THE SCOPE AND UTILITY OF CLASS ACTIONS UNDER ETHIOPIAN LAW: A COMPARATIVE STUDY

By Getachew Aberra*

Class actions[1] are a common feature of what is known as the common law system. Though they owe their origin to equity jurisdictions, their application now has been extended to lawsuits as well.

Class actions have been recognized under Ethiopian law since the adoption in 1965, of the Civil Procedure Code of Ethiopia. They seem to have acquired added significance and status since the adoption of the new Ethiopian Constitution which, under Article 37 (2) (b) mentions them as a means to get access to justice.

Given this added significance and status of the class action, discussions about its nature, scope and purpose is both topical and worthwhile. This paper is a modest attempt to show the evolution and the present scope of the class action and to evaluate the existing provisions of the Civil Procedure Code with a view to identify its possible shortcomings. For the purpose of analysis, the rules and practices followed mainly by and in United States courts are used as references since it is there where one finds the most highly developed application of the class action[2].

The Concept of Class Actions

1. Nature of the Class Action

The class action is a procedural device whereby one or more members of a class are allowed to sue or be sued on their own behalf and on behalf of all other members of the class. Those who sue or defend have an interest in the subject. In pursuing the suit, they protect their own interest; but they also

*Assistant Professor, Faculty of Law, Addis Ababa University.

[1] Class actions are also referred to as "representative suits" – see, for example, Art. 38 of the Civil Procedure Code of Ethiopia; in this paper, the term, class action, is used throughout; "class" in relation to class actions means not a formal, social class but a group of persons who are similarly situated in respect of a suit whose outcome affects them either as plaintiffs or defendants. Class actions are basically joinder devises; however, while the latter proceed with those in interest as named parties, the former proceed with only the representative as a named party and the other class members being absent from, and even being unaware of the suit in the outcome of which they have an interest.

[2] See, for example, Richard B. Cappalli and Claudio Consolo, "Class Actions for Continental Europe" Temple International and Comparative Law Journal, Vol. 6 Number 1, Spring 1992, p. 218, where it is emphasized that the class action is a unique American legal institution and that, "not only is the class action non-existent beyond America's shores, but also no truly comparable procedure exists". India is cited as the only major exception whose Code of Civil Procedure, Order 1. Rule. 8 provides for a representative suit which is remarkably similar to Federal Rule 23.

protect the interest of other members of the class in a representative capacity. Normally, such representation does not depend on the consent of those who are represented[3]. Those who sue or defend on behalf of themselves and others are presumed to represent all others because of the fact that they are all similarly situated.[4]

Where some of the class are allowed to sue or defend on behalf of themselves and all others similarly situated, some are given the opportunity to have their day in court and prosecute their own cases either personally or through personally selected representatives while others are not. The requirement of due process is satisfied in respect to some and not in respect to the rest. Class actions are, therefore, exceptions to the general rule of due process of law. As a joinder device, the class action "raises some of the most challenging procedural issues on the current legal scene... it raises questions that lie close to the heart of civil litigation: the nature of representation and the purpose of a law suit."[5]

Due process of law requires that no person should be deprived of causes of action or of defenses without being given the opportunity, either in person or through personally selected representative or through persons specially appointed to represent him as trustees or guardians, to present his side of a dispute and to protect his interest.[6] This requirement itself is based on considerations of fairness and reasonableness. However, under certain circumstances, it becomes unfair and unreasonable to require that all persons who are similarly situated be made parties to the suit. To require all persons similarly situated to be parties to suits brought jointly or severally has often proved to be inconvenient and unjust.

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[3] American Law Institute, Restatement of the Law of Judgments (1942), Section 86, p. 418; Carl C. Wheaton, "Representative Suits Involving Numerous Litigants", Cornell Law Quarterly, p. 399 at page 422; for a discussion of this point under Ethiopian Law, see pp ... infra.

[4] Stephen C. Yeazell, Civil Procedure (4th ed.), Little Brown and Company, New York (1996) p.966, Some writers refer to class actions as permissive joinder devises; and, indeed, class action is a form of permissive joinder the difference between the two being that in the case of joinder of plaintiffs or defendants, they are joined as named parties whereas in the case of class actions, only the class representative(s) appears as a named party, because it is unpractical to join all those similarly situated, see Robert Sedler, Ethiopia Civil Procedure, Oxford University Press, Addis Ababa (1968), p. 70. It should also be noted that even indispensable parties (see Sedler, p. 81) can be represented by class representatives in class actions so long as it can be shown that it is impractical to join them all in the suit-see pp. 7-9 infra.

[5] Ibid.

[6] American Law Institute op. cit, p.416. "Due process of law... means such an exercise of power by the government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." 16A Corpus Juris Secondum Section 567. Though its validity no longer depends on specific legislative action, the elements of due process of law, or at least most of them, are incorporated in the various Articles of Chapter Two of the Constitution.

If each member of the class, i.e., each of the person similarly affected whose number is either "many" or "numerous" or "several", as in Art. 38 of the Ethiopian Civil Procedure Code, were to bring suits singly, the courts would have to deal with a multitude of cases which involve essentially the same questions of fact and law and fundamentally the same remedies. Such a procedure would be time consuming not only to the courts but also to plaintiffs and defendants alike. Plaintiffs would expend time and energy and expenses simply trying to ferret out the evidence indicative of the existence of the cause of action when they could do that task jointly at a lesser time, effort and expenses.[7] Sometimes, this difficulty may force plaintiffs to drop the idea of instituting the suit altogether. Defendants, too, would be subjected to great expenses and inconvenience if they were made to defend a multiplicity of cases which are essentially similar when a single suit could dispose of the issues raised in all of them. Class actions are therefore, designed to avoid multiple litigation and the attendant inconvenience.[8]

Moreover, in cases with respect to which joinder is required by law, it may be impossible or impractical to join all persons who are similarly affected. The members of the class can be so numerous that the status of actual plaintiffs or defendants can be shifting and often, difficult to ascertain. The cost of ascertaining and joining them can be prohibitive. It may be impossible to join them all in the suit,

> "Because of the large number, great expenses would be involved if all were made parties; in many cases it is difficult or impossible to join them all because some of them are not within the jurisdiction, the whereabouts of some of them are unknown, or the likelihood of death of some of the parties and consequent abatement of processing would unduly delay decree if all were made parties to the action."[9]

Thus, joiner of all of those similarly situated as parties in conformity to the usual rules of procedure is impractical because "It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated, by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise."[10] Even in the unlikely event of the whereabouts of all class members being known and each of them

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[7] C.H. Brown, A.D Vestal and M. Lad, Cases and Materials on Pleading and Procedure, Dennis, and Co., Buffalo, New York, (1953), p. 537, quoting from Weeks v. Bareco Oil Company.
[8] Larry L. Teply and Ralph U. Whitten, Civil Procedure, the Foundation Press Inc., New York (1994), pp. 681-2.
[9] American Law Institute, op. cit, p. 417.
[10] Brown et. al, op. cit p.553.

ascertained, there is always a possibility that their voluntarily and unanimously joining in a suit is improbable and impractical.[11] This is particularly so in the case of mass tort action where the same wrong is done to a large number of people but no one person generally suffers sufficient damage to justify time consuming and costly court proceedings.[12] Accordingly, class actions were designed to, and provide for, the vindication of individual claims when joinder of multiple parties or assertion of each claim singly is impractical.[13] In such cases, class actions avoid both denial of access to justice and delay of justice.

2. Origin of the Class Action

The need to avoid inconvenience caused by multiplicity of suits and injustice caused by the impossibility and impracticability of joining in a suit all persons who are similarly situated both of which result from the literal application of the normal rules of procedure necessitated the introduction of the class action as an extra-ordinary measure.[14] The class action was invented by equity,[15] as a matter of necessity in the form of an exception to the general rule of due process.[16] The courts have power by means of the class action "...: to save the time and expenses of possible litigants and of courts and at the same time make it possible for a person who is subject to the possibility of litigation with a large number of others to ascertain his rights and liabilities with reference to all of them"[17]

Accordingly in common law jurisdictions, courts of equity have been using the class action since as far back as the last quarter of the 17th century to mitigate the rigors of strict procedural law.[18] The class action enabled them, under special circumstances, to dispense with rigid rules of parties and joinder. As applied in equity, the class action was a bill of peace which allowed an equity court to entertain an action by or against a representative of a group where the size of the group was so large as to make joinder of all its members impossible or impractical and where all members of a group shared a common right, a community of interest in the subject matter of the controversy or a common

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[11] Id., at p.557, quoting Judge Evans in Weeks v. Bareco Oil Company.
[12] Abraham L. Pomerantz, "New Developments in Class Actions- Has Their Death Knell Been Sounded"; Business Lawyer, vol.25 (1970), p.1259.
[13] Teply and Whitten, op. pp.681-2.
[14] American Law Institute, op. cit, p.419-431.
[15] Wheaton, op. cit, p. 401; he states that the first class action case was litigated in England in 1676 and the second one in 1701.
[16] American Law Institute op. cit, p. 417; William Wirt Blume, "The 'Common Question' Principle in the Code Provision for Representative Suits" ; Michigan Law Review, vol.30 (1932), p.879.
[17] American Law Institute, op. cit, p.417.
[18] Teply and Whitten, op. cit, p. 682.

title from which all their separate claims and all questions at issue arise.[19] An earlier authority has stated the same rule in essentially the same manner thus: "The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of others."[20]

As can readily be seen, the equity formulation of the exception provide for only one form of class action. The exception is applicable only where the number of class members is so large that it is impossible or impractical to join all of them and that they all have a common interest. A showing of both numerousity and commonality is necessary.[21] These equity rules also applied to equity cases only for "there was nothing like the modern class action at common law"[22] The modern rules applicable to class actions are taken over from these equity formulations with certain modification some of which are substantial.[23]

The first such code, the Field Code, formulated the rule as follows:

> "When the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impractical to bring them all before the court, one or more may sue or defend for the benefit of the whole"[24]

These formulations thus provided for two forms of class action: the first form applying when the question is of a common or general interest and the second form applying when the parties are so numerous that it is impractical to bring them all before the court. This is the formulation that was widely duplicated and that still exists in many U.S. States.[25]

Before 1938, class actions procedure was governed at the U.S. Federal level by the Federal Equity Rules and Conformity Acts. Rule 48 of the Federal Equity Rules, 1848, provided:

> "Where the parties are very numerous, and cannot, without manifest inconvenience and oppressive delays, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the

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[19] Ibid.

[20] Charles Fisk Beach, Jr., A Treatise on the Modern Practice in Equity, W.H. Anderson and Company, Cincinnati, Ohio, Voi. 1(1894), p. 79.

[21] See Wheaton, op. cit. p.415; this was the case in English practice as well - see ibid, p.414; for more discussion of this point, see pp ..... infra.

