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Criminal procedure
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2016 A.Y

Chapter one

- Definition
 - It is the rule which governs manner of crimes investigation, prosecution, adjudication and punishment.
 - it includes the protection of accused persons' constitutional rights
- The execution of the rule demands due process
 - It could be categorized in to two
- Substantive due process
 - It refers to the content or subject matter of a law.
 - It protects people against unreasonable, arbitrary or egregious law or acts of government.

Cont'd

- Procedural due process
 - It refers to **notice, hearing** and other procedure required before **life, liberty** or property of the accused.
 - Generally procedural due process demands
 - **Notice of hearing proceeding**
 - **Opportunity to being heard to present a defense**
 - **Impartial tribunal**
 - **Fairness**
- Hence, criminal procedure should be executed via the rules of procedural due process of law

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- Source of criminal procedure
 - It refers to the instrument and the organ which enacted the instrument.
 - The source of criminal procedure are determined by
 - Political and legal system of the country
 - In UK the source of criminal procedure is vested in the parliament. In addition,
 - Statutes enacted by delegated legislations
 - Court rulings are also source of cr.p

Cont'd

- In France the source of criminal procedure are
 - Constitution
 - legislation and
 - Decisions of constitutional courts
- However both UK and France have uniform criminal procedure rules
 - Because they adopted unitary based political system
- If we look at Germany and USA the fact we had in case of UK and France is different .

Cont'd

- Those countries have adopted federal system of political arrangement.
- The sovereign tier of the government has the right to share legislative and executive power
- In both US and Germany at federal level the source of criminal procedure are
 - Constitution
 - Decision of constitutional court
 - Federal laws or statutes

Cont'd

- At the state level the source of criminal procedure are
 - Federal constitution
 - Federal laws
 - State constitution
 - State legislations
 - Federal and Regional case laws or court decision

Cont'd

- In case of Ethiopia in order to identify the source, one has to look at
 - the political system and
 - The legal system the country had adopted
- the FDRE constitution adopted federal system
 - As per art. 55(5) of the cont'n the federal government is vested to enact criminal law.
 - However, the regional gov't can enact on matters not covered by the criminal law of the federal gov't

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- What is more vague is that the const'n does not state the jurisdiction over implementation of C.L
 - Because of this some argued that **federal government** should have the mandate to apply the criminal law it has enacted.
 - N.B: This argument derogate state first instance court to adjudicate criminal cases
 - Others argued basing their argument on article 52(2,g) of the cont'n which gave regional states the power to
 - organize police force
 - Maintain law and order

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- Literally this function are highly connected with implementation/ application of criminal law
- Moreover, criminal procedure rules are enacted in regional cont'n.
 - Ex. Tigray region and Addis Ababa City Adm'n const'n empower social courts to adjudicate petty offence
- Generally, in Ethiopia at the Federal level the source of criminal procedure are
 - federal const'n,
 - Federal Supreme Court,

Cont'd

- federal supreme court cassation decision,
- federal legislation,
- amended sentencing guideline no. 2/2006
- Criminal justice and prosecution policy and the like
- At the state level in addition to the above listed; the source of criminal procedure include
 - Regional consist'n
 - Policies and

Cont'd

Criminal justice system

- It has dual purposes
 - On one hand it protects the public against criminal harm and
 - On the other hand it protects accused against unfair treatment
- However, it is not easy to strike the balance between those competing issues

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- Models of criminal justice system
 - There are two types of models
 - A. due process model and
 - B. crime control model
- Due process model
 - Stresses on the process of investigation
 - Regardless of maximum efficiency, it focuses on procedural right protection of the suspect.
 - It obliges states to grant the suspect con'tal safeguard
 - It gives priority to fairness of procedure

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- It tolerates the escape of guilty criminals for the sake of not harming innocents or It protects innocent suspect from wrongful conviction
- Its' cons is that tricky to convict guilty suspects so that some will go free.
- Crime control model criminal justice system
 - It emphasize on efficiency at the expense of fairness of the process
 - It focus on repression of criminal conduct
 - It disregards errors by police or court in order to achieve punishing the guilty suspect

