists, the court will deliver a judgment declaring the death to have occurred. Nothing in the law provides for a declaration by the court as to the date of the death (this can be a capital point in many matters, especially filiation or succession); the author would be of the opinion that power to determine the date of the death should be given to the courts, in the same way that Article 160 allows them to fix the date of last news as the reference date for all matters arising out of the declaration of absence.

* * *

Planiol on the End of Personality

M. Planiol, *Treatises on Civil law*, Volume I, Part I (2nd Part), Louisiana State Law Institute, 1959, pp. 247- 249

A. Natural Death

Old Roman Fiction

Personality is lost with life. The dead are no longer persons. . . .

Roman law held, nevertheless, that a deceased person should be considered fictively as surviving until the acceptance of his succession by his heirs. This fiction was thus expressed: "*Hereditas personam defuncti sustinet.*" It was desired by this to avoid the abeyance of hereditary transmission, creative of a species of interregnum in property. France today attains the same end but in another way. This is done by considering the acceptance given by the heir as retroactive. It is thus not the estate of the dead person which is prolonged beyond his death. It is the heir who is considered such from the time of the death.

B. Civil Death

Cases in which It Takes Place

Natural death alone terminates personality. This idea is, however, altogether recent in the history of law. In antiquity he who became a slave ceased to be a person: "*servi nullum capet habent.*" In the old French law, persons who entered holy orders were considered dead as regards the world. And the law treated them as such. Their renunciation of the world caused them to lose their civil life. Until the middle of the nineteenth century, the same rule applied to three categories of condemned persons, stricken civilly dead by the law. They were, those condemned to death, those condemned to hard labor in perpetuity, and deportees.

Civil death was a fiction, in virtue of which the condemned person, although still living, was deemed to be dead in the eyes of the law. It was sought to have the fiction have the same effect as the reality. It was inevitable, nevertheless, that the assimilation could not be complete. He who was civilly dead still lived, and because he did, unless it was desired to have him die of hunger, certain rights could not but be accorded him.

Effects of Civil Death

The consequences of civil death were enumerated in Art. 25 of the Code Napoleon. Here are the principal ones:

1. Opening of the succession: The condemned person being considered dead, his succession was opened. His property was taken away from him to be distributed among his children. By a supplementary severity, his previous testament, although made when he was still capable, was annulled. It was, therefore, always a succession *ab intestatio* (intestate succession) which was opened.
2. Dissolution of marriage: As the condemned person was deemed to be dead, his marriage was dissolved. His spouse, having become free, was considered to be widowed and could remarry another person. If the spouse continued to live with the person civilly dead, there was concubinage and not marriage. And the children born of this relationship were illegitimate.
3. Loss of political and civic rights: This loss was complete even though Art. 25 does not speak of it. The person civilly dead could not be either voter, candidate, office holder, juror, witness or expert.
4. Loss of civil rights: Civil rights were lost but in part. Here is where the assimilation of a condemned person to a deceased person ceased. The right to marry; to stand in justice; the paternal power; the right to be tutor; the right to make or to receive gifts either by donation or by legacy; the right to acquire a succession, and the right to leave a succession were lost. Solely the right to pass onerous contracts was preserved. This permitted the person civilly dead to earn money by his labor, to sell, to buy, to become creditor or debtor. But when he had an action at law he could sue and be sued only through a special curator designated by the court. And when he died, the property which he had been able to acquire since his civil death, returned to the State by right of escheat.

Abolition of Civil Death

Civil death was greatly criticized. The objection was made to it that it stuck above all the innocent, the wife, the children, at the same time as the guilty person. The point was made that it did so in many ways. It often resulted in depriving the children of successions which their father would have acquired and which subsequently would have come to them through him. In seizing property which the condemned person left at his death, the State was guilty of

confiscation. The immediate opening of the succession of the condemned person caused his relatives to profit from his crime. This was not just.

Civil death was abolished in Belgium as early as 1831. Its suppression was even written into the Constitution which forbids its reestablishment in the future (Art. 13). In France a law of June 8, 1850 abolished it as regards condemned political deportees. The law of May 31, 1854 definitively did away with it as regards those condemned to death or to hard labour for life. "Civil death is abolished," (Art. 1).

Persons condemned to perpetual penalties are thus no longer civilly dead. The law of 1854 has, nevertheless, preserved something of the wreckage of the institution it abolished. If the general law alone had been applied to them, but two forfeitures would have affected them. They were those applicable even to persons condemned to temporary criminal penalties to wit civic degradation (in all cases) and legal interdiction (when the condemnation has been pronounced contradictorily). It was thought that this would not be sufficient. The opinion prevailed that a difference should be drawn between the different categories of condemned persons with due regard to whether their penalties were temporary or perpetual. To those condemned to perpetual penalties were added a double supplementary incapacity (law of May 31, 1853, Art. 3, given in a note under Art. 22 in the Tripier edition of the Civil Code). They are forbidden: to make gifts by donations *inter vivos* or by testament and to receive by donations *inter vivos* or by testament, unless the donation or legacy be merely what is sufficient for bodily maintenance. ...

* * *

Supplementary reading on absence and death

Extracts on Absence and Judicial declaration of death

Source: Robert Huebner, "*A History of Germanic Private Law*",
2000 (Pages 49-54)

Presumptive Death and Declarations of Death

1-The Older German Law

In the Middle Ages it was a common occurrence that uncertainty prevailed at his home concerning the fate of one who has left his country; for traveling consumed much time and was dangerous, and the possibility of sending messages was slight. Especially one who was compelled to journey over sea as merchant, pilgrim, or crusader, often lost for a long period communication with his home. A prince of Mecklenburg, Henry I the Pilgrim, who had gone to the Holy Land, remained for twenty six years (1271-1298) in captivity ...; only four years after his capture did the news of it reach his people; afterward, rumors of his death were repeatedly circulated, and only his return finally put an end to uncertainty. In such cases of disappearance, as the Magdeburg and Lubeck laws show, the property of the missing person was delivered to his next heirs, although at first only provisionally; they were bound to give it back to one who returned, and to give security therefore in taking temporary possession. But if the missing person never returned, the possession was unchanged, and so became a definitive inheritance. At what moment the period of uncertainty should be taken to be ended and the death of the missing person to be certain, German law left open for judicial determination in each case, setting upon definite periods. The proof of death was not particularly difficult, because it could be made by the oath of him who averred it; for the medieval law of procedure permitted proof by oath even of those facts which the oath taker merely believed, without having independent knowledge thereof. Moreover, all definite proof of death could be wholly excused when missing persons, as the Magdeburg "Questions" put it (I, 7, D, 6), "could not in nature have lived longer", i.e. when they had already passed the years of a normal age. So long as death could neither be proved, nor assumed with full assurance on grounds of nature, the absent person was regarded as living. And so, for example, the son of the Mecklenburg prince above referred to, when he had attained majority and had taken over the regency for his father, always used the latter's seal in acts of government.

2- The Later Development

After the Reception, the doctrine of unexplained disappearance received a more ordered form through the further development of older German legal ideas and their association with the results of Italian theory and practice. In the first place, fixed periods were introduced, and formal legal presumptions attached to them; and further, an ordered procedure was prescribed as a precondition to official declaration of death.

(A) The Periods

The classic Roman law knew, as little as did the older Germanic law, statutory presumptions of life and death; the judge was permitted to draw from the circumstances an inference of probable fact after an untrammelled weighing of the evidence. On the other hand, the Italian practice, "under the influence of the theory of formal proof," developed from the assumption (current among the Roman jurists as well) that a hundred years were to be regarded as the extreme age of man the strong presumption that the missing person should be taken to be living to the end of his 100th year of life ("presumption of life"), and from that moment on as dead ("presumption of death"). The former presumption was, however, rebuttable by proof, which in turn was facilitated by further presumptions.

These presumptions of life and of death were adopted in Germany. In the practice of the Saxon courts particularly, especially of the court of lay-judges at Leipzig, the attainment of a definite age was thus treated as decisive. The only change was that under the influence of Leipzig jurists, especially of Carpzow, the limit was lowered, in echo of the saying of the Psalmist, from the hundredth to the 70th full year of life ("Saxon system"). This age then attained a common law authority.