[22] Teply and Whiten, op. cit, p. 682.

[23] Ibid.

[24] Ibid.

[25] Ibid; see also Brown et.al. op. cit., p.554; Cappalli and Consolo, op. cit., p. 228,note 48; as to the two separate forms of class action, see pp. 8-9 infra.

suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases, the decree shall be without prejudice to the rights and clams of all the absent parties."[26] (emphasis mine).

As can be noticed the italicized part of the formulation deprives the class action of its essence,[27] for it is to dispose of a common issue affecting all persons similarly situated and to make such disposition binding on both the parties on record and the absent parties that the class action was primarily designed. It is to save, through the application of the principle of *res judicata*, the time and expenses of the court and of the parties that the class action was introduced as an exception. From this point of view Rule 48 did not resolve a fundamental question of class action. In fact, this question remained unresolved until 1966 though the Equity Rules were amended in 1912 and 1938.

From 1912 until 1938, class actions were governed by rule 38 of the Equity Rules of 1912. Though this rule dropped the "common or general interest" requirement, it did not address the defects of Rule 48 mentioned above, for questions continued as to the binding effect of judgments under Rule 38, too.[28]

When the Federal Rule of Civil Procedure was adopted in 1938, class actions were dealt with under Rule 23 which is said to have been " a substantial restatement of former Equity Rule 38."[29] Rule 23 divided class actions into what practitioners referred to as: "true" class actions, those which would require the joinder of all interested persons if class actions were not permitted; "hybrid" class actions, those which, though several, affect or may affect a specific property involved in the action; and "spurious" class actions, those which, though several, raise a common question of law or fact affecting the several rights and a common relief sought.[30] What is significant about Rule 23 (1938) is the fact that it extended the availability of an independent Federal class action procedure to law suits as well.[31] The previous doubt about the binding effect of judgments on absent class members was not resolved. "In the absence of a definitive statement in the rule as to the scope of judgements in class actions, the courts concluded that decisions in 'true' class suits bound all

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[26] Ibdi, p. 682-3.
[27] Ibdi, p.683.
[28] Ibid. This question, in fact, continued until the revision in 1966 of the Federal Rule of Civil Procedure; see Wheaton, op. cit, pp. 427-30.
[29] Teply and Whitten, op cit, p.683.
[30] Text of Equity Rule 23 is reproduced in ibid., pp. 683-4, note 276; it is also reproduced in Brown et. al., op. cit., pp. 554-5.
[31] Ibid., p. 683.

of the members and that actions labeled as 'hybrid' or 'spurious' affected only the parties named in the suits"[32] Moreover, the distinction of class actions into 'true' 'hybrid' and 'spurious' made it confusing both to the courts and practitioners.[33] Three decades of application showed that Rule 23 was inadequate. It was revised in 1966 by order of the U. S. Supreme Court. Rule 23 as so revised is the current basis for federal class actions in the U. S. To-date, Federal Rule 23 governs class action practice in federal courts and in states that have adopted the Federal Rules of Civil Procedure; its provisions, therefore, provide " a good general picture of modern class action practice in both federal and state courts."[34]

3. The Present Status of Class Action

Reference has already been made earlier on the class action procedure as applied in and by U.S courts is the most highly developed procedure.[35] Rule 23 as amended in 1966 is the legal basis for this developed class action procedure. Rule 23 has abolished the previous distinctions of class actions into 'true', 'hybrid' and 'spurious'. Instead, it lays down four basic prerequisites for class action certification. These prerequisites are:[36]

1. that the class is so numerous that the joinder of all members is impractical;
2. that there are questions of law or fact common to the class;
3. that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. that the representative parties will fairly and adequately protect the interest of the class.

In addition, a person who sues or defends as a representative of all members should show[37] that the case falls under one of the following three categories:

the prosecution of separate actions by or against individual members of the class would create the risk of:

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[32] William A. Friedlander, "Civil Procedure- Federal Rule 23- Aggregation of Claims in Class Actions", Tulane Law Review, vol. 43 (1969),p.363.
[33] Ibid., p.364.
[34] Teply and Whitten, op. cit, p. 686.
[35] See note 2 supra.
[36] Teply and Whitten, op. cit., p. 686.
[37] Ibid.; for the text of Revised Rule 23, see Friedlander, op. cit., pp. 364-5.

(a) inconsistent or varying adjudication's with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudication with respect to the individual members of the class would as a practical matter be dispositve of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

2. the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injuctive relief or corresponding declaratory reliefs with respect to the class as a whole; or

3. that the question of law or fact common to the members of the class predominates over any question affecting only individual members, and that a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

It can easily be seen that under the revised Rule 23, a suit can only proceed as a class action if each of the four prerequisites mentioned above is satisfied and the suit falls under one of the three categories of class suits.

The essence of the four prerequisites for class action certification can be briefly reviewed as follows.[38]

A. **Numerosity:-** This is a term practitioners use to signify the requirement that the class representative must show that there are enough persons in the class to make joining them as individuals impractical,[39] i.e., that "the class must be so numerous that the joining of all members is impractical."[40]

Just when it is impractical to join all persons similarly situated is a question that cannot be answered in the abstract. It has to be determined in the light of particular circumstances. In Hansberry v. Lee (1940), the U.S. Supreme Court held that to require all the parties to be brought upon the record as is required in a suit at law would amount to a denial of justice since the right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the

[38]Yeazell, op. cit, pp. 967-9; for categories of class suits, see pp. 14-16 infra.
[39]Ibid., p. 967.
[40]Ibid.

changes constantly occurring by death or otherwise.[41] Moreover, not all persons who are similarly situated are like-minded so that their voluntarily and unanimously joining in a suit is improbable and impractical,[42] particularly when their claims are very small, too small to justify prosecution. This view of the Court is on the understanding that where the parties are so great in number, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of suits to a hearing. It would therefore be unfair to demand the joinder by name of a large number of persons as parties since it would be difficult to ascertain all the names and residences, to add to the record the names of representatives of the original parties who might die during the proceeding, or to replace those who were, in the first instance, named as parties with the vendees of their interests which were sold after the commencement of the actions.[43] Impracticality arises from these circumstances; but it must be noted that the enormity of the number *per se* does not establish impracticality. Impracticality can not be assumed.[44] Since impracticability can not be assumed, the class representative must show to the satisfaction of the court that there is a class of persons having a common interest in certain questions of law and fact, and that the individuals are so numerous that it is impractical to join them all in the suits.[45] Numerosity is, therefore, tied with the common question principle.

Revised Rule 23 has a problematic formulation of this question. It provides that for a suit to be verified as a class action, either the class has to be so numerous that joining all members is impractical or that there must be shown questions of fact or law which are common to the class. It appears, therefore, that a class suit can proceed where joinder of all class members is impractical even though there are no questions of fact or of law, which are common to the class. It has been observed in this connection that although Rule 23, on its face, allows such a construction and courts have made decisions based on such a construction, it is wrong to apply the rule as so constructed. " No matter how many members there are in a class, a representative suit should not be allowed under the law being considered unless there is a proper question in which they all have a common interest. To conclude otherwise would result in permitting inumerable, unconnected questions of law and facts to be dealt with in a single suit".[46]

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[41] Quoted in Brown et. al. op. cit, p. 553; American Law Institute, op. cit, section 86, p. 417.
[42] U.S Supreme Court quoted in Brown et. al, op. cit, p. 557.
[43] Wheaton, op. cit., p.414.
[44] Ibid.
[45] Ibid., p. 435.
[46] Wheaton, op. cit, p. 434.

In connection with this issue, Pomeroy himself is quoted as having stated:

> " the language does not in terms require any question of common, or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs- so large that it would be impractical to bring them all actually before the court-unless the question to be determined was one of common or general interest to them all"[47]

B. **Commonality**:- A controversial and much litigated issue which is often raised in the "common general interest" prerequisite is the question of how much the class members should have in common. Courts have given differing answers to this question. Some have held that the parties must have *joint* interest so that their joinder is required by law.[48] Some have held that the parties must have a *commonality* of interest or *identical* interests.[49] Some have held that the parties must be *united* in interest.[50] Still others have held that the parties must have the *same* interest or *similar* interest or that the parties must be *similarly situated*..[51]

None has defined the term used to signify the common or general interest prerequisite. It can be noticed that these various terms can have the effect of restricting or broadening the scope of class action suits. The current view favours broadening the scope of the class action. Thus class members need not be shown to have joint or identical interest. A showing of some common interest in " the basic facts and law of the case" suffices.[52] Admittedly, since persons similarly situated almost always have some characteristics in common and some not shared, there are rooms for argument. In a suit brought by land owners owning lands severally against defendants who erected a dam across the watercourse thereby raising its level and damaging the farms and lowlands and in which the plaintiffs prayed for:

a) establishing their right to have the watercourse continue free from dams or obstructions,

b) ordering the defendants to remove the obstruction from the streams,

c) restricting the defendants from erecting or maintaining any such obstruction; and

d) an accounting of damages with each of the complainants.

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[47]Pomeroy quoted in Wheaton, op. cit. p. 415.
[48]Ibid., 410.
[49]Blume, op. cit., pp. 894-5; Wheaton, op. cit., pp. 407-8; op. cit., p. 83.
[50]Blume, op. cit., p. 895.
[51]Wheaton, op. cit., p. 407-8.
[52]Blume, op. cit., pp. 880-895; Wheaton, op. cit., p. 434.

