The law of civil procedure

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Presented to : III year LL.B Adigrat University students

PART ONE

CHAPTER ONE

Conceptual frameworks

Definition and nature of civil procedure

- Civil procedure is comprised of two separate terms or words.
- These terms are **civil** and **procedure**.
- Literally, the term "civil "connotes matters related to **private individuals** as opposed to **public affairs/matters**.
- Procedure refers to "**the way of carrying out a certain activity**."
- Hence, civil procedure refers to the method of conducting legal actions relating to the issues of private persons.

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- Civil procedure regulates every actions in civil bench of the court
- Civil procedure consists of the rules by which courts conduct civil trials.
- Civil procedure is the steps taken and methods used in bringing and conducting civil suits.
- The law of civil procedure is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits.
- The rules and standards of civil procedure govern:
  - how a case is commenced ,
  - what kind of service of process is required,
  - the types of pleadings,
  - orders allowed in civil cases,

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- the time and the manner of disposition and disclosure,
- the conduct of the trials, the process for judgment,
- the process for post trial procedures,
- varies available remedies and
- how the court and clerks must be functioned.

- ✓ The law of civil procedure is concentrated on addressing the way in which civil cases are entertained in courtrooms.
- ✓ Civil procedure law is *a body of law that regulates the process that courts must follow when hearing cases in a civil nature as opposed of criminal action.*

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- One can understand the nature, significant and scope of application of civil procedure through identification of it from other laws.

I. Substantive vs. procedural laws

- ✓ Among the various ways of classifying laws, one involves making a broad distinction between **substantive** and **adjective** legal rules.
- ✓ Adjective rules are subdivided into **procedural** and **evidence** laws.
- ✓ **Adjective laws** are the type of law that deals with the rules of procedure governing evidence, pleading and practice.
- ❖ The procedural rules cover the major portion of this course.
- ❖ The law of evidence, which governs **the method of proof of allegations or assertions of parties to a case.**

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- **Substantive laws** define rights, duties, privileges and liabilities of persons.

Example of substantive law , *the law of contract , the law of succession, the law of extra contractual (tort), land laws, law of trade, investment law, commercial law , criminal law etc.*

- Substantive laws seek to avoid disputes between and among individuals and groups in a society.
- Procedural rules in general, and civil procedure in particular to govern as to **how claims of persons are prepared; where and when presented; and, how determined and finally enforced** by a court of law.

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- Procedural rules **give effect ("life") to the ends sought to be achieved by substantive laws.**
- Procedural laws can be 'civil' and 'criminal' procedure codes.
- ✓ **Procedural laws** – laws that are concerned with the due process of law or these laws govern the ways in which the substantive laws to be administered or deals with how the legal system operates or defines how legal rights and duties must be exercised in the legal system.

- Procedural laws are applied even substantive laws are amended.

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Some of the distinction between substantive and procedural laws

Points of distinction	Substantive laws	Procedural laws
Definition	Establishes rights and obligations among individuals or individuals with the states or deals with the content or substance of law.	Deals with the means and methods through which substantive law is enforced or a law that outlines the legal process to be followed in starting , conducting and finishing of lawsuits
Governs	The rights and duties of individuals .	The stages in which civil and criminal proceedings proceed.
Application	It does not exclusively deal with proceeding inside a court.	It deals with the happening in a court.
Example	Property law, contract law, succession law ,land law, investment laws, criminal law , tort law etc.	Civil procedure laws, criminal procedure laws

II. Civil vs. Criminal Procedures: scope and application

- The infringements or violations of legal interests which are so recognized and protected by law -are considered to be **legal wrongs** thereby **entailing liabilities** and **incurring legal sanctions** upon the wrongdoer.
- **Legal wrongs** and the **attending liabilities** are considered to have either **private** or **public** nature.
- **Private nature of legal wrongs** are breaches of **private rights**, affecting **individual interests**; and are called **civil injuries**.
- **Public nature of legal wrongs** are violations of **public interests**, affecting the society as a whole; and, are called **crimes**.