A mode of calculating the necessary period, differing from the Saxon, evidences of which already occur occasionally in the Middle Ages, and which agrees also with the older French customary law, was prevalent in Silesia ("Silesian system"). This emphasized, not age, but the duration of absence, requiring for the assumption of death the passage of a definite period of time since the receipt of the last news, without regard to the age of the person missing. The expiration of thirty years was originally required; later, men were content with twenty, or more frequently with ten years. This method of reckoning was adopted by the Prussian "Allgemeines Landrecht" and by the Austrian Civil Code. Under certain circumstances the two systems were united; for when the missing person was of very great age a shorter period of absence was deemed sufficient,

e.g. the Prussian law lowered it from ten to five years for persons above 65 years of age; or it was wholly waived, e.g. at 100 years according to the Code Civil, at 90 according to the Saxon Code. And according to many systems of law the requisite of advanced age was wholly disregarded in cases of exceedingly long absence; as e.g., in Bavarian and French law, in case of an absence for 30 years.

All such periods were much shortened in case the missing person was proved to have been in jeopardy of life, as for example in a shipwreck or a theater fire. Notably after the great wars of 1864, 1866, and 1870-71, special statutes were enacted according to which the death of missing soldiers should be assumed after the running of a short period, or from a definite date in the future. The Swiss Civil Code (§ 34) has derived from these the new and general principle that the death of any person shall be regarded as proved, even though no one may have seen the corpse, whenever he disappeared under conditions that make his death seemingly certain.

The Saxon practice untied in a peculiar way the imported presumptions of life and death with the native rules concerning provisional instatement in actual possession, transforming the latter, in analogy to the Roman "*cura absentis*", into a so-called "*cura anomala*", a peculiar guardianship of absent persons. A "*curator absentis*" was appointed at the instance of the next heirs for an absent person whose fate began to be doubtful, and thereupon the heritable estate was turned over to them with full powers of administration, subject to their giving security. (At) the time ... to which the presumption of death (was attached), the heir received back his security and acquired the inheritance definitively; moreover he was thenceforth treated as though the inheritance had fallen to him at the moment when the "*cura*" had been instituted ("*successio ex tunc*"). This antedating of the fact of inheritance was in harmony, however, with the older Germanic law, which knew no succession save in individual pieces of heritable property. It was only because men held fast to this view of the Germanic law, despite the theoretical reception of the principle of universal succession, that they did not at first remark the contradiction between the presumption of life and the antedating of the accrual of the heritage. But later the "*successio ex tunc*" was abandoned, being replaced by a "*successio ex nunc*"; that is, that moment was made decisive of definitive accrual of the heritage in which the [absolute] presumption of death took effect. This rule attained a common law authority.

(B) Procedure by Gitation ('Aufgebotsverfahren')

The presumption of death originally arose the instant the term had run. But from the middle of the 1700s onward there came to be usual, as a further precondition, a process of judicial summons, which was introduced in view of improved facilities of trade and communication. It prescribed repeated public summonses of the missing person, to be printed in the newspapers. If these remained fruitless the procedure ended with a judicial finding embodying a declaration of death. Such summonses were introduced first into Prussia (1763) on the model of the Saxon practice, and spread rapidly thereafter through the rest of the Empire. The Code Civil, alone, did not adopt them. The procedure was regulated in detail in codes of procedure. It is true that by no means (had) all of these attributed the same legal significance to the final judgment; and that in general the detailed regulation of the whole institute assumed quite variant forms in the different State statutes. A few of these, as the Prussian "Landrecht", the Austrian Civil Code, Thuringian statutes, and a Bavarian statute of 1779, attributed to the judgment a constitutive force; so that the date when such judgment became effective was treated as the day of death, the effects of the declaration of death becoming positive from then onward. On the other hand other statutes treated the judgment as declaratory, so that, in accord with the older Saxon practice, that day was regarded as the death day on which the legal preconditions of a presumption of death were satisfied, the day, accordingly, upon which either the requisite age was reached or the necessary period of absence had run. This rule passed over into the common law; it was also adopted by the Saxon Code and by an Austrian statute of 1853.

(C) The return of a missing person.

By force of a declaration of death the missing person was regarded in law as dead from the date so fixed. But this assumption was rebuttable; news might come establishing another death day, or the continuance of life; or the missing person himself might return. The effects of the declaration of death had then, of course, to be rescinded. Special difficulties resulted when a spouse left behind had contracted a new marriage. Different legal systems assumed, as to this question, varying positions. The majority, including the Prussian "Landrecht" and the common law, declared the new marriage to be legally existing and the old marriage dissolved. Some adopted the opposite view, that of the Canon law, and declared the second marriage void. A compromise between these two extremes was attempted by the French law, which made the second marriage voidable at the instance of the

missing spouse who returned, and also by the Saxon law, which made it voidable by the spouse twice married.

3- Final result of development

The new Civil Code has substituted for the earlier diversities of the law a complete uniformity. The rules adopted by it (§§ 13-19), which are supplemented by the provisions of the Code of Civil Procedure (§§ 960-976) relative to citation-process, have given common law authority, as regards the essential prerequisites, to what was formerly the Silesian system (§ 14). It expressly adopts the presumption of life (§ 19). It attributes declaratory force to the judicial declaration of death (§ 18). In case of disappearance in war, at sea, and in accidents it establishes abbreviated periods (§§ 15, 16, 17). The presumption of death applies also to the case of marriage. Hence, in case the presumption be un rebutted, the old marriage is to be regarded as dissolved at the moment of presumptive death; but in case the error of the presumption be discovered after the contraction of a new marriage, the latter nevertheless remains valid, for its consummation, -- provided it be not void because of bad faith of both of the new spouses, -- dissolves the former marriage (§ 1348). Each of the new spouses, however, can impeach the new union if the missing spouse (is still alive) (§ 1350) subject to the condition of good faith.

The Swiss Civil Code (§§ 35-38) has established a somewhat variant regulation of declarations of the legal death of missing persons, resembling that of the Code Civil. Such a declaration is made by a judge upon the basis of a petition, which can be presented when five years have passed, either since the peril to his life simultaneously with which the missing person disappeared or since the last news of him, and when the judicial citation has also remained fruitless. Swiss law knows no presumption of continued life. The declaration of death is as in German law, of merely declaratory effect. An existing marriage is not dissolved by such a declaration, in itself, but the spouse left behind may demand its dissolution. The return of the missing person has no influence upon a new marriage (§ 102).

* * *

CHAPTER 6 - JURIDICAL PERSONS

Introduction

Physical persons exist in reality, and we can see and touch one another. However, juridical persons are creations of the human mind. It is to be noted that juridical persons are different from the managers and employees who work for them. They are also different from the buildings they use as premises, because such premises are analogous to the houses physical persons live in. Although we cannot empirically touch, see and *perceive* juridical persons, we can *conceive* them as entities. And, the term “*persons*” attached to them signifies the fact that they “*take part in legal relations*” as defined in the first paragraph of Chapter 1.

The legal recognition of entities other than physical persons became necessary when they started to *take part* in juridical relations as entities separate and distinct from their owners or members. Such entities acquire personality upon recognition by domestic laws and upon their subsequent establishment, registration and publicity as the case may be. The development of international law has further widened the scope of juridical personality onto the international plane. States and international institutions, for example, have international legal personality.

This chapter highlights the concept of juridical personality and serves as a preliminary foundation for future courses such as Law of Business Organizations, Law of International Institutions and the like.

Objectives:

At the end of this chapter students are expected to be able to:

- a) explain the concept of juridical personality;
- b) define bodies corporate under the Civil Code;
- c) define associations under the Civil Code
- d) define endowments under the Civil Code
- e) discuss name, domicile, nationality and capacity in the context of juridical persons;
- f) discuss representation and rights of juridical persons;
- g) define civil and criminal liability of juridical persons;

- h) define international legal personality;
- i) analyze case problems that involve the concepts and issues here-above.

* * *

Juridical persons: An overview

As briefly stated under Chapter 1, the term “persons” refers not only to natural persons but also to entities that have legal personality. Articles 394 to 549 deal with *bodies corporate* (i.e. entities that have legal personality) and property with specific destination. Under ‘bodies corporate’ the Civil Code recognizes the legal personality of the State (Article 394), Territorial Sub-divisions of the State (Article 395), Ministries, public administrative authorities, public establishments and religious institutions (Articles 396 – 399). The laws according to which these entities are constituted and administrative laws regulate the functions of these legal entities.

The capacity of these juridical persons is determined by the issue whether such a legal entity exercises its rights and activities within the scope of its functions. As stipulated under Article 401/1 of the Civil Code “Acts performed by the bodies referred to in (Articles 394 to 399) in excess of the powers given to them by law or without the observance of the conditions or formalities required by law *shall be of no effect.*” This is known as the principle of ‘*ultra vires*’ acts. Article 403 further provides that “the bodies referred to in (Articles 394 to 399) shall be liable for any damage arising from the fault or act of their organs or (employees) in accordance with the provisions ... of (the Civil Code) relating to ‘Extra-contractual Liability and Unlawful Enrichment’”.

