

## **Contractual or Judgmental Approach: Unearthing the Legal Nature, Effect and Execution of Compromise Agreement under Ethiopian Law**

Eyader Teshome Alemayehu\*

### **Abstract**

*As a matter of general principle, voluntary and pacific settlement of civil matters (and arguably some criminal matters) through compromise agreement between parties to an actual or potential legal dispute is commendable on various beneficial grounds. Compromise is a voluntary resolution of legal disputes to avoid litigation or put an end to one already commenced. Yet, an effective accomplishment of its purpose requires establishing an efficient legal framework that regulates every aspect of legal issues it involves. Accordingly, this article investigates the status, requirements, parties, subject matter, time, execution and legal effect of compromise under Ethiopian law. Based on a doctrinal legal research approach, it argues that the legal status, clarity and effect of compromise are vague in the Ethiopian legal framework. The legal regime is ambiguous about whether compromise is a contract or consent decree in addition to the vagueness of its substantive and procedural requirements for an execution. The recently introduced Arbitration and Conciliation Working Procedure Proclamation [No.1237/2021] also overlooks the subject of compromise. Hence, this article recommends an overall revision of compromise in the Ethiopian legal system. This includes clearly defining its legal status, scope that identifies subject matters not amenable to it, and establishing conditions such as the requirement for a written form to enter into it and court approval for its execution.*

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\* (LLB, LLM), Lecturer in Law, Dire Dawa University, College of Law. The Author can be reached at: eyaderteshome@gmail.com. The Author is very grateful to the internal and external reviewers for their constructive comments.

## **1. Introduction**

The formal litigation of legal disputes in a court of law is the primary mode of resolving disputes of both civil and criminal matters.<sup>1</sup> Nevertheless, one of the distinctive features of civil matters is that an individual whose right is allegedly infringed cannot be compelled to bring and pursue his/her claim against the defendant in a court of law.<sup>2</sup> As a natural corollary to this, parties can resolve their dispute in or out of court either through litigation, conciliation<sup>3</sup>, arbitration<sup>4</sup> or even to the extent of abandonment<sup>5</sup> of their claim.

In an attempt to legally acknowledge this private right in resolving disputes, many legal systems recognize compromise as one of the devices for prevention and/or termination of litigation over civil matters (and arguably some criminal matters)<sup>6</sup> where parties settle their contentious issues by agreement.<sup>7</sup> The very purpose of such compromise is a voluntary resolution of legal disputes and, at the same time, avoids litigation before the court on the same matter. Public policy acclaims this peaceful settlement of dispute between and among individuals for such resolution provides innumerable advantages over litigation from the vantage point of saving time, cost, and energy of parties as well as the court to the maintenance of social relationships.<sup>8</sup>

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<sup>1</sup> Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 37 & Article 79, Proc. No.1/1995, *Fed. Neg. Gaz.*, (Extraordinary Issue), Year 1, No.1.

<sup>2</sup> For one thing, it is a dispute over private rights or interests and for another thing, compulsory litigation of such matter is difficult and at times impossible as there is less public interest in it.

<sup>3</sup> Arbitration and Conciliation Working Procedure Proclamation, 2021, Article 4-Article 53, Proc. No.1237/2021 *Fed. Neg. Gaz.*, Year 27<sup>th</sup>, No.21 [Herein after ACWP Proclamation No.1237/2021]; Civil Code of Ethiopia, 1960, Article 3318-3324, Proc. No. 165/1960, *Neg. Gaz.*, (Extraordinary Issue), Year 19, No.2

<sup>4</sup> ACWP Proclamation No.1237/2021, Article 54-76; Civil Code, Article 3325-3346; Civil Procedure Code of Ethiopia, 1965, Article 315-319 cum Article 350-357, Decree No.52/1965, *Neg. Gaz* (Extraordinary Issue) 25<sup>th</sup>Year, No.3

<sup>5</sup> Civil Procedure Code, Article 278-279.

<sup>6</sup> Some argue that compromise can be validly made over certain types of crime. See I.J. Hardingham, 'Setting Aside Agreements of Compromise,' *Melbourne University Law Review*, Vol.8, 1971, p.152

<sup>7</sup> Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044-Article 2058. Civil Code of the Philippines, Republic Act No. 386, Article 2028-Article 2041.

<sup>8</sup> David Fosket, *The Law and Practice of Compromise*, (4<sup>th</sup> ed., London: Sweet & Maxwell 1996).

Nonetheless, compromise can also be an instrument of multiple litigations, dilatory tactics, exploitation of weakest parties, and unnecessary sacrifice of rights unless effectively regulated.<sup>9</sup> Therefore, for compromise to effectively settle disputes, it must be backed by an efficient legal framework that is a foundation for its effective utilization and easy enforcement. In particular, the law recognizing, governing and regulating compromise must be able to provide a detailed account of how, when and between whom compromise can be reached, its legal status and effect, the manner of its enforcement, and subject matters that can and cannot be amenable to it. This is particularly true given that the entire efficacy or otherwise of compromise depends on whether the law clearly and effectively governs those matters.

In Ethiopia, the applicable rules on compromise are primarily found in the Civil Code<sup>10</sup> and the Civil Procedure Code.<sup>11</sup> Inexplicably, the legal status of those provisions on compromise is neither repealed nor reformed by Arbitration and Conciliation Working Procedure Proclamation No.1237/2021 [ACWP Proc.No1237/2021], Federal Courts Proclamation No.1234/2021 and Federal Court Annexed Mediation Directive No.12/2014 E.C. One may wonder as to the comprehensiveness, effectiveness and even contemporariness of the Civil Code and the Civil Procedure Code provisions on compromise after half a century, which in turn, merits systematic investigation. In this regard, even if some scholars made notable contributions,<sup>12</sup> still much is left to be explored<sup>13</sup> vis-à-vis the underlying

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<sup>9</sup> For arguments against compromise see Owen Fiss, 'Against Settlement,' Yale Journal of Law, 1984, p.93.

<sup>10</sup> Civil Code, Article 3307-3317.

<sup>11</sup> Civil Procedure Code, Art.274-277.

<sup>12</sup> Tecele Hagos, 'Amicable Dispute Resolution in Civil and Commercial Matters in Ethiopia: Negotiation, Conciliation and Compromise', Mizan Law Review, Vol.13, No.1, 2019, PP.1-30. Samuel Ephrem, 'The Need for Comprehensive Legislative Reform on Court Annexed ADR in Ethiopia', Mizan Law Review, Vol.17, No.1, 2023, pp. 151-166. Fekadu Petros, 'Underlying Distinctions between ADR, Shimglina and Arbitration: A Critical Analysis', Mizan Law Review, Vol.3, No.1, pp.105-133. Shipi M. Gowok, 'Alternative Dispute Resolution in Ethiopia - A Legal Framework,' African Research Review, Vol. 2, No.2, 2008, pp. 265-285.

<sup>13</sup> For example, a detailed study has not been carried out in relation to the legal status of compromise, contractual or judgmental nature of compromise, legal effect, and parties to, time and execution of compromise in Ethiopia.

landscape of compromise and the relationships between these different laws to regulate every legal matter about compromise.

Accordingly, this article aims to provide a comprehensive investigation and analysis of the compromise agreement in the Ethiopian legal framework. For this purpose, a qualitative and doctrinal legal research approach is employed. Primarily, through doctrinal analysis, it identifies and analyses pertinent legal documents, such as laws and binding decisions to examine their legal nature, logicity, consistency, relevance and comprehensiveness. In addition, through a systematic literature review, it analyzes and digests secondary sources to support its arguments.

Thus, the article argues that the Ethiopian legal framework is ambiguous about whether a compromise is a contract or a consent decree, in addition to the deficiency of its substantive and procedural requirements for execution. The recent Arbitration and Conciliation Proclamation No.1237/2021 also doesn't adequately address the subject of compromise. Accordingly, as part of the legal reform on compromise, this article suggests the need to define the legal status of compromise and its scope of application in addition to introducing the requirements, such as a written form of compromise agreement and court approval for its execution. In the subsequent sections, this article discusses the theoretical and conceptual considerations about compromise; then it analyses the Ethiopian legal framework on the understanding, nature, scope of application, gaps and ambiguities of compromise; finally, it draws concluding remarks.

## **2. Theoretical and Conceptual Considerations of Compromise**

### **2.1. Concept and Rudiments of Compromise**

The term compromise<sup>14</sup> is interchangeably referred to as settlement, adjustment, negotiated or conciliated agreement or even just agreement. It is difficult to provide

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<sup>14</sup> In this article the words compromise, compromise agreement, and settlement are used interchangeably.

a generally acceptable definition of the term for the obvious reason that its meaning and purpose are used in diverse contexts.<sup>15</sup> Definitions forwarded for compromise demonstrate its contractual source that comes to being and getting legal force as a result of the consensual agreement of parties with a core determination of preventing or ending a dispute.<sup>16</sup> It has been held that a compromise is a contract perfected by mere consent where the parties making reciprocal concessions avoid litigations or put an end to one already commenced.<sup>17</sup> The Ethiopian Civil Code defines compromise as ‘a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute from arising in the future’.<sup>18</sup> As noted by Sally Brown, there are four requirements for valid creation and enforcement of compromise: (1) existence of litigation, (2) agreement between the parties, (3) intention of ending or preventing the litigation, and (4) reciprocal concessions or sacrifices made by the parties.<sup>19</sup>

Accordingly, the first element of compromise is the existence of litigation which contemplates the presence of either actual or potential legal dispute between parties. In explaining the denotation and rationale of this element of compromise, Sally maintains that “the mere existence of a disagreement, or even the belief that a dispute will arise, constitutes litigation to reach a compromise and such disagreement is required because if the parties did not disagree, there would be nothing about which to settle.”<sup>20</sup>

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<sup>15</sup> For example, Black’s Law Dictionary defines compromise in two ways: first as a normal compromise and second as a satisfaction “1. *An agreement between two or more persons to settle matters in dispute between them.* [Or] 2. *A debtor’s partial payment coupled with the creditor’s promise not claim the rest of the amount due or claimed.* Bryan A. Garner, *Black’s Law Dictionary*, (7<sup>th</sup> ed., West Publishing Co. St. Paul., 1999).

