Binding Interpretation of Law in Ethiopia: Observations in Federal Supreme Court Cassation Decisions

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Abstract

The Federal Supreme Court Cassation Division reviews cases based on cassation petition against final court decisions when they contain a fundamental error of law. Such decisions of the Cassation Division rendered by five judges are binding on lower courts. This article reviews cassation decisions for content and form under six categories. It also reviews how the Cassation Court sees its role to better contextualise the effectiveness of those decisions. It finds that the Cassation Division sees itself as part of a court, not an independent judiciary based on separation of powers, and its decisions show significant deference to administrative decisions, and heavy-handed interpretation and application of the rules of criminal and administrative laws. In civil cases, it shows strict interpretation of statutes; it does not resort to principle-based interpretation of rules; it rather interprets statutes as any other ordinary court does. Even if continental legal systems do not envisage case laws through their judicial decisions, courts are not expected to merely rely on the literal readings of the law where such readings are silent, absurd, unreasonable, inconsistent, and contrary to legislative intent. With regard to the form the judgments are written, there are decisions that are not befitting a Cassation Division, the highest judicial organ in Ethiopia.

Keywords:

cassation, binding interpretation, ratio decidendi, principles, legal interpretation

DOI http://dx.doi.org/10.4314/mlr.v18i1.1

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Received: 8 October 2023 **Accepted**: 30 December 2023

Suggested citation:

Simeneh Kiros Assefa (2024). "Binding Interpretation of Law in Ethiopia: Observations in Federal Supreme Court Cassation Decisions", 18(1) *Mizan Law Review*: 1-40

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1. Introduction

Despite its long history, the modern judicial practice in Ethiopia is still in its infancy. Thus, there are divergent decisions on the same issue regarding parties that are in more or less similar standing because of different interpretations or applications of the law. The Federal Supreme Court attempted to standardise the practice of courts by adopting a sentencing guideline, and the decisions made by at least five judges of the Cassation Division are binding on lower courts.[1]

The law does not determine whether review of cases by cassation would be made by an ad hoc tribunal or a permanent division of the Supreme Court. However, because of the volume of cases, there are several specialised divisions of the Cassation Division and practically it is made a permanent division of the Supreme Court. This article evaluates the practice of the Federal Supreme Court Cassation Division decisions as included in the first 25 volumes. Because all cassation hearings were conducted by five judges, all of them are binding. The cases are selected, only for illustration, if such a

Frequently used acronyms

Civ C	Civil Code
Civ Pro C	Civil Procedure Code
Crim App F No	Criminal Appeal File Number
Crim F No	Criminal File Number
Crim Pro C	Criminal Procedure Code
ERCA	Ethiopian Revenue and Customs Authority
FDRE Const	Constitution of the Federal Democratic Republic of Ethiopia
PDRE Const	Constitution of the People's Democratic Republic of Ethiopia

[1] *Federal Courts Proclamation Re-Amendment Proclamation No 454/2005*. The provisions were subsumed by the *Federal Courts Proclamation No 1234/2021* ('Courts Proc No 1234/2021') Art 10(2).

decision asserts, restates or contradicts an established legal principle, or if such a case is re-affirmed, varied, or reversed in subsequent cases establishing or indicating a trend. However, because of the high volume of those decisions, the selection of cases is unavoidably limited by the exposure of the author to specific subjects.

There are researches conducted regarding the Cassation Division;[2] they primarily focus on describing and critiquing, helping the understanding of the Cassation Division decisions, and some of them evaluate the performance of the Cassation Division. This article examines those decisions based on the trend of the Cassation Division decisions over the years under six strands. The evaluation is made based on fundamental legal principles defining that branch of law, such as the criminal law, the presumed objective of the Cassation Division and the values of Federal Courts.

Section 2 gives a brief overview of 'binding legal interpretation' in the Ethiopian legal system, and the evolution of cassation practice taking the present shape. Section 3 sets the context on how the Federal Supreme Court Cassation Division sees its role or the role of courts in general. This section depicts the Federal Supreme Court's deference shown to administrative decisions to the extent of abdicating its judicial power when not expressly authorised by a statute.[3] This gives the impression that courts were meant for the disposition of cases between litigating parties, and not an independent judiciary with the inherent power of judicial review.