The Civil Code also recognizes *associations* (Articles 404 to 482). Article 404 defines an association as “a grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits.” Articles 406 and 407 state that the provisions applicable to associations (i.e. Articles 404 to 482 shall apply to trade unions and religious institutions ... in the absence of special laws concerning them.

The constitutional stipulations enshrined in the FDRE Constitution include separation of State and religion (Article 11), absence of discrimination on grounds including religion (Article 25) and the right to religion and belief (Article 27). In effect, the distinction between the Ethiopian Orthodox Church (Article 398) and groupings of religious character (Article 407) has apparently

outlived its significance. Ultimately Articles 398 and 407 have the same theme, that is, they both accord legal personality to religious institutions and groups.

The Civil Code also defines partnerships (a term used to denote *business organizations*) established “with a view to securing and sharing profits” (Article 405/1). The business organizations that have been enumerated under the Ethiopian Commercial Code of 1960 are General Partnerships, Limited Partnerships, Ordinary Partnerships, Private Limited Companies and Share Companies. The sixth type of business organization referred to as “Joint Venture” is not relevant for our purpose because it doesn’t have legal personality.

The personality of partnerships and its owners is so interconnected that the liability of the partnership shall entail joint and several liability of the general partners. Companies, however, have distinct legal personality of their own that is distinct from shareholders. In effect, liability of a private limited company or a share company does not go beyond assets of the company. The distinct features of the various forms of partnerships and share companies go beyond the scope of this book.

Article 405/2 further recognizes “cooperatives and other groupings which tend to satisfy the financial interests of their members by placing them in a position to save money.” The list of juridical persons is merely illustrative and not exhaustive, because all forms of institutions, organizations and groupings that have been established and registered in accordance with the relevant laws have legal personality.

It is also to be noted that the Civil Code recognizes *Property with Specific Destination*, namely *Endowments* (Articles 483 – 506), philanthropic committees (507 – 515) and *Trusts* (Articles 516 – 544). Under endowments, a certain property is “irrevocably and perpetually endowed to a specific object of general interest other than the securing of profits” (Article 483); and “a trust is an institution by virtue of which specific property is constituted in an autonomous entity to be administered by a person, the trustee, in accordance with the instructions given by the person constituting the trust. Creditors of the trust are entitled to sue the trustee who judicially represents the trust (Article 526) and enforce their rights on the property forming the object of the trust (Article 537).

Endowments are closer to Associations. They shall be governed by statutes (Article 491) drawn up by the founder (Article 493). “The author of the act of the endowment may by an explicit provision, prohibit certain amendments of the

statutes of the endowment” (Article 498/1). The provisions that regulate the name, residence and capacity of associations (Articles 452 - 457) shall also apply to endowments (Art. 501) thereby conferring on endowments the capacity to enter into juridical interactions. Article 502 further provides that “the persons in whose favour the endowment is constituted may take legal action to enforce their rights against the endowment” thereby providing it certain aspects of legal personality although it is not an association as such.

* * *

Review Questions

1. Alexander Nékám (**The Personality Conception of the Legal Entity**, Harvard University Press, 1938, page 49) argued against using the same word ‘persons’ for physical and juridical persons. Comment.

“The word ‘person’ when used in juristic writings has at least two very different meanings. It sometimes designates the human being as we know or suppose we know it, with all the physical, psychological, and metaphysical qualities which we think we are justified in ascribing to it. On the other hand, the word may be used in a second technical meaning as a name of a certain well-defined and clearly marked juristic conception, the legal entity. If we use the word in this sense, it has, as we have seen, absolutely nothing to do with things designated under its first application. One may argue that it is dangerous to use the same word to designate two so entirely different conceptions, and we for this critical reason, would prefer to use another term, the legal entity instead. ...”

2. State your opinion whether “Ikub” and “Idir” have juridical personality.

* * *

Readings on Juridical Persons

Legal Personality (of business organizations)

Everett E. Goldberg, *An Introduction to the Law of Business Organizations*, **Journal of Ethiopian Law**, Volume VIII, No. 2, 1972 (pp. 502 to 509)

Definition

Persons are the subjects of rights and obligations. They may be compared with goods, which are objects of rights and obligations. For example, a chair may be owned or sold by a person. It cannot itself own something else; ownership is a right, which only a person may enjoy. Neither can it make a contract, a type of obligation, which only a person may incur.

Article 1 of the Civil Code provides: "The human person is the subject of rights from its birth to its death." In a number of situations, the law attributes personality to a thing or a group. Thus, Article 210(2) of the Commercial Code provides that "any business organization other than a joint venture shall be deemed to be a legal person." This is a way of enabling the organization to become the subject of rights and obligations.

A business organization is chiefly a collection of physical persons and of property. If the organization is not treated as a person, the members would normally be joint owners of the property. Any obligation incurred in the course of operating the business would normally be made in the name of one or more of the members, and those members would become subject to such obligations. When the law provides that the organization is a legal person, the organization itself may own the property and obligations may be made in the name of the organization. In the eyes of the law, it is like a physical person, distinct from the persons who are its members. For example, say A, B and C are all physical persons, and that A owns (a building) and B and C have no interest in that (building). The positions of the three parties with regard to the (building) are clear. If the situation is changed so that A is a business organization with legal personality, and B and C are members, the result is the same. A, a legal person, owns the (building). B and C do not. It may be that B and C are agents of A, and as such deal with the (building); but if so, they do it on behalf of A. As members, B and C may participate in decisions which affect the (building); but if so, their rights are of participation in the organization and not ownership of

the (building). The organization pays the taxes on the (building), if any. It may sell the (building), and does so in its own name when it does. A similar analysis could be applied to contractual and extra-contractual obligations and to juridical acts in general.

The principle was applied by the High Court in Addis Ababa in the case of *Delbourgo versus the Inland Revenue Department* [(High Court, Addis Ababa, 1961, Civil Case No 166-53). The case arose before the Commercial Code came into effect, but the reasoning of the court applies as well to companies formed under the Code. The petitioners were a share company and three members of the company. The Inland Revenue Department, in assessing the income tax of the company, had ordered the three members to produce the pass books and statements of their private bank accounts. The court held that the department had no power to make such an order, because the tax being assessed was only that of the company, and “the principle remains that a company has a completely different legal personality from the individual members or share holders.”

The concept of the legal person is used in many areas other than business organizations...; for example, it is applied to the State and its subdivisions, (religious institutions) and associations.

Attributes of the Legal Person

The following paragraphs discuss some of the characteristics of legal persons, with reference to business organizations. Any reference to business organizations does not include joint ventures, of course, since they do not enjoy legal personality.

Capacity

The extent to which the law permits a person to possess and exercise rights is called his capacity. (The term “rights” when used in this sense includes its converse, the incurring of obligations). When the law deprives him of rights or of the permission to exercise rights for himself, he is said to have an incapacity.

The distinction between the enjoyment of rights and their exercise should be noted. When we speak of the capacity of a legal person, we are only concerned with its enjoyment of rights. A legal person cannot by its very nature exercise any rights by itself; it must act through agents.

Incapacities normally are imposed for one of two purposes: protection of an individual against his own indiscretion, as in the case of minors and insane and

infirm persons, and protection of society against a person it distrusts or suspects, as in the case of criminals legally interdicted

According to Article 192 of the Civil Code, a physical person “is capable of performing all the acts of civil life unless he is declared incapable by the law.” The capacity of a legal person, adds Article 197, is to be regulated by the particular provisions applicable to it.

Article 22 of the Commercial Code enables a business organization ‘to carry on any trade,” subject to legal prohibitions, valid agreements prohibiting competition and any legal provisions regulating that trade. But no law deals with the capacity of a business organization to engage in activities generally (as trade is only one of those activities listed in Article 5 of the Commercial Code), to make contracts and perform other civil acts.

In this situation, the general rule provided for physical persons should be adopted for business organizations by analogy. A business organization should be capable of performing all the acts of civil life consistent with its nature unless declared incapable by law. It is a sound rule, since one to the contrary, by making the existence of capacity depend on specific laws or the content of the memorandum of association, would create uncertainty and inhibit commercial activity. Specific incapacities if desired can always be created by law, as they are in the case of physical persons. This is the basic rule regarding associations. “An association may (as stipulated under Article 454/1 of the Civil Code) perform all civil acts which are consistent with its nature”

Assuming this is the general rule, a business organization has the capacity to make contracts, to sue and be sued, to receive gifts, and generally to perform any civil act, subject to physical limitations imposed by its abstract nature and to restrictions imposed by law.