<sup>16</sup> Sally Brown Richardson, ‘Civil Law Compromise, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?’ *Louisiana Law Review*, Vol.69, No.1, 2008, p.180.

<sup>17</sup> *Air Transportation Office Vs Gopuco*, The Supreme Courts of Philippine, 2008, Jr, Sol phil.228, <http://sc.judiciary.gov.ph/jurisprudence/2013/> [last accessed December; 2023].

<sup>18</sup> Civil Code, Article 3307.

<sup>19</sup> Sally Brown, *supra* note 16.

<sup>20</sup> *Ibid.*

The second component of compromise is the existence of agreement which is a mutual assent or meeting of minds between parties to resolve their differences through settlement. This requirement is a clear indication that compromise is a progeny of parties' free will and consent, not of law or court. Consequently, the first nature of compromise is that it is a voluntary act. Thus, one is not legally or otherwise forced to enter into compromise. Such agreement can be made before, during or after commencement of litigation, in or out of court.<sup>21</sup> In the same fashion, Ethiopian law considers compromise as a contract which has a multifaceted implication.<sup>22</sup> The third requirement of compromise is the presence of cause, motive or purpose in the agreement. As a result, for a valid compromise to exist, the agreement must intend to end or prevent a dispute. The following remark has been made regarding this element:

‘If a dispute arises and the parties enter into an agreement, then the goal of that agreement must be to resolve the dispute via settlement rather than judgment. Otherwise, the agreement does not serve the purpose of a compromise, as the disagreement between the parties will continue to exist.’<sup>23</sup>

The existence of an element of cause or motive in a compromise agreement can be considered as one of its distinctive features.<sup>24</sup> In principle, cause or motive is not relevant in determining the validity of the contract under Ethiopian law unless it is explicitly indicated in the contract itself.<sup>25</sup> Sally Brown's last requirement for a valid

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<sup>21</sup> Civil Procedure Code, Article 275.

<sup>22</sup> Civil Code, Article 3307. Concerning the contract nature of compromise, the provisions of the Civil Code (Article 1675-2125 of Civil Code) governing General Contract Law do have application whenever the special provisions governing compromise are silent (Article 1676(1)(2) of Civil Code). This insinuation of reference to provisions of general contract law is particularly important given that the special provisions on compromise are silent regarding most legal requirements on the conclusion of compromise agreement such as capacity of parties, offer, acceptance etc.

<sup>23</sup> Sally Brown, *supra* note 16, P.182.

<sup>24</sup> In fact, an element of cause or motive is also found in the case of an Administrative Contract; see Civil Code Article 3170-3171.

<sup>25</sup> *Id.*, Article 1717 and Article 1718.

compromise is the existence of reciprocal concessions. Parties to compromise usually end or prevent disputes through methods of reciprocal concessions or sacrifices. The actual meaning and legal effect of this particular phrase is not clear under Ethiopian law. It has been interpreted as a condition requiring consideration<sup>26</sup> where both parties undertake an obligation in exchange for something in which there is a quid pro quo, something given, done, or not done in return.<sup>27</sup> Here, the resolution of a disputed claim in return for obligations assumed by the defendant can be considered as a reciprocal concession or good consideration.<sup>28</sup> Hence, mutual concession in case of compromise means parties avoid the filing of a suit or put an end to one that has already been instituted by giving, promising, or retaining something.<sup>29</sup> A question might arise as to whether unilateral undertaking, when only one of the parties assumes obligation or gives away his rights without taking anything from the other, is regarded as a compromise. The position of the Ethiopian Civil Code seems to recognize the total renunciation of rights by one party as a compromise.<sup>30</sup>

Putting together most definitions, it is possible to describe compromise as an agreement between two or more persons with actual or potential legal disputes who enter into a settlement in or out of court to end or prevent litigation over such disputes through mutual concession.<sup>31</sup> Hence, a validly created compromise must be able to resolve disputes, and at the same time prevent future litigation or end one that has already been undergoing.

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<sup>26</sup> General Contract law of Ethiopia does provide considerations as elements of the contract, unlike most common law legal systems.

<sup>27</sup> Sally Brown, *supra* note 16, p. 186.

<sup>28</sup> I.J. Hardingham, *supra* note 6, p.151.

<sup>29</sup> Sally Brown, *supra* note 16, p.186.

<sup>30</sup> Civil Code, Article 3309-3310.

<sup>31</sup> *Id.*, Article 3307.

## **2.2. Nature and Legal Status of Compromise**

There have been uncertainties and at times scholarly debates,<sup>32</sup> regarding the particular nature and legal status of compromise. About its nature, the usual debate revolves around whether compromise is regarded, in and of itself, as a dispute settlement mechanism or it is a mere result of other dispute resolution mechanisms like negotiation, conciliation or court-annexed mediation. Still, the most important confusion pertains to the characterization of the legal status of compromise as a contract (contractual approach) or consent-decree (judgmental approach). The particular association or classification of compromise either as a contract or judgment does have far-reaching repercussions on the legal effect, enforcement and execution of it as well as in its utility to avoid multiplicity of suits over the same subject matter. Consequently, careful delineation of its nature and legal status inevitably goes beyond academic discourse as it has practical implications.

### **A. Process Vs. Result Nature**

Here the issue is whether a compromise agreement is a means of dispute settlement or it is a result of other dispute settlement mechanisms. To answer this question, one needs to consider whether a compromise agreement includes procedural aspects in addition to substantive features.

The answer to the above query sequentially boils down to an assessment of whether what is considered a compromise is the final agreement of the parties or whether it includes all procedural aspects before those agreements. Some hold that normally compromise is an outcome of amicable dispute resolution methods (particularly that of negotiation and conciliation/mediation) which makes it a by-product or end; rather

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<sup>32</sup> See different positions maintained by works of Tecele Hagos, *supra* note 12, p.25 and Damissew Tessema, 'Compromise as a Dispute Settlement Mechanism under the Ethiopian Civil Procedure Code' (Senior Thesis, Addis Ababa University, 2000) (Unpublished).



than itself being an independent dispute settlement mechanism or means.<sup>33</sup> It naturally follows that according to this view, compromise does not have a separate and autonomous existence.

On the other hand, by considering a contract as a dispute settlement mechanism, it is equally possible to consider compromise as a distinct and independent means of dispute resolution.<sup>34</sup> Thus, as a contract, compromise encompasses serious transactions of pre-contractual discussions, offers, counter-offers, and acceptance, and as such can be considered as a process of dispute resolution.

This writer holds that compromise can be treated both as an autonomous process of dispute settlement mechanism or result of negotiation, conciliation and court-annexed mediation. A closer look at Ethiopian law reveals that the law seems to adopt both processes and result nature of compromise. First, both the Civil Code and Civil Procedure Code treat compromise as a distinct means of preventing, ending or discontinuing disputes and litigation.<sup>35</sup> On the other hand, Article 3324 of the Ethiopian Civil Code indicates the result nature of compromise by affirming that compromise can be reached through conciliation. Similarly, the result nature of the settlement agreement is maintained under some provisions of the Arbitration and Conciliation Working Procedure Proclamation No.1237/2021<sup>36</sup> and Federal Courts Proclamation No.1234/2021.<sup>37</sup> Yet, the characterization of compromise as a process or result of dispute settlement still depends on whether it is a contract or judgment.

## **B. Contractual Vs. Judgmental Approach**

A compromise is a contract in the sense that it is a by-product of the parties' consensual agreement, unlike third-party-imposed court judgment or arbitral award.

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<sup>33</sup> Tecele Hagos, *supra* note 12, p.25.

<sup>34</sup> Fekadu Petros, 'Underlying Distinctions between ADR, Shimglina and Arbitration: A Critical Analysis', *Mizan Law Review*, Vol.3, No.1, pp.105-133.

<sup>35</sup> Civil Procedure Code, Article 274-Article 277 & Civil Code, Article 3307-Article 3317.

<sup>36</sup> ACWP Proclamation No.1237/2021, Article 67 & Article 68.

<sup>37</sup> Federal Courts Proclamation No.1234/2021, Article 45 (3 & 4). See also Federal Court Annexed Mediation Directive No.12/2014 E.C.

But once it comes to life through a contract between parties, its characterization as a contract or judgment carries consequences of different gravity on its legal effect and enforcement mechanism.

It has already been noted that compromise between parties settles disputes through agreement and prevents or ends litigation over such matters. But it is possible that, later on, disputes between parties might arise on various issues such as over existence or validity of such compromise itself, and whether or not it settles the underlying subject matter. The legal resolution of those disputes mostly depends on the legal approach adopted in the treatment of compromise as a contract or consent decree. Furthermore, compromise mostly settles original disputes by substituting them with new arrangements or by creating new rights and obligations.<sup>38</sup> There is still a prospect for disputes to emerge lest one of the parties fails or refuses to abide by the terms and conditions of compromise. The legal status of such compromise still determines the enforcement mechanism of this newly created arrangement as well as the legal remedies and remedial recourse pursued by the aggrieved party. If one bestows a decree status upon compromise, one can simply enforce it by instituting execution proceedings. On the other hand, if one continuously regards compromise as a contract, it must be enforced through the normal judicial proceeding of a full-blown trial.

Hence, it is necessary to ascertain the particular legal status of compromise under the legal system. The Ethiopian law lacks clarity on the particular legal status of compromise other than declaring that between parties' compromise has the force of *res judicata* without appeal.<sup>39</sup> This legal effect of compromise invites a conclusion that compromise does have judgmental status as it bars any subsequent suit on the matter. However, it is doubtful whether all kinds of compromise have such status

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<sup>38</sup> Civil Code, Article 3308(1) declares that a compromise may be made to create a legal obligation.

