The Doctrine of *Res Judicata* under Ethiopian Law: Essence and Conditions for its Assertion

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1. Introduction

A system of civil justice strives to create symmetry between conflicting interests such as accuracy and cost, truth and efficiency, quality and speed. The rules of procedure aim at creating the steps to be followed to unearth truth and achieve justice. At the same time, because of resource and time constraints, it must be ensured that the process is effective and efficient. The dilemma a legal system encounters in balancing accuracy of judgments and efficiency of process is succinctly presented as follows:

> It is axiomatic that the object of procedure is to render litigants their due; namely, to return judgments which correctly apply the law to the true facts. But this does not mean that the state has an obligation to provide the most accurate civil procedure regardless of cost. It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. Yet it would be equally absurd to suggest that procedure need not strive to achieve any level of accuracy to satisfy the demands of justice.[1]

Legal systems grapple with the futile effort to strike the balance between these values a procedural law aspires to cater for. They are, therefore, compelled to tilt towards one of them. It is crucial "to periodically inquire whether the administration of justice reflects an optimal compromise between accuracy and cost and whether it fulfills the needs of the community at the time."[2] The extent to which a system of procedure has to strive to ascertain the truth hinges on procedures which strive to provide a reasonable measure of protection of rights, commensurate with the resources that a country can afford to spend on the

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[1] A.A S Zucjerman, "A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice", Journal of Law and Society, vol. 22, (1995), P. 160, available at http://www.jstor.org, last accessed on 13/2/2014

[2] *Ibid.*,P 161

administration of justice.[3] Generally, despite the rhetoric that the search for truth is of a goal or in some cases the fundamental aim of the law, countries usually prefer to live with an erroneous or unjust decision, rather than allowing parties to litigate forever. *Res judicata* is a doctrine which reflects the stance a legal system takes in this direction by virtue of which a case is made to rest irrespective of the outcome which may be contrary to truth and the law.

As we will see below, it is not right to conclude that *res judicata* is a universal principle recognized in all nations. If we look at the experience of some countries regarding the determination of the underlying principle of their procedural laws, we witness that they have diversified emphasis. For instance, Jewish law does not accept an approach whereby a judgment is irreversible even when incorrect[4] since discovery of the truth[5] is an element of justice to which all else is subordinated. On the other hand, the majority of jurisdictions across legal traditions recognize an end to litigation in spite of the fact that the decision could be erroneous or has unjust outcome.

The doctrine of *res judicata* is one of the tools employed by the Civil Procedure Code of Ethiopia[6] to end litigation. The Code aims at efficiency with the ultimate

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[3] *Id.*

[4] In the Jewish legal system, a judgment is in principle subject to revision, normally by the court that issued it. Courts revise judgments if new evidence comes to light undermining the facts on which the judgment was based, provided that the party seeking to adduce the new evidence is not debarred from so doing. Judgments are also subject to revision for errors in the application of the law. See Yuval Sinai, "Reconsidering *Res Judicata*: A Comparative Perspective", Duke Journal of Comparative & International Law, Vol 21:353(2011), Page 388

[5] Jurisdictions declare that they are committed to establishing the truth through procedural laws even though this cannot be the overriding principle because of the cost it entails. For instance it is stressed that one of the fundamental tasks of the Law of Civil Procedure of the People's Republic of China (Law of Civil Procedure) is to ensure the courts establish the truth based on facts even if it must also recognize an end to litigation whatever the outcome. See Zhong Jianhua & Yu Guaghu, Establishing Truth on Facts: Has the Chinese Civil Process Achieved this Goal? Chinese Civil Process (Spring, 2004), p. 1, available at http://www.law.fsu.edu/journals/transnational/vol13_2/yozhong.pdf, last accessed on 26/05/2014

[6] The Civil Procedure Code of the Empire of Ethiopia Decree No. 52 of 1965 (herein after "Civil Procedure Code or simply the "the Code"), Article 5. The general principle is that a case decided cannot be re-litigated. But, there are exceptions to the rule, the main one being review of judgment. The law recognizes an exception to the rule under article 6 of the Code by allowing review of judgment.

goal of the discovery of truth that, however, cannot be attained if erroneous decisions are allowed to stand by means of *res judicata*. Hence, the two most important goals, ending litigation and seeking justice, come into conflict. Nevertheless, the Code has made a choice in article 5: unjust or factually and legally wrong decisions are allowed to sustain and produce effect in return for stability and efficiency of the system. This article examines the essence of the doctrine and the law applicable to it with a view to establishing whether the balance between these two conflicting interests i.e., ending litigation vs. discovery of truth, has been struck at the right point.

It is generally accepted that the doctrine of *res judicata* will be operational as a bar to subsequent suit only when a former judgment meets certain conditions. However, not all countries employ similar yardsticks in addition to variation in terminology. This article examines the essence of the doctrine of *res judicata* and explores the requirements that need to be fulfilled under Ethiopian law for the proper application of the doctrine to bar subsequent suit. The article also explores exceptions to the application of the rule on *res judicata*. With this end in mind, this piece is divided into the four parts. The first section introduces the concept while the second part dwells on the purpose and significance of the concept of *res judicata*. The requirements for asserting res *judicata are* the conditions which must be fulfilled so that it can be a defense in a subsequent litigation which conditions are listed and explicated in the third part. Finally, the article draws its conclusion from the discussion presented.

2. Conceptual Framework

2.1. Meaning

"*Res Judicata pro veritate accipitur*" is the full Latin maxim which has, over the years, shrunk to mere "*Res Judicata*". The word '*Res Judicata'* is derived from Latin which literally means, a thing adjudged. It is a rule that says a final judgment on the merits by a court having jurisdiction is conclusive between the parties to a suit as to all matters that were litigated or that could have been litigated in that suit.[7] Ethiopian law doesn't define the term although it can be

[7] Black's Law Dictionary defines it as "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." See also Henry Campbell Black., Black's Law Dictionary 4th ed. (1968); See also C. A. Dhanashree Prabhu, Res Judicata in Tax Matters, http://www.hiregange.com/downloads/April_2013-E-Newsletter.pdf, accessed on 6/13/2013

gathered from the contents of the relevant provisions that it subscribes to this traditional meaning of the term.

Variation in the purview of the doctrine can be observed depending on the legal system one may be examining. In this regard, Sinia[8] has identified three models, namely, broad-scope *res judicata*, narrow-scope *res judicata* and non-finality of judgments. The first approach is adopted mainly in common law legal system which is broader precluding subsequent suit on the ground of identity of cause of action or that the issue is a necessary ingredient of a former suit. The second model is that of continental Europe which does not recognize the concept of *res judicata* in the broad sense as is the case in common law countries. For the continental legal system, the fundamental principle is that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.[9] The third approach rejects many of the elements of *res judicata* and emphasizes that discovery of truth is a paramount goal of justice all other concerns being subsidiary. Hence, in principle, a party can usually get a judicial decision reversed after the judgment has been handed down and judgments which otherwise are binding, can be re-opened for reconsideration based on an error in the judgment or on newly discovered evidence.[10]

As far as the Civil Procedure Code of Ethiopia is concerned, it appears to have borrowed the broader approach together with the provisions by which not only matters explicitly raised in the proceeding but also matters which could or should have been raised as a ground of defense or attack are barred by *res judicata*. Another inquiry that should be made is whether both claim and issue preclusion, which are the two main forms of *res judicata* in most countries belonging to the common legal system are incorporated in the Code.

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[8]Yuval Sinai, "Reconsidering Res *Judicata*: A Comparative Perspective", Duke Journal of Comparative & International Law, Vol. 21:353(2011), p. 357 ff

[9]*Ibid*, p.384

[10] Ibid, In the Jewish legal system, a judgment is in principle subject to revision, normally by the court that issued it. Courts revise judgments if new evidence comes to light undermining the facts on which the judgment was based, provided that the party seeking to adduce the new evidence is not debarred from so doing. Judgments are also subject to revision for errors in the application of the law, See Yuval, *Supra* note 8, p. 215

In the common law system, the doctrine of *res judicata* has largely two main forms even though the terminology is not the same throughout.[11] Thus, distinction is made between issue preclusion and claim preclusion although the latter is sometimes simply referred to as *res judicata* as it is *res judicata* proper. The doctrine of issue preclusion or collateral estoppels provides that a court's final decision on an issue actually litigated and necessarily decided in a previous suit is conclusive of that issue in a subsequent suit. Issue preclusion is broader in that it applies to claims for relief different from those litigated in the first action and narrower in that it applies only to issues actually litigated.[12] Issue preclusion may arise where a particular issue forming a necessary ingredient of a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.[13]

Sedler acknowledges that the issue whether *res judicata* bars a re-determination of any issue that was determined in a previous suit is unresolved.[14] He, however, contends that this extended application of the doctrine is not perceived under Article 5 of the Civil Procedure Code of Ethiopia. He maintains that the law does not prohibit re-litigation of an issue between different parties even if one of the parties was a party to the former suit.[15]It is not clearly pronounced in our Code whether the doctrine applies to cases where the other requirements such as identity of subject matter are not met. That aspect of issue preclusion which extends *res judicata* to suits relating to a different subject matter in which the issue is raised is not addressed. The requirements[16] in article 5 are cumulative and the extension of the *res judicata* to suits which deal with a different subject matter does not appear to be tenable.[17]

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[11] In England and Canada the forms are called "issue estoppel" and "cause of action estoppel;" in U.S. terminology, the two forms are referred to as "issue preclusion" (traditionally known as "collateral estoppel") and "claim preclusion", respectively.