It was held that "the complainants could join upon the ground of preventing multiplicity of suits and that once equity has taken jurisdiction of a case like this, it will retain for all purposes and dispose of the whole matter, even to the assessment of damages."[53] Thus according to this view, it would suffice to show that complainants have enough in common to justify class certification. The fact that there are also individual issues is not a bar to class certification.[54]

On the other hand, it had earlier been held that though the act complained of was common to the plaintiffs, some of them could not bring a suit on behalf of themselves and all others on the ground that the injurious act operated on each of the complainants as an individual alone, and they did not, therefore, have common interests.[55] In similar cases, it was held that, "for the recovery of damages, each member of the class must intervene to assert and prove such damages to himself."[56]

This narrow interpretation of the rule, it has been observed, was due to the influence of Pomeroy who had formulated, in his work on code remedies (1904) the following test for class action joinders:

> "The test would be to suppose an action in which all the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but if such an actual joinder would be improper, then the suit by or against one as a representative would be improper, notwithstanding the permission contained in this section of the statute."[57]

Thus, according to this test, only persons whose claims "arise from the same transaction or transactions connected with the same subject of action" or "persons having an interest in the subject of the action and obtaining the relief demanded"[58] can bring a suit on their behalf and all others. This interpretation, therefore, limits class suit to strict joinder procedures. Due to the vision and principled arguments of authorities, for a broaden view and liberating the class action from the

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[53]Blume, op cit, pp. 883-4. See also Marshnall B. Grossman, "Prerequisites and Other Requirements", Class Actions 1975, Litigation Course Handbook Series No. 71, Practising Law Institute, New York City (1975), p. 17.
[54]Judge Turrentine, in Alco International Group, Inc. Securities Litigation, quoted in Yeazell, op. cit, p.973.
[55]Beach, op. cit, p. 84, note 3.
[56]Brown, et al. op. cit, p. 559.
[57]Quoted in Blume, op. cit, p.898.
[58]Wheaton, " A Study of the Statutes Which Contain the Term 'Subject of the Action' and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims", Cornell Law Review, vol. 10(1932-33) p. 241.

restrictive, joinder procedure, and due to defects observed in practice, it is now made subject to a procedure of its own. Thus, revised Rule 23 provides for maintenance of an action as a class action when there arise questions of law or fact common to the class which predominate over individual questions and a class action is superior to other available methods for fair and efficient adjudication of the controversy.[59]

Just when the question of law or fact common to the class is said to predominate over individual questions and the class action is superior to other available methods are questions which are left for the court to decide. In deciding these questions the court must have regard to the purpose of the rule, i.e., "to achieve economies of time, effort and expense and the promotion of uniformity of decision as to persons similarly situated without the sacrifice of procedural fairness or the production of other unreliable results."[60] Rule 23 makes it clear that proof of a common question alone is not sufficient to maintain a class action. The common question must be shown as predominating individual questions. Although the determination of this question is left to the court, it has been suggested that " when the common questions represent an important aspect of the case and these questions can be resolved for the entire class in a single proceeding, they should be held to predominate even if a significant amount of time also will be spent on individual questions"[61] It has further been suggested that the class action should be held superior when (a) the damage claims of individual class members are so small that separate prosecutions are impractical; (b) when the pendency of other actions concerning the same subject matter is not such as to destroy the ability of the class action to achieve economies of time and uniformity of result and when it does not indicate strong desires of the parties for separate law suits; (c) when the forum is convenient in relation to the location of the witnesses, evidence and similar other factors and (d)when it is established that the class can be managed, i.e., individual issues are not so numerous that they can be handled without much difficulty and that the notice requirement to absent class members can be fulfilled.[62]

3. **Typicality**- Once again typicality is a term coined by practitioners to indicate that the interests of the class representative must be, in significant aspects, the same as other class members whose interests he represents, not by choice, but by the mere fact that he is in the same situation as the other class members.

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[59]For the text of Federal Rule of Civil Procedure, Rule 23(b)(3), see the sources indicated in note 37 supra.
[60]Teply and Whitten, op. cit, p. 691.
[61]Ibid., p. 692.
[62] Ibid., p.693.

> "The premise underlying the typicality requirements is that the class representative will be controlling the litigation, making the decisions that a client would be making in a one-client suit. In order to protect the interests of the absent class members, one would want the representative of client to have the same incentives and motivations as a representative of the average class members."[63]

This is ensured where the claims or defences of the representative parties are typical of the claims or defences of those represented.[64] It is this typicality of claims or defences which is the basis for some of the parties to be allowed to proceed with a suit brought on their behalf and all others, for objective representation, so to speak. However, the very nature of the question itself suggests that there can not be any one single formula to determine just how and when the typicality test is satisfied. And, indeed, courts have arrived at different conclusions from essentially the same state of facts. Three out of three hundred subscribers to a fund to whom a circular concerning the fund had been sent before they subscribed were said not to properly represent all of them for the facts as to the subscription of those represented might not be similar to those made to the persons suing.[65] In another case, it was held that factual differences between the claims of each class member and the claims of representatives can only be a bar for class certification where the interests of the class are placed in jeorpordy as a result of such differences.[66] Typicality exists where, in relation to the predominant questions, there is no adversity or antagonism between the interests of the representative and the absent class members. It has also been suggested that " the best approach is to consider the requirement satisfied if the claims or defences of the representative parties and the absent class members arise from a single occurrence or are based on the same legal or remedial theory."[67] Where the class as a whole is affected by the same injurious act or acts or where the interests affected are protected by the same legal or equity rule, the interests of some of the class are presumed to be typical of the interests of all.

Difficult as the question is, courts in practice either do not pay any attention to this test or view it as a factor that is related with and buttresses the adequacy of representation requirement.[68] Indeed, some courts have even gone to the extent of being willing to bend the requirement of typicality when they are assured that the adequacy of representation prerequisite is satisfied.[69]

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[63]Yeazll, op. cit, p. 967.
[64]Teply and Whitten, op. cit, p. 687.
[65]Wheaton, op. cit, p. 417.
[66]Judge Turrentine, in Alco International Group Inc. Securities Litigation , quoted in Yeazell, op. cit, pp.972-3.
[67]Teply and Whitten, op. cit, p.687, note 292.
[68]Ibid.
[69] Yeazell, op. cit, p. 967.

D. Adequacy Of Representation:- It has been noted earlier that the effect of a decree made in a class suit other than "true class actions" has been dubious until it was cleared by the revised Rule 23, of 1966. Since then a decree made in respect of a class suit, irrespective of the nature of the class action is binding both on the record parties and the absent class members. The consequence is that the principle of *res judicata* applies in respect of issues decided upon by the court and every member of the class is barred from bringing a fresh suit involving issues litigated in the class action.[70] It can readily be seen, therefore, that the question of adequacy of representation is much more critical under revised Rule 23 than it was under equity, and previous class action procedures.

Revised Rule23 provides that "one or more members of a class may sue or be sued as representative parries on behalf of all" where it is ascertained that "the representative parties will fairly and adequately protect the interests of the class."[71] Whether, in any given case, the party or parties appearing before the court can actually protect the interests of the class fairly and adequately is a question that is left for the court to decide in each case.[72] In declaring the issue of adequacy of representation, the court needs to have regard to two statutory requirements. The first requirement is that there must be a sufficient number of persons on the record to ensure a fair representation of the class.[73] Just how the number of parties on record must relate to the number of those represented has been answered differently by different courts.[74] While one creditor was allowed to sue for numerous creditors to foreclose mortgages and secure all the claims of defendant's creditors, three subscribers to a fund were found not to properly represent all subscribers to the said fund.[75] It is important to notice that the number of the record parties alone, though there have to be a sufficient number of them, is not sufficient to establish adequacy of representation. It is fair to say that the first requirement is dependent upon the second one. The fact that a large number of class members appears before the court does not necessarily show fair and adequate representation.[76] In considering adequacy of representation, i.e, fair and adequate protection of the interests of the class, the court must be guided by the principle that "one can not be a representative of a class instituting litigation on behalf of the other members of the class unless his interests are theirs. A conflict in interest destroys the representative character of his action."[77] In this connection, the observation made by Mr. Justice Stone in

[70] Teply and Whitten, op. cit, p. 687; American Law Institute, op. cit, section 86, p.415.,
[71] Brown, et. al, op. cit, p.557.
[72] Ibid., p. 558; Teply and Whitten, op. cit, p. 687, note 293.
[73] Brown, et. al, op. cit, p. 558; Wheaton, Plural Litigation, p. 435.
[74] See, for example, ibid., pp.416-7.
[75] Ibid., p. 417.
[76] Moore, quoted in Brown et. al, op. cit, p.558.
[77] Clark v. Chase National Bank, quoted in Brown et. al, op. cit, p.561.

Hansberry v. Lee is pertinent:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any other of the class in litigating their interests in either alternatives...."[78]

The determination of adequacy of representation must be made on a case- by- case basis. It has been suggested that the factors to be considered in such determination included "the quality of the legal counsel employed by the representatives, the personal characteristics of the representatives, such as honesty, the extent of the representatives interests in the action and the extent to which the representatives' interests are adverse, antagonistic, or conflicting with the interests of the members of the class."[79] It must be observed here that *res judicata* does not apply to absent class members where it is established that their interests have not been fairly and adequately represented.[80] In such cases, the requirement of due process of law will not be satisfied which affords a basis for challenging the binding effect of the decree made in respect of absent class members.[81]

E. Categories of Class Action and Notice: Under current federal practice, the class action procedure is only available to three categories of class suits.[82] In other words, even if the four prerequisites of class action, i.e., numerosity, commonality, typicality and adequacy of representation are satisfied, a suit cannot be certified as a class action unless the particular suit falls under one of the three categories of suits. It now remains to consider each of these three categories as additional requirements for class action certification. The first category applies where any one of two circumstances are ascertained to exist. The first circumstance is that which would occur where prosecution of separate actions by or against individual class members can result in varying adjudication that would require the other party to adopt incompatible standards of conduct. Protection of the party opposed to the class is, therefore, the primary aim of this provision. If, for example, individual members of a class bring a suit against a municipality concerning bond issues, some of them wishing to invalidate the issues, others wishing to enforce interest

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[78] Quoted in Yeazell, op. cit, p. 987.
[79] Teply and Whitten, op. cit, p. 687, note 293.
[80] Hansberry v. Lee, quoted in Yeazell, op. cit, p.486.
[81] Ibid.
[82] Federal Rule of Civil Procedure, Rule 23(b).

payments under the bonds and still others wishing to limit those bonds, the defendant municipality will be subject to incompatible standards of conduct if some of the class succeeded in invalidating the bond issues and some of them obtained judgement for enforcing the payment of interests on the bonds.[83] The second circumstance is that which would occur where adjudication with respect to individual members of the class, as a practical matter, would be dispositive of the interests of the other members of the class or would substantially impair or impede the ability of the other members to protect their interests. If, for example, some share holders of a company bring an action against the company requiring it to declare dividends , success or failure of these share holders would be dispositve of the interests of other shareholders of that company with respect to dividends,[84] for the issue of payment of dividends will be *res judicata* in respect of all shareholders.