Cont'd

- It focuses on convicting the guilty person
- It involves risk of convicting innocent people
- Generally, the criminal justice system does not completely adopt a single model
 - It is better to strike the balance between the two.
- System of criminal procedure
 - Based on process of adjudication; system of criminal procedure are
 - Adversarial/ accusatorial
 - The inquisitorial and
 - The mixed system

Cont'd

- Both adversarial and inquisitorial systems have
 - objective of finding the truth
 - Guilty should be punished
 - Innocent should be freed
- A. Adversarial system
 - It is adopted by common law legal system country
 - It is similar with private litigation
 - The evolution of initiating action is developed from:

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- First lies on the victim/accuser/ wronged person

- Then extends to relatives of the victim

- Then extends to his group such as friends

- Finally to the government for societal wellbeing

Cont'd

- Hence, for committed wrong act justice is set before impartial organ i.e. judge which serve as referee.
- The disputing parties are the accused and the government
- They contest before the organ which is considered as adversaries.
- Impartial officials (judges) are passive
- Accused is innocent until proven guilty

Cont'd

- The core responsibility of the judge is to ensure a fair contest.
- The **prosecutor** is expected to prove the guilty
- They believe in competition to obtain the truth.
- **Accused had procedural advantage**
 - such as the right to attorney, the right to remain silent, the right to be free of unwarranted search and arrests, the right to compel witness to appear for the defense, the right to confront accuser, the right to appeal and the like.

Cont'd

- It emphasize on the trial phase rather than screening phase
- It restrict the involvement of judiciary on investigation and adjudication
- The accused is not expected to assist investigation
- The role of the judge is referee
- The prosecutor is expected to develop and present the case

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B. The Inquisitorial system

- It is adopted by civil law legal system
- There is no private accuser
- Private accuser is replaced with a public official.
- **Public official** play the role of investigation
- **The accused and the government are not contesters.**

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- There is no referee
- The impartial official/ judge play active role
- Accused is guilty until proven innocent.
 - Because, there is extensive pretrial investigation and interrogations not to brought innocent before trial.
 - Most of the time defendants who are brought to trial is most likely would be guilty.
- it emphasize on screening phase

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- They said that careful investigation will ultimately determine guilty.
- It permits the involvement of judiciary on investigation and adjudication
- It assumes that all parties seek truth
- It expect (not require) from the accused cooperation
- The court/ judges ask most of the questions and develop the facts.

Cont'd

C. Mixed System

- It is the combination of adversarial and inquisitorial system.

D. The mixed court

- It is also another method of adjudication
- The professional judges are helped by lay judges
- Lay judges are not legal professional but chosen/elected from citizens.

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- *Their function is to deter judges from acting in arbitrary or unreasonable way.*

Institutional set up of the criminal justice sectors

- Across the world the main actors in the criminal justice system are
 - ❖ The police,
 - ❖ The Prosecutor, and
 - ❖ Courts.

Cont'd

- In Ethiopia, the justice sectors are organized at the federal and regional level.
- Like countries of the world the main actors in the criminal justice system are
 - Police
 - Courts and
 - Public prosecutor
- Each are separately organized
- The country had adopted BPR as government office policy in 2009.

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- Then after the police and prosecutor are supposed to act together on handling criminal cases.
- They undertake investigation together
- Hence some argued that BPR impliedly bypassed art. 37-38 of cr.p.
- The public prosecutor has the right to give direction for the police in due course of investigation

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- However, they had separate administration and institutions regarding budget, training, salary, discipline and the like
- Moreover, there are also specialized institutions like
 - ethics and anti-corruption and
 - revenues and customs involved in the current Ethiopia criminal justice system.
- Those institutions are unique because they have their own police and prosecution

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Fundamental principles of criminal procedure

- Basic principles of modern criminal justice system which are universally recognized in the democratic states are directly or indirectly incorporated in the FDRE Constitution and other laws
- Those principle are:
- the presumption of innocence until proven guilty art. 133