[12] Diane Vaksdal Smith, Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case, http://www.burgsimpson.com/pdf/civlitjulyv01clean.pdf, p. 1-2 accessed on 28/6/2013

[13] *Supra* note 10, P. 358

[14] R. A. Sedler, Ethiopian Civil Procedure, (1968), p. 327

[15] *Ibid*, p. 320

[16] See section 4 below, p. 11

[17]The Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960 (herein after the Civil Code), Art. 1898 reads "Proceedings instituted against one of the debtors shall be no bar to

2.2. Purpose and Significance

The doctrine of *res judicata* is deemed to have universal application forming part of the legal systems of all civilized nations even though there are legal scholars who challenge the foundation of the doctrine and a jurisdiction which does not accept the basic legal tenets of *res judicata.*[18] The motivations for revising decisions, it is argued, are "the hopes of correcting error; of altering outcomes based upon changed circumstances; of imbuing some decisions with more meaning by having them made repeatedly and sometimes by prestigious actors, of giving individuals a sense of having been fully and fairly heard."[19]It is also maintained that accurate application of laws serves the goals of legal rules such as maximization of economic value while judicial mistakes impose social cost and thus the procedural system should strive to reduce those costs. Re-litigation of factual issues can be done economically in the trial court because this court has already examined the main factual aspects of the case and, unlike the appellate court, the trial court does not need to learn all the details of the case to reconsider its initial decision. Proponents insist that some major fairness factors weigh against the rules of *res judicata,* among them "the fair-outcome value of deciding on the merits rather than on technicalities and of refusing to curtail society's search for truth".[20] Hence, procedure, it is contended, should frown on any obstruction to correcting mistakes.[21]

On the other hand, proponents of the doctrine insist that the presence of errors in a prior judgment is irrelevant to *res judicata* and a second round of litigation is unlikely to be more accurate; re-adjudication will not avoid error or costs. Although humans are fallible, the errors committed at the trial level can be corrected at the appeal level as the function of the appeal is primarily to reduce

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similar proceedings being instituted against the other debtors." In other words, the decision given in the case involving one of the defendants does not operate a bar against a suit against other defendants. On the other hand relying on Indian law The decision of a matter which is directly and substantially in issue between the parties to a suit operates as *res judicata* between the same parties or their representatives in interest in a subsequent suit irrespective of the fact whether the subject-matter of the two suits is identical or is different. See note 55 infra, p. 351

[18] *Supra* note 8, p. 354

[19] For a detailed discussion on the arguments for and against *res judicata* see Sinai, *Supra* note 8, p. 378

[20] *Id.*

[21] *Supra* note 8, p. 379

the incidence of such errors.[22] It can be witnessed that, for these and other reasons the concept has been incorporated in almost all procedural laws. But, at the same time *res judicata* could result in prevalence of injustice by allowing erroneous, unjust and blatantly wrong decisions to be enforced curbing any room for rectification. Thus, the choice between justice and stability or efficiency is a riddle legal systems encounter in designing their procedural laws. In fact, as has been elucidated above, legal systems are not at one as to how they address the predicament. For instance, pursuant to the common law approach, the court does not acknowledge the doctrine of *res judicata* on its own initiative whereas the idea that *res judicata* primarily concerns the public interest has prompted many continental countries to adopt an absolute principle of *res judicata.*[23]

It is noted that the basic proposition of *res judicata*, namely, a party should not be allowed to re-litigate a matter that he has already litigated, remains the same even if the concept has undergone changes with the evolution of procedural laws.[24]However, despite the general observation that can be made regarding the rationale for barring re-litigation, no consensus among jurists and legal systems exists as to the justification for the incorporation of the rules of *res judicata*. Basically, there are three principles which underlie the concept giving justification for its incorporation in laws.[25] The first principle is that no man should be vexed twice for the same cause. A dispute between parties should be settled once and for all and none of the parties should be allowed to trouble the other by dragging him/her to court now and again for the settlement of a difference relating to the same subject matter. Accordingly, through the principle of *res judicata* the law avoids inconvenience and harassment of parties.

The second justification is that it is in the interest of the state that there should be an end to litigation. Judicial economy requires that there should be an end to lawsuits. Courts are public fora using scares public resources mobilized to resolve disputes. The state has interest in the conclusion of disputes which

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[22] *Id.*

[23] *Ibid*, page 385. It is referred to as absolute because its application is not dependent upon the will of the parties and the court can initiate it by itself.

[24] *Ibid*, P. 353

[25] C.K. Takwani, Civil Procedure,(4th ed. 1997). P. 47; Sinai classifies the justifications for the common law rules of *res judicata* into public policy and individual rights, economic efficiency of courts and consistency and stability. See *Supra* note 8, p. 60-61

cannot be allowed to continue only because one of the parties wishes so consuming scarce public resource.

The third reason is judicial decisions must be accepted as correct. If cases are submitted to different courts so that they can be tried to determine the settlement, then it is possible to have contradictory decisions adversely affecting the credibility of the system. Confining the parties to one litigation averts the possibility of two contradictory decisions. The ultimate reason why the verdict of a court as to the law and facts prevails is that such "pronouncement is *ex officio* and the political sovereign has said through organic law that judicial pronouncements shall prevail."[26]The doctrine thus ensures the conclusiveness of a judgment rendered by a court of law and ensures the integrity of the latter.

The foregoing reveals that the doctrine is dictated by both public policy and private interest which laws readily take into account.[27] In the absence of this doctrine, there will be no end to litigation, parties will be harassed with unceasing suits on the same subject matter and courts will be over burdened with litigation with no end in sight. Hence, the doctrine benefits both public and private interests. The query as to the fundamental justification for preclusion leads us to divergent conclusions contingent upon the legal system on may be surveying. In the common law system, *res judicata* is an affirmative defense available to a party to be raised in proceedings. Courts don't raise it by themselves which in effect denotes that the public has no interest so long as parties are willing to re-litigate by waiving their right to raise it as a defense. It is up to the party, to invoke or to waive the right, then the courts have no room to intervene to enforce the public interest purported to be implied in the concept. The continental system, on the other hand, mainly requires the court to take into account a former judgment on its own initiative.[28] It is only then that we can say there is public interest which is primarily promoted through the application of this doctrine.

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[26]Hazard Geoffrey C. Jr., "Preclusion as to Issues of Law: The Legal System's Interest", Iowa Law Review, Vol. 70 (1984), p.82. Available at http://repository.uchastings.edu/faculty_scholarship/959

[27] *Supra* note 28 , p.47

[28]In several European countries, explicit statutory provisions can be found to this effect. See Yuval, *Supra* note 8, p. 385

Coming to our legal system, just like the law, it appears that we have to borrow the justification for the incorporation of the doctrine and for the scope it is allowed to have in Ethiopia since it is not a home grown concept which evolved through practice and theoretical back up. The source of Ethiopia Civil Procedure Code which contains the precepts governing *res judicata* is its Indian counterpart[29]. It is, therefore, natural to resort to the rationale why the law is designed as it is so as to decipher the justification applicable to Ethiopian law. Accordingly, we may embark on comparing section 11 and article 5 of the Indian and Ethiopian Civil Procedure Codes, respectively. Section 11 of the Indian Code reads:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."[30]

Article 5 reads:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided."[31]

A mere comparison of the wordings of the two provisions exposes that the only divergence pertains to the mention made about the court which gave the decision on the former suit in the Indian Code. Apart from this distinction, the meaning of which is discussed below, the two provisions can be said to be identical.

In keeping with the legal tradition which is its source, it can be maintained that the Ethiopian Civil Procedure Code limits the application of the doctrine to

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[29]Even if Sedler insists that the borrowing was selective, at least regarding the doctrine of *res judicata* the rules are copied as they are. Supra note 16, p. 3 Ultimately, we can say that those rules are influenced by English Law as "the substance of the rule as enunciated and recognized in England was, however, approved of and acted upon in numerous cases by the Judges, and imported, almost *res integra*, in India. See, Infra 55, p.2

[30] The Code of Civil Procedure of India, 1908 (as amended)

[31]Civil Procedure Code, article 5

situations where parties raise the defense. In other words, it is not purely a public policy consideration even if that can be one of the justifications for the position taken in the law, namely, giving effect to objection to re-opening a suit. Had it been public policy of the state to proscribe re-litigation, in the same manner as is the case in the Continental legal tradition, the court would have been empowered to dismiss suits which re-open cases already decided on its own initiative. In line with this contention, as the law stands now, it is only the will to invoke the defense by a party[32] that can do good to the legal system by bringing about its efficiency and integrity.

Nevertheless, the Federal Supreme Court Cassation Division gave a decision saying that courts are required to reject a suit lodged by a party when they discover in the course of the proceeding that it is submitted again. In the case of Fatuma Jemal v. Ali Bekir[33], the court reversed the decision of the lower courts on the ground that they should have closed the file when they learnt that the suit is *res judicata*, which knowledge, the court said, can be inferred from the decisions that that same case was decided by the Sheria Court. The decision given unearths the issue whether *res judicata* is an objection to be raised by the parties only. Hence, even if this decision is binding[34] it is worth inquiring whether it actually reflects the spirit of the law.

The relevant provisions from which we can gather the intended purpose of *res judicata* are article 5 and 244/1/b of the Code where reference is made to the doctrine. Reading the English version of the Code, it is vivid that a court is prohibited from re-opening a suit. The Amharic version[35] imposes the proscription on the parties who cannot lodge an application to re-litigate a suit barred by *res judicata*. Subscribing to the approach adopted by the authoritative version, it becomes imperative to pose the query as to the outcome of an

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[32] The court is sometimes identified as a third participant in the controversy, in addition to the patties, which has a strong although not unequivocal interest in seeing that things judicially decided-*res judicata*-stay decided.

[33]Federal Supreme Court Cassation Division, civil file No. 58119 decided on 21/2/2004 EC), Federal Supreme Court Cassation Division, Vol. 13, p. 37

[34]This interpretation is binding by virtue of Article 10/4 of Federal Courts Proclamation No. 25/1996 Federal Negarit Gazeta, 2nd year, No. 2 as amended by proclamation No. 454/2005 Federal Negarit Gazeta 11th year,No. 42.