The second category of class actions applies where the party opposed to the class has acted or refused to act on grounds applicable to the class, thereby making final injunctive or declaratory relief appropriate with respect to the class as a whole. A typical example of this category is where the defendant is charged with unlawful discrimination against a class. Indeed, Rule 23(b)(2) was formulated primarily with civil rights claims in mind, where the plaintiff class would be alleging that the defendant(s) was acting on racially motivated basis.[85] In such cases, the plaintiffs seek injunctive or declaratory relief requiring some action by the defendant body or private person, such as voter registration, school integration, changes in employment practices, etc. Social action litigation on behalf of children, women, the disabled and the aged can be brought as class actions under this provision. It is this category of class actions which "hold considerable promise for redressing injuries to large numbers of citizens who individually would not have the economic and logistical capacity to litigate."[86]

The third category of class actions applies where there exist questions of law or fact common to the class which predominate over individual questions and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.[87] This category of class action brings together persons who have interests severally but are united by some common questions of law or fact. The class is, therefore, "more loosely knit" than in other categories. This is a category which under the previous Rule 23 was referred to as "spurious"

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[83] See Teply and Whitten, op. cit, p. 689.
[84] Ibid., p.690
[85] Yeazell, op. cit, pp. 968-9; Teply and Whitten, op. cit, pp. 690-1.
[86] Arther R. Miller, "Of Frankenstein Monsters and Shinning Knights: Myth, Realty and the 'Class Action Problem', Harvard Law Review, vol. 92(1979), p. 665.note 3.
[87] See pp. 9-11 supra

class action, precisely because "the character of the right to be enforced for or against the class is several, and there is a common question of law or fact affecting the several rights and a common relief is sought."[88] Due to the nature of this class action, the degree of representation of the absent class members by the party or parties on the record is conditional and relative. It is this category of class actions, which is more controversial as it raises the most controversial due process issues. It comprises, essentially, all claims in which the plaintiffs seek primarily money damages.[89] In practice, actions under this category can be subdivided into two groups. The first group consists of what are usually referred to as "small claims" law suits in which numerous persons allege small amounts of damage. These are also referred to as " impractical- but- for-Rule 23" law suits, so termed to signify situations where the party opposed to the class has pursued a common course of conduct against the class which has resulted in individual damages so small that separate suits by class members are impractical.[90] By pooling its claims together, the class can through the class action become an economic unit powerful enough to oppose effectively a large corporation or governmental unit.[91] The second group consists of what is referred to as the "mass tort" class actions where a mass of people are injured by an act such as airplane crash, a hotel fire, exposure to asbestos fibers, etc. In this case, each individual plaintiff can bring a viable suit against the defendant. However, such individual suits can be time consuming and expensive. The class suit is, therefore, preferable. More importantly, however, the consolidation of such suits is more advantageous to the defendant than to the individual plaintiffs.[92]

4. The Notice Requirement

Since the third category of class actions consists of class members who have claims severally, though they have common questions of law or fact, Rule 23 requires that absent parties be served "with the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." Only thus can the due process requirement be fulfilled to the degree of the constitutional standard. What form of notice is the best notice under the circumstances is a question that needs to be answered having regard to the particular circumstances of each case. Where the class is large, the cost of notice

[88] Federal Rule of Civil Procedure (1938), Rule 23.
[89] Yeazell, op. cit, p. 969.
[90] "Managing the Large Class Action" Harvard Law Review, vol. 87 (1973), p.427.
[91] Ibid.
[92] See Yeazell, op. cit, p. 969.

can be prohibitively high and may defeat the purpose of the class action.[93] This is particularly so where the claims of individual class members and, therefore, the representative parties, are too small. The rule laid down in Eisen V. Carlise and Jacqueline that the representative plaintiff bear the cost of notice and that notice should as nearly as possible correspond with the constitutional requirements of due process with individual notice to class members who can be ascertained with reasonable effort has been attacked on this ground.[94] To minimize the effect of cost of notice, it has been suggested that "since, under the new rule, defendants, too, stand to benefit from *res judicata,* they should pay for the notice from which they benefited so long as plaintiffs can show a prima facie case.[95]

The requirement of notice is applicable only to the third category of class actions. As earlier noted, the requirement arises from the nature of this particular type of class action- that the class members have rights severally but share some common questions of law or fact and that, therefore, the question of representation can give rise to issues of due process. The purpose of the notice is to advise class members that a suit affecting their interests is being instituted and that, if they wish, they can be excluded from, or made parties to, the suit. If, after such notice, they do not "opt out" or "opt in", then, their assent to the prosecution of the representative suit is presumed[96] and the judgement, whether favorable or not, will include all members who do not request exclusion.[97] Notice can keep the avenue of private prosecution open to class members. In practice, however, particularly where the claims are small, private prosecution is not pursued. Pomerantz reports that less than one

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[93] See, for example, Teply and Whitten, op. cit, p.694; Ashton Phelps, Jr " Civil Procedure- Federal Rule 23 (C) (2)- Notice in Class Actions- Mullane Reconsidered", Tulane Law Review , Vol..43(1969), p.373; " Managing the Large Class Action", note 86, supra, where it is argued that if adequate representation is established, actual notice to absent class members is not constitutionally required precisely because, as Rule 23 requires that the interests of the members of the class be adequately represented, due process does not always require actual notice of the proceedings, since the interests of those who are not individually notified will presumably be represented in the suit-ibid., p. 375. It is further observed that "to require individual notice by plaintiffs would transform a device intended to help the 'little' man into one which could be used only by the wealthy"- the Mullane court quoted in ibid.

[94]See, Phelps. op. cit, pp. 375-6; Managing the Large Class Action, note 90 supra, pp. 433-4. Pomerantz, pp.433-41. Pomerntz argues that the notice requirement established in the Eisen case can be extended by defense counsel to the point of absurdity; citing this case where suit was brought on behalf of four million odd lot buyers and sellers alleging violations by defendants of the anti-trust laws, defendants saw the opportunity in the notice and seized it. "They informed plaintiff's counsel that they were able to identify and name one million members of the class, and that they would be happy (ecstatic might be a more descriptive word) to make all those named available free of charge to the plaintiff. All that the plaintiff and his counsel need would be to pay for mailing 1,000,000 letters that costs $2,000,000. But, this was not all. There were still, defendants pointed out, three million members of the class whose names could not be 'identified through reasonable effort'. The only way to reach them, defendants claimed, was by publication in newspapers throughout the country. The cost: staggering." Ibid, pp. 1263-4.

[95]Ibid, p.1265, note 6.

[96]Rule 23(c)(2), note 37, supra.

[97] Wheaton, "Representative Suits", op. cit., p.422.

percent of class members request exclusion and none of those excluded go on to pursue his own remedy.[98] Under these circumstances, to insist on strict requirements of notice would be to make a fetish out of the formality and to thereby destroy one of " the most important and socially useful weapons in the entire arsenal of remedies."[99]

II. Class Action under Ethiopian Law

1. Background

As indicated at the beginning of this paper, class actions under the designation of "Representative Suits" have been part of Ethiopian procedural law since 1965. It appears that the provisions of the Civil Procedure Code of Ethiopia dealing with class actions, like most other provisions of the Code, drew their inspiration from the Indian Code of Civil Procedure.[100] The experience of Indian courts in interpreting and determining the scope of the legal elements of class action will, therefore, be a useful source for Ethiopian courts charged with the task of interpreting and applying the provisions of Article 38 of our Civil Procedure Code and also for Ethiopian legal scholars who wish to elaborate and explain these provisions. At the same time, and perhaps more significantly, the Indian origin of the Civil Procedure Code in general and Art. 38 in particular provides a link between the procedure of class action under our law and the concept of class action as developed and applied in the United States.[101] The link between the provisions of Art. 38 of the Civil Procedure Code, Order 1, Rule 8 of the Indian Code of Civil Procedure and Federal Rule 23 of the Supreme Court of the United States provides strong basis and justification for using Indian and, ultimately, U.S. standards to evaluate the provisions of Art. 38 of the Code.

Just as India is the only country in the world which has class action procedure very much similar to Federal Rule 23 of the U.S., the incorporation in our Civil

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[98] Pemrantz, op. cit., p. 1266.

[99] Ibid. p. 1265; it must be mentioned here that the class action procedure had its own detractors especially in the early years of the modification of Rule 23. Some referred to it as "a form of legalized blackmail"; some believed that it was the attorneys, and not class members, who were the real beneficiaries and the real parties in interest; some believed that large cases including the class action were "monstrosities"; others believed that the cost of converting the Federal judiciary into small claims court has not been offset by any substantial social benefit; still others characterized class actions as the generation of claims for people who have no interest in pursuing them – see, for example, Cappalli and Consolo, op. cit., note 14, p. 233.

[100] See Robert A.Sedler, Ethiopian Civil Procedure, Haile Selassie I University in association with Oxford University Press, Addis Ababa, 1968, p. 5.

[101] Cappalli and Consolo, op. cit., p 218, note 2.

Procedure Code of class action procedure makes Ethiopia the only country within the continental legal system to have this procedure officially as part of her legal system.[102] This is emphatically so especially now when the constitution of the Federal Democratic Republic of Ethiopia under Art. 37(2)(b) has exalted the status of class action and has made it available as a means of securing access to justice and as one of the procedures for seeking constitutional remedy.[103] While one may question the wisdom of raising class action to a constitutional status,[104] it certainly lightens the burden of our courts in justifying the overriding status of class action procedures, in the sense that the constitution itself has introduced them as procedures which can be applied in derogation of the usual due process requirements when the circumstances of the particular case demand.

2. Scope of Class Actions Under Ethiopian Law

The constitution of the Federal Democratic Republic of Ethiopia (hereinafter the "constitution") provides that "Any group or person who is a member of, or represents a group with similar interests" has the right to bring a justiceable matter to, and obtain a decision or judgement by, a court of law or any other competent body with judicial power.[105] However, the class action procedure in Ethiopia predates the constitution. Indeed, Art. 38(1) of the Ethiopian Civil Procedure Code, which has been in force since 1965, provides:

> "Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agreed to be so represented".

What then is the scope of class actions under this code and how does it relate to Art. 37(2) (b) of the constitution? Is the constitution to be interpreted in the light of Art. 38 of the Civil Procedure Code? Or is Art. 37(2) (b) of the constitution broader than Art. 38 of the Civil Procedure Code?

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[102] Ibid; see, however, Jerome S. Sloan, "Games French People Play with Class Actions or French Games with Class", Temple Law Quarterly, Vol. 45 No. 1(1971), pp. 210-238; Cappalli and Consdo argue that "the blockage (of class actions in Europe) thus far has not been a lack of social need for this legal institution but, rather the stiff barriers of tradition and narrow-minded scholasticism." op. cit. p. 211.

[103] Art. 37 of the Constitution is the equivalent of Art. 32 of the Indian Constitution which is regarded in Indian jurisprudence as a guarantee of constitutional remedies.

[104] Sedler argues that procedural matters are better left to the judiciary so that they could make the necessary adjustments to keep pace with changed needs and circumstances – op. cit., p. 4. Such adjustments will be difficult when they relate to rules which are exalted to constitutional status since constitutional amendment is cumbersome and time-consuming.

[105] The Constitution of the Democratic Republic of Ethiopia, Negarit Gazeta 1st year No. 1(1995), Article 37.

To begin with, the terms used in Art. 38 of the Code appear to render it devoid of much substance and value. Indeed, it is so limited that one doubts whether the framers of the Code had in mind a class action procedure properly so called. This is perhaps one good reason why there is no case of any significance that has been decided by the courts using Art. 38 of the Code.[106] In the following sections, an attempt is made to point out the major limitations of the class action procedure under Art. 38 of the Civil Procedure Code of Ethiopia.

3. Limitations of Article 38 of the Civil Procedure Code

3.1. Numerosity

Under Art. 38 of the Code, class action suits appear to be maintainable where several persons have the same interest. The key term here is represented by the word, "several". And the usual issue that arises from the use of such indefinite terms is how large should the group of several persons having the same interest be in order for one or more of them to sue or be sued or defend on behalf of themselves and all others similarly situated?