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- Certain wrongs are conceived to be so grave enough to affect **the public at large in the controversy as an eligible interested party-represented through the state.**
- **Crimes** are more serious and sufficiently injurious to the **public** as compared to civil wrongs which affect only the private victim.
- Civil procedure is **a set of rules employed in the disposition of civil cases**
- Criminal procedure **governs the steps to be followed in penal prosecutions.**

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Basic difference between civil procedure and criminal procedures

Basis of difference	*Civil procedure*	*Criminal procedure*
Area or scope of application	**Civil matters** Examples dissolution of marriage, invalidation of contract, dissolution of company, bankruptcy, restitution of land etc.	**Penal / criminal matters** Examples, grave willful injury , common willful injury , murder,/homicide , rape, abduction etc.
Affected interest	Breaches of private rights / Individual interest / civil injuries	violations of public interest / The society as a whole are affected/ crimes
Nature of parties in the proceeding	**Individuals** ✓ *A physical person against another physical person* ✓ *A physical person against a legal person* ✓ *A legal person against another legal person*	**The state** which is represented by public prosecutors in one hands and **defendant** who committed a crime in the other hand.

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Bases of differences	*Civil procedure*	*Criminal procedure*
Remedies /reliefs	Restitution or delivery of goods or an injunction , payments of damages or payments of money , specific relief (personal performance) or forced performance , no loss of personal liberty	Penal sanctions /Punishment / acquittal or conviction such as simple and rigorous imprisonment, fine , compulsory labor, capital punishment
Purpose	Enforce individual rights	Ensuring the overall peace and security of the nation as a whole
ADR	Civil cases are subject to ADR	Criminal cases are not subject to ADR
Review of judgment	Encapsulated under Ethiopian Civil procedure code	Not encapsulated under Ethiopia Criminal procedure code

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- Notice: Sometimes the government may initiate a legal action and be a party to a civil case in a **private capacity .**
- The government become a party in civil-suits when it conduct **commercial transactions** and a dispute arises from such activities .

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Question 1.

- ✓ Assume that a dispute arises between the vision fund microfinance institution S.C and an individual who alleges that he was an employee of the microfinance institution but improperly and unlawfully dismissed of his official duty; and, hence, filed a suit in a court of law demanding, among other things, to be reinstituted.
- ❖ **Is this a civil or penal case? Why? Can the parties in dispute solve their difference in ADR**
- ✓ What if an employee of the microfinance institution committed a grave willful injury on other employee of the institution.
- ❖ **Is this a civil or penal case? Why? Can the dispute be solved in ADR**

The Purpose of Civil Procedure Vis-à-vis Fundamental Procedural Rules

- **Purpose of rules of civil procedure**

✓ To ensure that disputes are handled by an ***impartial legal tribunal*** *in a* ***fair and orderly*** manner and as ***expeditiously and economically*** as possible.

✓ To secure the ***just, speedy*** and ***inexpensive*** disposition of cases.

✓ To treat **the parties to a law suit equally**

✓ To **make the decision within *a reasonably fair and quick time.***

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- ✓ Civil procedure may be considered as ***a means to an end not an end in it self***.
- ✓ Civil procedure ensure the proper enforcement of rights and duties arising from substantive laws.
- ✓ Civil procedure **enable the court to make a fairly prompt dispensation of civil justice.**
- ✓ **Excessive dalliance** in civil procedures violate the administration of justice.
- **Justice delayed is justice delayed.**
- **Justice rushed is justice crushed .**
- Miscarriage of justice happens due to dalliance of justice

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- Speedy and inexpensive determination of a law suit depends on a number **of factors;**
  - The **number and nature (complexity) of filed cases**
  - The **number of the courts (benches)**
  - The **number of the judges**
  - **The degree of compliance with the governing rules**
  - **The case flow management** techniques **etc.**
- Costly litigation process undermines the justice administration systems .
- **Customary practice** undermines the justice system