[35] It reads "... በክርክሩ ላይ የነበሩት ወይም ከተከራካሪ ወገኖች መብት ያገኙ ሶስተኛ ወገኖች በዚያው ነገር ሁለተኛ ክስ ለማቅረብ አይችሉም።"

application lodged by a party that may re-open a suit. If an objection is raised by a defendant as per article 244/1/b, the court obviously upholds it and dismisses the suit.[36] It remains to be examined as to what the role of a court will be in the absence of such an objection raised by a party.

The law classifies preliminary objections into those which may and those which may not prevent the court form giving a valid judgment or those which can be waived and those which can never be waived as defenses. Basically, the classification of objections into these categories is a function of the underlying interest protected thereby. Even if the policy consideration of the doctrine cannot be gathered from the relevant provisions of the code, considering the position taken in India which the origin of the law[37], it can be affirmed that the fundamental interest is that of the individual. It is submitted that if a party who secured a decision in his favour is not willing to bring into play the objection of *res judicata*, he is entitled to do so.[38]*Res judicata* is, therefore, one of the objections to be raised by a party which, if not raised, does not prevent the court from rendering a valid decision. Courts should continue to consider the suit and there is no room for them to raise it, if it is waived by the party benefiting therefrom. Following this line of argument, it is to be concluded that decision of the Supreme Court is contrary to the spirit of the law[39] and the essence of the concept[40] as incorporated in Ethiopian law. However, apart from the intricacy to decipher the intention of the legislature, given a clear provision of the law proscribing re-litigation, it will be contrary to the law to look for a meaning

[36] Civil Procedure Code, Article 245/2

[37]Sedler argues that *res judicata* is not the type of matter which prevents a valid judgment being given and it is not jurisdictional in nature; it is waived if not raised, Supra note 14, p. 320. Having identical provision, Indian law holds that the defense can be waived in which case courts cannot raise it. Explaining Indian Civil procedure law, Takwani states that the doctrine of *res judicata* belongs to the domain of procedure and the party may waive the plea of *res judicata*. See Supra note 25, p. 51. But there is no uniformity in approach on this matter as some give priority to public interest. See See Robert Von Moschzisker, "*Res Judicata*", The Yale Law Journal, Vol. 38, No. 3, p. 229

[38]*Supra* note 14, p. 175

[39] In fact, it is rational to inquire the rationale behind these provisions in order to discover the intention of the legislature. However, in the absence of such documents, and given the fact that the provision is copied word for word, the intention cannot be different unless it can be unconvincingly argued that it is borrowed separately from the underpinning justification.

[40] This is not a home grown concept and its essence remains the same even if it crosses borders unless the borrower introduces modifications which, unfortunately, are no apparent in this case.

deviating from this clear message. The question remains whether it is the intention of the law to allow courts to raise the defense, departing from the approach adopted by its source, when a party fails or refuses to invoke it.

3. Requirements for Asserting *Res Judicata*

Legal systems introduce different tests that a judgment must stand before it can have preclusive effect. For instance, under French law the prevailing test for whether a judgment will have claim preclusive effect is the triple identity test. This requires that the second action involve (1) the same parties; (2) the same relief; and (3) the same legal grounds.[41]The Federal Rules of Civil Procedure of the USA declares that to engage claim preclusive effects, a judgment must be valid, final and the same claim must be involved in the second action.[42]In the same manner as its source, Ethiopian law has five tests for a former judgment to be accorded *res judicata* effect which are discussed below.

3.1. The Requirement of "Directly and Substantially in Issue"

Concurring with its source, the Ethiopian Civil Procedure Code uses the "directly and substantially in issue" standard. The element that is to be compared is the suit or the issue. Hence, the law offers two elements for comparison, namely issue and suit. The Amharic version focuses on the identity of issues and causes of action in the two suits in contradistinction to the English version which focuses on identity of suit and issue. It is natural to presume that these two terms are used so that they can respond to different situations and one will take effect when the other is not operational. Obviously, if we have a suit, it is likely that we will have an issue. It is central to pose the query whether the term issue points at an issue different from that we find in a suit if an issue is inherent in a suit. Issue is defined as a material proposition of fact or of law which is affirmed by one

[41]Comparative Table: The Effect of Recognition of Judgments p. 13. Available at http://www.biicl.org/files/3479_comp_table_-_effect_of_judgments_questionnaire_without_scotland.pdf, last accessed on 29/05/2014. It should be noted, however, that the triple identity test has, of late, not been strictly adhered to, and instead, there is a growing trend which focuses on the general concept of the first set of proceedings as a whole. If new factual circumstances arise between the first and second action, a new claim between the same parties will be admissible source.

[42] *Ibid*, p. 77

party and denied by the other.[43] Suit is not defined in the code but it is employed to refer to a case initiated by a person to enforce claim relating to a cause of action. It refers to the proceeding in first instance courts and encompasses both statement of claim and defense. It is maintained that the issue is not necessarily the subject matter.[44] So long as the two terms are used purposefully, they must have their respective divergent purposes to serve.

Obviously, both versions lay down that the law intends to prevent re-litigation of an issue on which the court exercised judicial mind. A decision on an issue becomes *res judicata* between the parties to the previous suit and cannot be re-litigated in collateral proceedings.[45] The focus here is restricted to a given issue which is precluded as it is decided by the court even if a party tries to bring it up in a subsequent proceeding. This rule applies in cases like Ermeas Mulugeta v Bekelcha Transport S.C[46] in which the issue relating to the responsibility of the applicant which was resolved could have been re-litigated. Here, there was no doubt about the suit which was not barred by *res judicata*, but the objection was directed against a particular relevant issue which was submitted for re-determination.

The second component avoids multiple suits when there is mere duplication of issues decided in one of them. The Amharic version appears to prefer the identity

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[43] Civil Procedure Code, Article 247(1)

[44]The Elements of *Res Judicata,* available at http://www.ockadvocates.com/2013/04/the-elements-of-res-judicata/

The following example is offered to explain the assertion: Suppose A files a case against B claiming rent, B files a statement of defense and says that A does not own the house and in fact C owns it. The suit is about rent but the issue becomes ownership. The court has to decide on ownership to know who is owed rent. Therefore, an issue is something that the court has to deliberate upon in order to determine the plaintiff's right. Therefore in such a case you can say that the issue of ownership was directly and substantially in issue.

[45]Indian law recognizes an exception to this rule: Where, however, the question is only purely of law and it relates to the jurisdiction of the court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land. See, Tawakin, Page 59-60

[46]Ermias Mulugeta and Bekelecha Transport Share Company, (Federal Supreme Court Cassation Division Archives) , civil file No. 39471, decided on Hamle 29, 2001) It is also available at http://chilot.me/ accessed on 11/6/2012. Briefly the issue raised pertains to the effect of decision of a labour court which released the applicant from liability on a subsequent suit to recover the damage allegedly caused by the applicant.

of "cause of action"[47] test, as distinguished from the English version of the Code and its source. A suit is initiated by a statement of claim[48] and refers to proceedings at the court of first instance as distinguished from the proceedings in the appellate court.[49]Every statement of claim must contain a cause of action[50]making the latter more specific. At any rate, not every cause of action or issue will produce *res judicata* effect unless it is a matter directly and substantially in issue in the former suit.

As it is the case in India, direct *res judicata* pertains not to the entire subject matter of a suit but particularly to those matters which have been alleged by one party and denied by the other. But that does not suffice. In addition, it is a requirement that it must have been in issue directly and substantially. A matter cannot be said to be directly and substantially in issue unless and until it is or becomes material, for the decision of the suit.[51]A matter is directly and substantially in issue[52] if a distinct issue has been raised on it and it has been in issue in substance.[53]A suit may also involve matters which are in issue but incidentally or collaterally. A matter does not constitute *res judicata* if it is "incidentally or collaterally" in issue, as distinguished from that which is "directly and substantially" in issue. A matter collaterally or incidentally in issue is one "in respect to which no relief is claimed, but which is put in issue for the purpose of enabling the court to adjudicate on issues with respect to which relief is sought."[54]

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[47] It is difficult to ascribing a meaning to the Amharic equivalent of the term "cause of action" since its usage in the Amharic version is not consistent and strict as can be inferred from articles 29, 217,145/3 and 470(b). The operation of *res judicata* may depend on the definition of the term as it can give rise to small-size or big *res judicata*. See Edward W. Cleary, "Res Judicata Re-Examined", The Yale Law Journal, Vol. 57 (1948), Page 334

[48] Civil Procedure Code, Article 213

[49] *Supra* note 28, Page 58, See also Civil Procedure Code article 32/2

[50] Civil Procedure Code, Article 222/1/f

[51]T. L .Venkatarama Aiyar, Mulla on the Code of Civil Procedure, (1965). P. 296

[52]Issues are defined in Article 247of Civil Procedure Code and the sources of materials from which issues can emanate are specified in Article 248 of Civil Procedure Code. It is further stressed that for a matter being in issue it is not necessary that it should have been distinctly and specifically put in issue by the pleading. See Karia, *Supra* note 42, P. 304

[53] *Supra* note 51 , p.55

[54] *Ibid*, PP.55-56

It is important to comprehend the meaning of the qualification to the term "issue" as that will determine which issues will produce preclusive effect. Recognizing the difficulty to lay down a general yardstick to distinguish what is substantial, it has been submitted that if the parties by their conduct of the litigation clearly treated a matter as a substantial question and the court followed suit treating it as a substantial question, it would be almost conclusive to show that question was one substantially in issue.[55]The Federal Supreme Court Cassation Division maintained that the issue is the basis for comparison and it extends to any matter which was claimed by one party and denied or directly or indirectly admitted by the other on which decision has been given.[56] However, defying such simplicity, cases before courts become more complex in the endeavor to apply this element of the doctrine to facts of specific cases obscuring the fine line between what is precluded and what is not. The complexity of determining whether two suits are the same or not was manifested in this same case in which the Federal Supreme Court Cassation Division was split on the question whether, under the circumstances, *res judicata* operates or not.