Section 4 reviews decisions of the Cassation Division under different strands; the first category of cases (Section 4.1) relates to the restatement of

[2] Muradu Abdo (2007), 'Review of Decisions of State Courts Over State Matters by the Federal Supreme Court', 1 *Mizan L Rev* 60; Mehari Redae (2015), 'Cassation Over Cassation and Its Challenges in Ethiopia' 9 *Mizan L Rev* 175; Bisrat Teklu & Markos Debebe (2013), 'Change for Aptness: Fighting Flaws in the Federal Supreme Court Cassation Division', 5 *Jimma University Journal of Law* 43; Hirko Alemu (2022), 'The Binding Interpretation of the Federal Supreme Court Cassation Division: A Critical Analysis of Its Novelty and Rickety', 11 *Oromia Law Journal* 43; Yosef Aemero, 'Final Decision in Ethiopian Cassation Process', in *Cassation Question in Ethiopia* (in Amharic, Muradu Abdo, ed. Papers Presented at a Symposium Organised in Commemoration of the 50th Anniversary of the Founding of the Law School, AAU April 29, 2014)); Ali Mohammed Ali, 'Fundamental Error of Law' in *Cassation Questions in Ethiopia* (in Amharic, Muradu Abdo (ed). Hussien Ahmed Tura 'Uniform Application of Law in Ethiopia: Effects of Cassation Decisions of the Federal Supreme Court' (2014) 7 African J of Legal Studies 203.

[3] Yemane argues in certain critical stages the legislator made executive order override judicial power. Yemane Kassa Hailu (2015), 'Executive Override of Judicial Power: In search of Constrained Exercise of Delegated Legislation in Ethiopia', 27 *J Eth L* 1.

established legal principles for the correct application of a legal rule. The second category (Section 4.2) of decisions deals with the sale of immovables and related transactions. Because the cases revolve around authentication and registration of contracts for sale of immovables and related rights, decisions on mortgage and pledge of shares, are also included.

The third category of cases (Section 4.3) relates to criminal cases – involving both substantive and procedural criminal law. The fourth category (Section 4.4) includes cases where the Federal Supreme Court played a proper role in identifying subjects for proper interpretation and application of the law and addressing those issues. The fifth category (Section 4.5) relates to decisions that deviate from established practice, such as direct civil execution of criminal judgements.

Section 5 deals with the sixth strand of the discussion and makes general observations of decisions of the Cassation Division in light of the general practice of judgement writing. The final section contains ending remarks.

2. Brief History of Binding Cassation Decision of Supreme Courts

Judicial decisions that are binding on lower courts in subsequent litigation regarding parties in similar standing are referred to as binding legal interpretation. This varies from case precedents in common law systems which cite cases as laws, while binding cassation decisions in the Ethiopian context merely relate to the interpretation of a specific provision by a cassation bench in matters that involve similar issues and comparable facts and circumstances.

Binding Legal interpretation is practical in several ways. It addresses issues that were already litigated earlier thereby minimizing full-scale litigation on an identical legal interpretation. It also creates a sense of predictability of the outcome of cases and gives a sense of certainty of the law.[4] Superior courts, such as cassation courts, do this by taking into consideration principles that are not otherwise available to lower courts either because of specialisation or if those principles are based on matters that are not in the realm of the positive law.

As the judicial power is highly interconnected with administrative power, the hierarchical nature of decisions was historically defined; the decision of

[4] Neil Duxbury (2008), *The Nature and Authority of Precedent* (Cambridge UP) 1 -30; Orlin Yalnazov (2018), *Precedent and Statute: Lawmaking in the Courts versus Lawmaking in Parliament* (Springer) 2 -8.

the king in Ethiopia was binding on everyone; and the modern court structure dates back to the 1920s.[5] As institutionalisation of justice appeared along with the establishment and modernisation of courts, the story of justice in Ethiopia was a story of judges and not of courts.[6] A systematically arranged compilation was published in 1945 (Ethiopian Calendar) based on 'archived ancient Ethiopian judgments' that presupposed a similar application of the law.[7] Although the restatement focused on limited civil matters, such as betrothal, marriage, and loan, its reading implies the restatement of legal rules.