Naturally, a business organization, like any legal person, cannot do the things physical persons can do which depend on the human nature of the physical person. On the other hand, it is not subject to incapacities which depend on human characteristics of physical persons; for example, those based on minority, insanity, and infirmity.

Rights and Liabilities

Many attributes are directly connected with the capacity of a legal person to enjoy rights. These include, particularly with regard to business organizations, the following:

- a) the organization may sue or be sued.
- b) The property of the organization is not available to satisfy judgments against its members on their personal debts. A personal creditor of a member who obtains a judgment against (the latter) may not have it executed on the property belonging to the organization even if the property was contributed to the organization by that member. The member is not the owner of such property, either alone or jointly. On the other hand, the personal creditor may proceed against the membership interest of the member. ...
- c) There is no set-off between debts owed to third parties by the organization and debts owned by third parties to individual members (or in the converse situation).
- d) When a member dies, his heirs inherit no rights of ownership over the property belonging to the organization. Their rights only involve the membership interest of the deceased. Depending on the type of organization and the provisions of the memorandum of association, they might inherit the membership interest or be paid its value by the organization. Even if the organization is dissolved upon a member's death, the heirs do not inherit its property; they are paid the value of the proportionate share of the deceased member just as if dissolution occurred while the member lived. An important result of this is that if the law or the memorandum of association so provides, an organization may have a "life" which survives that of its members.
- e) A business organization may be put into bankruptcy or employ a scheme or arrangement.
- f) The business organization is primarily liable to pay the taxes of its property, income and taxable activities.

Representation and Civil Liability

Since a legal person cannot act by itself, Article 216 of the Commercial Code provides that "a business organization shall acquire rights and incur liabilities by its agents in accordance with the provisions relating to agency." Title XIV of the Civil Code contains the general rules of agency in Ethiopia. Particular rules regarding business organizations are provided in the parts of the Commercial Code dealing with each organization. These rules deal chiefly with managers. Each organization has one or more managers, who have general powers to represent the organization. In share companies, the management function is

split between a board of directors and a general manager. Articles 28-62 of the Commercial Code, which contain particular rules dealing with commercial employees, managers of traders, commercial travelers and representatives, commercial agents, commercial brokers and commission agents, also apply to business organizations, except to the extent they are expressly or impliedly modified by the provisions on business organizations.

In general pursuant to the rules of agency, a business organization is bound by any contracts or other act made in its name by an agent acting within the scope of his powers. It may also be bound in certain other circumstances; for example, in a general partnership, when a manager acts in his own name but for the benefit of the partnership.

A business organization is subject to extra-contractual liability when one of its agents or employees incurs a liability in the discharge of his duties. In such a case, the organization and the agent or employee are jointly and severally liable. The organization will not be liable if the person who incurs the liability is not subject to its control or is deemed to have retained his independence. The liability is presumed to have occurred in the discharge of duties if the damage is caused at the place where or during the time when the agent or employee is normally employed; this presumption is rebuttable by evidence to the contrary.

...

Name

A legal person usually has a name. The name of a business organization is chosen by the members, subject to any legal requirements. There are no specific requirements for the name of an ordinary partnership. The name of any of the other types of business organization must contain the type of organization it is – “General Partnership,” “Share Company,” etc. In addition, the name of a general partnership must consist of the names of at least two partners and the name of a limited partnership may only consist of the names of general partners. The names of a share company and private limited company may be freely chosen; for example, with the names of one or more members, or a term of fantasy, an indication of the purpose of the business, or a combination of these.

Article 305 of the Commercial code prohibits the choice of a share company name which offends public policy or the rights of third parties. This is the only place a specific requirement of this nature is established, but the principle would seem applicable to every business organization. In so far as public

policy is concerned, it is embodied in Article 2030 of the Civil Code, which prohibits anyone from acting in a manner which offends morality or public order.

Various provisions deal with specific rights of third parties, or wrongs which may be done by the use of a name. In general, a name may not be chosen for a business organization which would tend to create confusion among customers with the name of a competing business organization or trader. If such a name is chosen, the rule concerning unfair competition would apply. In this sense, the name of a business organization is like a trade name, which is the “name under which a (trader) operates his business and which clearly designates the business.

A physical person may not use his own name in the name of a business organization connected with his occupation if it has “the object or effect of causing prejudice, by means of a harmful confusion, to the credit or to the reputation of a third person.” The offender is subject to an action in unfair competition or defamation. A business organization may not usurp the name of any physical person in such manner that he suffers harm thereby.

Head Office

The place of its head office has consequences for the legal person similar to those of domicile for the physical person. The term ‘head office’ is not defined in the codes. In French law, it means the place where the principal organs of administration and management of the organization are found.

The location of the head office is important in procedural matters, particularly insofar as court jurisdiction and service of process are concerned. It also is important in matters related to nationality.

Nationality

One may hear business organizations, particularly share companies, referred to as ‘Ethiopian’ or “foreign.” In a way, it is inaccurate to speak of nationality in this situation, since, a legal person cannot feel the sense of allegiance and does not enjoy certain rights of citizenship (such as the right to vote) which are usually connected with nationality. But some laws do speak of legal persons or business organizations which are ‘foreign’ or have “nationality,” and the rights and obligations of an organization may be different if it is connected in some way with a foreign country. Particularly important are the laws governing the formation and operation of a business organization, the right generally to carry on activities in Ethiopia and specific rights reserved to Ethiopian citizens.

In principle, a legal person with its head office in a foreign country has such nationality as is given to it by the laws of that country. It follows that a legal person with its head office in Ethiopia is of Ethiopian nationality, although no law expressly so provides. This abstract principle is limited by concrete rules concerning the enjoyment of rights in Ethiopia of legal persons in general and the formation and operation of business organizations in particular. To summarize: Insofar as the formation and operation of a business organization and its enjoyment of rights in Ethiopia are concerned, three factors are taken into account: the location of its head office, the place of its principal object of business and the country under whose law it is formed. A business organization with its head office in Ethiopia is subject to Ethiopian law with respect to its formation and operation. An organization with its head office abroad is subject to Ethiopian law if it is formed in accordance with Ethiopian law or if its principal object of business is in Ethiopia. An organization formed abroad (and, presumably, with its head office and principal object of business abroad) must register in Ethiopia and is subject to Ethiopian law with respect to its Ethiopian offices. Wherever its head office is, a business organization is defined as “foreign” ... if it is “organized or existing under” the law of another country. Such organizations are required to register before engaging in activities in Ethiopia, with somewhat different requirements from those imposed on “domestic” organizations. In addition to the factors mentioned above, the existence of foreign interest (for example, in membership or management) may be taken into account by special laws.

Moral Persons

Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law*, (Oxford University Press: London, 1935) pp. 43-54

The true nature of moral personality has given rise, during the last half-century, to much discussion in France. During the two generations which followed the promulgation of the Code, the doctrine that ‘corporateness’ was a fictitious creation of positive law was generally accepted and encountered little serious criticism. The reaction against this traditional view, which began to make itself felt in the French universities in the last years of the nineteenth century, gave rise to various rival theories, of which it is sufficient to mention the following:

- i) The theory of the objective reality of moral persons: According to this somewhat fanciful view, groups or institutions which behave, or purport

to behave, as corporate persons, are in fact and reality persons, no less real and no less endowed with a personal will, than physical persons. Prima facie, it has been urged, there is no more reason why the law should refuse to treat a club as a person, than why it should refuse to treat its porter as a person: such refusal can be justified only by reasons of policy.

- ii) A more plausible theory is that of (collective property), which shelters under the great authority of M. Planiol. According to this view it is a pure superstition that in 'natural law' rights can only be vested in natural persons. Once the fallacious character of this belief is recognized, the appeal to fiction becomes unnecessary, and the way is left open for the unprejudiced recognition of the juristic fact that rights can perfectly well be regarded as vested in social groups. "The idea of fictitious personality is a conception which, though simple, is superficial and false, and one which conceals from our eyes the persistence in our own time of collective property side by side with individual property. [FN: It has been objected to this theory that it fails to explain the nature of *personnes morales* (juridical persons) which are not groups of persons, such as hospitals and schools. The English student may find a similar difficulty in a theory which would be baffled by the corporation sole.]
- iii) The theory which seems to be most generally accepted is that of *la personnalité morale réalité technique* (juridical personality base on social reality). According to this view, while it is by considerations of social convenience that the law is led to treat institutions and organizations as independently invested with rights and liabilities, it is logical convenience which invites and justifies the assimilation of entities so treated to 'persons'. Legal personality is not a fiction, since the recognition of 'corporateness' involves no untruth; on the other hand, to insist that corporate property is of necessity owned by some group of natural persons is to distort juristic facts in the interest of arbitrary theory. The truth is that corporateness is a social reality, and, when recognized by the law, a legal reality, of which 'personality' is the most appropriate technical description.