In this case the statement of claim was not clear and a claim was made in connection with two separate plots of land with respect to one of which a final decision had been given. The majority ruled that the second suit is precluded by *res judicata* since the plot to which the claims in the two suits relate is the same and no relief regarding the other plot is made in the pleading. However, this decision does not relate to the subject matter of the judgment against which an application is submitted for cassation. If the woreda court was wrong in line with the analysis of the majority opinion, then the mix-up pertains to rendering decision, on a matter which was not referred to it contrary to article 182(2) of the Code.

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[55] Lata Karia, *"Doctrine of Res-judicata"*, PhD thesis, Saurashtra University (2007), P.304, available at http://etheses.saurashtrauniversity.edu/736/1/karia_l_thesis_law.pdf, last accessed on 29/5/2014

[56]Awetash Abreha v. Gebrekidan Engida , (Federal Supreme Court Cassation Division, civil file No. 36780 decided on Megabit 30, 2001), Federal Supreme Court Cassation Division, Vol. 8, p.50.

The dissenting opinion concedes that the statement of claim lacks clarity but insists that the court can frame an issue from the examination of parties at the first hearing which was rightly done by the woreda court. It is obvious that *res judicata* does not affect the claim of the party regarding the plot on which no decision has been given earlier and it is for the first time that a court exercised it judicial power over a dispute relating to the plot. It was not, therefore, proper to invoke the rules of *res judicata* to bar the litigation because the claimant had the right to a day in court. The issue should have focused on whether the court could have framed an issue from allegations made at first hearing particularly when there was deviation from the facts stated in the statement of claim and on a decision made on a matter not stated in the statement of claim.

This case was resolved by decision of the majority shedding light on the perplexity of the concept. The parameter under consideration determines the substance of the doctrine as it pinpoints the subject matter to be precluded. In India, it has been submitted that it is not necessary for a matter to be directly and substantially in issue that a distinct issue should have been raised upon it; it is enough if "the matter was in issue in substance."[57]In other jurisdictions, too, in order to invoke the bar of *res judicata* more than a mere duplication of issue is required. The examination of the nature of the former suit and the treatment that the issue has received in it are taken to be essential.[58]

In Mulunesh Alemu v. Ketemash Chernet[59], the relief sought was recovery of the house and payment of rent regarding a house the respondent forcefully occupied. The respondent submitted plea of *res judicata* which was upheld by lower courts. The Federal Supreme Court Cassation Division ruled that the two cases are distinct and the suit is not barred by *res judicata*. The suits involve the same

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[57]*Supra* note 59, P.55

[58] John J. Cound, J. H. Frindenthal, A. R. Miller & J. E Serton, Civil Procedure, Cases and Materials, (1989) P.1166

[59]Federal Supreme Court Cassation Division, civil file No. 29780 decided on 29/5/2000 E.C), Federal Supreme Court Cassation Division, Vol. 6, p. 103. The facts as succinctly summarized in the judgment (which is the only source of information) do not give the impression that the two suits are different in substance. Both cases relate to possession and nothing points toward any characterization otherwise. In both cases the suit was to recover the house which was alleged to be forcefully taken from the plaintiffs. In fact, the court said that some of the facts stated in the statement of claim indicate that it is a claim for ownership although the judgment did not show those facts.

parties and the same object, i.e., house number 1288. The former suit was filed to request cessation of disturbance to enjoyment of the property. In both suits it is stated that they were prevented from enjoying the property although in the former it appears that the defendant locked it blocking entrance while in the latter it was because it was occupied by the defendant who broke the lock and started to inhabit it. The Court reasoned that the two cases are different since the former is a possessory action while the latter is a petitory action. It is obvious that a judgment on possessory action does not preclude a subsequent petitory action. Even if the judgment does not contain the facts which made the distinction between the two suits, it can be concluded that the two suits are not same as the issues raised and disposed are not the same.

Matters which are directly and substantially in issue are divided into two; those actually in issue and those which are constructively in issue.[60] The former includes situations envisaged under Art. 5(1) of the Code while the latter encompasses the circumstances depicted in sub-art 2 of the same article. Constructive *res judicata* is referred to as artificial form of *res judicata* as it is an amplification of the general principle whereby actual issues raised are covered. Matters precluded by operation of constructive *res judicata* were not in issue; they were not heard and finally decided by the court. But, in order to avoid harassment and hardship to the other party and ensure finality of judgments which otherwise will be materially affected, they are treated as matters which were actually, directly and substantially in issue.[61] Constructive *res judicata* extends to all matters which might and ought to have been made a ground of defense or attack in the former suit.

In Bekele Deboch v. Azalech Desalegn et al [62] the Federal Supreme Court Cassation Division reversed the decision of Oromia Supreme court which

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[60] *Supra* note 55, P.54 In some common law countries, the rule of *res judicata* comprises two doctrines: claim preclusion or true *res judicata* and issue preclusion or collateral estoppels. Under the doctrine of claim preclusion, a claim may be merged or barred by a party's failure to raise the claim in a prior action, Issue prelusion, however, applies only to matters argued and decided in an earlier suit, Supra note 58, PP,1146 ff

[61] *Supra* note 28, p 54-46

[62] (Federal Supreme Court Cassation Division, civil file No. 26996, decided on 18/6/ 2000 E.C), Federal Supreme Court Cassation Division, Vol. 7, p.140.

annulled the decision given by Jima Zonal Court on the ground that the subsequent suit is barred by *res judicata*. The suit was filed for enforcement of the contract of sale of a factory between the parties in which the applicant lodged a counter claim whereby he, among other reliefs, prayed that the contract be cancelled. The plea of *res judicata* was put forward by the respondents. In file number 19/94 (the former suit) the applicant lodged a statement of claim by which he prayed for an order to the transfer title of the factory and reimbursement of damages and costs and payment of debt on the property. In the first suit, Jima Zone High Court decided that the respondents transfer title as per the contract and reimburse the expense amounting to Birr 215, 460.13. In the subsequent suit, the court cancelled the contract because title of the property mortgaged could not be transferred.

The issue whether *res judicata* is operational was finally decided by the Federal Supreme Court Cassation Division which reasoned that

> በመሰረቱ የፍ/ሥ/ሥ/ሕ/ቁ 5 ተፈጻሚነቱ ቀድሞ በተወሰነው ክርክር የስረ ነገር እና የያዘው ጭብጥ አንድ ዓይነት በሆነ ጊዜ ነው፡፡ በዚህ ጉዳይ ምንም እንኳ ቀድሞ በመ/ቁ 19/94 የቀረበው ክርክር በፋብሪካ ሽያጭ ዙሪያ የሚያጠነጥን ቢሆንም በክሱ የተጠየቀው ዳኝነት ይሁን አከራካሪ የነበረው ጭብጥ ከውሉ መፍረስና አለመፍረስ ጋር የተገናኘ ባለመሆኑ አመልካች ውሉ ይፍረስልኝ ሲሉ ያቀረቡት ክስ በድጋሚ የቀረበ ክርክር ነው ሊባል የሚችል ሆኖ አልተገኘም፡፡
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> (Basically, Article 5 is applicable where the subject matter and issue are the same in the former suit. In this case even though the dispute in file no. 19/94 revolves around the sale of the factory, the relief sought or the controversy has no relation to the cancellation of the contract and thus the request for cancellation of the contract is not *res judicata*.) (Translation mine)

In the two cases the subject matter of the dispute is the contract of sale. In the first suit a decision had been given for its enforcement but in the second suit the court ordered its cancellation. It needs no explanation that a legal system cannot afford to allow its courts to enforce and cancel a single contract. In fact, as rightly pointed out by the court, the issue of cancellation of the contract was not submitted and was no decided by the court. But, by enforcing a contract, a court is discounting the other alternative remedies, if at all it was part of the claim. Article 1771of the Civil Code stresses that cancellation and forced performance are alternative reliefs when non-performance is alleged. As alternative remedies, they must be either claimed alternatively or else one rules out the other. Once the

court concludes that the contract is worthy of enforcement, it cannot subsequently reconsider the issue whether the contract should be cancelled.

The Ethiopian civil procedure law seems to aim at the broader scope of *res judicata* as it bars not only matters which are directly and substantially in issue but also those matters which might or ought to have been a ground of defense or attack. Sedler argues that a decision on "an issue operates as *res judicata* with respect to the cause of action involved in the suit in which it was rendered." [63] The concept of *res judicata* is also referred to as "the rule against splitting a single cause of action" extinguishing the entire cause of action or claim, including items of the claim that were not in fact raised in the former action. The plaintiff can no longer sue on the original cause of action or any item of it even if that item was omitted from the original action.[64]

In Commercial Bank of Ethiopia v. Moyale City Administration Office[65] the Federal Supreme Court Cassation Division ruled that article 5 is not applicable as the former suit was instituted to enforce priority right while the latter was to recover the loan from heirs of the deceased. One may wonder whether the bank should have another opportunity to present its case against the borrowers with whom it has a single secured contractual relationship separating the loan from the mortgage. The Court reasoned that

> በተያዘው ጉዳይ ባንክ ቀደም ሲል ክርክር አቅርቦ የነበረው ለፋይናንስ መመሪያው ዕዳ በሐሪጅ እንዲሸጥ የተባለው ንብረት በመያዣ የያዘው በመሆኑ በንብረቱ ላይ የቀዳሚነት መብቱን ለማረጋገጥ ነው፡፡ በመሆኑም በክርክሩ የተያዘው ሥረ ነገር እና ጭብጥ በንብረቱ ላይ ቀዳሚነት አለው? የለውም? የሚለው ነው፡፡ በዚህ መዝገብ የቀረበው ክስ የሟች ሀጂ አብዱለዚዝ ካሕሳይ የወሰዱት ብድር የሚቹ ባለቤትና ወራሾቻቸው ሊከፍሉ ይገባል የሚል በመሆኑ የሚያዘው ጭብጥ ተከሳሾቹ የብድሩን ገንዘብ ሊከፍሉ ይገባል? አይገባም? የሚለው ነው፡፡ በመሆኑም የሁለቱም ክርክሮች ሥረ ነገር እና ጭብጥ የተለያየ በመሆኑ ጉዳዩ የመጨረሻ ውሳኔ ያገኘ ነው ለማለት አይቻልም፡፡ ስለዚህ ፍርድ ቤቶቹ የፍ/ሥ/ሥ/ሕ/ቁ 5ን ጠቅሰው የአመልካቾን ክስ ውድቅ ማድረጋቸው የሕግ ስህተት ነው፡፡