<sup>39</sup> Civil Code, Article 3312(1).

regardless of approval by the court or whether made before or after litigation, in or out of court.

In many of its decisions, the Cassation Division of the Federal Supreme Court vividly proclaimed and underlined the status of compromise as a judgment rendered by the court.<sup>40</sup> In most of those cases, by referring to Article 277 of the Civil Procedure Code, the Cassation attaches approval of the court after ascertaining legality and morality as a requirement for compromise to be treated and executed as court decree.<sup>41</sup> However, in one of its decisions, the Cassation Bench seems to have taken the judgmental status of compromise too far by noting compromise made out of court has judgmental status and effect capable of execution as a decree even without the approval of the court.<sup>42</sup> Though it emanates from the contractual agreement, compromise has a peculiar characteristic of the consent judgment, which is binding and capable of execution by itself like judgment when approved by the court.<sup>43</sup> This court decree character of compromise emanates from its very nature of ending or terminating litigation like a court judgment.

The finality, non-appealability and court decree like the execution of a settlement agreement that emanates from conciliation and court-annexed mediation are also provided under both ACWP Proclamation No.1237/2021<sup>44</sup> and Federal Courts Proclamation No.1234/2021.<sup>45</sup> It is also stated under Article 15 (2) of Federal Court Annexed Mediation Directive No.12/2014 E.C that a compromise agreement

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<sup>40</sup> *Birru Qorcho v. Kifle Habdeta*, Federal Supreme Court, Cassation Bench, File No.25912, (02/08/00 E.C), Vol.5, p.343. *Kedir Haji and Lucy College Sh.c. v. Amin Usman and Nuriya Jemal*, FSC, Cassation Bench, File No.52752, (16/10/2002 E.C), Vol.9, p.341. *Werkinesh Wubeneh v. Alemaz Alemu et.al.*, FSC, Cassation Bench, File No.83582, Vol.15, (27/07/2005 E.C), p.144-148.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Niema Abadga Abawaji & Others vs. Taha Jemal Adem*, Federal Supreme Court, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, at 110. Similarly, in other case the Cassation Bench held that according to Article 3312 of Civil Code compromise agreement is like a final judgment. *Id.*, p.343.

<sup>43</sup> *Haji Beya Abamecha Kelifa Abakoyas vs. Oromia Forestry and Wild Animal Protection Authority (and Merawa Cooperative Society)*, FSC, Cassation Bench, File No.114623, (22/06/2009 E.C), Vol.20, p.124-127.

<sup>44</sup> ACWP Proclamation No.1237/2021, Article 67 & Article 68.

<sup>45</sup> Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).

springing from court-annexed mediation is executed like court judgment once approved by the court.

Consequently, one may arguably conclude that compromise does have both characteristics of contract and judgment. It has a contractual nature as to its sources, but considering its purposes in ending/terminating disputes and in its *res judicata* effect, it has a judgmental nature. As noted, before, the contractual nature of compromise relates to its source which is the parties' consent. Hence, any dispute concerning the existence of a valid compromise between parties, its content, scope and subject matter encompasses the contractual aspect of compromise which should be entertained through normal court proceedings. However, once the valid existence of compromise on a litigious matter is ascertained, subsequent controversies over the original subject matter of dispute, its termination, and breaches of terms and conditions of compromise call for judgmental treatment of compromise. This in turn calls for an execution proceeding rather than a full-blown trial.

### **2.3. Compromise vis-à-vis Satisfaction, Withdrawal of Suit, Conciliation and Arbitration**

Here, it is helpful to differentiate compromise from withdrawal, satisfaction of suit and other alternative dispute resolution mechanisms. Withdrawal of suit is a unilateral act made by the plaintiff that abandons to pursue of his claim up to the end of litigation and thus will lose his right of instituting fresh suit unless such withdrawal is made with the permission of court.<sup>46</sup> On the other hand, compromise is a mutual and bilateral act of both parties. Moreover, unlike compromise, withdrawal of suit is mostly applicable after commencement of litigation and not made for obvious purposes of preventing or ending litigation; rather it has something to do with personal reasons of the plaintiff. On the other hand, accord or satisfaction of suit is a payment by the defendant of the full or partial claims of the plaintiff which

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<sup>46</sup> Civil Procedure Code, Article 278-279.

met with full or partial acceptance by the latter.<sup>47</sup> It is more like the performance of claims. In case of satisfaction, if it is accepted by the plaintiff, nothing is left and it is the end of litigation, while in case of compromise, most of the time, it replaces the subject matter of the suit with new rights which should be performed or executed.<sup>48</sup> If parties to compromise perform their reciprocal obligations at the same time, it instantly ends litigation as that of satisfaction. Like the withdrawal of the suit, satisfaction operates after the institution of the suit. Given this post institution of suit application of withdrawal and satisfaction of suit, it is possible to conclude that they have procedural aspects only. On the other hand, compromise has both substantive aspects (as a contract) and procedural aspects (as an effect) in ending or terminating disputes. Due to this, withdrawal and satisfaction of the suit are treated separately from compromise under Ethiopian law.<sup>49</sup>

Compromise is also different from other out-of-court alternative dispute resolution mechanisms such as conciliation and arbitration. Though voluntary and non-binding, compromise is different from conciliation and mediation as it usually comprises a result of other dispute settlement mechanisms such as negotiation, conciliation or court-annexed mediation. Second, unlike conciliation and mediation, compromise can come to be even without the involvement of a neutral and impartial third-party conciliator/mediator. Legal disputes can be settled by compromise either between parties themselves or through the facilitation of a third party. It is worthwhile to mention that compromise can be a result of conciliation proceedings or court-annexed mediation<sup>50</sup>. Compromise is also different from arbitration in the sense that it is non-adversary and there is no third party appointed by the disputants to render binding decisions.<sup>51</sup> Unlike arbitration, there is no risk of losing, and no semi-formal

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<sup>47</sup> Civil Procedure Code, Article 281-283 indicates that "satisfaction" is the actual acceptance by the creditor of the substitute performance.

<sup>48</sup> Civil Code, Article 3308(1).

<sup>49</sup> Civil Procedure Code, Article 278-279 and Article 281-283.

<sup>50</sup> Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).

<sup>51</sup> Fekadu Petros, *supra* note 34.

procedural aspects involved in compromise as to appearance, argument of claim, production of evidence and rendering of decision. However, compromise has a striking similarity with negotiation. One of the differences between the two is that while compromise sometimes operates as a result of other dispute settlement mechanisms, negotiation does not.

#### **2.4. Utility and Otherwise of Compromise**

There has been a consensus that, rather than going to court for litigation, parties to actual or potential legal disputes are encouraged to settle their matters voluntarily through compromise with the attendant saving of time and expense to both the litigants and the court,<sup>52</sup>for maintaining social harmony,<sup>53</sup>and reducing court congestion. In relation to its easy enforceability and other advantages associated with compromise, the Right Honorable Lord Bingham of Cornhill has made the following remarks in writing a foreword to one of the most celebrated books on the subject:

‘The law loves compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by a court decision. A party who settles forgoes the chance of total victory but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat.’<sup>54</sup>

Compromise is creditable for being a less expensive, expeditious, private or confidential resolution of disputes, and most importantly it maintains post-resolution societal accord between disputants. It also shares benefits of other ADRs as it enables disputants to control the process and outcomes of dispute resolution, in its win/win,

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<sup>52</sup> *Carney v. Hartford Accident & Indem. Co.*, 250 So. 2d 776, 779 (La. App. 1st Cir. 1970) Cited in Sally Brown, *supra* note 16, p.176.

<sup>53</sup> Robert A. Sedler, *Ethiopian Civil Procedure*, (Haile Sellasie I University, Addis Ababa,1968), p.187

<sup>54</sup> David Fosket, *supra* note 8, p.ix

transparent, predictable, and flexible outcome, and reduces unreasonable emotional, economic and time costs which in turn can improve disputants' satisfaction and trust.<sup>55</sup>

Like all mechanisms of dispute resolution, compromise has its adverse sides. One of the drawbacks of compromise is that it has the potential to aggravate the position of weaker parties in the agreement when the bargaining powers of the parties are not equal.<sup>56</sup> It has been pointed out that in case of an imbalance of power between plaintiff and defendant, settlement [compromise] can produce unfair outcomes.<sup>57</sup> Second, compromise does not necessarily mean an accurate and fair outcome in the sense of determining conclusively the legitimate rights and obligations of parties. Rather it is a partial or total sacrifice of legal interests in an attempt to avoid or put an end to litigation. As Owen Fiss argued, "parties might settle while leaving justice undone."<sup>58</sup> Similarly, Laura Nader opined that settlement favours harmony over justice.<sup>59</sup> Theoretically speaking, compromise means parties agree over disputes of substantive rights recognized under the law, but the existence of which should have been verified by evidence before the court of law. It can be contended that, in case of compromised dispute, controversies over substantive rights, the existence of which is not proved, have been given legal recognition and enforcement just because they emanate from parties' consent.<sup>60</sup> As a result, the appropriate utilization of compromise must take into account those limitations and has to be operated together

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<sup>55</sup> Samuel Ephrem, "The Need for Comprehensive Legislative Reform on Court Annexed ADR in Ethiopia", *Mizan Law Review*, Vol.17, No.1, 2023, p. 158.

<sup>56</sup> Owen Fiss, *Against Settlement*, *supra* note 9, p.1076-1077. See also David Luban, 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice', *Philosophy & Public Affairs*, Vol.14, No.4, 1985, pp.413-414.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Id.*, p.1085.

<sup>59</sup> Laura Nader, 'Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology', *Ohio State Journal on Dispute Resolution*, Vol.9, 1993, p.1.

<sup>60</sup> As some argue the whole point of such a contract is to eliminate uncertainty in relation to otherwise doubtful issues of law and/or fact and to terminate litigation, to put an end to contention. I.J. Hardingham, *supra* note 6, p.157.

with litigation, conciliation and arbitration. According to Michael Moffitt, the choice is not between litigation and compromise as “both have values and functions worthy of celebration and at the same time both also have significant flaws and shortcomings in their ideals and their implementation.”<sup>61</sup> Instead, litigation and settlement have come to depend on each other to function properly.<sup>62</sup> In any case, as the social utility of compromise outweighs its shortcomings, it is well settled that the general policy of the law favours compromise.