In spite of the influence exercised in the French legal world by doctrinal criticism, and in spite of the discredit which such criticism has cast upon the 'fiction' theory of moral personality, the French courts have not been led to the view that 'corporateness' is a character which they are authorized by the general 'common law to recognize for themselves, in the absence of definite legislative authority. Corporateness may not be an intrinsically artificial thing;

but none the less it calls for regulation, both for the security of private dealings, and for reasons of public policy. In principle, therefore, only such bodies and institutions are deemed to have personality as have been invested with that character by the legislator. The chief difference which it is possible to discern, in this respect, between the attitude of the French and that of the English judges is that the former have been somewhat more ready than the latter to find an implied intention to confer corporate character. Of this tendency the principal example is furnished by the case of *sociétés civiles* (civil associations), to which further reference is made below.

Classes of Moral Persons

The moral persons recognized by French law fall into two classes:

1. Moral persons of public law, and
2. Moral persons of private law.

1. Moral persons of public law include, in the first place, the state --the Republic itself; secondly, certain territorial unities, namely the departments, communes and sections of communes, unions or 'syndicates' of communes, ... and thirdly, (public establishments).

(Public establishments) are defined as 'branches of the general services of the State, detached from the totality of the services and established as organs endowed with independent legal existence. Such are, for example, the State railways, the (National Agency for Savings), the College de France, the Institute de France and its five component academies (including the Academie Francaise), the Universities and their component faculties, the Legion of Honour, the Government Schools, learned institutions, hospitals, and museums, the chambers of commerce, and the various local bars.

2. The principal categories of moral persons of private law are:

Commercial and civil (*associations*);

Associations (recognized) under the law of 1.7.1901.

(Trade Associations) or associations of landowners, formed under the law of 21.6.1865 and subsequent amending Acts, for the purpose of carrying out projects of common interest, such as drainage and irrigation.

(*Professional associations*) or trades unions, governed by the law of 21.3.1884 and amending acts.

(*Associations for medical assistance*), or friendly societies, formed under the law of 1.4.1898.

(*Foundations recognized as public establishments of public utilities*)

Sociétés

The term *société* embraces both partnerships and companies, and consequently cannot be rendered by any one word in English. A *société* is a contractual association of two or more persons, who contribute a common stock with a view to a patrimonial advantage. It is an essential character of a *société* that it should have *un but lucrative* (profit-making objective), this being the feature which distinguishes it from an association.

Sociétés are either *sociétés civiles* or *sociétés commerciales*. A *société commerciale* is a *société* whose *but lucrative* (profit objective) is to be realized by distinctively 'commercial' operations. Both kinds of *société* are moral persons. That commercial *sociétés* possess a corporate character has been recognized since the Middle Ages.

The view taken of the character of *sociétés civiles* has been the result of an evolution. In the first half of the nineteenth century, the courts readily recognized the corporate character of all *sociétés*, whether civil or commercial. In the middle of the century both the critics and the courts began to scrutinize the texts of the Code more closely, and the view began to prevail that '*la personnalité apparaît dans l'esprit du Code comme une faveur exceptionnelle et non comme le droit commun des collectivités de biens, et aucun texte n'accorde cette faveur aux sociétés civiles* (i.e. the granting of juridical personality seems to be a special measure and not the result of the basic law applicable to all forms of collective property and is not explicitly granted to civil associations by any law). The prevalence of this view was followed by a period of compromise, when civil *sociétés* were held to be corporations if, and only if, they had adopted a commercial form of constitution. Finally, in 1891, the Court of Cassation came back to the earlier opinion, and in what has now come to be regarded as the leading case of *la Banque générale des Alpes Maritimes c. le duc de Rivoli*, laid down that '*les têtes du Code Civil .. personnifient la société d'une manière expresse, en n'établissant jamais des rapports d'associé d'une manière expresse, en n'établissant jamais des rapports d'associé à associé, et en mettant toujours les associés en rapport avec la société* (i.e. the provisions of the Civil Code grant juridical personality to '*sociétés*' expressly without ever creating relationship between members of the '*société*' but rather by putting the members at a level relationship only with the *société*.)

Associations

Post-revolutionary France inherited from the (old regime) the principle that no corporation could be created, no body be invested with moral personality, save by virtue of a formal license granted by the executive government.

Until quite recent times the rule of civil law that moral persons (excepting *sociétés*) could not be brought into existence without licence, was regarded as a complement of the general police principle which placed all unauthorized associations under the ban of illegality. The question of the right of association was not clearly distinguished, at any rate from a legislative point of view, from the question of the conditions under which an association may claim personality. Previously to the year 1901, the only bodies which possessed or could be invested with personality under the general law, without the express authority of government, were civil and commercial *sociétés*, trades unions, friendly societies, and *associations syndicales* (labour unions).

The year 1901 witnessed a momentous change in the legislation relating to associations. The law of 1 July of that year, the passing of which marked the triumph of the anti-clerical party, had two principal objects: the first was to put a ban upon religious (associations), which thereafter could only be formed if authorized by an *ad hoc* law; and the second (for our purpose the more important) object was to establish a more liberal regime for secular associations. The provisions of the Penal Code, directed against unauthorized associations, were repealed; and it thus became lawful to form any sort of club, society, or union, fraternity, or other association (not being a religious association), the objects of which were not illicit. It was provided further that any association could acquire moral personality by merely depositing at the prefecture a declaration, setting forth its title and objects, and other particulars of its organization, together with copies of its statutes. When it has satisfied this formal condition, the association becomes (a recognized association). The law further provides that (a recognized association) may, on its own petition, and in the discretion of the government, be recognized by decree as being *d'utilite publique*. Such recognition frees the association from certain limitations upon the sources and amount of the property which it may lawfully acquire and possess. Unless (it is registered as public utility a recognized association) cannot receive any gift or legacy, excepting subscriptions not exceeding 500 francs.

Foundations

The term '*fondation*' has been defined as *l'affectation perpetuelle d'un fonds à un but determine* (the perpetual setting aside of assets for a specific purpose)". The '*fondatin*' (foundation) is an amphibious institution, which appears in one or other of two forms; either (a) as a corpus of property conveyed or bequeathed either to a natural person or to an antecedently, or at least separately, existing moral person, as trustee, subject to a direction and condition that the fund shall be used for a prescribed object; or (b) as a corpus or fund, which, being dedicated to a specific object, and equipped with an appropriate organization for its administration, is invested, or intended to be invested, with moral personality. In the first case we have the *fondatin libéralité 'sub modo'* and in the second the *fondatin personne moral* (the foundation with juridical personality). We are here only concerned with the second form.

It is only in recent years that the (foundation) as an independent type of moral person has won recognition in French practice and theory. The way to its recognition in institutional theory seems to have been prepared by the recognition in Germany of the *Stiftung* as something distinct from the 'Corporation', a recognition supported by the weighty authority of a passage in Savigny's *Heutiges Romisches Recht*. To acquire moral personality a (foundation), in accordance with the general principle laid down in 1749, must be (recognized as public utility), a recognition granted by Presidential decree, promulgated after inquiry and report by the Conseil d'Etat (State Council).

The capacity of moral persons

According to the view which has prevailed in French law, a body or institution either has or has not moral personality; this attribute or characteristic does not admit of degrees. The fact that a body is invested with a corporate character involves, in principle, its possession of a general capacity to acquire, to own, and to alienate property of all kinds, to participate in all juristic acts which are not exclusively appropriate to natural persons, to sue and be sued, and to incur liability in tort and quasi-contract. There is, in short, no general doctrine of French law which at all closely corresponds to the English principle of *ultra vires*. But this does not mean that the capacities of corporate bodies are subject to no limitations save such as are based on natural reason (such as the incapacity to marry, or to enlist in the army). Certain limitations are imposed by positive law, and these are of two kinds: (a) positive prohibition; and (b) the incapacity resulting from the so-called *tutelle administrative* (administrative tutelage).

(a) Positive prohibitions

For example: an association whether (simply recognized) or (recognized as a public utility) can own no immovable property save such as is necessary to its (activity): a friendly society cannot own immovable property to a value exceeding three quarters of its capital assets.