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- Effective implementation of rules of civil procedure serve to **save the time and money of both the litigants and the courts.**

  Example, assume Mr. Abebe institute a lawsuits to north shewa zone high court which has no material jurisdiction and the high court entertain the case for 1 year and finally rendered a decision for Abebe. How ever , the defendant appeal to ANRS supreme court and the supreme court reversed the decision of the high court by reasoning that the court rendered the decision without having material jurisdiction after 8 month litigation process. Finally Mr. Abebe institute a fresh lawsuits in Debre Berhan worda court. The litigation process in high court and supreme court takes the time and money of the court and the parties.

Principles of Civil procedure

1. Fair Hearing of a Suit/Impartiality of the Courts

The are factors that affect impartiality of courts. Some of them are:-

A. Neutrality of the Presiding Judge

- Judges must bear an **impartial and objective** mind to the question in the controversy
- Judges must dispose cases based on **the true merits of the case**
- There are two attributive features of impartiality.

I. **Subjective impartiality** refers to the impartiality of the **judge** himself.

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II. <u>Objective impartiality/ impartiality of the court</u> refers the tribunal should provide the public with the guarantee that it operates impartially; i.e., conditions that avoids suspicions of impartiality.

- ✓ Some common sources of bias that should disqualify a person from acting as a judge incudes

A. personal Bias

- ✓ It arises from **friendship, relationship** (either personal or professional) or **hostility or animosity** against either of the parties.

B. **Pecuniary Bias/ Bias as to the Subject- Matter.**

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No one should be a judge in his own case!

B. Right to be Heard: *(see Art.20 of FDRE constitution)*

- Nobody should be condemned unheard!

As far as the concepts of the right to be heard,

- **Notice** has to be given to the party before the proceedings start,
- A party has to be given an **adequate and reasonable (effective) opportunity to explain (hearing).**

C. Equality of Treatment Every one or equality before the law*(Art.25 of the FDRE constitution)*

- ✓ Each party to a law suit should be treated equally without discrimination of any sort.

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- ✓ There are three fundamental pillars used as ultimate test of procedural fairness (equality)

I. **Equipage Equality**

Refers equality between the litigants in preparing their respective pleadings in getting legal aids (services) in searching for evidence etc., irrespective of their differences in income levels.

Example, if a party is allowed to amend or alter his pleading same opportunity should be granted the other party (Art.91 of CPC)

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II. Rule Equality

- ✓ Under similar circumstances, each party should be subjected to and protected by, similar rules.

  *Art 58 (a) of the Cv. Pr. Cd, representation is allowed for a **father**, the same rule should apply for a **mother**.*

III. Outcome Equality

- ✓ Similar issues, under same grounds /circumstances, should have similar outcomes

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2. Public Hearing of a Suit

Justice must not only be done but must also be seen being done. ***(see Art 12 of the FDRE constitution)***

3. Independence of the Judiciary and Accountability of the Judges

I. **Judicial Independence (Art 78(1) of the FDRE constitution)**

A. **Institutional Independence**

- ✓ The institution has to be independent from influence of the executive and legislative organs of the government.

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Institutional independence is ensured through

- *Having legal basis to establish independent institution*

  (Art 78 and 79 of the FDRE constitution)

- *Independence to Administer Internal Affairs*

B. Functional/Personal Independence

- ✓ A judge deciding a case does not act on any order or instruction of a third party- ***inside or outside*** the judiciary.
- ✓ Judges should be **free, internally, from *their own colleagues* and/or from the *influence of superior courts*; or, externally, from any kind of outside intrusion/interference, fear or influence**; and they should **solely be bound and guided by the law**

II. Accountability of the Judges

- Independence of the judiciary should not be taken as a special privilege of the judge himself.
- Independence **does not mean and should not lead to irresponsibility and arbitrariness.**
- Judges are to be held responsible for their decisions.