### **3. Ethiopian Legal Framework on Compromise**

In Ethiopia, the applicable rules on compromise are dispersedly found in the special as well as general contract provisions of the Civil Code<sup>63</sup> and the Civil Procedure Code.<sup>64</sup> Noticeably, the legal status of those provisions on compromise are neither repealed nor reformed by Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, Federal Courts Proclamation No.1234/2021 and Federal Court Annexed Mediation Directive No.12/2014 E.C. The new Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, though it explicitly repealed the provisions of the Civil Code and Civil Procedure of Ethiopia on Conciliation and arbitration,<sup>65</sup> does not say anything about the status of the provisions of both laws on compromise. The sensible conclusion is that, in the absence of any contradiction, expressed or implied repeal, the provisions of the Civil Code and Civil Procedure Code continue to be the prevailing legal frameworks regulating compromise in Ethiopia. Moreover, nothing is clearly provided about compromise under ACWP Proclamation No.1237/2021 other than stating settlement agreement is a by-product of successful conciliation with almost the same legal

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<sup>61</sup>Michael Moffitt, ‘Three Things to be Against ("Settlement" Not Included)’, *Fordham Law Review*, Vol.78, 2009, pp.1203-1206.

<sup>62</sup> *Ibid.*

<sup>63</sup> Civil Code, Article 3307-Article 3317.

<sup>64</sup> Civil Procedure Code, Article 274-Article 277.

<sup>65</sup> ACWP Proclamation No.1237/2021, Article 78(1) & (2).



effect as that of compromise.<sup>66</sup> Similarly, Federal Courts Proclamation No.1234/2021 considers a settlement agreement as an outcome of successful court-annexed mediation.<sup>67</sup> In the face of the silence of current laws to deal specifically with compromise, the reasonable course of action is to look to the Civil Code and Civil Procedure Code laws to determine the legal framework that governs compromise.

### **3.1. The Borderline Between the Civil Code and Civil Procedure Code on Compromise**

The sphere of application and relationship between the two laws are not clearly delineated. At times, there seems to be some contradiction between the two laws.<sup>68</sup> Despite this confusion, Article 274(2) of CPC seems to suggest the overriding status of the Civil Procedure Code regarding compromise as it proclaims, “without prejudice to the provisions of this Chapter, the provisions of Arts. 3307-3324 of the Civil Code shall apply to compromise agreements, in particular as regards the effect of, appeal from an invalidation of such agreements.”

The above provision states that the Civil Code parts of compromise apply as long as it is consistent with the Civil Procedure Code counterparts. This provision raises several critical issues. The straightforward issue is that there’s debate over whether the Civil Procedure Code, which is a decree, can take precedence over the Civil Code, a Proclamation, even though the former was enacted later. The more serious concern is whether procedural laws, especially the Civil Procedure Code, can have priority over substantive laws. The clear answer to this is a resounding no. Hence, to make a reasonable construction out of the message purported by Article 274(2) of

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<sup>66</sup> *Id.*, Article 67 & Article 68.

<sup>67</sup> Federal Courts Proclamation No.1234/2021, Article 45(3) & (4) & Federal Court Annexed Mediation Directive No.12/2014 E.C.

<sup>68</sup> Particularly, in relation to formality requirement, content and effect of compromise See Article 3308(2) of Civil Code and Article 276 & Article 277 of Civil Procedure Code.

the Civil Procedure Code, one has to draw a rational line between the two laws in governing compromise.

The Civil Procedure part of compromise relates to compromise made after the suit has been instituted in court<sup>69</sup> and governs the procedural aspects of compromise. Its application is limited to procedural issues as to what the court has to do when faced with suits subjected to compromise and where objections<sup>70</sup> are raised or when the pending suit itself is compromised.<sup>71</sup> On the other hand, the Civil Code provisions govern mostly the substantive and contractual<sup>72</sup> aspects of compromise and apply to all kinds of compromise whether made before, during or after the commencement of litigation in court. Accordingly, the question of whether a valid compromise has been concluded, between whom, its effect, grounds of invalidation and other substantive matters are determined concerning the Civil Code. It follows that the overriding features of the Civil Procedure Code do not relate to substantive aspects of compromise.

### **3.2. Legal Requirements for Making a Compromise Agreement**

Though a compromise agreement must fulfil certain essential requirements of general contract law,<sup>73</sup> here an inquiry is only made in relation to special requirements necessary for a compromise agreement stated under the special contract law.<sup>74</sup>

#### **A. Parties to Compromise Agreement**

Ostensibly, those who can enter into a compromise agreement must be capable under the law and have either actual or potential legal disputes. The relevant provisions governing compromise under the Civil Code neither require special capacity nor put

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<sup>69</sup> Civil Procedure Code, Article 274(1). See also Robert A. Sedler, *supra* note 36, p.186.

<sup>70</sup> *Id.*, Article 244(2(g)).

<sup>71</sup> *Id.*, Article 274(1).

<sup>72</sup> The Civil Code parts of compromise is found under Book V titled Special Contract.

<sup>73</sup> Civil Code, Article 1676(1& 2) cum Article 1678-1730.

<sup>74</sup> *Id.*, Article 3307-3317.

any limitation on the capacity of parties who can lawfully enter into such agreement.<sup>75</sup> Ethiopian law does not explicitly require any positive special capacity in relation to the subject matter of compromised dispute. Conversely, under French law, in order to compromise, one must have the capacity to freely dispose of the things included in the compromise.<sup>76</sup>

In relation to the limitation on the capacity, Ethiopian law imposed legal restraint on the tutor when concluding a compromise agreement.<sup>77</sup> For instance, the Revised Federal Family Code puts a restriction on the capacity of the tutor to enter into a compromise agreement concerning the interests of the minor.<sup>78</sup> The restriction depends on the monetary value of the disputes concerning the minor. The tutor can freely enter into a compromise agreement whenever the amount of the dispute is less than one thousand Ethiopian Birr. However, for interest in excess of one thousand Ethiopian Birr, the tutor needs court authorization to enter into a compromise agreement.<sup>79</sup> Here the rationale for court authorization is to check whether such an agreement is in the best interest of the minor child who is legally incapable of administering his affairs so that those in charge should not abuse their power to the detriment of the minor interests. In addition to restrictions on guardians or tutors representing incapable persons in suits,<sup>80</sup> some legal system has the same restriction of requiring court authorization for compromise entered in case of a class action or

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<sup>75</sup> The Civil Code, however, under Article 3311 does state that a compromise agreement is governed by the doctrine of privity and binds only parties to the agreement.

<sup>76</sup> Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2045. The same requirement is found under the repealed provision of the Civil Code of Ethiopia Article 3326 (1) for parties to arbitration submission.

<sup>77</sup> Civil Code, Article 301. See also Revised Federal Family Code, 2000, Article 288, Proc. No. 213/2000, *Fed. Neg. Gaz.* (Extraordinary), year 6, No.1.

<sup>78</sup> *Id.* Article 288.

<sup>79</sup> *Ibid.*

<sup>80</sup> Likewise, under Indian law the guardian or tutor needs court authorization to enter into a compromise agreement on behalf of a minor child and any such agreement or compromise entered into without the leave of the court so recorded shall be void. See Rule 7(1), Order 32 of Indian Code of Civil Procedure; Rule 7(1), Order 32 of Indian Code of Civil Procedure *Cited in* Jatindra K. Das, *Code of Civil Procedure*, (PHI Learning Private Limited, Delhi, 2014), p.453.

representative suit.<sup>81</sup> Here the need to have court authorization for a compromise agreement is to protect the interests of others who are not named in the suit so that their say should be heard on the fate of the suit. Ethiopian Law should have the same restriction on the compromise of a class action or representative suit.

## **B. Subject Matter and Scope of Compromise**

One of the most important issues not well addressed under Ethiopian law is concerning the kind of subject matter which could be safely resolved by compromise. Unlike Ethiopian law, the position of other countries' laws is explicit in this regard. However, the laws and practices of countries varied in response to what type of disputes, civil or criminal, can and cannot be validly settled through a compromise agreement. Almost all countries prohibit compromises made over criminal matters.<sup>82</sup> On the other hand, the practice of some countries shows that some criminal matters of a private nature can be capable of settlement through a compromise agreement.<sup>83</sup> In relation to civil matters "the general principle of law is that all matters [that] can be decided in a suit [before the civil court] can also be settled using a compromise."<sup>84</sup> However, some even legally prohibit compromise agreements in certain civil matters.<sup>85</sup>

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<sup>81</sup> For instance, the Indian Code of Civil Procedure provides that no agreement or compromise may be entered into in a representative suit without the leave of the court expressly recorded in the proceeding and any such agreement or compromise entered into without the leave of the court so recorded shall be void. Moreover, before granting such leave, the court must give notice, in such manner as it may think fit, to such persons as may appear to it to be interested in the suit. See Rule 3-B (1), Order 23 of the Indian Code of Civil Procedure. See *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480; (1990) 1 SCC 613, *Cited in* Jatindra K. Das, *Code of Civil Procedure*, p.452.

<sup>82</sup> Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2046. See also Civil Code of the Philippines, Republic Act No. 386, Article 2034.

<sup>83</sup> Compromise can be validly made over offences of a private nature, See *Goldsbrough, Mort & Co. Ltd Vs Black* (1926) 29 W.A.L.R. 37; *Kerridge Vs. Simmonds* (1906) 4 C.L.R. 253 *Cited in* I.J. Hardingham, *supra* note 6.

<sup>84</sup> Jatindra K. Das, *supra* note 80, p.446.