Sedler writes that "the drafters of the Ethiopian Code carefully substituted several for numerous, making it clear that the class does not have to be large, though it would have to include more than two persons."[107] This construction, it would seem, negates the very purpose for the solution of which the class action was originally invented and which today continues to underpin its existence and vitality.

As already noted in part I of this paper, the class suit was an invention of equity to enable the court to proceed with a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. The usual rules of procedure are clear and almost universal; a person's right to sue another is considered a valuable property or liberty interest protected by constitutions and due process clauses; these due process clauses include the right to notice and an opportunity to be heard before a court judgment deprives one of a legal claim or defense and the right to be at risk only after being brought into court as a party by appropriate process.

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[106] All attempts of this writer to find class action suits decided by Ethiopian courts failed partly because of lack of properly kept and organized judicial records, and partly, and more significantly because, as I am told by persons of long judicial experience, no cases have been prosecuted or defended using Art. 38 of the Code.

[107] Sedler, op. cit., p. 63.

The class action negates all these constitutional protections and due process guarantees because it is a procedure whereby one or more persons are authorized to sue or be sued or defend on behalf of themselves and all others similarly situated and the judgment becomes binding on these others similarly situated. Hence, those similarly situated, being absent parties, are deprived of their claims or defenses without the opportunity to be heard. These derogations are necessitated because it is impractical to join all those interested in the suit. If, therefore, the assertions of Sedler to the effect that the class does not have to be large are correct, one can argue that the class action under the Ethiopian Civil Procedure Code hardly addresses itself to the necessities which historically gave rise to the need for group representation. This is so because, it needs to be stressed, the class action was invented in equity as a derogation from the ordinary procedures of law to provide for situations *where it would be impractical to join all persons similarly situated.*[108]

Where only two or three or several persons are involved, it is obviously not impractical to bring them all before the court.[109] In such cases, there can be no justification for derogation from the ordinary guarantees of due process of law. Indeed, if the class action procedure in the Ethiopian Civil Procedure Code is not attached to resolving this problem of impracticability of bringing before the court all persons similarly situated, it cannot be said that it serves any meaningful procedural purpose.

The Indian Code of Civil Procedure uses the term, "numerous". Though it may be argued that the difference between the term, "several" and "numerous" is not that clear, it is obvious that the latter term signifies a much larger size than the former. It is simpler to identify and ascertain *several* persons than numerous persons. The point is that the issue of impracticality of bringing before the court all persons interested in a suit is attached with the difficulty of ascertaining such persons and their fluctuating character. And the term that describes best the size of such unascertainable and fluctuating group is "numerous". According to Indian practice, "the law is now well settled that for this rule (class action) to apply, it is not necessary that the parties must be capable of being ascertained and that even fluctuating bodies can sue under this provision".[110]

Federal Rule 23, as we have noted earlier[111] defines numerosity in terms of the

[108] See pp. 3-6 supra; Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action, Yale University Press, New Haven and London (1987) p. 2

[109] "Impracticability" does not mean "impossibility" but only the difficulty or inconvenience of joining all members of the class – Marshall B. Grossman, op. cit, p. 116.

[110] Mulla, The Code of Civil Procedure (ed. P.M. Bakshi), Bombay, N. M. Tripatti Private Limited (1990), p. 422.

[111] See pp. 6-7 supra.

impracticality of joining all persons similarly situated. Even then, it must be admitted that there is no single and precise formula for numerosity. Both Indian and United States courts have used different sizes of numerosity to grant or deny class action certification. Numerosity largely depends on the particular circumstances of each case. In India, thirty defendants were held to be numerous enough for class certification. And in the United States, classes as few as eighteen were held to be sufficient. But these class sizes are cited as illustrations of certain cases whose particular circumstances necessitated lower numerosity thresholds. The typical class action cases involve much bigger sizes. Thus, 550 taxicab companies, 1,300 large public libraries, 10,000 wholesalers of gasoline, 250,000 users of heart ailment product and much larger classes were certified in the United States in the 1970's.[112] These numbers, it can be observed here, are better described by the term "numerous" than "several".

Numerosity is very much linked with the essence of class action. The essence of class action lies in the opportunity it affords to proceed with suits on behalf of plaintiffs or defendants whom it is impractical to join. Necessity which arose out of this impracticality provided the basis for the invention and application of the class action procedure. Its purpose is to resolve this necessity.

The use of the term, "several" in the Ethiopian Civil Procedure Code directs the class action concept away from this necessity. But, the class action should not be understood as a normal procedure to be used in lieu of the ordinary joinder procedure. It is an extra-ordinary remedy necessitated by considerations of justice where it is impractical to join all persons similarly situated. Where the number of persons similarly situated is small or several, the ordinary joinder procedure should apply. Fortunately, the constitution is silent as to the size of persons in a group, thus making it possible for the legislature and the courts to make Art. 38 of the code serve true class action purposes.

3.2. Commonality

Commonality is related to the question of how much class members must have interests in common in order for one or more of them to sue or be sued or defend on behalf of themselves and all others similarly situated. The issue has been a subject of much litigation and courts have resolved it in so many different ways.[113]

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[112] See pp. 8-9 supra.; as C. A. Wright observed, "The requirement of a numerous class is intended to protect members of a class from being deprived of their rights without a day in court ..." Law of Federal Courts, Hornbook Series, Student Edition, St. Paul, Minn., West Publishing Co. (1983) p. 473; he further observes that "extreme difficulty or impracticability of joinder" arising from numerosity need to be established for class certification – ibid.

[113] See pp. 8-9 supra

Art. 38 of the Civil Procedure Code provides that all class members need to have the *same* interest. But, the word same does not tell us much about how much class members need to have interests *in common*. Sedler, discussing the subject under Art. 38, argues that, "... in order for a representative suit to be maintained, the interests of the parties must be *identical*"[114] (emphasis mine). He further stresses that, "A representative suit is designed to enable persons having *the same exact interest*[115] in the suit to be represented by one party" (emphasis mine).

The Indian Code of Civil Procedure, too, uses the same term. In the case of India, it is urged that "It is essential that the parties should have the same interest in the suit although the expression "the same interest" is not understood to mean the same thing as the same transaction"[116] Sedler appears to have based his conclusion on the apparent meaning of the expression, "same interest" as it appears in the Indian Code of Civil Procedure. However, a closer look at the Indian Code would reveal that the identity of interest is just one aspect of the commonalty requirement. It by no means excludes representation of parties with several interests but having common questions of fact and law. To require the same exact interest as a prerequisite is to drastically limit the utility of a procedural device invented to resolve delays, and even denial, of justice. If the origin of the class action was necessity, convenience and utility have now become, partially since 1938 and now fully since 1966, its major components. Convenience to the parties and the court has now made it imperative that class suit certification be granted to parties having interests severally but united in common questions of fact and law so that a multiplicity of suits can be avoided. Indeed, Mulla, commenting on Rule 8 of the Indian Code, states, "It has been held that 'the same interest' does not mean identical interest and that it includes similar but distinct interest".[117] This broader construction of the term, the "same interest" is justified by the fact that the eventuality of all class members having the exact same interest is very much limited[118] though not impossible. And the law cannot be assumed to have been provided for almost rare situations. In most cases, the exact same interest, identical interest, the same interest or community of interest can only occur in

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[114] Sedler, op. cit., p. 64

[115] Ibid, p. 65

[116] Mulla, op. cit., pp. 422-3

[117] Ibid, P.423; this is supported by the definition of the term in Black's Law dictionary wherein it is stated that the word, "same" does not always mean identical and that "it frequently means the same kind or species, not the specific thing; hence this term leaves room for interpretation.

[118] Mulla, op. cit., pp. 422-3. These are what were referred to as "true" class actions. However, since the distinction between "true", "hybrid" and "spurious" class actions were dropped, the class action as a remedy has been expanded; "under this new remedy some individuals who have interests must be permitted to initiate a proceeding for and on behalf of all others who are similarly situated in order to try, once and for all the common issues of fact and law" – Joseph J.Simeone, "Procedural Problems of class suits", Michigan Law Review, Vol.60 (1961-1962), p.925.

cases where the relief sought is in the form of declaratory judgment. Thus a villager may bring a suit on behalf of himself and his fellow villagers for a declaration of a right of way and for an injunction against the defendant for distracting the way or water passage; any one tax payer may bring a suit against a municipality on behalf of himself and the other tax payers to restrain the municipality from misapplying its funds, i.e., a declaration on the application of the funds by the municipality.

On the other hand, the constitution provides for a somewhat broader basis for the representation of class members as it uses the term "similar interests",[119] instead of the "same interest",[120] as in the Civil Procedure Code. To the extent that the term "similar interests" is different from and broader than the term, the "same interest",[121] we can presume that the narrow basis of representation in Article 38 of the Civil Procedure Code has been superceded and replaced by Art. 37(2)(b) of the constitution. However, though the constitution provides for a broader basis, it does not tell us in fairly clear terms, how much class members must have interests in common for one or more of them to sue and be sued on behalf of themselves and all others similarly situated.

Art. 37(2)(b) itself is, therefore, open to diverse interpretation. However, when interpreting the constitution, one needs to have regard to the fact that, although in some limited cases, an act by the defendant may cause the same or identical damage to all members of the class,[122] in many cases, "The only bond between class members may be the defendant's act, as when a defective product damages many who are connected only by the common complaint against a common defendant".[123] In such cases each member of the class may suffer damages distinctly and separately from others; but the class members hold together common questions of fact and law against the same adversary. If a group of people have claims, even if severally, against the same actor whose act radiated within the group the same issues of fact and law, there is no procedural reason for denying the group as a group a common forum.[124] A good example in which this reasoning was applied was the "Agent Orange" case (1983). The federal judge who heard

[119] Art.37(2)(b) of the Constitution, note 6 supra
[120] Ibid.
[121] Black's Law Dictionary defines the word "same" as "identical, equal, equivalent; however, it does not always mean identical"; and the word "similar" as "nearly corresponding; resembling in many respects; somewhat like, having a general likeness"; it is thus clear that the word "similar" is much broader and more inclusive than the word "same".
[122] These types of suits are what were known as "true" class actions under Rule 23 of the Federal Rules of Civil Procedure, 1938 - see p. 5 supra; see also Simeone, note 19, supra; this has now been dropped precisely because it would not resolve the issue of class action suits which involved interests held severally by individual class members who shared important common questions of fact and law.
[123] Cappalli and Consolo, op.cit., p. 224.
[124] Ibid, pp. 224-5; Sloan, op.cit., p.218.

this case used the class technique on behalf of 2.4 million victims of the "Orange Agent" in order to avoid "a tedium of repetition lasting well into the next century".[125] This did not mean that all 2.4 million victims were damaged to the same extent and had identical remedies. It only meant that there were questions of fact and law common enough to justify class certification. Convenience and utility were the primary considerations when granting class suit certification. One should note here that it was more convenient and advantageous to the defendant to join all the victims in one suit. In Victorian Investors v. Responsive Environment Corporation [56. F.R.D. 543 (S.D.N.Y. 1972)], the rule which currently applied was restated thus:

> "The existence of issues peculiar to individual plaintiffs is not of itself reason for denying the propriety of the class action where there are important common issues of law and fact relating to a financial report or other public financial information claimed to have influenced the investment decision of many persons and claimed to have influenced the market price of the securities involved in the case."[126]

Thus, to answer the question, how much class members must have interests in common for class action certification or authorization under the Ethiopian constitution, which we assume subsumes Article 38(1) of the Civil Procedure Code, the incidence of important common questions of law and fact is sufficient. The common issues arising from a common source of harm should be a sufficient linkage between class members to justify action by representatives on behalf of the group. If each member of the class were to file suit separately, "many passages in the complaints will be substantially identical" and, hence, "a joint litigation of the common issues will promote judicial efficiency."[127] This purpose is, it should be stressed here, additional to the attainment of justice which, were it not for the class action device, would be denied because of the impracticability of joining numerous persons similarly situated.[128] The class action device, therefore, serves the purpose of justice, convenience, and utility without, as we shall see later, doing violence to the constitutional protection of personal representation in suits affecting one's rights and the opportunity to be heard as guaranteed by the requirements of due process of law.