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[63] *Supra* note 8, 337-338; the aim of the Code to settle the whole of the claim can further be ascertained from the prohibition to split claims, see Civil Procedure Code, Art. 216

[64] *Supra* note 10, page 359-360

[65] File no. Federal Supreme Court Cassation Division, civil file No. 28522 decided on 3/3/2000 E.C), Federal Supreme Court Cassation Division, Vol. 6, p. 87

> (In this case, the applicant filed a suit to ascertain its priority right against the finance department which had floated auction to sell the mortgaged property. The issue then was whether it has priority or not. In this file, the claim is that the wife and heirs of the deceased borrower should repay the loan and the issue is whether the defendants should repay or not. Therefore, the cause of action and the issues in the two cases are distinct; the new suit is not barred by res judicata. Lower courts have committed error of law in rejecting the claim of the applicant on the basis of article 5 of the Civil Procedure Code) (Ttranslation mine)

In both cases the Bank instituted action against the defendants who were wife and heirs of the borrower. The plea of *res judicata* is rejected because of the diversity of issues of the two suits. This is manifest when we focus on the other defendants in the two suits, the Finance Department and the City Administration. But, the relationship between the bank and the borrower was based on a loan agreement which was secured by a mortgage, the latter being an ancillary to the former. In the previous suit, the heirs who substituted the borrower were made parties because presumably there was a claim against them. Otherwise, a priority right against third parties doesn't require the presence of the borrower or his heirs unless they are answerable for the loss ensuing form the invalidity of the purported security in which case the relief should have been sought alternatively. Even if the contents of the judgment and pleadings in the former suit should be examined, from the contents of the decision under consideration it appears that given a single contractual relationship which is secured, it was the duty of the Bank to raise its entire claim against those defendants in the former suit.[66]

It is palpable that similarity between the two suits is to be evaluated based not only on the issues actually litigated but also on those matters which were constructively in issue. Constructive *res judicata* broadens the scope of the

[66]A foreign court which decided on a similar case noted that the doctrine of *res judicata* which preclude re-litigation of the same cause of action is "broader in its application than a mere determination of the question involve in the prior action. Rather, the bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination the prior action. Gaither Corp. v. Skinner, 241 N.C. 532,535-36, 85 S.E.2d 909, 911(1955) reported in Affirmative Defenses: *Res Judicata* and Collateral Estoppel, Page 7, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/200610DavisResi.pdf, accessed on 28/6/2013

concept in such a way that matters which were not actually entertained in the proceeding could be precluded if they ought to have been a ground of attack or defense. It is thus essential to establish as to how a matter which the judgment does not even allude to is precluded. One test suggested in this regard is "to see whether by raising the question, the decree which was passed in the previous suit, should have been defeated, varied or in any way affected."[67] As a general rule it is put forward that every ground of attack with reference to the title sued on must be pleaded if necessary in the alternative for the plaintiff will not be allowed to make a fresh suit afterwards.[68]

As stated above, the Civil Procedure Code of Ethiopia has in built mechanisms of ensuring that a suit encompasses all the claims of the plaintiff and the defendant relating to the subject matter of the dispute. This can be gathered from article 5(2) and 216 of the Code which entail a bar to matters omitted by the parties to a dispute. The doctrine of r*es judicata* bars a litigant from splitting claims into separate actions because once a judgment is entered in an action it extinguishes the plaintiff's claim entirely. It outspreads to all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[69]*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that was previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.[70]

The law requires every suit to be framed in such a way that any further litigation is prevented on the subject matter. Parties must submit all the grounds of attack or defense relating to the subject matter of the dispute under the pain of relinquishing them. Every suit shall include the whole of the claim which the plaintiff is entitled to make with respect to the cause of action. This prerequisite is enforced by the rules governing *res judicata*.[71]To grasp the extent to which *res*

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[67]*Supra* note 28, p. 57
[68] *Supra* note 51, p. 73
[69]Diane Vaksdal Smith, Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case, P. 8, available at http://www.burgsimpson.com/pdf/civlitjulyv01clean.pdf, last accessed on 28/6/2013
[70]Res Judicata and Related Doctrines, available at http://ncbj.org/PublicOutreach/Public/Res_Judicata_September_2012.pdf, accessed on 28/62013
[71] Civil Procedure Code, Article 216

judicata could affect subsequent suit it is imperative to read article 5(1) and (2) together with article 216 of the Code. Thus, given a ground for a claim, a decision on such claim precludes any further suit which either could result in litigation of any matter which is directly and substantially in issue or the whole of the claim with respect to the cause of action which might or ought to have been a ground of attack or defense or any relief with respect to any such matter.

3.2. Same Parties

The second requirement denotes the extent to which *res judicata* may affect parties and points toward restriction of its effects to the parties who took part in the proceeding having the opportunity to present their case. Hence, the litigation should be between same parties or privies (persons who claim under them) so that the judgment can be *res judicata*. This requirement hinges on the general principle that judgments bind merely the parties and privies.[72] If the parties are different in a subsequent suit, *res judicata* does not have effect as the former decision does not bind the new parties.

A party is a person who is involved in a case and a person can be involved in a case either by alleging something against another person or because the allegation is against him.[73]The wording of the Amharic version[74] of the Code is broad enough to extend the consequence to persons who take part in the litigation beyond the party who initiated the proceeding and the party who is called upon to respond to it. Thus, the term "same parties" refers to those persons whose names were on record either as a plaintiff, or a defendant or third party defendant or intervenor.[75] A person who is not named in the suit is not a party [76] and *res judicata* does not operate against him as he is not bound by the decision.

In contrast, persons who claim under the parties are bound by *res judicata*. These are persons on whom the right or interest involved in the suit devolves. They

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[72] *Supra* note 28, p. 60

[73] *Supra* note 44.

[74] It uses the term " ...በክርክሩ ላይ የነበሩ..." broadening it beyond the parties to those who take part in the dispute.

[75]It should be noted that some contend that recognition should be given to exception such as *pro forma* defendant (a person who is made a defendant only because his presence is necessary for a complete and final resolution of the dispute against whom no relief is sought.) See Supra note 28, p. 61-62

[76] *Supra* note 16, p. 323-324

acquired an interest in the subject matter of the suit by inheritance or purchase subsequent to the former suit or must hold the interest subordinately in the sense that their interests are entirely dependent on the interests of the transferor.[77]A decision against a party will bind interests acquired from him subsequently and all subordinate interests represented by him whenever acquired.[78]

The application of the second element of the principle has become concern of several court cases which tried it out in different scenarios. In Ethiopian Grain Trade Enterprise v. Kedija Sabir,[79] the respondent instituted an action in her own name to recover the remaining payment that her deceased husband failed to include in his statement of claim. The question to be addressed here is whether she can have an independent entitlement regarding those payments which were left out by her late husband. One of the two reasons which the Federal Supreme Court Cassation Division made the basis of its decision is that the two suits are the same. Of the factors to be considered under article 5, the most relevant component here is the similarity of the parties. Even if the action was instituted in the name of the wife, she based her claim on the employment relationship of her late husband with the applicant. Hence, she was claiming under him. Otherwise, it would involve the question of vested interest because the claim would be based on a contract to which she was not a party. In another case[80] the Court ruled that a person who was denied to intervene in a case is entitled to initiate a new suit to seek justice and it cannot be validly contended that such party cannot institute an action on the basis of the judgment given in the case she was denied to intervene.

The case of Dashen Bank S.C v. Amelmal Mekonnen[81] raised this issue in the context of money transfer through the applicant. The question was whether the decision given against the sender bars a subsequent suit filed by the recipient.

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[77]*Supra* note 16, p.324, See also Mullah, *Supra* note 77 p.80

[78]*Supra* note 42, p. 464 -466

[79]Federal Supreme Court Cassation Division, civil file No.38601 decided on 14/4/2001E.C), Federal Supreme Court Cassation Division, Vol. 8, p.30

[80]Bethlehm Tadesse v.HannaTadesse et al, (Federal Supreme Court Cassation Division, civil file No. 62173 decided on 11/11/2003 E.C),Federal Supreme Court Cassation Division, Vol. 12, p.371.

[81]Federal Supreme Court Cassation Division, civil file No. 51223 decided on 24/6/2003 E.C), Federal Supreme Court Cassation Division, Vol. 12, p.332.

The court ruled that the recipient's right is derived from the sender and the suit is precluded. Here it does not seem to be an issue of *res judicata* rather it is a question of who between the two can claim refund from the bank. It is very difficult to say one is claiming under the other. The contractual relationship is between the sender and the bank and the recipient is not a contracting party lacking vested interest to initiate action. It does not appear to be correct to dispose the case based on article 5 as neither the two parties are the same, nor one was claiming under the other.

In Tirunesh Ayele v Wegayehu Solomon,[82] an opposition was filed against a judgment rendered by the Addis Ababa First Instance Court in favor of the respondent which declares that she is heir-at- law. In the opposition to the judgment lodged to the same court, it was stated that the matter had already been decided that the deceased had left a will by which the applicant is intestate successor and thus the suite is barred by *res judicata*. Cassation Division of the Federal Supreme Court ruled that it is contrary to article 5 to give a decision on the dispute as there was a prior decision given by the Federal First Instance Court in file number 3680 which is conclusive on the validity and effect of the will. But, can there be issue of *res judicata* in the two cases? First, they deal with different subject matters. Second, the parties are not the same in the two cases. A will can be considered at the time of liquidation which doesn't prohibit one from requesting the court for issuance of certificate of heir.[83] It is contended that succession certificate is merely an authority to collect debt. It does not adjudicate questions of title.[84]

The issue whether a matter could be *res judicata* between co-plaintiffs and between co-defendants is outstanding. Based on the application of Indian law, it

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[82] Heirs of Tirunesh Ayele v Wegayehu Solomon, (Federal Supreme Court Cassation Division, civil file No. 49713 decided on 3/8/2003 E.C), Federal Supreme Court Cassation Division, Vol. 11, p. 79.