4. Establishment of Courts by Law

- **Judicial power should principally and solely be vested in the regular courts.**
- **Administrative tribunals which have** some quasi-judicial power are established for some cases that need technical and expert knowledge. *(Art.78(4) of FDRE constitution*)
- Some of administrative tribunal includes, *labor relation board, tax appeal commission, civil service tribunal, board of privatization agency*

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Special or temporary bodies that take away judicial powers from regular courts do not follow the stringent procedures prescribed by law. *(Art 78(4) of the FDRE constitution)*

Why quasi judicial ?

- *Some disputes are **technical** and need **expert knowledge** by nature*
- *Less expensive / provides cheaper justice*
- *Not time consuming /render speedy justice*
- *What are the basic difference between regular courts and quasi judicial tribunal ?*
- ***Are kebele social courts are categorized as regular courts? Discuss.***
- *Do kebele social courts embrace them within the domain of Art 78 (4) of the FDRE constitution*

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In nutshell, the court structure which are established under the FDRE constitution summarized as follow.

Courts and tribunal established by the FDRE constitution	***Features***	***laws***
Regular courts - Federal & states - Woreda/First instance court , high court and supreme court	✓ Adjudicating of cases based on the law of civil procedure ✓ Expensive and time consuming as compare with special /ad hoc tribunal ✓ No special expertise	➢ FDRE constitution ➢ The 1965 decree of CPC ➢ Proc.No.1234/ 2021
Special/ Ad hoc tribunal : Outside the regular court system	✓ Adjudicate cases without adhering the stringent laws of procedure ✓ These tribunals are administrative in nature ✓ Technical and need experts knowledge: *Example tax appeal commission ,labor relation board*	➢ Art 78(4) of the FDRE constitution
Religious and customary courts: outside regular court system	✓ There power is limited to <u>personal or family matters</u>. Example : sharia courts	➢ Art.34(5) and Art 78(5) of FDRE constitution

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Minimum requirements of fair trail litigants are afforded

- Adequate notice of the nature and purpose of the proceedings ;
- Adequate opportunity (time and space) to prepare their case;
- The right to counsel during all stages of the proceeding;
- The right to have an interpreter;
- The guarantee that the litigants rights or obligations affected only by a decision based solely on evidence known to the parties to the proceedings ;
- The opportunity to have a decision rendered without undue delay
- The right to obtain the attendance and examination of witnesses.

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- The right to appeal (Art.20(6) of the FDRE constitution)
- The right to have legal assistance to prevent miscarriage of justice (Art.20(5) of FDRE constitution)
- The right to examine, or have examined, the witnesses against him (Art.20(5) of FDRE constitution)
- The right to be tried in his presence;
- **Rules of Procedure Vis-à-vis Modes of Proceedings**
  - Before assessing the modes of court litigation, it is better to differentiate common law and civil law legal systems

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Basis of difference	***Common law***	***Civil /continental legal system***
Origin	English tradition	Roman Jurisprudence
Judicial role in law -making	Active	Passive
Nature of laws	Non codified	codified
Appellate review focus	Procedural	Procedural and substantive
Source of law	Precedents /case laws Custom, practice , court decisions	Statues /written codes / legislations
Court litigation	***Adversarial***	***Inquisitorial***
Law of evidences	Separate code of evidence	No separate code of evidence
Emphasis /weight of evidences	More for /oral testimony witness	More for documentary evidence
Role of judge	Passive /referee /umpire	Active /examiner

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- Rules of procedure are commonly termed as means to an end and not end in themselves.

Two modes of litigation / rules of procedures

1. **The Adversarial Procedure 2. Inquisitorial procedure**

1. The adversarial procedure

- ✓ **It is an Anglo Saxon /common Law / rule of procedure**
- ✓ In an adversarial court proceeding, the parties themselves (or represented by their advocates) shoulder the burden of initiating, shaping and fixing the scope of the litigation.