<sup>85</sup> For example, Philippines law explicitly declared an invalid compromise made over questions of (1) the civil status of persons; (2) The validity of a marriage or a legal separation; (3) Any ground for legal separation; (4) Future support; (5) The jurisdiction of courts; and (6) Future legitimate. Civil Code of the Philippines, Republic Act No. 386, Article 2035.

Concerning civil matters in Ethiopia, we cannot find any single provision which explicitly prohibits the compromise of such subject matter. The usual limitation put on compromise agreement is the ‘lawfulness and the ‘public morality’ of the settlement.<sup>86</sup> Most civil disputes are settled between parties without getting the attention of courts since it is up to private parties to pursue litigation or not.<sup>87</sup> Seemingly, the law cannot prohibit and punish parties for settling their disputes out of court. Thus, it is possible to argue that almost all civil matters can be settled through compromise under Ethiopian law provided that it is not contrary to law and morality.

Nevertheless, still question remains whether those civil matters the adjudication of which is exclusively vested in court by law such as divorce,<sup>88</sup> existence of marriage<sup>89</sup> and irregular union<sup>90</sup> can be subject to a compromise agreement. Teckle Hagos holds that as those disputes involve strong public interest, they cannot be subject to private dispute settlement mechanisms [including compromise].<sup>91</sup>

Conversely, it is possible to maintain that whether those disputes are legally amenable and subject to settlement through a compromise agreement depends on whether a suit has been already filed before a court or not. About compromise made at the hearing, the provisions of the Civil Procedure Code make no restriction on the kind of subject matter as long as it relates to civil matters in issue between parties in such court. Once the suit is already filed, it is possible to make a compromise on those dispute resolutions which are solely vested in court as the latter (court) can supervise over it. The striking question is whether the court can honour and enforce

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<sup>86</sup> See Article 3316 of the Civil Code and Article 277 of the Civil Procedure Code.

<sup>87</sup> Mauro Cappelletti and Bryan Garth, ‘Civil Procedure’, in Mauro Cappelletti (ed.), *International Encyclopaedia of Comparative Law*, Vol. XVI, p. 21.

<sup>88</sup> Revised Federal Family Code, Article 117.

<sup>89</sup> *Id.*, Article 115.

<sup>90</sup> *Id.*, Article 116.

<sup>91</sup> Teckle Hagos, *supra* note 12, p.18.

the settlement of those civil disputes made out of court if it passes the hurdles of legality and morality. But our law is silent regarding this issue.

This article shows the possibility of a compromise agreement on administrative contracts, divorce and some criminal matters at hearings and before the court. First, though recently settled by the new law,<sup>92</sup> the typical tense debate over arbitrability or otherwise of administrative contracts is not usually heard of when it comes to whether or not disputes over administrative contracts are amenable to compromise. Administrative contracts, including public work contracts, can be (and have been) resolved by amicable settlement of dispute mechanisms including compromise as there is no explicit legal prohibition to that effect.<sup>93</sup> It is commendable if the public body representing the government enters into an administrative contract and reasonably believes that settlement of the dispute through compromise is in the best interest of the public. However, it is worthwhile to mention the fact that the Federal Court Annexed Mediation Directive No.12/2014 E.C. under Article 12 (2) prohibits court-annexed mediation over cases in which one of the parties (as a defendant or plaintiff) in the case is government organ unless both parties to the case are government organs or at least one of them is a public enterprise. It seems that cases concerning the administrative contract between government organs on the one hand and private parties on the other hand are not subject to court-annexed mediation. Moreover, as per Article 12(3) of the above Directive, cases involving public interests, whether or not the government organ is party to the case, are also not amenable to court-annexed mediation. It is highly questionable whether the Federal Supreme Court, through delegated law with the status of Directive, has the power to determine cases subject to or excluded from court-annexed mediation.

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<sup>92</sup> ACWP Proclamation No.1237/2021, Article 7(7)

<sup>93</sup> See, Federal Public Procurement Directive, Ministry of Finance and Economic Development, June 2010, Article 27.8(c), Article 27.11(c). Public Private Partnership Proclamation, 2018, Article 61-63, Proc. No. 1076/2018, *Fed. Neg. Gaz.*, Year 22<sup>nd</sup>.

Second, the Federal Revised Family Code recognizes two types of divorce:<sup>94</sup> divorce by mutual consent<sup>95</sup> and divorce by petition.<sup>96</sup> Like compromise, divorce by mutual consent is an outcome of the parties' agreement, which needs to be in writing and submitted to the court for approval.<sup>97</sup> The court also approves the conditions of the divorce agreement between the spouses together with the divorce agreement<sup>98</sup>. This scenario might indicate the possibility of compromise of divorce because, even though the final declaration of divorce and approval is made by the court, the underlying decision of divorce is the product of the two spouses' agreement. Moreover, during the approval of divorce, the same obligation as that of recording of compromise under Article 277 of the Civil Procedure Code is legally imposed on the court as follows:

‘The court shall approve the divorce agreement only when it believes that the agreement is the true expression of the intention and free consent of the spouses and is not contrary to law and morality.’<sup>99</sup>

However, in the above position, displaying divorce as the subject of compromise seems indefensible. This is because first, the approval by the court of the divorce agreement between the two spouses is a necessary and mandatory condition for the divorce to bring about valid legal effect. Otherwise, a mere compromise agreement over a divorce would not produce any legal consequences. Second, given the strong public policy behind legal and societal protection of family as a fundamental unit of society<sup>100</sup>, bestowing exclusive judicial jurisdiction over the pronouncement of divorce matters and thereby excluding alternative dispute settlement mechanisms including compromise over divorce is plausible. As to the practice of courts in

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<sup>94</sup> Revised Federal Family Code, Article 76.

<sup>95</sup> *Id.*, Article 77-80.

<sup>96</sup> *Id.*, Article 81-82.

<sup>97</sup> *Id.*, Article 77.

<sup>98</sup> *Id.*, Article 80 (2).

<sup>99</sup> *Id.*, Article 80 (1).

<sup>100</sup> Revised Federal Family Code, Preamble.

Ethiopia, even though the Cassation division of the Federal Supreme Court had an opportunity to decide over the enforceability or otherwise of a divorce agreement made at a foreign embassy, it quickly escaped the matter and diverted the issue to jurisdiction and the appropriate court for registration of compromise.<sup>101</sup> Still, a closer look at the decision of the Cassation Court in this case shows the possibility of compromise of divorce and its effects.<sup>102</sup>

Likewise, it is conceivable to argue that exceptionally some crimes of a private nature are amenable to settlement between parties under Ethiopian law.<sup>103</sup> Those crimes the initiation and continuation of which are dependent upon a private complainant and charge brought by private prosecution can be subject to compromise or reconciliation.<sup>104</sup> Article 151(2) of the Criminal Procedure Code states “before reading out the charge to the accused, the court shall attempt to reconcile the parties.” The law goes on to state that where reconciliation is affected, it shall be recorded by the court and shall have the effect of a judgment. Though the above provision uses the term reconciliation instead of compromise, the whole nature, process and result of such reconciliation is similar to compromise. It is worthwhile to note that as per Article 275 of the Civil Procedure Code, a compromise agreement can be made upon the court attempting to reconcile parties and this is one of the instances where the court does the same. Article 151(2) of the Criminal Procedure Code not only indicates the possibility of compromise of some crimes but also states the judgmental status of such compromise after being recorded by the court.

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<sup>101</sup> *Niema Abadga Abawaji vs. Taha Jemal Adem*, Federal Supreme Court, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, pp.108-110,

<sup>102</sup> *Ibid.*

<sup>103</sup> Jetu Edosa, ‘Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospects of Restorative Justice’, *Oromia Journal of Law*, Vol.1, 2012, pp.99-143

<sup>104</sup> Criminal Procedure Code of Empire of Ethiopia, 1961, Article 42, Article 44, Article 47 and Article 150-153, Proc. No. 185/1961 *Neg. Gaz* (Extraordinary issue), Year, No. 1.



Concerning the position of the Cassation Bench, one can impliedly make an inference in one case since the court, though not directly, held the situation where parties can enter into a compromise agreement over a criminal case instituted on the private complaint.<sup>105</sup> However, the new Federal Courts Proclamation No.1234/2021 restricts the scope of court-annexed mediation that might end in a settlement agreement only to civil matters.<sup>106</sup> As a recommendation, to avoid confusion and uncertainties, the law governing compromise at least needs to explicitly exclude subject matters that are not legally settled through a compromise agreement.

Concerning the scope of the compromise, the experience in other countries shows compromise may, at parties' wish, (1) relate to the whole suit, (2) relate only to part thereof, or (3) also include matters that do not relate to the suit.<sup>107</sup> In this regard, Ethiopian law suffers from a lack of clarity, especially whether parties can include in their compromise other matters different from the subject matter of the dispute. By citing Article 3308 of the Civil Code, purposes of compromise and Indian law, Robert A. Sedler sustains that Ethiopian Law should be interpreted in a way that allows parties to the suit to compromise any matter whether related to the suit or not in the same agreement.<sup>108</sup> In relation to the subject matter of the dispute before the court, parties are free to terminate their disputes through compromise on the whole subject matter of the suit or some of the matters in issue.<sup>109</sup> Different legal consequences ensue where parties to a suit compromise the whole suit or parts of it because in the former case, once the court records the compromise and passes

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<sup>105</sup>*Kedir Haji and Lucy College Sh. v. Amin Usman and Nuriya Jemal*, Federal Supreme Court, Cassation Bench, File No.52752, Vol.9, (16/10/2002 E.C), pp.340-342.

<sup>106</sup>Federal Courts Proclamation No.1234/2021, Article 45(1).

<sup>107</sup> Here it is essential to note that the Indian Code of Civil Procedure (1908) (as amended) which is the material sources of Ethiopian Civil Procedure Code, permits parties to compromise not only the underlying disputes at hearing, but also, they can include in such agreement other matters unrelated to the dispute. See Order 23, Rule 3 of Indian Code of Civil Procedure.