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[125] Cappalli and Consolo, op. cit., p. 225.
[126] Grossman, op. cit., p. 17.
[127] Cappalli and Consolo, op. cit., pp. 224-5.
[128] See pp. 2-3 supra; in U.S. practice, this element is considered together with the requirement of Rule 23(b)(3) that the common questions predominated over individual questions and, therefore, many judicial opinions have ignored this requirement, see Grossman, op. cit., p. 16.

3.3. Consent As a Prerequisite

Article 38(1) of the Civil Procedure Code provides that one or more members of a class can sue or be sued on behalf of themselves and all others only where the court is satisfied that all persons so interested have agreed to be represented. Indeed, since the code envisages a class of several persons, it is not impractical to find their whereabouts and to obtain their agreements. The person who takes the initiative is required to have the agreement of each member and he can only proceed with the class suit on the basis of the agreement of individual members. A class member who does not give his agreement neither gains nor loses at the end of the suit by the mere fact that he is a member of the class whose claims and defenses have been litigated and resolved in the course of the suit.

Where the class representative proceeds with the class suit on the basis of the agreement of the other class members, the relationship between the class representative and the other class members is more of a client – attorney relationship than that of a class representative - class relationship. The only difference is that in the latter relationship the class representative is a member of the class having claims and defenses in common with the other class members. The class representative has a vested interest in the outcome of the case while an attorney is only entitled to his fees. In both cases, however, the agreement of the person represented is decisive. In both cases, too, the class member has his day in court through a personally designated representative. In such cases, the question of absent parties does not arise and the judgment on the case becomes binding on all class members on the ground that they have been represented in the suit through representatives they personally designated. The principle of *res judicata* applies on all class members since they have, through their personally designated representatives, litigated all the issues of law and fact which arose in the suit. A suit in which representation of persons is based on the agreement of those persons is hardly a class suit. We have seen earlier the circumstances that gave rise to the need for the class action procedure. It should be noted that the class action was introduced with a view to solving the procedural hurdle represented by consensual representation; it was a shift from consensual representation, as provided under Art. 38 of the Ethiopian Civil Procedure Code, to non-consensual representation as is the law and practice in India and the United States.[129] A person affected in common with other members of a class by the acts of a defendant who desires to proceed with a suit on behalf of himself and the other members of the class cannot in many cases obtain the agreement of these other persons because they are too

[129] See pp. 2-3, supra; on the non-consensual nature of class action representation, see Yeazell, note 2 supra, pp. 11-16.

numerous; these other persons cannot be joined in the suit because it is impractical; each member of the class cannot pursue his own separate suit because the damage and the compensation recoverable may not justify the cost of the suit and also because it will not be convenient to deal separately with the issues of fact and of law which are common to all class members.[130] S.C. Yeazell has aptly described the situation that a customer having a grievance with a department store in common with thousands of customers would face:

> "To begin with, no single customer would be likely to know that others were similarly situated. Even if a customer guessed that others had the same grievance, it would be virtually impossible to locate those who found themselves in the same situation. Even if they could be located, the chances of organizing them into a group, securing agreement to share litigation expenses, agreeing to hire a single lawyer and the like would be very difficult. In addition, not only are these difficulties predictable, but the individual customer has no incentive to try to overcome them – the stakes for any individual are too low to warrant the task of organization."[131]

Under these circumstances, the requirement of the agreement of class members is impractical. Thus, Rule 8 of the Code of Civil Procedure of India only requires authorization by the court, so that a person, upon satisfying the requirements of numerosity, commonality, authorization by the court and notice, can proceed with the class suit on behalf of himself and other class members without having to obtain the agreements of the other class members. Thus, agreement of class members is not a requirement under the Indian Code.[132] This is also the case with Federal Rule 23. Under the latter Rule, it is only necessary to satisfy the requirements of numerosity, commonality, typicality and adequacy of representation;[133] in addition, it is necessary to show that the case falls under one of the three categories discussed elsewhere in this paper.[134] The agreement of the parties is irrelevant for class action certification.

It appears, therefore, that under Rule 8 of the Indian Code of Civil Procedure and Federal rule 23, the purpose to be served by the agreement of the parties as provided under Art. 38 of our Code is effectively served by the requirements of adequacy of representation and notice. The requirement of authorization is common to the three legal systems though, under our system, given the consent of

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[130] Note 28 supra; see also Mulla, op. cit., p. 421; Simeone, op. cit., Cappalli and Consolo, op. cit., pp. 224-5.

[131] Stephen C. Yeazell, note 2 supra, p.10.

[132] Mulla, op. cit. P.421; Sedler, op. cit., p.63.

[133] Rule 23, Federal Rule of Civil Procedure, note 33 supra; Yeazell, note 9 supra, p. 15; Cappalli and Consolo, op. cit., p.231.

[134] See pp. 13-15 supra.

group members as a requirement, it can be observed, the authorization of the court is expected to be automatic[135] and, therefore, the consent of class members appears to be unnecessary. In other words, under our Code, too, the consent of class members is not necessary because the class suit can only proceed with the authorization of the court; and the court is expected to give authorization where it is reasonably certain that the object served by the consent of class members is satisfied through the adequacy of representation and notice. .

3.4. Adequacy of Representation and Notice

We have seen in the preceding section that the terms used in Art. 38 of the Ethiopian Civil Procedure Code relating to the requirements of numerosity and commonality have denied the class action procedure under our Code of its essence. The requirement of the agreement of class members for being represented in a class suit is not only unique to class actions under the Ethiopian Code but is also unnecessary. The fact that it is unique is indicative of lack of regard to the experience of other countries and, thus, it is submitted, has contributed to its defects and non-use.

Indeed, it is possible that these shortcomings explain, to a very large extent, the absence of class action cases in Ethiopia. The class action procedure as it exists now under our Code is not usable. Why would a member of a class of *several* persons surrender the prosecution and control of his own case to another class member when he can personally or through his personally designated representative appear before the court and conduct his suit under his control and in a manner he thinks fit. Where the persons involved are several, the surrender of such a fundamental right is not reasonably expected and required. Nor do the small claims of only *several* persons justify the cost of class suits. Several persons cannot normally forge a viable litigating unit for small claims. It will not, therefore, be farfetched to believe that the very nature of the procedure under Art. 38 of the Civil Procedure Code resulted in its non-use.

Accordingly, it is suggested that class actions under our Code need to be redefined in terms of numerosity and commonality as these requirements are understood and applied in India and the United States. In these two jurisdictions, the consent of class members to proceed with class suits on their behalf is not only considered impractical but also irrelevant. Since class suits can only proceed upon the certification or authorization of the court, the purpose to be served by individual consent is covered through the process of certification.

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[135] Sedler, op. cit., p.63.

If these arguments are correct, then the requirement of the agreement of class members can safely be dropped. The court should be able to protect the interests of absent class members by making sure that the other imperatives of class action certification are fully complied with. Accordingly, the requirements of adequacy of representation and notice to absent class members assume added significance and hence deserve some more elaboration.

3.4.1. Adequacy of Representation

As noted earlier,[136] adequacy of representation addresses the question of whether the person who is to represent absent class members in a class suit is in a position to fairly and adequately protect the interests of the class members he represents. Art. 38(1) of the Civil Procedure Code does not provide for the responsibilities of such person in protecting the interests of absent class members.

Since the agreement of other class members is required, it is assumed that class members will not give their agreements to a person or persons who are unlikely to protect their interests, apart from the fact that they need to have the same interest. Under Rule 8 of the Indian Code of Civil Procedure, the court has the authority and the responsibility to ensure that the person who represents absent class members proceeds with due diligence so that where, in the opinion of he court due diligence is lacking, such person can be substituted by any other person having the same interest.

Federal Rule 23 of the United States, on the other hand, has made adequacy of representation one of the four prerequisites for class action certification. U.S. practice attaches considerable importance to adequacy of representation for two basic reasons. The first reason is that the person who represents absent class members is entrusted virtually with an absolute control over the conduct of the case. Here is what a U.S. court stated regarding this power of a representative in class actions:

> "One who brings a suit .. holds and retains absolute dominion over it unless the court orders otherwise upon findings made after hearing that it is not being prosecuted in good faith, with vigor and reasonable capacity. There can be but one master of litigation for the plaintiffs. The original plaintiffs assumed the burden of prosecuting the cause to a conclusion and the liability to costs if defeated. It would be impractical to permit litigation in these circumstances to be conducted by the independent action of several plaintiffs acting without harmony and according to divergent ideas as to the establishment of the liability of the defendant. This is the general rule supported by

[136] See pp. 11-13 supra.

many authorities."[137]

Thus, the class representative may fail to call relevant witnesses; he may fail to introduce relevant evidence; he may fail to have the case dismissed or settle it with the defendant. He controls the fate of the interests of absent class members.

The second reason is that absent class members are assumed to have argued out their case through the class representative and hence the principle of *res judicata* applies in respect of all issues of fact and law litigated by the class representative.

> "When the law suit is certified by the trial court as a class action and prosecuted to a judgment on the merits, this judgment will bind all members of the class regardless of their participation in the suit. An adverse judgment will preclude them from ever again litigating either the whole claim or any particular issues. But should the class be victorious, the defendant is bound by the judgment of liability, and absentees need only appear to prove their damages."[138]

Absent class members not only surrender to the class representative, the control of the conduct of the case and, thereby, control over the fate of their interests, but also lose their future claims or defenses. Adequacy of representation is, therefore, an important factor to determine class action certification.