(b) The *tutelle administrative* (administrative tutelage)

(It) is the general control exercised by Government over the acts and proceedings both of subordinate public institutions, and, to a limited extent, over certain private corporations. For the most part this control belongs, as a topic, to administrative law, including, as it does, in the case of public bodies in the narrower sense, the power to annul votes, to dismiss offending officers, and to dissolve offending institutions. The (administrative tutelage) touches upon the field of civil law by reason of the fact that there is a large class of incorporated bodies which are incapable of accepting any gift or legacy any *libéralité* (gratuity), save on condition of being specifically authorized to that effect, in the particular instance, by the administration. This rule, the exposition and discussion of which occupies a place in French legal literature and life corresponding to that taken in our own world by the topic of charitable and religious trusts, applies not only to all strictly public bodies such as departments, communes, and (public establishments), but also to (foundations), associations (even when recognized as public utility), and to friendly societies.

The motives of policy upon which the requirement of administrative licence for the acceptance of gift and legacies is based, and by which the administration (and in particular, the Conseil d'Etat) is guided, in granting or refusing the required authority, are threefold. (i) The policy of limiting mortmain; (ii) consideration for the interests of frustrated next of kin, and (iii) the principle of *spécialité* (specialty).

It is difficult to state the *principe de la spécialité* in English without exaggerating its categorical character. Let it serve to say that according to this principle a moral person cannot with propriety ... own property or act save for the purposes and the ends to promote which it has been called into existence. It is natural to think, at first sight, that this principle is the equivalent of the English doctrine of *ultra vires*. But this is not the case. The chief applications of the principle are concerned with gifts and legacies to public and semi-public bodies; it governs the exercise of the administrative discretion to license or to refuse to license the acceptance of such liberalities (gratuities). In this

application, at any rate, the principle of specialty is a rule of administrative policy, and not a rule of capacity.

When we turn to a wider field, and inquire, for example, what is the attitude of the law to the acts of associations or societies which exceed their statutory powers, or, to use more appropriate language, which are not relevant to their statutory objects, we find no trace of a rule that such acts are intrinsically void. The position appears to be simply that were the administrator of an association or the director of a company to enter into, or the general meeting of either body to purport to authorize, a contract directed to a non-statutory purpose, such act or vote would be assimilated to the act of an agent acting beyond his authority. The contract could be set aside at the suit of the dissentient minority of members, or of the assembly itself, probably also at the suit of a creditor, exercising the *action indirecte*, but not at the suit of the party with whom the contract was made; and such action, being an action *en nullite* (with no effect) would be prescribed in ten instead of thirty years.

In certain cases a moral person may be dissolved at the instance of the government, on the ground that it is engaged in pursuits foreign to the purposes for which it was founded. This penalty is applicable to trade unions and to friendly societies.

It has also been held that where a moral person has acquired an interest which the law does not authorize it to possess, the court will not permit it to sue for the protection of that interest.

But peremptory incapacities such as those here contemplated affect only bodies, such as *syndicats professionnels* (professional associations) the powers of which are expressly presented and limited by law, on grounds of public policy.

* * *

Criminal liability of juridical persons

English Law

Corporate Personality

Andrew Ashworth, *Principles of Criminal Law*, Fourth Edition
(Oxford Printing Press: 2003) p. 114

...

The present theory ... is that corporate personality attaches to companies just as natural personality attaches to individuals (with certain modifications). But does this theory, which has a firm hold in company law, mean that companies can be convicted of offences? The court moved slowly in this direction in the mid-nineteenth century. Although still doubting whether companies could be said to do 'acts', the courts overcome any reluctance to hold companies liable for failing to act (*Salomon v. Salomon* [1897] AC 22) and for committing a public nuisance (*Great North of England Railway Co.* [1846] 9 QB 315). The driving force behind these innovative decisions, both concerning railway companies in the early days of rail travel, was not legal theory but pragmatism: 'there can be no effective means of deterring from an oppressive exercise of power, for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority. And from there the law developed towards criminal liability for companies, acting through their controlling officers.

* * *

South Africa

Criminal Liability of Corporate Bodies

CR Snyman, *Criminal Law*, Third Edition (Durban
Butterworths: 1995) pp. 238-241

1. Introduction

Only a human being can perform an act, as the latter term is understood in criminal law. There is an exception to this general rule: a corporate body can also in certain circumstance engage in conduct and be liable for a crime. The law distinguishes between a natural person on the one hand and a legal person, juristic person, corporation or corporate body on the other. The latter is an abstract body of persons, an institution or entity which can also be the bearer of rights and duties, without having a physical or visible body or a mind.

Examples of corporate bodies are companies, universalities, building societies, ... and church societies.

2. Desirability of punishing a corporate body

It is sometimes debated whether it is desirable to punish an entity such as a corporate body which is not, like a natural person, capable of thinking for itself or of forming any intention of its own. It is sometimes said that the idea of blameworthiness inherent in the concept of culpability presupposes personal responsibility -- something which an abstract entity such as a corporate body lacks. The corporate body does not think for itself or act on its own; its thinking and acting are done for it by its directors or (employees), and it is argued that it is these persons of flesh and blood who ought to be punished. On the other hand, there is in practice a great need for this form of liability, especially today when there are so many corporate bodies playing such an important role in society. It is very difficult to track down the individual offender within a large organization; an official can easily shift blame or responsibility onto somebody else. In any event, other branches of the law, such as the law of contract, acknowledge that a corporate body is capable of thinking and of exercising a will. This form of liability is especially necessary where failure to perform a duty specifically imposed by statute on a corporate body (for example the duty to draw up and submit certain returns or reports annually), constitutes a crime.

Holding a corporate body criminally liable raises certain procedural questions such as who must be summoned, who must stand in the dock, who must act on the corporate body's behalf during the trial, and what punishment must be imposed. In South Africa the matter has been regulated by statute since 1917. The original section 384 of the Criminal Procedure and Evidence Act of 1917 has been replaced by other sections, and at the moment the matter is governed by the provisions of section 332 of the Criminal Procedure Act 51 of 1977.

3. Liability of a corporate body for the acts of its director or (employee)

In the above-mentioned section the liability of the corporate body for the act of a director or (employee) is distinguished from the liability of the director or (employee) for the "acts" of the corporate body. We shall first consider the first-mentioned form of liability. An act by the director or (employee) of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or (employee), or if the director or (employee) was furthering or endeavoring to further the interests of the corporate body. A corporate body can commit both common-law and statutory crimes. It can commit crimes requiring intention, those not requiring intention (that is, crimes requiring

negligence) and strict liability crimes. Acts by a director or (employee) are held to include not only acts performed by such persons personally, but also acts performed on their instructions or with their express or implied permission. The culpability of the director or (employee) is similarly ascribed to the corporate body. The word "director" has an extended meaning: it means any person who controls or governs a corporate body or who is a member of a body or group of persons which controls or governs a corporate body. Where there is no such body or group of persons, the term "director" refers to any person who is a member of the corporate body.

4. Liability of a director or (employee) for crimes of corporate body

When a crime has been committed for which a corporate body is liable for prosecution, a director or (employee) of the corporate body is deemed to be guilty of the crime, unless he can prove, first, that he did not take part in the commission of the crime and secondly, that he could not have prevented it. This provision places quite a heavy responsibility on the director or (employee). If he realizes that some other person in the company is committing or is about to commit a crime which is related to the company's operations, he cannot turn a blind eye to try to prevent the commission of the crime. However, the words "that he could not have prevented it" must be interpreted to mean that the accused will be guilty only if he was aware of the prohibited conduct. The fact that he could have known of it but negligently failed to investigate the matter is not sufficient to ground liability, for the test which is applicable here is subjective.

5. Appearance at trial, plea, punishment

Who must stand in the dock at the prosecution of a corporate body, who must speak on its behalf and what punishment can be imposed on it? To solve these problems, the section provides as follows: In any prosecution against a corporate body, a director or (employee) of that corporate body is cited, in his capacity as its representative, as the offender. He may then be treated as if he were the accused. It is he who has to stand in the dock. If he pleads guilty, the plea is not valid unless the corporate body has authorized him to plead guilty, except in the case of minor crimes where a fine may be paid as admission of guilt. If during the course of the proceedings the said person ceases to be a director or (employee) of the corporate body, the court may, at the prosecutor's request, substitute any other director or (employee). If the representative of the corporate body is convicted, the court may not impose any punishment other than a fine, even if the statute which created the crime does not make provision for the imposition of a fine. The fine must then be paid by the corporate body,

even if this necessitates the attachment and sale of its property. The reason why a fine is the only punishment which can be imposed is of course the fact that an entity which has no physical existence cannot be changed (or) thrown into goal

A director or (employee) who has been summoned to represent a corporate body may at the same time be charged under the provisions relating to the liability of directors and (employees) for the acts of a corporate body. In fact, it frequently happens that a person is charged in both his personal capacity and his capacity as representative of the corporate body.

...