<sup>108</sup> Robert A. Sedler, *supra* note 53, pp.187-188

<sup>109</sup> Moreover, a compromise agreement may settle all accessory matters, in particular as regards costs, damages and execution. Civil Procedure Code, Article 274(1) and Article 276(2).

judgment accordingly, the whole dispute ends there while in the latter case, the suit before court is only terminated partially.

### **C. Form and Content of Compromise**

Most countries require the written form and signature as a formality requirement for a valid compromise agreement.<sup>110</sup> One cannot certainly tell the position of Ethiopian law regarding valid forms of compromise agreement. This unfortunate scenario not only emanates from the different approaches adopted by the Civil Code and Civil Procedure but also from the formality requirement that varies within the same Code itself. For instance, the Civil Code contemplates different forms of compromise depending on the kinds of property, transfer of the rights freely<sup>111</sup> or whether there is renunciation of right,<sup>112</sup> or whether it is an outcome of conciliation.<sup>113</sup> First, the Civil Code proclaims under Article 1723(2) that a compromise relating to an immovable property shall be in writing and registered with a court or notary. Then, Article 3308(2) of the Civil Code provides a distinctive formality requirement for all compromise agreements without distinction as it declares “the forms required by law for the creation, modification or extinction of these obligations without consideration shall be complied with.”

This provision of the Code is one of the ambiguous and troublesome provisions regarding formality requirements. First, it creates difficulty and uncertainty by cross-referring issues of form to other substantive laws governing the underlying rights and obligations to be compromised thereby putting much burden on parties. Above all, this provision creates confusion by requiring parties to follow the form required by law for the free transfer of such obligations. There is a critical problem with the practical application of this provision due to the fact that, mostly, Ethiopian law does

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<sup>110</sup> Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044. See also Rule 3. 3-A and 3-B, Order 23 of the Indian Code of Civil Procedure where compromise must be made in writing and signed by parties.

<sup>111</sup> Civil Code, Article 3308(2).

<sup>112</sup> *Id.*, Article 3317(2).

<sup>113</sup> *Id.*, Article 3322(2).

not require different formality requirements for the transfer of rights in consideration or for free. Bezawork Shimelash, commenting on an almost similar legal prerequisite for Arbitral submission, maintained that this formality requirement is not only confusing but also leads to an absurd conclusion, which deviates from the intention of the legislator and imports elements of uncertainty.<sup>114</sup> Moreover, such formality requirement of Article 3308(2) of the Civil Code indicates the possibility of making a compromise agreement orally. Still, a different legal approach is adopted in case of compromise having renunciation of rights. Without making any distinction between transfer for consideration or free, Article 3317(2) of the Civil Code obliges parties to make the compromise in the conditions and forms required by law for the transfer of the right renounced.

On the other hand, the Civil Procedure Code adopts different formality requirements depending on whether a compromise is made out of court or before the court at the hearing.<sup>115</sup> The Code explicitly requires the written and signed requirements of the compromise agreement made at the hearing.<sup>116</sup> Moreover, in such cases, the court is also required to record or enter a compromise agreement in the case file after checking its legality and morality.<sup>117</sup> The Civil Procedure Code is, however, silent regarding the formality requirements of the compromise agreement made out of court during litigation. However, the lists provided under Article 276 of the Civil Procedure Code about the contents of the compromise agreement purport to designate the written requirement of such compromise made out of court.<sup>118</sup>

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<sup>114</sup>Bezawork Shimelash, 'The Formation, Content and Effects of Arbitral Submission under Ethiopian Law', Journal of Ethiopian Law, Vol.17, 1994, pp.76-77. See Article 3326(2) of the Civil Code.

<sup>115</sup> Civil Procedure Code, Article 277.

<sup>116</sup> *Id.*, Article 277(1).

<sup>117</sup> *Id.*

<sup>118</sup> Regarding contents of Compromise Article 276(1) of the Civil Procedure Code provides as follows:

A compromise agreement shall contain

- (a) the name and place of the court in which the suit is pending;
- (b) the title of the action and the number of the suit;
- (c) the name, description, place of residence and address for service of the parties; and

To avoid the current legal ambiguities in relation to form and to ensure certainty as well as predictability, it is recommended that Ethiopian law should adopt uniform and the same written formality requirements for all types of compromise. In particular, such an approach is suggested given the execution of compromise in court. The same position is adopted under current French law where all compromise is required to be made in writing.<sup>119</sup>

In relation to content, both the Civil Code and Civil Procedure Code prohibit compromise whose object is illegal or immoral and declare such kinds of compromise as void.<sup>120</sup> Other than this, in principle, parties to a compromise agreement are free to terminate their disputes in any manner they see fit by creating new rights and obligations, modifying the existing ones or extinguishing or renouncing the whole rights.<sup>121</sup> Concerning compromise having renunciation of rights, actions and claims, it has a legal effect of extinguishing such rights, actions and claims which prohibits the holder from exercising them later on unless he/she subsequently acquires such rights, actions and claims from another person in which case he/she can bring an independent claim.<sup>122</sup> Consequently, the law requires a restrictive interpretation of the compromise clause having renunciation.<sup>123</sup>

#### **D. Time of Compromise**

As we will see later on, the time or stages at which parties entered into a compromise have countless implications on the legal status and effects of the compromise agreement. The Civil Procedure Code states “[a] compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them.”<sup>124</sup> Hence, a compromise agreement

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(d) the matters to which the agreement relates.

<sup>119</sup>Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044.

<sup>120</sup>Civil Code, Article 3316; Civil Procedure Code, Article 277(1).

<sup>121</sup> Civil Code, Article 3308(1).

<sup>122</sup>Civil Code, Article 3310(1) & (2).

<sup>123</sup>*Id.*, Article 3309.

<sup>124</sup> Civil Procedure Code, Article 275(1). On the other hand, the Civil Code does not have explicit time indication or limitation in making a compromise Agreement. However, according to the

can be made before the dispute has arisen, after the dispute occurs but before the commencement of litigation, during litigation at the hearing or out of court.<sup>125</sup>

But the critical question is whether parties can make a compromise agreement over a subject matter finally settled by court decision but not executed. Concerning this, Indian law excludes the application of rules regarding compromise at the execution stage.<sup>126</sup> One cannot confidently tell the position of Ethiopian law on this issue as it neither explicitly prohibits nor allows such post-judgment compromise. A closer look at Article 3307, Article 3314 of the Civil Code and Article 275 of the Civil Procedure Code invites different interpretations.

To clearly understand the position of Ethiopian Law, the content of Article 3314 of the Civil Code, superficially looks as if it prohibits compromise at the execution stage asserting the existence of binding judgment as a ground for invalidation of compromise.<sup>127</sup> To prohibit post-judgment compromise as invalid, some requirements must be fulfilled: 1) there must be a final judgment (2) over the same subject matter (disputes), (3) no appeal lies or taken from the judgment and (4) both parties must be unaware of such judgment.

At first glance, it seems this provision prohibits or invalidates compromise entered over a dispute settled by final court judgment. Yet, the title and content of this

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definition, since a compromise is not only made to terminate an existing dispute but also to prevent a dispute from arising in the future, it is possible to make a compromise before or after the institution of a suit. Civil Code, Article 3308.

<sup>125</sup> The phrase during litigation or at hearing under Article 275 of the Civil Procedure Code includes both trial stages of first-instance court and hearing at appeal or by extension cassation stage. Civil Procedure Code, Article 32. *Kedir Haji and Lucy College Sh. v. Amin Usman and Nuriya Jemal*, FSC, Cassation Bench, File No.52752, Vol., (16/10/2002 E.C), pp.340-342. This case shows a situation where parties can enter into a compromise agreement at the appeal stage.

<sup>126</sup> Order 23 Rule 3 of the 1908 Indian Code of Civil Procedure.

<sup>127</sup> See Article 3314. - 2. *Unknown judgment*.

(1) *A compromise may be invalidated where the dispute which it was intended to terminate has been settled by a judgment having the force of res judicata of which one or both of the parties were unaware.*

(2) *Where an appeal lies from the judgment of which one or both of the parties are unaware, the compromise shall remain valid.*

provision do not invalidate all compromises after judgment. Rather, the invalidation of post-judgment compromise applies only where there is unknown court judgment the existence of which both or one of the parties are unaware. A contrary reading of this provision shows if both of the parties know the existence of such judgment and still enter into a settlement agreement, the compromise is still valid. In this context, the provision seems aimed at protecting the parties' free consent rather than outright prohibiting post-judgment compromise, as its application is contingent on the parties' lack of awareness of the judgment.<sup>128</sup> Accordingly, the legal fate of compromise made after the final court judgment existence of which both parties are cognizant of is not clear. Though a contrary reading of Article 3314 seems to suggest the validity of such a compromise, still the law does not explicitly recognize it.

The Cassation Division of the Federal Supreme Court held conflicting positions regarding this issue in three cases. In the case of *Tekle Degfe & Others vs. Befkadu Haile & Others*<sup>129</sup>, the cassation division indicates impliedly that a compromise agreement can be made even after the court passed judgment on the matter and at the execution stage. Specifically, by quoting Article 274 (1) and Article 275(1) of the Civil Procedure Code, the court sustained that at any stage of the proceeding [including execution], parties can terminate their dispute by compromise.<sup>130</sup> It then went on to state that the lower court should have terminated the execution proceeding as long as it was ascertained that the compromise agreement was not contrary to law or morality.

In its later decision, the Cassation Bench puts restrictions on post-judgment compromise.<sup>131</sup> It states that a compromise agreement concluded after court

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<sup>128</sup> See the phrase "...which one or both of the parties were unaware" under Article 3314(1) of the Civil Code

<sup>129</sup> *Tekle Degfe & Others vs. Befkadu Haile & Others*, FSC, Cassation Bench, File No.22857, (15/04/00 E.C), Vol.5, p.339.

<sup>130</sup> *Ibid.*, paragraph 6.