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- In this court proceeding, judges play a relatively **passive role.**
- They only follow smooth flow of process**.**
- Judges are an impartial umpire to see to it that the rules of the game are evenly and properly observed by the players.

2. The Inquisitorial Procedure

- It is a civil law/continental legal system rule of procedure
- In inquisitorial procedure, judges are actively involved deep into the merits of the case.

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- The basic material source of the Ethiopia civil procedure code is ***the 1908 Indian Code of Civil Procedure***-which itself was taken as a model procedure in some British colonies in Africa-such as the Sudan.

Rules of Civil Procedure in Ethiopia:

Historical Development

- Until the end of the 19th century, there was no adequately articulated and/or formally institutionalized system of administration of justice.

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- In Ethiopia, there was traditional litigation system the so called " bela – libelha (ቤላ ልቤላሃ)" or "*Tattayaq-muget(ተጠየቅ ልጠየቅ)*".
- **village tribunal** → **Chiqa Shum** *(lowest level official adjudicator)* → **Deputy- Governor** → ***Womber Rasses*** → ***Afe-Negus/mouth of the king/*** → **Zofan Chilot / crown court/.**
- The Administration of Justice Proclamation No. 2/1942 introduced modern court structure in the judicial history of this country
- In 1943 the first ever written procedural law (called, **Court Procedure Rules** was issued.(statute No.33/1943)

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- It contains 99 articles of both civil and criminal procedures.
- Its material source is the Indian procedural laws.
- The rules relating to appeals to the Imperial Supreme Court was issued as statute No 155/1951.
- It consisted of 45 articles of both civil and criminal procedures out of which 36 articles were rules of civil procedure.
- Its material source was still that of the Indian procedural laws.
- There were also other legislations before the issuance of 1965 CPC of Ethiopia.(read civil procedure I teaching material)

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- ✓ The 1965 civil procedure code of Ethiopia
- It is issued as decree no.52 of 1965
- Robert Alen Sedler argued that the code was remarkably of Ethiopian origin.
- But ,other scholars argued that like the previous rules of procedure, the code was verbatim copies of the 1908 Indian Civil Procedure Code.

Basic features of the 1965 CPC of Ethiopia

- It was codified in book, chapter, paragraph and sub paragraph.

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- It has 9 books which contains chapters and paragraphs

Book 1 – jurisdiction of courts

Book 2-parties to suits

Book 3-General provisions regarding civil suits

Book 4- ordinary proceedings in first instance

Book 5- special procedures

Book 6- appeal , opposition and revision

Book 7 – execution of decree

Book 8- costs

Book 9- final provisions

– It contains only 483 articles-divided into chapters and paragraphs.

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- Regardless of others, it encompasses rules on jurisdiction of courts; framing of issues; parties to and scope of litigation; service of summons; pre –trial and trial proceedings; revision of decisions and modes of executions , costs, suit by paupers.
- In some provisions of the code there is mismatches between the Amharic and the English versions. (which version prevails?)
- The CPC of Ethiopia is from sources substantially influenced by the common law tradition though the substantive laws transplanted from civil law traditions. Such distinction become a problem is litigation process.
- The Code was issued as a "Decree" by the Emperor make difficulty during interpretation of laws.

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- The code is not promulgated by the parliament.
- There is not parliamentary debate on the CPC of Ethiopia. It is difficult to know the intent of the legislator. *Hence, how can we interpret it ?*
- Intentions can be inferred from the terms of the pertinent articles of the Code.
- To achieve the general purpose of the procedure, more *practice-oriented mode of interpretation is essential*

Reading assignment

- *Discuss relevant themes that are encapsulated under federal court establishment proclamation number 25/96 and new federal courts proclamation number 1234/2021.*
- *Discuss the major changes in the federal courts proclamation number 1234/2021 as compare with the previous proclamation.*