How, then, is adequacy of representation determined. First of all, the representative needs to belong to the class which he represents, for he cannot sue or be sued or defend on his behalf and on behalf of others similarly situated unless he is one of those who are similarly situated in terms of claims or defenses. Secondly, the "representative ought to be squarely aligned in interest with the represented."[139] The representative, i.e., the named plaintiff, ought to stand in the shoes of those whom he represents.[140] These requirements together constitute what is generally referred to as typicality. Typicality is generally held to be satisfied where there is no adversity or antagonism between the interest of the representative and the absent class members in any essential respects.[141] We have noted earlier that it is not the relationship that the number of plaintiffs on record bears to the number of the class members or the amount of claims that matter in determining typicality.[142] Where the whole class is affected by the same injurious

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[137] Simeone, op. cit. P.933

[138] Cappalli and Consolo, op. cit. P.227

[139] Grossman, op.cit., p.18; in U.S. practice, where the interests of the representative are typical of the interests of some groups but not of others, sub-classes can be designated; note also that "the claim of even a relatively small member of a class can be 'typical' even of the claims of larger ones" – Ibid; see also generally pp. 10-11 supra.

[140] Grossman, op. cit., p. 18.

[141] See pp. 10-11 supra.

[142] Grossman, op. cit., p.18; see also p. 11 supra.

act or where the interests affected are protected by the same legal rule or equity rule, typicality is presumed to exist.[143] Typicality of interest is the door through which the representative makes his way to representation of absent class members. But, it is not the only condition that determines adequacy of representation. Indeed, U. S. courts do not attach to typicality of interest much significance any more. They see it as a factor that buttresses the requirement of adequacy of representation.[144]

Secondly, the fact that the interests of the representative are typical of the interests of the absent class members is, though necessary, not sufficient to ensure adequacy of representation. This requirement is based on the due process notion that the interests of any party who is not before the court and who is bound by the adjudication be adequately represented. The question of whether the interests of absent class members can be protected by the class representative is largely a question of fact to be decided by the court having regard to the particularities of each case.[145] Here again, neither the number of persons representing the class nor the size of their individual interest is decisive. Rather, "the crusading zeal of the representative party and the incentive of a substantial contingency fee which may be earned by the representative party's attorney are key."[146] The character of the representative and the qualifications and experience of the attorney are, therefore, vitally important elements in determining adequacy of representation. These are requirements which should be made part of or read into Art. 38 of the Ethiopian Civil Procedure Code.

3.4.2. Notice

Since Article 38 of the Ethiopian Civil Procedure Code requires the agreement of group members for the class action to proceed, it does not require notification. On the other hand, rule 8(2) of the Code of Civil Procedure of India, provides:

> "The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff expense, give notice of the institution of the suit to all persons so interested, either by personal service, or where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct". [147]

This is so because, under the Indian Rule, the class involved is "numerous" and

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[143] See p. 11 supra.
[144] See p. 11 supra.
[145] Grossman op cit., p. 19; see also pp. 11-13 supra.
[146] Grossman, op. cit. p. 19.
[147] Reproduced in Mulla, op. cit. p 420-1.

not "several' and, perhaps more significantly, the class representative does not need to show the agreement of class members to proceed with the suit. Agreement of class members is not made a requirement since it would be impractical to obtain the agreement of numerous persons. "It is, therefore necessary that notice of the suit should be given to all the parties who would be bound by the decree, for otherwise, a person might be concluded by a suit of which he was unaware." [148]

The notice requirement of Federal Rule 23 of the U.S. is applicable in principle to damage class actions, also known as "(b)(3)" actions, although authorities advise U.S. judges to order notice in other class actions, too.[149]

It is important to note here that the cost of notice can be so prohibitive that this requirement can render the class action procedure an empty shell. This is even more so when one considers the high standard of service of notice provided in Rule 8 (India) and Federal Rule 23 (U.S.). Under Rule 8, personal service is the normal requirement; only where the plaintiff can show that this is not reasonably practicable that he can be allowed the second type of service, i.e., public advertisement. In countries like ours, these types of service of notice may be prohibitively high. Under Federal Rule 23, the requirement is even more demanding.[150]

It may be observed here that in the case of Ethiopia, the purpose of notice to absent class members may essentially be limited to enabling them to "opt-in" as is provided for under Article 38(2) of our Code and Rule 8(3) of the Indian Code or to "opt-out" as is the case in U.S. law and practice (our Civil Procedure Code as well as the Indian Code of Civil Procedure do not have provisions for "opting-out", i.e., exclusion of a person from the suit and its consequences upon his application). The opportunity to opt-out is predicated upon the pursuit of individual prosecution of one's own case and this is in conformity with the imperatives of due process of law. However, those who opt-out rarely pursue prosecution of their case largely due to the high cost involved in private prosecutions.[151] The possibility of private prosecution is even more remote in small claims cases. On the other hand, the right to opt-in is an essential aspect of due process of law; this right needs to be respected as far as possible by giving due notice to as many class members as practicable.

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[148] Ibid, p.425.
[149] Cappalli and Consolo, op. cit., p. 231,note 63.
[150] See p.15-16 Supra, esp. notes 91 and 92.
[151] See Cappalli and Consolo, p. 230 note 63 and p. 232 note 6 in addition to the discussion of notice on pp 15-16 supra.

However, it must be observed here also that the purpose served by notice in class suits is to a very large extent served by the requirements of adequacy of representation. This is because the interests of absent class members are certain to be protected with or without their knowledge of the class action suit where the interests of the class representative are the same as theirs and where the representative has all the qualities required – honesty, zeal, capacity to retain qualified and experienced lawyer, etc.[152] These are matters with which the court needs to be satisfied before granting class action certification. And it is suggested that this is the point on which our law needs to be express and effective. In this country, to require effective notice could prove to be too much in terms of cost and, therefore, impractical. This does not mean that notice will have to be dropped altogether. It only means that, initially, i.e., for the purpose of class action certification, simple newspaper advertisement[153] can be sufficient. Where the class representative wins the case, he can afford better and effective means of notice to invite class members to prove their individual damages and collect their awards.

3.5. "Requirements" for Class Action Certification

As we noted earlier,[154] for a certain suit to be certified as a class suit, it is not sufficient to satisfy the four conditions which are usually referred to as "prerequisites"; there are other imperatives which need to be fulfilled. These other imperatives are usually referred to as "requirements"; these requirements can only be met by showing to the satisfaction of the court that the suit falls under one of the three categories discussed above.

Since these requirements are by their very nature additional conditions for class certification, they restrict the availability of class suits as a remedy. Those who advocated for their express inclusion in Federal Rule 23 seem to have been impelled by the need to protect the normal individual guarantees of due process of law. And, indeed, due process of law as a fundamental tenet of justice is a value which should not be compromised except for a higher societal interest. It so happens that class action suits also serve the same purpose of justice as the guarantees of due process of law.

In U.S. practice, a policy decision has already been taken that class action suits which do not fall under any of the three categories do not serve the purposes of justice and, in such cases, the normal due process of law is the best method for the

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[152] See, for example Yeazell, From Medieval Group Litigation to the Modern Class Action, note 9 supra, p.15.
[153] Cappalli and Consolo, op. cit., p. 232, note 64.
[154] See pp. 8-15 supra.

attainment of justice. In Indian practice, however, the law attaches no legal significance to the category to which a class action suit belongs. Thus, the primary concern is to extend the rules of standing and to enable social action groups help the poor and the disadvantaged sections of the population to have access to justice.[155] Redress of the injustice done to the poor, who otherwise could have no access to justice, is more important than the protection of individual rights to the due process of law. And in so far as Art. 38 of the Ethiopian Civil Procedure Code is silent on requirements, it seems that Ethiopian law does not attach any legal consequence to the category under which a class action suit falls. We are entitled to draw the conclusion that in Ethiopia, too, the primary concern is affording access to justice to the poor and less advantaged sections of our population. For the moment at least, this seems to be the right approach.

This, of course, does not mean that Indian and Ethiopian courts can safely disregard the elements embodied in the requirements of class action suits. For example, it will be unjust and inefficient for any court to certify a class action suit where the common questions of fact and law do not predominate over individual questions.[156] Where individual questions outweigh both in extent and complexity, individual suits will be preferable. Nor can any court certify any class action suit unless it is satisfied that the class action suit is superior to individual suits in relation to the time to be spent on common issues and individual issues. These are factors which the court must consider in the exercise of its authority to certify or authorize class action suits.

In a similar vein and perhaps more important from the practical point of view, a court may have no alternative other than certifying a class action suit where it is made clear to it that separate actions "inescapably will alter the substance of the rights of others having similar claims".[157] This is also the case where numerous plaintiffs bring a claim against a fund which is insufficient to satisfy all claims.[158] This is so because individual judgment decreeing recovery from the fund may so dissipate it that the rights of others similarly situated will be definitely impaired.[159] Similarly, class action certification is unavoidable where varying adjudication with respect to individual members of the class would establish incompatible standards of conduct for the party opposing the class.[160] This requirement is clearly applicable where the opponent is required legally or in practice to treat all the class members equally. Finally class action suits in which plaintiffs pray for final

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[155] Rajindar Sachar, "social Action Litigation: Activist and Traditionalist Judges", The Supreme Court Cases, Eastern Book Company, India (1987), Vol. 1, pp. 14-16.
[156] Landers it.al op. cit., p. 560.
[157] Ibid, p.557; Grossman, op. cit. p.20.
[158] Landers et. al., op. cit., p.558.
[159] Grossman, op. cit., p.20.
[160] Ibid, pp. 19-20.

injunctive or declaratory judgments are obvious suits whose certification is normally expected. These suits mainly involve cases where the defendant has acted or refused to act with respect to the class as a whole. They are often used in civil rights cases where the defendant has created a class of injured persons by his own actions.

These factors need to be considered by Ethiopian Courts. It is, however, difficult to suggest that all class suits need to satisfy them for certification. Provided the prerequisites are fulfilled and provided further that they can advance the opportunity of the poor to have access to justice, class action suits should be certified notwithstanding that they do not fall under any of the categories.

3.6. Recovery of Damages

3.6.1 Sharing in Litigation Expenses

In class action suits, claims are brought against the defendant, on behalf of the class representative himself and on behalf of other persons whom the class representative represents. The class representative becomes the plaintiff and the other class members become plaintiffs only through their class representative. The class representative assumes the authority to enter into service contracts, i.e., to incur expenses on behalf of the class and also to be a judgment debtor or creditor, on his own behalf and on behalf of all others similarly situated. All others similarly situated either lose or gain in the same way as the class representative.