6. Association of persons

The section further provides that if a member of an association of persons which is not a corporate body commits a crime in the course of carrying on the business or affairs of the association, or while endeavoring to further its interests, any person who is a member of that association at the time of the commission of the crime is deemed to be guilty of the crime, unless he proves, first, that he did not take part in the commission of the crime and, secondly, that he could not have prevented it. If the business or affairs of the association are governed or controlled by a committee or other similar body, these provisions are not applicable to a person who was not at the time of the commission of the crime a member of that committee or other body. The association of persons as an abstract entity cannot commit a crime itself, since it is not a corporate body. A partnership is not a corporate body, but is an association of persons for the purposes of the provision in question.

* *

Liability of juridical persons under the 1957 Ethiopian Penal Code

Everett E. Goldberg, *An Introduction to the Law of Business Organizations*, **Journal of Ethiopian Law**, Volume VIII, No. 2, 19... (pp. 502 to 509)

Penal Liability

It is unclear whether a legal person is subject to penal liability, in the absence of an express provision making it liable. Doubt as to liability arises from at least four sources. First, being without mind or limbs, a legal person cannot have the intent or negligence in action which must exist for a person to be guilty of a crime. Second, there is no provision in the Penal Code (of 1957) similar to

Article 2129 of the Civil Code, which makes legal persons civilly liable for the acts of their agents and employees. Third, Article 689 of the Penal Code states that if an economic or commercial offense defined in Article 671-988 is committed in the management of a body corporate, punishment is imposed on the managers, agents, members, directors, auditors or liquidators who committed the offense. Fourth, punishments such as death and restriction of liberty cannot be imposed on a legal person. Yet a punishment such as a fine can be imposed on a legal person. And restricting liability to physical persons would ignore the reality that the facilities of an organization may be used in, or benefit from, the perpetration of a crime; punishing the organization may be the best way to deter the crime.

(Articles 147 and 148 of the) Penal Code ... provide that a court may order (the suspension or the closing of) any “undertaking or establishment” used to commit or further the commission of an offense which endangers public security. If the offender has been punished with a sentence of rigorous imprisonment exceeding one year, the undertaking or establishment may be dissolved and wound up. Since legal persons engage in undertakings and have establishments, these articles in effect impose liability on them. But they do not completely solve the problem of liability of legal persons. In the first place; they only contemplate crimes where a natural person is also liable. Article 147 expressly provides that it applies in addition to the penalty imposed on the offender. In the second place, closing the undertaking may be ordered only (where) a crime endangers public security. Finally, an order under Article 147 is a drastic remedy, even if limited in time and place. In many situations, a fine may be more appropriate.

Whatever the case in general, a legal person may be deemed to have committed a crime where expressly so stated. Only one Penal Code provision appears to do this. Article 576 provides for the levying of a fine on a legal person committing an offense against honor or reputation. Closing or dissolution under Article 147 may also be ordered, and the officers and other natural persons who committed the offense may be punished as well.

Corporate criminal liability under the 2004 Ethiopian Criminal Code

Offences committed by juridical persons (Arts, 34, 513, 716, 777 ...) do not require moral guilt (23/3) because bodies incorporated by law are not (as entities) capable of awareness and volition. In effect, the criminal liability of juridical

persons arises from occupational activities of managers and employees as in the cases of strict liability and vicarious liability under the law of torts. (E. Stebek *Ethiopian Criminal Law Digest*, Parts I & II, 2006, p. 48)

... In a case like *Alphacell Ltd. V. Woodward* [(1972) AC, 824] where polluting matter escaped from the company's premises into a river, it seems both fairer and more accurate to convict the company rather than to label one individual as the offender. [W]here the law imposes a duty, the company should be organized so as to ensure that the duty is fulfilled."

(Ashworth, *Supra*, p.119)

* * *

Readings on International legal personality

International organizations, individuals, companies and groups

Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Revised Ed. (New York: Ruotledge, 1997), pp. 91, 92

When lawyers say that an entity is a legal person, or that it is a subject of the law (these two terms are interchangeable), they mean that it has a capacity to enter into legal relations and to have legal rights and duties. In modern systems of municipal law all individuals have legal personality, but in former times slaves had no legal personality; they were simply items of property. Companies also have legal personality, but animals do not; although rules are made for the benefit of animals (for example, rules against cruelty to animals), these rules do not confer any rights on the animals.

In the nineteenth century states were the only legal persons in international law; international law regarded individuals in much the same way as municipal law regards animals. Writing in 1912, in his famous treatise on international law, L. Oppenheim still found: 'Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law. While states have remained the predominant actors in international law, the position has changed in the last century, and international organizations, individuals and companies have also acquired some degree of international legal personality; but when one tries to define the precise extent of the legal personality which they have acquired, one enters a very controversial area of the law.

The problem of including new actors in the international legal system is reflected in the very concept of legal personality, the central issues of which have been primarily related to the capacity to bring claims arising from the violation of international law, to conclude valid international agreements, and to enjoy privileges and immunities from national jurisdictions. Thus, the International Court of Justice has noted that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community' (*Reparations for Injuries Case*, ICJ Reports, 1949, 178). It is the international legal system which determines which are the subjects of international law and which kind of legal personality they enjoy on the international level.

Legal personality can be unlimited, in the sense that, in principle, all international rights and obligations can be accorded to a subject. This is so only in the case of **states**, *the original, primary and universal subjects of international law*. States have exclusive jurisdiction with respect to their territory and personal jurisdiction over their nationals. Other subjects of international law, such as international organizations created by states have legal personality only with respect to *certain* international rights and obligations. The legal personality of international organizations is limited as to substance by the treaty which states have concluded to constitute them and to accord them rights and duties to achieve their specific tasks. It is also relative in the sense that it exists only with regard to the member states of the organization and with respect to non-member states acknowledging the organization. Such secondary subjects act *ultra virus*, meaning that their acts are legally void, if they operate beyond the authority given to them by the constitutive treaty.

Individuals have acquired a certain status under international law with the development of human rights, but they cannot make treaties or create rules of customary international law. Other questions concern the status of multinational companies, insurgents and national liberation movements, ethnic minorities and indigenous peoples under international law

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(International) Legal Personality – Introduction

Malcolm N.Shaw, *International Law*, 5th Edition, (Cambridge University Press, 2003), pp. 175, 176

In any legal system, certain entities, whether they be individuals or companies, will be regarded as possessing rights and duties enforceable at law. Thus an individual may prosecute or be prosecuted for assault and a company can sue for breach of contract. They are able to do this because the law recognizes them as 'legal persons' possessing the capacity to have and to maintain certain rights, and being subject to perform specific duties. Just which persons will be entitled to what rights in what circumstances will depend upon the scope and character of the law. But it is the function of the law to apportion such rights and duties to such entities as it sees fit. Legal personality is crucial. Without it institutions and groups cannot operate, for they need to be able to maintain and enforce claims. In municipal law individuals, limited companies and public corporations are recognized as each possessing a distinct legal personality, the terms of which are circumscribed by the relevant legislations. It is the law which will determine the scope and nature of personality. Personality involves the examination of certain concepts within the law such as status, capacity, competence, as well as the nature and extent of particular rights and duties. The status of a particular entity may well be determinative of certain powers and obligations, while capacity will link together the status of a person with particular rights and duties. The whole process operates within the confines of the relevant legal system, which circumscribes personality, its nature and definition. This is especially true in international law. A particular view adopted of the system will invariably reflect upon the question of the identity and nature of international legal persons.

Personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims. One needs to have close regard to the rules of international law in order to determine the precise nature of the capacity of the entity in question. Certain preliminary issues need to be faced. Does the personality of a particular claimant, for instance, depend upon its possession of the capacity to enforce rights? Indeed, is there any test of the nature of enforcement, or can even the most restrictive form of operation on the international scene be sufficient? One view suggests, for example, that while the quality of responsibility for violation of a rule usually co-exists with the quality of being able to enforce a complaint against a breach in any legal

person, it would be useful to consider those possessing one of these qualities as indeed having juridical personality. Other writers, on the other hand, emphasize the crucial role played by the element of enforceability of rights within the international system.

However, a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what rights, duties and competences apply in the particular case. Personality is a relative phenomenon varying with the circumstances. One of the distinguishing characteristics of contemporary international law has been the wide range of participants. These include states, international organizations, public companies, private companies and individuals. Not all such entities will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. The latter element will be dependent upon many different factors, including the type of personality under question. It may be manifested in many forms and may in certain cases be inferred from practice. It will also reflect a need. Particular branches of international law here are playing a crucial role. Human rights law, the law relating to armed conflicts and international economic law are specially important in generating and reflecting increased participation and personality in international law.