<sup>131</sup> *Ananaytu Issa v. Asina Hussen*, Federal Supreme Court, Cassation Bench, File No.98263 (06/05/07 E.C), Vol.17, p.336.

judgment is rendered on the matter and made to set aside it should follow the strict procedure under Article 276 of the Civil Procedure Code and must be registered by the court as per Article 277 of the Civil Procedure Code to have a legal effect.<sup>132</sup> The reasoning of the court indicates that since post-judgment compromise has the effect of threatening the finality of court decisions and becomes a cause for a multiplicity of suits on the same subject matter, it must be registered by the court. Still, in its latest decision (as a third stand), the Cassation Division gives an impression, though not explicitly, that post-judgment compromise is prohibited.<sup>133</sup> The court specifically held that a compromise made at the execution stage with the effect of modifying the court decision cannot be approved and enforced by the court as per Article 277 of the Civil Procedure Code; rather in such cases Article 396 of the Civil Procedure Code is applicable.<sup>134</sup>

Technically speaking, after the court renders final judgment on the matter and if no appeal is taken, such judgment actually settles the underlying dispute between parties. From this point of view, it appears that beyond affecting the principle of finality of a court judgment, it is an unnecessary waste of time and resources to enter into a compromise over a matter that has already been settled by judgment and merely awaits execution. Specifically, a post-judgment compromise that modifies or reverses the final judgment of the court has the potential to invite extra disputes on the matter when parties disagree over the validity or existence of such compromise with attendant ramifications of multiplying suits on the same subject matter. After all, compromise is concluded to prevent or terminate both dispute and litigation. But here, none can be accomplished once parties go through litigation and final judgment is rendered by the court over the same subject matter.

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<sup>132</sup>*Ibid.*

<sup>133</sup>*Ato Agmas Umer and W/ro Sebrina Getachew v. Ato Umer Asaye and w.ro Asegad Hassen*, Federal Supreme Court, Cassation Bench, File No.109497, (03/06/2008 E.C), Vol.19, pp.63-65.

<sup>134</sup>*Ibid.*

However, one might still argue that litigation between parties is not over yet since the execution proceeding is independent. Hence, compromise is possible at the execution stage to settle disputes about the enforcement of judgment. To support the above assertion, one might also opine that the purpose of compromise goes beyond preventing or terminating litigation as it has the purpose of maintaining social harmony. The possible counterargument is that some decisions have only a declaratory effect which does not need execution. This article maintained that legal prohibition, or at least restriction on post-judgment compromise, is justified in the interest of preventing a multiplicity of suits.

### **3.3. Legal Effects of Compromise**

One of the serious, yet legally unsettled matters under Ethiopian law is the exact legal effects of compromise. Though Article 3312(1) of the Civil Code declares that compromise has a force of *res judicata without appeal* between the parties, this provision does not totally answer all matters about the legal effects of compromise. Apparently, a valid compromise must have a legal force to end disputes over the subject matter. However, it is questionable whether compromise ends disputes in the same way as a binding final court decision. Second, one needs to be certain as to the legal effect of compromise that creates new rights and obligations.

This writer contends that the exact legal consequence of compromise depends not only on the time of agreement but also on whether or not approved by the court. We can possibly classify the legal effects of compromise according to the stages or time it was concluded. Hence, a compromise that occurs before the commencement of litigation has the legal effect of avoiding or preventing suits on the same subject matter. It serves as a *res judicata without appeal* effects.<sup>135</sup> It is well established legal principle that everyone is entitled to bring justiciable matters before the court of law

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<sup>135</sup>Civil Code, Article 3312(1). In this regard, Article 3317 (1) of the Civil Code provides the *declaratory effect of Compromise in relation to the rights, which one of the parties renounces therein.*



and get remedies.<sup>136</sup> When parties enter into a compromise over such matter before the institution of litigation, the legal effect of such settlement is the ability to forgo the right to bring suits against the other party before the court. Consequently, if one of the parties happens to file a suit in court over the compromised subject matter, the other party is entitled to raise a preliminary objection, at the earliest possible time (which otherwise is considered to be waived).<sup>137</sup> Once an objection is raised, the court must go about deciding over the matter according to Article 245 of the Civil Procedure Code by requiring the production of necessary evidence in determining whether a valid compromise has been reached between parties over the subject matter of the suit. This is where the evidentiary benefit of the written formality requirement of compromise comes into the picture. If the court affirmatively finds that parties have a valid compromise over the subject matter of the suit, it must dismiss the case.<sup>138</sup> Accordingly, in this way, compromise has the legal consequence of barring any fresh and subsequent suits over the same subject matter.

However, we need to consider the *res judicata* without appeal effects of compromise carefully. If disputes arise between parties as to the existence, validity and content of a compromise agreement, the court will likely entertain the matter like any other contract. This means the *res judicata without appeal* effects of compromise are merely related to the underlying subject matter of dispute and not extended to disputes concerning the compromise agreement itself unless approved by the court. So, it is possible that one of the parties can challenge the validity and existence of a compromise agreement in court litigation by alleging grounds stated under Article 3313-Article 3316 of the Civil Code.

On the other hand, if compromise occurs during litigation of the matter, it has the legal effect of terminating or ending the ongoing litigation between parties once the

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<sup>136</sup> FDRE Constitution, Article 37.

<sup>137</sup> Civil Procedure Code, Article 244 (2) (b) & (g).

<sup>138</sup> Dismissal of the case is allowed in this case as compromise is regarded as *res judicata*, Civil Code, Article 3312.

court approves it.<sup>139</sup> Moreover, if the court records the terms of compromise in the case file, it is considered a judgment that can be legally executed as if rendered by the court. This effect of compromise is reiterated by the Cassation court as follows:

..... that parties to a suit can settle their disputes through compromise and submit it to the court for approval. Once the compromise is approved by the court it is as binding and executed as a judgment rendered by the court. So, non-participant parties whose interest is allegedly affected by it can bring opposition as per Article 358 of the Civil Procedure Code.<sup>140</sup>

Consequently, the legal effect of compromise concluded after the end of litigation and once final judgment has been rendered over the matter is controversial as it is exposed to various possibilities. For example, if both parties are unaware of the judgment and no appeal is taken, such post-judgment compromise is invalid as per Article 3314 of the Civil Code. Otherwise, post-judgment compromise has the legal effect of modifying court judgment or serves as execution of judgment.<sup>141</sup> Still, the most controversial question is as to the legal effect of compromise that creates new rights and obligations which the following part tries to discuss.

### **3.4. Recognition and Enforcement of Compromise**

The *res judicata* effect of compromise is applied to bar fresh suits on underlying disputes. Nonetheless, numerous issues remain controversial as to the legal status or effects of compromise where it creates new legal rights and obligations.<sup>142</sup> How would parties enforce those new obligations and rights when the other party fails to act according to the agreement? Is the court required to enforce/execute such compromise in the same way as court judgment or the party must institute a

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<sup>139</sup> Civil Procedure Code, Article 274-Article 277

<sup>140</sup> *Haji Beya Abamecha Kelifa Abakoyas v. Oromia Forestry and Wild Animal Protection Authority (and Merawa Cooperative Society)*, FSC, Cassation Bench, File No. 114623, (22/06/2009 E.C), Vol.20, pp.124-127.

<sup>141</sup> Civil Procedure Code, Article 276(2).

<sup>142</sup> Civil Code, Article 3308(1).

contractual claim that involves a full-blown trial? Is the court required to register or approve the compromise before execution?

On these and other similar matters, Ethiopian law fails to provide explicit answers because of the diverse positions maintained by the two laws. In certain countries, if one of the parties fails or refuses to abide by the compromise, the other party may either enforce the compromise or regard it as rescinded and insist upon his original demand.<sup>143</sup> If the party opts to enforce and execute the terms of compromise through judicial assistance, such a settlement agreement must be approved by the court.<sup>144</sup>

Under Ethiopian law, the execution or enforcement like-judgment nature of compromise is not clearly stated under the law. But, Article 3317 (1) of the Civil Code states that compromise shall have a declaratory effect as regards the rights which one of the parties renounces therein. However, this provision of the Civil Code is silent as to whether or not judicial recognition or approval is necessary for the execution of the compromise whenever subsequent disputes arise between parties over rights created by the compromise itself. Generally, the answer to the above questions depends on three related things: 1) the time/stages of compromise, 2) the degree of judicial oversight of compromise and 3) whether one regards compromise as a contract or a judgment with regard to enforcement.

In relation to legal status and judicial oversight of compromise made after the institution of the suit, the Civil Procedure Code divides compromise made at the hearing and that made out of court. Article 277 of the Civil Procedure Code proclaims the court's duty to recognize the compromise made at the hearing after verifying its legality/morality and to pass judgments on the same upon request of parties. Accordingly, when a compromise agreement is made at the hearing, the court has four primary tasks. The first duty of the court is to check whether the compromise

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<sup>143</sup> See Civil Code of the Philippines, Republic Act No. 386, Article 2041.

<sup>144</sup> *Id.*, Article 2037.

agreement is reduced to writing and signed by the parties as a judicial ascertainment of the voluntary act of the parties. Second, the court is under a duty to check whether the terms of compromise are not contrary to the law or morals which is in line with Article 3316 of the Civil Code. The third duty is to enter or record the contents of the compromise, as indicated under Article 276, in the case file. Finally, the court has to make an order or give judgment in terms of such agreement upon the application of the parties.<sup>145</sup> The consent decree, approved by the court, based on a compromise will be given on the subject matter of the suit when a compromise is made at the hearing. Such consent decree will be recognized and enforced by other courts in the same manner as court judgment. Accordingly, if one of the parties fails or refuses to abide by such compromise, the other party is entitled to enforce his rights through the filing of execution proceedings. Likewise, settlement agreement of conciliation and court-annexed mediation has the same legal effect.<sup>146</sup>

Concerning compromise made out of court over the subject matter of the suit, Article 277(3) of the Civil Procedure Code proclaims “Where a compromise agreement is made out of court, the court shall be informed thereof and the plaintiff may apply to the court for permission to withdraw from the suit.” The apparent message of the above provision is that when parties to the suit enter into a compromise out of court over the same subject matter, it entails withdrawal of the suit upon application of the plaintiff. However, the wording of this provision raises many unanswered questions<sup>147</sup>; yet the critical one pertains to the apparent meaning and legal effect of

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<sup>145</sup> Civil Procedure Code, Article 277(2).