Where the class representative loses his defense and the class is held to be liable, only the defendants on record on whom service of process is served bear the consequences. It is generally the rule that the judgment against the class cannot have the effect of imposing personal liability on absent class members. Judge Johnson in Montgomery Warly and Co. v. Langer (1948) is quoted as having held:

> "No one has ever previously believed that a federal court was entitled, on the basis of class representation alone, to enter a personal judgment of pecuniary liability against an individual who was in no other manner being brought into court."[161]

The basis of this rule is the constitutional right to be at risk only after being brought into court as a party by appropriate process.[162] Thus, unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgement recovered in such proceeding will not affect his legal right.

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[161] Simeone, op. cit., p. 930.
[162] Cappalli and Consolo, op. cit. P. 234.

A somewhat modified version of this rule applies also in India. Mulla explains the general rule thus, "... when a person is allowed to represent others as defendants in a representative capacity, the decree passed in the suit will be binding on the property of the persons represented but that they will not be personally liable unless they are *eo nomine* [named parties] on record."[163] In India, therefore, the absence of a class member from a class suit does not prevent the execution of the judgment on his personal property; this means that his absence is deemed to have no effect on his constitutional right of due process except that the judgment will not impose personal liability other than on his property.

When a party brings a class suit on his behalf and all others similarly situated and wins the case all others similarly situated have the duty to share in the expenses incurred by the class representative. The class representative, though entitled to his share of damages, will have incurred expenses much larger than what he can recover in the form of damages. In addition to his personal expense, he will have contracted huge sums of attorney's fees. As regards the liability of those represented in a class suit brought to a successful conclusion, the Supreme Court of the United States laid down the rule in Trustees v. Greenough (1881) thus:

> "... where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bond holders having an equal interest in the fund... and done at great expense and trouble on the part of the complainant; and other bondholders have come in and participated in the benefits resulting from his proceedings... It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage"[164]

The principle involved here is that no represented person may gain unless he submits to bear his own proportion of fees. And in many cases, such expenses need to be distributed among class members proportionately since their claims could be several though they all share common issues of fact and law. The class attorneys are, therefore, paid an amount assessed by the court and deducted from the common fund of damage recovered by the class representative.[165] The fees paid to attorneys take into account services rendered plus risks assumed by attorneys for, since they often advance court fees and other litigation costs, they are exposed to the risk of getting nothing at the end of the proceedings.[166]

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[163] Mulla, op. cit., pp. 426-7.
[164] Simeone, op. cit., p. 951; see also Cappalli and Goasolo, op. cit., p. 230, note 54.
[165] Ibid, p. 229, note 50; Yeazell, Civil Procedure Note 3, supra, p.1001.
[166] See ibid, p. 229, note 50 and 51; Yeazel, Civil Procedure, p. 1001.

3.6.2 Managing Damage Differences

In U.S. class action practice, the issue of individual differences in damage calculations for each class member is one of the factors that determines the manageability of class actions and, therefor, the certification of class action suits. This issue inevitably arises in modern class actions because of the fact that class action suits are now possible under Federal Rule 23 in respect of class members who suffer damages severally by the same act or series of the same acts of the defendant but are united by common questions of fact and law. In this regard, it has been held that anticipated difficulties to calculate and allocate individual damage should not defeat the class action where it is clear that wrongful conduct has resulted in identifiable loss.[167] The rationale of this rule was stated as regards securities class action, in Grad v. Memorex Corp. (1973), thus:

> "If liability is found, it is unquestionable that the court has the duty to see that wronged shareholders recover. To deny a class determination on the ground that the computation of damages might render the cause unmanageable would encourage corporations to commit grand act of fraud instead of small ones with the thought of raising the specter of unmanageability to defeat the class action. The court does not deceive itself in believing that this task will be easy; it does believe, however, that justice requires it be attempted"[168]

A number of alternative methods are adopted to calculate individual damages.[169] Some courts have used the same standard formula to fix liabilities and damages of class members: thus, each class member was charged with the same unlawful odd lot differential (Eisen v. Carlisle and Jacquelin (1968); in Illinois v. Harper and Row Publishers (1969), buyers were deemed to have been affected in the same manner and to the same extent. In anti-trust and securities cases, total sales figures and other summary and statistical techniques were used to prove damages on an aggregate or class wide basis. Some other courts proceed by separating liability and damage issues so that if the defendant is found not liable, the court is spared from becoming embroiled in discovery problems relating to damage calculations. The deferral of damage computation until after liability has been established has thus been recognized as an effective procedure to manage class actions. Still other courts use class wide trial followed by a test case for damage. This method involves trial for all class members with respect to liability, and the damage claims of only selected class members. Such procedure is preferred by some courts on the

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[167] Lee Freeman, Jr., "Manageability of the Action: The Main Battleground", Class Actions 1975, Note 51. Supra, p. 49.
[168] Ibid, p. 50.
[169] Ibid, pp 50-58; also Cappalli and Consolo, op. cit., p. 233.

ground that it retains the advantage of total separation of damages and liability issues and at the same time can induce the defendant who has been impressed with the plaintiffs proof of damages in particular cases to settle the claims of other class members.

The utility of separating liability issues from damages issues is augmented where, as practiced by some courts, a special master is relied upon to deal with the details and masses of documentary evidence adduced in support of individual damage claims. This method can be effectively used in legal systems like Ethiopia's where the right to a jury trail does not give rise to any constitutional controversies since no such right is recognized by the constitution.

Finally, where the identity of injured class members is not known, and aggregate damage is nevertheless proved, most courts use the "fluid class recovery" method.[170] This method is grounded on the notion that there may be cases, most notably consumer class actions, where absent class members cannot be identified or the class may be so large and the average individual claim so small that the total cost of distribution would exceed the aggregate amount recovered for each class member. In such cases, the concept of "fluid class recovery" has been advanced. Thus, defendants would not be permitted to keep ill-gotten funds and recovery would be used to benefit those individuals having future dealings with the defendants.

Each method of dealing with damage recovery issues outlined above can best be used by having regard to the particular case before the court. The adoption of any of these methods, therefore, needs to be left to the discretion of the court. It appears that the last two methods are perhaps more expeditious and can save the time of the courts by entrusting the administration of details and technicalities to the management of specialized professionals. Ethiopian courts may, therefore, be advised to pay particular attention to appointing special masters to deal with details of damage computation and also to administer "fluid recovery funds" in the event illegible class members cannot be identified.

4. Concluding Remarks

The utility of class actions lies in the fact that they provide a procedural device

[170] Ibid, p. 57, see also Yeazell, Civil Procedure, note 3 supra pp. 1002-3 see also Jonathan M. Landers, James A. Martin, Stephen C. Yeazell, Civil Procedure, (2nd edition), Little Brown and Company, Boston, Toronto (1988), pp 565, 587-8; note that past victims of the class who proved their claims cannot benefit from the unclaimed fund, because, as the court in Eisen v. Charlisle and Jacquelin held, "such a recovery would expropriate funds belonging to class members who had not asserted their claims and give a windfall to those who claimed" Ibid, pp. 582-3.

for numerous persons to come together and forge one viable litigating unit. It thus enables group members to confront a more powerful defendant or plaintiff. It paves the way for the vindication of wrongs suffered by individuals, who, were it not for this device, would have neither the capacity nor the inclination to pursue the case. At the same time, the device enables defendants to settle the issue of their liabilities in one suit and thus to save themselves a multiplicity of court cases entailing substantial cost. Once the issue is settled for or against the defendant the principle of *res judicata* can be invoked to bar subsequent suits by individual class members.

Similarly, the class action device saves the courts time and labour because it helps them avoid trying the same issues of fact and law which were it not for this device, would arise in a multiplicity of cases pursued by class members individually. The class action serves yet another and no less significant social purpose; it serves as a deterrence of illegal conduct especially by big business groups, and even by the state itself through its organs. Absent class action procedure, an illegal act of such bodies can cause widespread damage to a large number of citizens and they can get away with it without any penalties. Such cases can be too overwhelming for the ordinary law enforcement machinery of the state. The damage claims of individual victims can be too small to be pursued in court individually. The class action is, therefore, the most efficient and effective deterrence for such unlawful conduct.

The end of justice is perhaps the more fundamental purpose the class action procedure serves. Justice necessitated the invention of the class action and provides its *raison d'etre*. Today, in the United States and India, the class action is one of the most important remedial procedures that affords the less advantaged sections of society access to justice. Of the multitude of citizens who are victimized by a wrongful act of an industry, a wholesaler, a school, a company, etc, few are aware of the source, the cause and consequence of the wrongful act and of their rights against the wrongdoer.[171] A few of the victims who are aware and who can raise the required financial resources can take the initiative and bring an action on their own behalf and on behalf of all other victims. Hence, the class action is very much related to the practical aspects of justice; "it takes justice to places where people live, work and love."

From this point of view, "the class action is a powerful tool for actualizing important rights which sit grandly in revered documents like constitutions and EEC treaties but which generally remain no more than noble thoughts.[172]

[171] See for example Cappalli and Consolo, op. cit., pp. 221-2.
[172] Ibid, p. 224.

In its aspect as serving the ends of justice, the class action procedure is very much related with social action litigations. Whereas, today, class suits are usual in the United States mainly for the protection of consumers, this purpose does not appear to be of topical significance in countries like Ethiopia where many of the people live either below or just on the poverty line. "Every country must orient social action litigation to the peculiar and pressing problems it faces. ... No two countries have identical problems nor identical remedies. ..."[173] Thus social action litigation must concern itself with the real problems of the poor and the deprived.

In this connection, Justice Bhagwati of the Supreme Court of India is quoted as having stated:

> "It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and, in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law."[174]

The poor and the deprived can only be won for the court of law if there are adequate procedural devices, along with substantive rights, of course, by which they can get remedies and redress wrongs they are made to suffer. The class action procedure is, therefore, an appropriate device for the poor and the deprived because it enables them to pull their resources together and achieve judicial redress which would be unattainable if they were to proceed individually. It is a necessary and practical way of affording to the poor and the deprived access to justice.

It is, therefore, suggested that the limitations of Article 38 of the Ethiopian Civil Procedure Code be revised with a view to making the procedure available not only to several persons having the same interest but also to numerous persons whose claims could be several but who are united by common questions of fact and law. Also the requirement of the agreement of class members should be dropped since, as Yeazell staed:

> "Interest provides the substitute for individual initiative and consent; the class action justifies action that legally binds another without his consent by pointing out that his interest is represented in a situation in which it is inconceivable that

[173] Sachar, op. cit., p. 15.
[174] Ibid, p.14.

he would not wish his interest to be so pursued."[175]

Accordingly, Article 37(2)(b) of the constitution needs to be so interpreted as to render the limitations of Article 38 of the Civil Procedure Code inapplicable. Only thus, it would seem, can the class action procedure be an effective constitutional remedy in Ethiopia.

[175] Yeazell, op. cit., note 30 supra, p. 15.