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Annex I - PROVISIONS RELEVANT TO MINORITY :

Civil Code and Revised Family Code Comparison Table

(N.B. With regard to organs of protection the function of the family council has been given to courts, and the co-tutor and assistant tutor are omitted in the Revised Family Code)

* Where asterisk (*) is indicated before the word "amended", the only amendment is the substitution of "family council" by "court"

R.F. Code, Article	Civil Code, Article	Remarks
<i>General Provisions</i>		
215	198	Identical
216	199	Article 199/1 amended
217	200	Amended
----	201	Omitted
218	----	Supplemented
----	202-03	Omitted
<i>Organs of protection</i>		
219	204	Identical
220	205	Identical
221	206	Amended
222	207	Article 207/3 deleted
223	208	Identical
224	209	Identical
225	210	Amended
226	211	Amended
227	212	Amended
228	213	Identical
229	214	Edited for clarity
230	215	Amended
231	216	Identical
232	217	Identical
233	218	Identical
----	219	219 (co-tutor) deleted
234	220	Article 220/2 amended
		220/3 (Ass. tutor) deleted
235	221	Identical
236	222	221, edited for clarity
237	223	Identical
238	224	Identical
239	225	Amended

R.F. Code, Article	Civil Code, Article	Remarks
240	226	Identical
241	227	Article 241/1 amended
242	228	Identical
243	229	Identical
244	230	Identical
245	231	Identical
246	232	Amended
247	233	Edited
248	234	Amended
249	235	Article 235/1 amended
250	236	Title of the provision amended Art. 236/2 amended
251	237	237/2 edited for clarity
252	238	Edited for clarity
253	239	Article 239/2 deleted
254	240	Co-tutors omitted
----	241-260	Provisions about family council deleted
----	261-264	Provisions about assistant tutor deleted
<i>Care of the person of the minor</i>		
255	----	Art. 255 supplemented
256	265	265/3 edited for clarity
257	266	266/2 edited for clarity
258	267	Arts. 267/1, 267/2 amended
259	268	Article 268/1 edited Article 268/2 deleted
260	269	Amended
261	270	Title edited
262	271	*Amended
263	272	Amended

R.F. Code, Article	Civil Code, Article	Remarks
264	273	Article 273/1 amended
265	274	Amended
----	275	N.B. Art 134/1, 140/2/3 -RFC
266	276	Authority of parents amended
267-68	277-279	Amended
<i>Administration of the property of the minor</i>		
269	280	Edited for clarity
270	281	Article 281/1 amended
271	282	Article 282/1 amended
272	283	283/1 edited for clarity
273	284	Identical
274	285-86	Amended
275	287	Edited
276	288	288/1 amended; 288/2 edited
277	289	289/1 edited
278	290	290/1 edited 290/2 amended
279	291	291/1 edited for clarity
280-81	292-93	292/1, 293/1 edited *292/2, 293/2 amended
----	294	Deleted
282	295	Title edited
283	296	Amended
284	297	* Amended
285	298	298/2 amended
286	299	299/1 amended
287	300	Amended
288	301	Amended
289	302	* Amended
290	303	* Amended
291	304	304/1 amended
292	305	305/1 amended
293	306	* 306/1 amended 306/2 amended
294	307	Identical
295	308	308/2, 308/3 amended
----	309	Deleted
296	310	Edited for clarity
297	311	Amended

R.F. Code, Art.	Civil Code, Article	Remarks
298	312	Amended
<i>Arts of a minor</i>		
299	313	Identical
300	314	314/1 edited for clarity 314/2 deleted
301	315	Edited
302	316	Edited
303	317	Amended
304	318	Identical
<i>Acts of the tutor</i>		
305	319	319/1 deleted
306	320	320/2, 323/3 deleted
307	321	Amended
308	322	Co-tutor deleted from the provision
<i>Liabilities which may be incurred</i>		
309	323	Amended
----	324	Deleted
----	325	Deleted
----	326	Deleted
----	327	Deleted
<i>Cessation of minority</i>		
310	328	Edited for clarity
311	329	Edited
312	330	Amended
----	331	Deleted
----	332	Deleted
313	333	Edited
314	334	334/3 edited
<i>Rendering accounts of tutorship</i>		
315	335	335/2 Edited
316	336	336/1 edited for clarity
317	337	Identical
318	338	338/2 amended
319	----	Arts. 198 to 338 of the Civil Code are repealed where the Revised Family Code applies

Annex I - PROVISIONS RELEVANT TO MINORITY :

Civil Code and Revised Family Code Comparison Table

(N.B. With regard to organs of protection the function of the family council has been given to courts, and the co-tutor and assistant tutor are omitted in the Revised Family Code)

* Where asterisk (*) is indicated before the word "amended", the only amendment is the substitution of "family council" by "court"

R.F. Code, Article	Civil Code, Article	Remarks
<i>General Provisions</i>		
215	198	Identical
216	199	Article 199/1 amended
217	200	Amended
----	201	Omitted
218	----	Supplemented
----	202-03	Omitted
<i>Organs of protection</i>		
219	204	Identical
220	205	Identical
221	206	Amended
222	207	Article 207/3 deleted
223	208	Identical
224	209	Identical
225	210	Amended
226	211	Amended
227	212	Amended
228	213	Identical
229	214	Edited for clarity
230	215	Amended
231	216	Identical
232	217	Identical
233	218	Identical
----	219	219 (co-tutor) deleted
234	220	Article 220/2 amended
		220/3 (Ass. tutor) deleted
235	221	Identical
236	222	221, edited for clarity
237	223	Identical
238	224	Identical
239	225	Amended

R.F. Code, Article	Civil Code, Article	Remarks
240	226	Identical
241	227	Article 241/1 amended
242	228	Identical
243	229	Identical
244	230	Identical
245	231	Identical
246	232	Amended
247	233	Edited
248	234	Amended
249	235	Article 235/1 amended
250	236	Title of the provision amended Art. 236/2 amended
251	237	237/2 edited for clarity
252	238	Edited for clarity
253	239	Article 239/2 deleted
254	240	Co-tutors omitted
----	241-260	Provisions about family council deleted
----	261-264	Provisions about assistant tutor deleted
<i>Care of the person of the minor</i>		
255	----	Art. 255 supplemented
256	265	265/3 edited for clarity
257	266	266/2 edited for clarity
258	267	Arts. 267/1, 267/2 amended
259	268	Article 268/1 edited Article 268/2 deleted
260	269	Amended
261	270	Title edited
262	271	*Amended
263	272	Amended

R.F. Code, Article	Civil Code, Article	Remarks
264	273	Article 273/1 amended
265	274	Amended
----	275	N.B. Art 134/1, 140/2/3 -RFC
266	276	Authority of parents amended
267-68	277-279	Amended
<i>Administration of the property of the minor</i>		
269	280	Edited for clarity
270	281	Article 281/1 amended
271	282	Article 282/1 amended
272	283	283/1 edited for clarity
273	284	Identical
274	285-86	Amended
275	287	Edited
276	288	288/1 amended; 288/2 edited
277	289	289/1 edited
278	290	290/1 edited 290/2 amended
279	291	291/1 edited for clarity
280-81	292-93	292/1, 293/1 edited *292/2, 293/2 amended
----	294	Deleted
282	295	Title edited
283	296	Amended
284	297	* Amended
285	298	298/2 amended
286	299	299/1 amended
287	300	Amended
288	301	Amended
289	302	* Amended
290	303	* Amended
291	304	304/1 amended
292	305	305/1 amended
293	306	* 306/1 amended 306/2 amended
294	307	Identical
295	308	308/2, 308/3 amended
----	309	Deleted
296	310	Edited for clarity
297	311	Amended

R.F. Code, Art.	Civil Code, Article	Remarks
298	312	Amended
<i>Arts of a minor</i>		
299	313	Identical
300	314	314/1 edited for clarity 314/2 deleted
301	315	Edited
302	316	Edited
303	317	Amended
304	318	Identical
<i>Acts of the tutor</i>		
305	319	319/1 deleted
306	320	320/2, 323/3 deleted
307	321	Amended
308	322	Co-tutor deleted from the provision
<i>Liabilities which may be incurred</i>		
309	323	Amended
----	324	Deleted
----	325	Deleted
----	326	Deleted
----	327	Deleted
<i>Cessation of minority</i>		
310	328	Edited for clarity
311	329	Edited
312	330	Amended
----	331	Deleted
----	332	Deleted
313	333	Edited
314	334	334/3 edited
<i>Rendering accounts of tutorship</i>		
315	335	335/2 Edited
316	336	336/1 edited for clarity
317	337	Identical
318	338	338/2 amended
319	----	Arts. 198 to 338 of the Civil Code are repealed where the Revised Family Code applies