<sup>146</sup> ACWP Proclamation No.1237/2021, Article 68; Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).

<sup>147</sup> For example, the requirements stated under sub-article (1) & (2) of Article 277 apply. In the case of sub-article (3) of Article 277, does the court required to check the written, signed by parties, entering in the file, legality and morality of the compromise agreement before permitting the plaintiff to withdraw from the suit? To start from this, like a compromise made at a hearing the court is required to check the legality and morality of the compromise agreement and other requirements stated under sub-article (1) & (2) of Article 277 of the Civil Procedure Code before allowing the plaintiff to withdraw from the suit. However, it is not clear whether the parties (plaintiff) can apply to the court to make an order or give judgment in terms of a compromise agreement made out of court as *per* sub-article (2) of Article 277 of the Civil Procedure Code.

the phrase “...permission to withdraw from the suit.” The issue is whether the use of the term ‘withdrawal’ here has the same meaning and effect as normal withdrawal of suit with leave to institute fresh suits on the same cause of action as indicated under Article 278 of the Civil Procedure Code.

Normally, the court can grant the plaintiff permissive withdrawal or suspend the proceeding for the purpose of compromise out of court. Here, parties can ask the court for permission to compromise the dispute out of court and withdraw with leave to institute a fresh suit is possible if their attempt is not successful.<sup>148</sup> But, if the parties settle the matter out of court and one of the parties (particularly the plaintiff) informs the court, the appropriate term and legal effect of such compromise should have been discontinuance of suit or dismissal; not withdrawal. Since compromise has *res judicata* effect of barring fresh suits on the same cause of action, the term withdrawal of suit is not in line with the very nature of compromise itself because permission to withdraw legally allows the plaintiff to institute fresh suits on the same subject matter and entails multiplicity of suits. The term withdrawal under sub-article (3) of Article 277 of the Civil Procedure Code must be interpreted and understood as conditional upon the unsuccessfulness of out-of-court compromise or replaced by dismissal. However, the law is silent as to what would happen if the plaintiff failed to inform the court about an out-of-court compromise. Practically, in such cases, courts apply the usual legal effect of abandonment of suit or non-appearance of parties provided under the Civil Procedure Code.

The essential issue revolves around the legal status and enforcement of compromise made before the commencement of litigation when it creates new rights and obligations. Do our courts have a legal duty to recognize and enforce those compromises without approval? In this regard, different approaches have been

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<sup>148</sup> Settlement of dispute out of court can be considered as a sufficient ground for withdrawal with leave under Article 278 of the Civil Procedure Code.

adopted by the Federal Supreme Court Cassation Bench. In the case of *Niema Abadiga Abawaji & Others vs. Taha Jemal Adem*, the Court held as follows:

በመሰረቱ እንደ እርቅ በፍርድ ቤት ሊፀድቅ የሚችለው ጉዳዩ ስልጣን ባለው ፍርድ ቤት በመታየት ሂደት ላይ እያለ ተከራካሪ ወገኖች ጉዳዩን በስምምነት የጨረሱ መሆኑን ገልፀው ይኼው ስምምነታቸው ለሕግ እና ለሞራል ተቃራኒ ያለመሆኑ ከተረጋገጠ በኋላ እርቁ ወይም ስምምነቱ በፍርድ ቤት ተመዝግቦ ክርክሩ እንዲቆምላቸው ሲያመለክቱ ስለመሆኑ የፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 277 ድንጋጌ ይዘትና መንፈስ ያሳያል። ከዚህ ውጪ ከፍርድ ቤት ውጪ በሚደረግ እርቅ ወይም ግልግል መሰረት ያለመግባባትን ያስቀሩ ወይም ለጉዳያቸው እልባት ያገኙ ሰዎች እርቁ ወይም ግልግሉ እንደ ተፈረደ ፍርድ ሊቆጠሩላቸው የሚገባ እና በውጤቱም በፍርድ ቤት ማስመዝገብ ወይም ማስፀደቅ ሳያስፈልገው ራሱን ችሎ ሊፈጽም የሚችል ስለመሆኑ ከፍ/ብ/ሕ/ቁጥር 3312 እና 3324 ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው።<sup>149</sup>

The above position of the court is erroneous in case of a compromise made out of court because without court approval it is difficult to execute such an agreement like a court decree. It is practically questionable whether a compromise agreement, which is not honoured by the court, can be executed in the same manner as a court judgment. Unless the court approved and recorded the terms of compromise by checking its legality and morality,<sup>150</sup> one can surely argue that the latter has only the status of contract, not judgment. Due to this, in the later decision, the Court held that a compromise made after judgment (usually made out of court) must be written, signed and registered in court.<sup>151</sup>

Even if one can assert that compromise can be enforced like judgment, the issue of whether or not it needs to be approved by the court for execution purposes is not settled conclusively. The Ethiopian law ought to have an explicit position on legal

<sup>149</sup> Roughly translated, the Court in the above case decided as follows:

*Registration of a compromise agreement is required only when parties decide to compromise at the hearing before the court and thus registration or confirmation by the court is not necessary when a compromise agreement is made out of court. In such a scenario, compromise, in and of itself, can be executed like a court judgment as per Article 3312 and Article 3324 of the Civil Code. [Translation mine]. See Niema Abadiga Abawaji & Others v. Taha Jemal Adem, FSC, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, p.110*

<sup>150</sup> *Id.*, Article 277 of Civil Procedure Code.

<sup>151</sup> *Ananaytu Issa v. Asina Hussen*, FSC, Cassation Bench, File No.98263 (06/05/07 E.C), Vol.17, p.336.

status and execution procedure of compromise that creates new rights and obligations. This writer firmly holds that approval or registration of court is necessary in case of execution of compromise that creates new rights and is made before commencement of suit or out of court. Judicial supervision and approval are legally made mandatory for compromise made at hearing to check various legal requirements, among other things, its voluntariness, legality and morality. For stronger reasons, such judicial checks and balances of compromise are even more important in case it is made out of court. As David Fosket notes in some instances, the approval of the court is necessary for a compromise to be effective.<sup>152</sup> Experience of other countries also indicates that approval of court order is necessary for the execution of a compromise agreement.<sup>153</sup> Generally, this article holds that to be enforced, such compromise must be approved and checked by the court at least as to its legality and morality.

### 3.5. Grounds for Invalidation of Compromise Agreement

The grounds of invalidation of compromise stated under Article 3313-3316 of the Civil Code only include void or false documents<sup>154</sup>, unknown judgments<sup>155</sup> and illicit objects.<sup>156</sup> The issue of whether other grounds of invalidations stated under general contract law are excluded or not is contentious. This is because a mistake of right is the only ground of invalidation explicitly excluded under Article 3312(2) of the Civil Code. It is possible to argue that as per Article 1677(1) & (2) of the Civil Code, other grounds of invalidations are also applicable since they are not excluded by the special law of compromise. Considering the contractual nature of compromise, *mutatis mutandis* application of some grounds of invalidation stated under general contract

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<sup>152</sup> David Fosket, *supra* note 8, p.113.

<sup>153</sup> For example, Article 2037 of the Philippine Civil Code states, “A compromise has upon the parties the effects and authority of *res judicata*, but there shall be no execution except in compliance with a judicial compromise.”

<sup>154</sup> Civil Code, Article 3313.

<sup>155</sup> *Id.*, Article 3314.

<sup>156</sup> *Ibid.*

law for compromise agreement must be considered. For instance, some grounds of invalidation such as duress are so serious that there is strong public policy interest behind the prevention of those acts in a contract and hence should be taken as a ground of invalidation of compromise.

Here, it is essential to consider the legal effect of declaring a compromise invalid. Since the purpose and effect of compromise is preventing/terminating disputes, its invalidity entails the underlying dispute to be intact and unresolved which might trigger litigation or other dispute settlement mechanisms. Since the compromise is invalid, the subject matter of dispute it purports to resolve continues to exist between the parties. Still, Ethiopian law is silent about the appropriate court that can entertain the claim of invalidation of compromise when it is made before litigation, at the hearing, at the appeal stage or after judgment.

#### **4. Concluding Remarks**

Realistically, some disputes of civil matters are practically settled outside of courtrooms either through arbitration, conciliation or compromise. However, a compromise agreement achieves its intended purposes only when it is backed by a robust legal framework that ensures parties' legitimate expectations by clearly governing all legal aspects of compromise i.e. its source, status, legal effect and execution. Above all, the legal rights or interests created by the agreement need to be protected. Otherwise, the gaps, uncertainties, and inconsistencies in the law can create a multiplicity of suits, delay in execution, court congestion and at times unfair decisions.

The overall investigation of the Ethiopian laws on compromise, in this article, shows its incompleteness, ambiguity and inconsistency. This article reveals that Ethiopian laws on compromise are incomplete, ambiguous, and inconsistent. The law lacks clarity on various issues such as the legal status and effect of compromise, whether it is a contract or consent decree, substantive and procedural requirements for



execution of compromise, and on capacity of parties. Moreover, the Ethiopian law suffers from vague provisions about formality requirements for making compromises not only between the Civil Code and Civil Procedure Code but also within the same law. The new Arbitration and Conciliation Working Procedure Proclamation No.1237/2021 and Federal Court Proclamation No.124/2021 neither repealed the provisions of compromise under existing law nor improved it.

Therefore, this article recommends the overall revision of Ethiopian laws on compromise in the manner that requires a written form for the creation of compromise, makes restrictions on compromise in case of class action, explicitly defines the scope by identifying subject matters not amenable to compromise, clearly indicate the legal status and manner of execution of it. The form and content of such law should not only maintain certainty and ensure easy execution but also able to avoid or at least reduce room for recalcitrant and dilatory behaviour as well as the multiplicity of suits.