[83] Article 971/3 of the Civil Code considers such persons as interested persons. An heir is permitted to apply to the court to be given a certificate of heir. See article 996, Civil Code. The remedy available for a person who objects the issuance of the certificate is to apply for annulment under article 998of the Civil code. Determination of persons entitled to take the property in the inheritance is part of the liquidation process. See art. 994/a/ of the Code. A succession may be testate, intestate and partly testate and partly intestate. See art 829 of the Code.

[84] *Supra* note 77, p. 112

is submitted that the doctrine may be asserted in such situations if certain conditions are fulfilled.[85] Even though no clear solution can be unraveled based on the provisions of the Code, we can think of such cases arising under the Civil Procedure Code of Ethiopia. Article 43(3) provides that the court will determine the claim between the defendant and the third party who has the position of a defendant[86] and such decision will have *res judicata* effect between the parties. But if the defense of co-defendants is separate and independent, a decision on the defense submitted by one cannot be established against the other. In Fetlework Mengesha v. Belaynesh W/kidan[87]the issue whether a decision given on an objection raised by a defendant would bind a co-defendant was decided and the Cassation Division of the Federal Supreme Court reversed the decision of the Court of Cassation of Tigray Regional State saying that the defense of a defendant was independent of that of a co-defendant and it is personal to the applicant which doesn't fall in article 5.

Exceptionally, the law is stretched out to affect persons who are not actually on the record. Such is the case where, *res judicata* becomes operational against persons who are not actually on the record in suits where persons litigate for themselves and others. When a suit is instituted in good faith in respect of public or private rights claimed in common, *res judicata* operates against all persons interested in such right.[88] Here, the persons to be affected are not necessarily represented through an agent and it may be inquired whether it is fair to broaden the application of the doctrine to those who didn't have the opportunity to present their case. The law assumes that all persons who have the same interest are represented by the plaintiffs[89]dispensing with the justification for allowing

[85]A matter becomes *res judicata* between co-plaintiffs if there is a conflict of interest between the parties and it is necessary to resolve the same in order to give relief to the defendant. If this matter is decided by the court regarding the matter in dispute between the parties and thus *res judicata* operates. Regarding co-defendants the following conditions should be fulfilled. First, there must be a conflict of interest between the co-defendants such that it is necessary to decide the conflict in order to give relief to the plaintiff. Second, the con-defendants were necessary and proper parties in the former suit and the question between co-defendants must have been finally decided Supra note 28, p.60-61

[86]Civil Procedure code, Art. 43/2

[87](Federal Supreme Court Cassation Division, civil file No49852 decided on 30/10/2002 E.C), Federal Supreme Court Cassation Division, Vol. 9, p361.

[88]Civil procedure code, Article 5/4

[89]Legal systems accept the application of *res judicata* in Class actions and the doctrine of virtual representation in which adequate representation in the prior litigation, it is held, satisfies due

others to make the same claim on which decision has been given. Otherwise, contradictory decision may be given in a suit to be instituted by others.[90]

The assumption under article 5 of the Code is that there are at least two parties and such parties or their privies are the same in the two suits. However, it is not true to assume that all cases involve multiple parties or rivals as some judgments are rendered up on the application of a party without a defendant or a respondent. Applications to obtain certificate of heirs, change of name, and declaration of absence are cases in point. Following words of the law, it can be argued that there should be multiple parties for the application of the doctrine. It is not only a matter of fulfilling the requirements of the law, but also it cannot be imagined as there is no party to invoke plea of *res judicata*. Take for instance change of name. Would *res judicata* impede effort to change one's name more than once? Let us suppose a hypothetical case[91] in which a judge rejects an application lodged by a person who wants to change his first name for the second time. In such a case the requirement that the dispute should be between the same parties is not fulfilled and the objection cannot be raised by a disputing party. Can the judge reject the application on the ground that it is *res judicata*? It can be contended that in such cases, the court cannot bring up its earlier decision to block a subsequent suit as has already been brought to light above, this is a defense courts consider if a party raises it. Yet, given that there is a binding decision of the Federal Supreme Court[92], it appears that courts do have the power to raise it.

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process requirements, where policy factors weigh heavily for preclusion, even though the person to be bound did not personally appear in that litigation. Where there is notice 65 and adequate representation, fair treatment is accorded the person to be bound. If, however, the interests of the nonparty are not adequately represented, he will not be bound. See John K. Morris, "Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered", California Law Review, Vol. 56 (1968), p. 1150

[90] *Supra* note 28, p. 62-63

[91] This is not a hypothetical case per se. A colleague shared the experience of a client who applied to a court to and succeeded to change his name to an Islamic name with the ultimate goal of travelling to one of the Middle East countries. But he was not lucky enough to have his dream come true which rendered his new name inept. He had to apply to the court to change his name again which rejected his application on the ground that the court cannot change its own decision and the power to amend judgments is vested on the appellate court only.

[92] *Supra* note 33.

3.3. Same Title

The third condition is that the parties in the new suit should be litigating under the same title as the former suit. Title is the capacity of a party which determines whether a party sues or is sued in his own interest for himself or representing the interest of another or representing the interest of others along with his own. If a person is suing in different capacities a decision cannot block a subsequent action. This requirement has nothing to do with the particular cause of action or subject matter to which the dispute relates.[93] The identity of title in the two cases is the test that must be fulfilled for asserting *res judicata.*

3.4. Validity

A judgment can have a preclusion effect only if it is valid. Validity is not, however, correlated to correctness or otherwise of the judgment. A question of a judgment's validity is rather taken to be a challenge to the authority of the court to have decided the case.[94]It is thus apparent that if the judgment invoked is rendered by a court having no material jurisdiction, the judgment is not valid and cannot be put forward as a bar to a subsequent suit in a court having jurisdiction despite the fact that the issue in the fresh suit is identical to the previous one.

No explicit pronouncement is available as to the requirement of validity of judgment in our code. A glance at article 5(1) of the Code reveals that without any qualification regarding the court which has given the judgment, the prohibition to re-litigate a suit in the circumstances provided for therein applies to courts across the board as the sweeping phrase "No Court…" indicates. Yet, that does not warrant the conclusion that the requirement of validity is missing since it will be repugnant to the integrity and coherence of the code.[95]

The endeavor to decipher the message in the provision is lessened when we look at the Amharic version of the code. It uses the phrase "በሕግ ሥልጣን የተሰጠው ማንኛውም ፍ/ቤት…" (any court having jurisdiction) implying that a judgment will have preclusion effect if it is entered by a court having jurisdiction. *A contrario,*

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[93]*Supra* note 77, p. 89-90

[94]. J.H. Friendenthal, M.K. Kane, A.R. Miller, Civil Procedure, (1993), P.648

[95] See for instance, Art 9(2) cum Art, 244(3) of the civil procedure code of Ethiopia, Material Jurisdiction is one of the objection which under art 244(3) are considered as those which prevent a valid judgment from being given.

the principle of *res judicata* will not be applicable if the judgment invoked is given by a court having no authority to hear the case since validity is a matter of jurisdiction of the court and the law requires that the judgment be given by a competent court. Therefore, validity, in Ethiopia as well, is one of the requirements that should be there in order to assert *res judicata*.

It is worth noting that the court referred in the Amharic version of the Code is different from that of the English version. In the former, the court is that which has heard and decided the previous suit whose judgment is invoked as a bar to the new one while in the English version refers to the one in which the new suit is lodged. The Amharic version prohibits parties from submitting a case decided again while the English version imposes the duty on the court not to try such a case. The disparity of the two versions in incorporating the validity requirement seems to arise from such equivocation albeit the authoritative version rests the case by its clear terms.

In Merigeta Lisanework Bezabehi v. Ethiopian Orthodox Church General Secretariat Office[96] the case was first lodged with the Labour Board which closed the file on the ground that it does not have jurisdiction. But, it did not stop there: it declared that the suit is barred by period of limitation. Subsequently, the case was submitted to the Federal First Instance Court where the plea of *res judicata* was raised by the defendant because the Board decided that the case is barred by period of limitation. The first instance court ruled that the Board had no jurisdiction and should not have ruled on the issue of period of limitation. The High Court to which the case was referred on appeal concluded that the ruling on the period of limitation is not reversed by the appellate court and with this order remaining intact, the first instance court could not entertain the case. The Cassation Division of the Federal Supreme Court upheld the position taken by the first instance court. The case illustrate that the operation of *res judicata* hinges on a valid judgment rendered by a competent court. Short of fulfillment of this requirement, *res judicata* cannot be asserted.

[96]Federal Supreme Court Cassation Division, civil file No. 32229, decided on Miazia 30/8/2000 E.C, Federal Supreme Court Cassation Division, Vol. 6, p377.

3.5. Finality of Judgment

In order to invoke the bar of *res judicata*, it is not sufficient that a matter directly and substantially in issue in a suit was directly and substantially in issue in a prior action. It is further required that it must have been heard and finally decided.[97] For purpose of *res judicata* , finality "represents the completion of all the steps in the adjudication of a claim by the court, short of execution.[98] This last requirement to assert *res judicata* as to the quality of judgment is referred in many jurisdictions as finality of judgment. In line with its source, the Ethiopian civil procedure code describes this yardstick as "heard and finally decided." It literally requires that the decision should be final disposing the dispute or an issue after hearing the parties.