Cont'd

- The right of defense, art. 142(1) of cr.p...*the right to defend..*
- The right to remain silent art. 27(2) of cr.p
- freedom from self-incrimination art. 35(2) of cr.p *The confession should be voluntary...*
- fair trial art. 136(3) of cr.p ...*the right to put question for witness, art 142 of cr.p the right to present counter witness/evidence*
- speedy trial, art. 94 of cr.p*the adjournment should be given for the interest of justice*

Cont'd

- public trial, art. 176 cr.p. *for young person proceeding shall be held in chambers*. It is exception and the principle is public trial
- the right to defense counsel, art. 61, 174(1) of cr.p
- equality, 136(3), *142 of cr.p.....*
- legality, art. 42(1,a), 141, 149(2) of cr.p
- rule of law,
- due process of law art. 25, 26, 29, 32,33.....of cr.p etc.
- In addition all of the principles are embodied in art. 19-24 of FDRE Constitution.

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History of Ethiopian Criminal Procedure

- In Ethiopia procedural laws had been developed before the substantive laws though it were traditional.
- Those traditional means of crime investigations or detections were known as
 - Leba shay
 - Afarsata and
 - Market guards (arada zabagna) and secret guards (mist'ir zabagna)

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- Leba Shay was a method employed to identify a thief by using a young boy after he had intoxicated by beverage made of herb.
 - By confining people in certain house; one end of a piece/ portion of a cloth would be tied around the waist/ flank of the boy and the chief of leba shay would follow the intoxicated boy wherever he went by holding the other end and

Cont'd

- then any person on whom the boy laid his hand would be taken as a suspect and brought before a court of law
- During the reign of Empress Zewditu an invg'n for a thief who had stolen a garment from the palace was conducted by leba shay
- The chief of leba shay tipped-off to the intoxicated boy to indicate someone as a thief of garment

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- Then the boy picked as he had hinted by the chief
- The picked person was a well-known personality with the palace but he was not on good term with the chief of leba shay
- later it was discovered that the garment had been stolen by a maid of the palace
- This incident revealed the disadvantages of the institution for imperial courtiers

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- The afarsata was a device by which all male in a community would assemble to identify an offender before elders.
- The market guard is similar with coteremporary metropolitan police force
- They had the power to arrest persons found committing, or suspected of committing a crime and

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- The secret guard was charged with the crime prevention by moving around public squares, and in hotels and bars where alcohol was served

Historical Introduction to the Criminal Procedure Code

- In 1961 modern criminal justice system had appeared with the enactment of the CPC.

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- Initially the task of drafting the criminal procedure code was given to Professor Jean Graven of Genève, who had presented to the commission 840 basic articles, and 174 articles dealing with post judgment proceedings.
- He was then also engaged in drafting the Ethiopian Penal Code of 1957
- formal discussions of drafting the CPC began on August 13, 1955.

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- The commission undertook discussion 5 times
- Professor Graven had stopped attending the CPC commission discussion in August, 1956
- In 1957, the commission decided to reject the draft for two reasons
- The first reason is that the code should not contain many provisions dealing with
 - judicial organization,

Cont'd

- jurisdiction,
 - Evidence, etc.,
- The second reason was that the initial draft was more inquisitorial/continental and less adversary
- However his draft did ultimately influence the code's final structure
- Due to those facts in October, 1958, the commission asked and agreed with Sir Charles Mathew to review Pr. Graven's draft with a view to:

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- Examining and simplifying it, and
- Making the code more adversary and less inquisitorial than it was
- Sir Charles was a distinguished English jurist
- The provisions of the code, particularly those with continental sources, are derived from Pr. Graven's avant project

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- The overall essence of the code is adversary, but often it contains fragments of inquisitorial procedure retained from the avant-project.
- Therefore, due to background of the drafters of the code it has been mainly influenced by common law legal system and also it has civil law inclination

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- However, the code is not comprehensive and it only contains 224 articles as compared with the Civil Procedure Code's 482 articles.
- Because of its' non comprehensiveness the current criminal procedure is full of lacunas
- Filling the gaps/ lacunas via interpretation would be tricky method
 - because it is hard to extrapolate/infer legislative intent from a body of law which is not comprehensive