The decision that the court reached must be final and the court should have come to the decision on a contested matter after arguments and consideration. The first question to be set forth is whether the requirement that the parties are heard is to be distinguished from the finality requirement. Thus, it is worth inquiring what purpose is served by the word "heard." It is acknowledged that *res judicata* by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly.[99] It is contended that a mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is *obiter dictum* and cannot be said to be a decision on any issue, and is, therefore, *res nova.*[100]

Although an identical wording is used in the Indian civil procedure law, it is missing in the Amharic version of our code, which uses the clause "ክርክሩን ተቀብሎ የመጨረሻ የፍርድ ውሳኔ ከሰጠ በኋላ..."[101]emphasizing on the finality of judgment. Accordingly, Art.5 of the civil procedure code bars re-litigation of an issue or cause of action in respect of which "a formal expression of a preliminary or final

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[97] *Supra* note 59.p.96
[98] *Supra* note 45, p215
[99] *Supra* note 42, p. 572
[100] *Ibid*, p. 573
[101] "Hearing"' seems to have been omitted which simply refers to decision on the merit. See, *Supra* note 28, p.70

adjudication which so far as the court expressing it, conclusively determines the rights of the parties concerning all or any of the matters in dispute in the suit."[102]

One may argue that the "heard and finally decided" requirement does not hold well in cases of matters constructively in issue. Such matters are precluded not because a final decision has been given upon them. The party failed to join them in the suit while he might or ought to have made them his ground of defense or attack. They are not at all raised in the proceeding let alone becoming the subject matter of one of the issues or the decision given. It is contended that from the very nature of the case, such a matter could not be heard and decided and "it will be deemed to have been heard and decided against the party omitting to allege it."[103]

Similarly, the question whether a matter which was submitted for consideration of the court could have preclusive effect if it was left out of the decision should be posed. The requirement of final decision demands that the court has disposed the issues of the case. But, article 5(3) of the Code deals with a situation where the court's failure to treat a relief would be *res judicata* on the presumption that it was rejected. In the case of Ethiopian Orthodox Church General Secretariat Office v Yitbarek Sahilu[104] the Cassation Division of the Federal Supreme Court said that the application of article 5(3) is limited to a situation where a court has given decision on some of the reliefs sought and left out one or more. If no decision is given on all the issues, the court concluded that article 5(3) is not applicable. On the other hand in Bahir Dar textile S.C v Ameshe Seid[105], the court affirmed that a relief which is passed over is refused. In this case the appeal submitted by the applicant was completely ignored and the court said that Art. 5(3) is applicable. The question whether this rule applies when the court ignores all or one or some of the reliefs is not answered unless it is arguably presumed that the latest decision is the expression of the intention of the court.

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[102]Civil Procedure Code, Article 3

[103]*Supra* note 59, p. 62

[104] Federal Supreme Court Cassation Division, civil file No. 24574 decided on 11/3/ 2000 E.C), Federal Supreme Court Cassation Division, Vol. 5, p. 79

[105]Federal Supreme Court Cassation Division, civil file No. 29920 decided on 26/2/2000), Federal Supreme Court Cassation Division, Vol. 6, p. 257

A judicial decision is deemed final when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution.[106]The Amharic version of the Code emphasizes the finality of judgment while the English version is concerned with final decision.[107]Decision is not a technical term and it is employed in the code in connection with both final and interlocutory judgments[108]while the word "judgment" is defined as the statement given by a court of the grounds of a decree or order[109]encompassing both the decision and reasoning for the decision. In the absence of any proviso in the law, it is tenable to conclude that any judgment will have preclusive effect.[110]

It is held that the scope of the principle of *res judicata* is of more general application and it is applicable to different stages of the same suit as to findings on issues in different suits.[111] It follows that if in the earlier stage of the same suit a matter in issue has been finally adjudicated upon, the issue cannot be re-litigated at the later stage of the same suit[112]. In Kassaye Yadete v Signor

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[106]*Supra* note 42, p. 576. See also Richard S. Crummins, "Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?", P. Fordham Law Review, Vol. 56, Issue 3, (1987), p. 490, available at: http://ir.lawnet.fordham.edu/flr/vol56/iss3/8 accessed on 21/5/2013

[107] It should be noted that the Constitution (Article 37) uses the two terms distinctly while article 182/1 renders decision a component of judgment.

[108]Decision on objection is provided for in article 245 of the Civil Procedure Code of Ethiopia

[109]Civil Procedure Code, Article 3

[110]That being the principle, it is indicated, however, that there are conditions which must be fulfilled before it can have preclusive effect. For instance, it is argued that the decision must be a judicial decision implying that decisions on dispute entertained by administrative tribunals will not have preclusive effect. Supra note 41, p. 4

[111] See Appellants: Appellants: Arjun Singh Vs. Respondent: Mohindra Kumar and Ors, In the Supreme Court of India, Decided On: 13.12.1963 it is available at http://indiankanoon.org/doc/1608703/, last accessed on 29/05/2014; see also *Supra* note 55, p. 194; But the issue is not settled as can be gathered from the judgment of, the European Court of Justice delivered on November 15th , 2012 in case C-456/11Gothaer Allgemeine Versicherung and others. It ruled extended the application of *res judicata* to procedural decisions in the ruling that a judgment by which the court of a member state declines jurisdiction on the basis of a jurisdiction clause was a judgment in the meaning of art. 32 of the Brussels Regulation even if it was categorized as a mere procedural judgment under the national law of a member state. The ECJ further ruled that the court before which the recognition of such a judgment is sought is bound by the finding regarding the validity of the jurisdiction clause even if such finding were made in the grounds of the judgment.http://conflictoflaws.net/2012/ecj-rules-on-res-judicata-of-judgments-declining-jurisdiction/ accessed on 7/9/2013.

[112]*Supra* note 42, p.61

Francisco Vencian[113], Cassation Division of the Federal Supreme Court said that an issue which is resolved earlier in the course of the proceeding cannot be re-litigated at a later stage of the proceeding. Thus, final decision can arise from a judgment, a decree, and an order[114] which ends a dispute or settles an issue. Nonetheless, distinction is made between interlocutory decisions which resolve issues of substance and which are a step towards the decision of the dispute between parties by way of a decree or a final order. Orders which do not decide any matter in issue arising in the suit, nor put an end to the litigation, nor impinge upon the legal rights of parties to the litigation are not of *res judicata.* [115]

One may wonder whether *res judicata* may operate when a suit comes to an end in the absence a hearing or a judgment. Such may be the case if a default judgment, withdrawal, compromise, etc… bring an end to a claim. The question is whether in such cases, the requirement "heard and finally decided" is met. A default judgment which is pronounced after availing the opportunity to the other party to present his case is deemed to be a judgment having *res judicata* effect.[116]

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[113]Federal Supreme Court Cassation Division, civil file No. 72189, decided on 18/10/2004 E.C), Federal Supreme Court Cassation Division, Vol. 13, p. 20

[114]Awetash Abreha and Gebrekidan Engida,(Cassation Division, civil file No. 36780 decided on30/7/2001 E.C), Federal Supreme Court Cassation Division, Vol. 8, p.50. The court included provisional orders as having preclusive effect which as discussed below do not necessarily have that effect.

[115]This issue was decided in a case in India and I think it explains how the rule should be interpreted under the circumstances. In this regard, the court noted that: "It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation." See *Supra* note 111

[116]*Supra* note 41, p. 7-8. Article 70(a) of the Civil Code of Ethiopia lays down that if the defendant does not appear after the summons was duly served, the suit will be heard *ex-parte*. It

Similarly, it may be inquired whether *res judicata* may be asserted if a previous suit was withdrawn without the permission of the Court to bring a fresh suit. Precluding from instituting any fresh suit in respect of such subject-matter or such part of the claim[117], the law gives the same effect even though no reference is made to this under article 5 of the Code.

A compromise decree is not a decision by the court even if it settles the dispute between the parties. It is contended that compromise is merely the acceptance by the court of something to which the parties have agreed. For the court does not decide anything, one may doubt the application of article 5 which presupposes final judgment. However, article 3312(1) of the Civil Code renders a compromise agreement to produce *res judicata* effect even without involvement of the court.[118] On the other hand, article 277 of the Civil Procedure Code denotes that after entering the compromise agreement in the case file, the court may, on the application of the parties, make an order or give judgment in terms of such agreement. So it is the order or judgment of the court which elevates the status of the agreement of the parties to an enforceable decision. Applying this provision to a specific case, the Cassation Division of the Federal Supreme Court stressed that a compromise agreement is equivalent to a judgment and it must be enforced as such.[119]

Another issue that arises is that even if we have a valid judgment, it remains to be examined whether the judgment will have preclusive effect if it is rendered by a court of another jurisdiction. It can be a judgment rendered by the court of a regional state or that of the federal government or a foreign court. The issue whether a judgment given in one regional state will have preclusive effect in the court of another state is outstanding. Considering the latest shift from a unitary to a federal state structure, an attempt to grapple for a solution in the Code is futile. Having a similar state structure, the USA resolved this problem by a

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can be, therefore, said that the suit is heard. Th same issue has beeen treated in Appellants: Arjun Singh Vs. Respondent: Mohindra Kumar and Ors, *Supra* note 111.

[117] Civil Procedure Code, Article 279/1/

[118] Reading article 3307 of Civil Code, it can be understood that the dispute can be one arising in the future.

[119]Kedir LajuaHussien et al v. Amin Ousman, (Federal Supreme Court Cassation Division, civil file No52725,decided on 16/10/2002 E.C) Federal Supreme Court Cassation Division, Vol. 9, p. 340

constitutional provision. Article IV (1) of the US Constitution requires that "Full Faith and Credit" be given in each state to the public acts, records, and judicial proceedings of every other State. It requires each State to honor the judicial proceedings of every other State.[120] Although this goes beyond the purview of civil procedure law, whether the silence of the FDRE Constitution in this regard can result in glitch of the system, remains to be seen.

Having the definition given to the term 'judgment' in the code it is important to question whether foreign judgments will have preclusive effect in Ethiopia. Unlike the Indian Civil Procedure Code[121] which gives preclusive effect to a foreign judgment subject to fulfillment of certain conditions, the Ethiopian Code is silent on this matter. Pendency in a foreign court doesn't bar a suit in Ethiopian courts.[122]Moreover, foreign judgments cannot be executed unless the prerequisites set forth in the Code are met.[123]Sedler contends that the decision of a foreign court has *res judicata* effect as this is in accordance with general principles of law recognized by most nations.[124]Ethiopian courts do not freely give recognition to foreign proceedings or judgments as evidenced in the decision of the Cassation Division of the Federal Supreme Court in the case of Alemnesh Abebe v. Tesfaye Gessesse.[125] It is held that an Ethiopian court cannot give effect to a foreign judgment for the purpose of *res judicata* unless the conditions set forth in Article 456 and the following articles of the Code are fulfilled. So, the effect is that foreign judgments do not have preclusive effect in

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[120] Ronan E. Degnant, "Federalized *Res Judicata"*, Yale Law Journal, Volume 85, Number 6,(1976), p. 741

[121] Section 13 reads A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title, except (a) where it has not been pronounced by a Court of competent jurisdiction (b) where it has not been given on the merits of the case ;(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of the Union of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud, and (f) where it sustains a claim a breach of any law in force in India.

[122]Civil Procedure code, Article 8/2/

[123] Civil Procedure Code, Article 456/1/

[124]*Supra* note 14, p. 320

[125]Federal Supreme Court Cassation Division, civil file No. file no. 59953, decided on 2/10/2003), Federal Supreme Court Cassation Division, Vol. 12, p. 365.

Ethiopia unless such judgments have been recognized in Ethiopia on account of fulfilling the requirements for recognition under Ethiopian law.

The application of the doctrine to situations where parties resort to mechanisms of settling their dispute out of court particularly by means of arbitration presents a riddle. Such is the case when an attempt is made to make an award fit in article 5. It is obvious that arbitration ousts the courts and the decision is not pronounced by a court of law casting the doubt whether the finality of decision can be achieved through the final award of arbitrators. So, too, the restriction to entertain a case barred by *res judicata* is explicitly imposed on courts and it is proper to inquire whether it can be extended to arbitral tribunals. These issues are not straightaway addressed in the Code and a readymade answer is not on hand.

Other jurisdictions provided an answer by codifying *res judicata* provisions regarding arbitral awards.[126] Accordingly, the laws of several countries explicitly lay down that arbitral award carries the authority of *res judicata* in relation to the dispute which it has determined.[127]It is widely accepted that *res judicata* is also a

[126]International Law Association Berlin (2004) International Commercial Arbitration, Interim Report: "Res judicata" and Arbitration, P. 16 available at www.ila-hq.org/...cfm/.../446043C4-9770-434D-AD7DD42F7E8E81C6, last accessed on 29/5/2014

[127] See *Ibid*, p. 16-17. The Committee mandated to study report on *lis pendens* and *res judicata* in arbitration summarized the laws of several countries as follows: Article 1476 of the French NCPC states (in translation): "The arbitral award, from the moment that it has been given, shall carry the authority of *res judicata* in relation to the dispute which it has determined" This provision also applies to "awards made abroad or made in international arbitration" (per Article 1500);Article 1703 of the Belgian Judicial Code provides that the arbitral award has *autorité de la chose jugée* if it has been notified to the parties and provided it does not violate public policy and that the subject-matter of the dispute was capable of settlement by means of arbitration. In The Netherlands, only final or partial final awards may constitute *res judicata* and do so from the date of the making of the award (Article 1059(1) of the Code of Civil Procedure).Depositing the award with the District Court is not a requirement for the award to obtain *res judicata* status. A statutory provision regarding *res judicata* was deemed necessary to establish that the award has become binding under the applicable law at the place of arbitration in relation to enforcement proceedings of such an award abroad under the 1958 New York Convention (Article V(1)(e)); Article 1055 of the German Code of Civil Procedure provides that an arbitral award has the same effect between the parties as a final and binding court judgment.See also Article 190 of the Swiss Act on Private International Law, and Article 823(6) of the Italian Code of Civil Procedure. Swiss law also accepts the application of *res judicata* to awards on jurisdiction, and partial final awards on substantive issues; The Italian Code of Civil Procedure also states that an award may be annulled if it is contrary to a preceding court decision entered into force amongst the parties, provided that such objection has been raised in the arbitral proceedings (Article 829(8)).;In Sweden and Denmark, similar principles regarding *res judicata* apply to arbitral awards. It is not

rule of international law. The binding effect of arbitral awards is prescribed by many institutional rules and has been repeatedly recognized in several decisions of international arbitral tribunal and tribunals applying international law.[128]

Limiting oneself to the wordings of article 5, the constraint appears to be on courts barring them from entertaining suits or issues decided. However, arbitration tribunals are required to follow the same procedure as courts to the extent possible.[129]Under article 244(2) (g) of the Code, the fact that the claim is to be settled by arbitration is a preliminary objection excluding courts as opposed to the Amharic version which apparently restricts its application to pendency before arbitrators.[130]An arbitral award has the effect of finally settling a dispute and it may be inquired whether it will have preclusive effect in particular with the specific reference made to courts in article 5. If the law permits execution of an award in the same form as a judgment[131], it is logical to give the same preclusive effect under article 5 even if the law seems to be concerned with judgments pronounced by courts. Further, it is tenable to suggest that the effect of foreign arbitral award should be given the same effect in line with the stance taken by the court in relation to foreign judgments. Accordingly, the fulfillment of the conditions for enforcement[132] should be met so that a foreign award can have preclusive effect.

The preclusive effect of a judgment given by a special division of a court on cases which will be handled by other divisions of the court is debatable. For instance, what is the consequence of a finding of a labor or criminal court on the cases pending before a civil court, or vice versa? This issue was addressed by the

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clear whether their laws are more open than other Civil Law jurisdictions to accept some sort of issue preclusion.

[128]For instance, in the *UN Administrative Tribunal Case*(1954), *Arbitral Award Case*(1960), *South West Africa Case*(1966), *Cameroon and Nigeria*(1998), and in the *Boundary Dispute between Qatar and Bahrain Case*(2001). International Law Association Berlin (2004) International Commercial Arbitration, Interim Report: "Res judicata" and Arbitration, Interim Report: "Res judicata" and Arbitration, p. 18-20; See also the *Pious Fund Arbitration* (1902), and the *Trail Smelter Case* (1935). The distinguished tribunal in *Amco v Indonesia (Resubmission: Jurisdiction* International, Supra note 125, p. 18-20

[129] Civil procedure code, Article 317/1/

[130] The Amharic version lacks clarity as it does not clearly specify whether it refers to pendency or finality. It is rather confusing as it mingles arbitration and compromise.

[131]Civil procedure code, Article 319/2

[132]Civil procedure code, Article 461

Cassation Division of the Federal Supreme Court which ruled that the issues that may be framed by the civil and labour divisions of a court are not the same and a decision given by one cannot have preclusion effect. In Ermiyas Mulugeta and Bekelcha Transport S.C, the court held the fact that a party was relieved from responsibility in a labour court does not have *res judicata* effect on the same matter and the civil court will re-hear to determine whether a party is responsible afresh.[133]

One can understand the position that the findings of a criminal court should not be binding on a civil court because the two courts are guided by dissimilar procedural rules and employ different standards of proof. This position is embraced even by the law in Ethiopia. The Civil Code provides that a civil court before which an action for damage is pending is not bound by a decision of a criminal bench on whether or not an offence was committed.[134]But, civil and labour divisions are the same in every respect except the subject matter they deal with. The same standard of proof and the same procedural law justify that a decision given by one should be recognized by the other. Is it conceivable that one would be held accountable by a labour court and exempted by a civil one based on the same facts or occurrence? The courts are the same and it must be expected that the same outcome is to ensue. Otherwise, courts could give contradictory decision compromising their integrity, one of the goals to be achieved by *res judicata*. A decision on the issue whether a fault has been committed by a worker should be conclusive and it should not be re-litigated.

4. Conclusion

The foregoing discussion uncovered the concept of *res judicata*, the conditions for its operation and its boundaries. It can be observed that the Code tries to balance the tension between correctness and stability, on the one hand and revisionism and truth, on the other. It is beyond the focus of this piece to dwell on the philosophical backdrop and underpinning in determining the purpose of law in general and procedural law in particular. However, an attempt has been made to examine the reason underlying the doctrine of *res judicata* with a view to testing whether the ultimate purpose of the law would be attained. A policy

[133]*Supra* note 61
[134]Civil Code, Article 2149

decision has to be made by which the legal system chooses its focus. It can be said that our legal system should have a civil justice system which enables it to say what is, is and what is not is not. Truth should be the goal of a legal system even if the expense seeking it may cause or the depth it may dig up to unravel it hinges on several determinants.

It can be generally accepted that endless litigation cannot be justified no matter what the consequence. At the same time a legal system cannot afford to completely pay no heed to truth and blatant disregard of justice in return for stability or efficiency. It is tenable to limit litigation but it should not be at the expense of compromising the credibility of the legal system. The cost, be it social, economic, etc., a society is willing and capable to pay determines the degree of indulgence in the pursuit of truth. Nonetheless, it is imperative to make a conscious choice whether truth or efficiency should supersede based on the reality on the ground[135] with a view to balancing these competing interests a legal system cannot afford to utterly ignore.

It is also recommended that a periodic assessment be made in order to ascertain that the law strikes the balance taking into account relevant factors. Further, in addition to addressing the call for making a policy decision as summarized above, the foregoing discussion makes it imperative to re-examine the rules governing the doctrine with a view to clarifying the issues raised in this article. The Code has been in force for several decades with little amendment which in any case does not apply to the doctrine under consideration. It is desirable to make it responsive to the era it is intended to serve. With this end in mind it is needful to revisit the rules governing *res judicata*.

[135] In order to determine the degree of conclusiveness of judgments, an assessment should be made regarding the quality of judgment that the judiciary produces, structural and organizational effectiveness of courts, qualification and competence of the judges, integrity of the personnel in the judiciary and other factors which are directly related to the reliability of judgments