The rules obliging judges to provide the dissatisfied party with a written copy of the appeal judgment were adopted only on 31 March 1922.[8] The *Supreme Imperial Court Procedure Rules 1951*[9] only has an appellate procedure. Article 8 provides for an appeal procedure to the Supreme Imperial Court. Courts were re-structured; established were Woreda courts, Awraja Courts, the High Court and the Supreme Imperial Court.[10] A party who exhausts appeal rights could petition the Imperial Majesty's Chilot.[11] However, as the statute recognises a hierarchy of courts, and owing to the limited number of appeals, Article 15 of the Courts' Proclamation No 195/1962 provides that decisions *on matters of law* given by superior courts would be binding on all subordinate courts. In this regard, the Amharic version appears to be clear '**በሕግ ረገድ በሚነሳ ክርክር**'. Even in case precedents that are

[5] Thomas Geraghty (1969), 'People, Practice, Attitudes and Problems in the Lower Courts of Ethiopia' 4 *J Eth L* 427; Yosef (*supra* note 2) 19 – 20; **አበራ ጀምበሬ፣ *የኢትዮጵያ ሕግና የፍትሕ አፈጻጸም ታሪክ ከ1426 እስከ 1966 ዓ/ም*** **(ሻማ ቡክስ** 2006 **ዓ/ም** 'Abera') 32.

[6] Governors were also judges. *See*, for instance, *Administrative Regulation Decree No 1 of 1942*, Art 10, part 78 - 83; the 1930 Penal Code, Preface, para 3. The *Fiteha Negest* under Paragraph 43 provides for appointment of 'judges'. It makes no reference to 'court'. Further, State appointed judges were referred to as **ወንበር**(chair) which they seat on to make judgment. **ማኅተመ ሥላሴ ወልደ መስቀል፣ ዝክረ ነገር ፪ኛ እትም (አዲስ አበባ ፲፱፻፷፪ ዓ/ም** 'MahitemeSelassie') 78 – 85. Thus, the appeal process was not coherent and organized.

[7] **በኢትዮጵያ ከጥንታውያን የፍርድ መዛግብት የተገኘና የተዘጋጀ ሕጋዊ ድርጅት ፲፱፻፶፩ ዓ/ም የተዘጋጀ።። (በሦስት ቅጽ የተዘጋጀ)** Abera Jembere states that imperial doctrines are precedential jurisprudence. Abera (*supra* note 5) 145 - 46. J Vanderlinden (1966), 'An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century' 3 *J Eth L* 227, 246 – 48.

[8] MahitemeSelassie, *supra* note 6, 71-72.

[9] *The Supreme Imperial Court Procedure Rules 1951 Legal Notice No 155/1951*.

[10] *Courts Proclamation No 195 of 1962*.

[11] Id., Art 9; this is also reproduced in Crim Pro C, Art 183.

applicable in common law systems, it is the *ratio decidendi* that is binding on subordinate courts, not the decision.[12]

This tradition is also reflected in the practice of the Special Courts between 1981 and 1987. For instance, the court interpreted the provisions of Article 12(2) of the Special Penal Code to contain four elements constituting the crime of breach of trust.[13] It was found to be difficult for the prosecutor to obtain a conviction. The provision was thus revised by the *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, Article 12(2). The justifications were stated in *Maj. Tefaye Atilabachew.*[14] The Special Court invoked the interpretation of the provision made in other judgments in finding the respondent guilty. It stated the reasons for the adoption of the new rule and its purpose in *Mulugeta Girma*.[15]

A review of cases by cassation as we know it today was established in 1987. The PDRE Constitution established the Supreme Court of Ethiopia[16] whose jurisdictions are defined in *Supreme Court Establishment Proclamation No 9/1987*.[17] Review of final decisions of the Supreme Court or other courts by cassation was one of the jurisdictions of the Supreme Court. The Proclamation provided that such a decision may be reviewed by cassation where such judgment is said to have contained a *fundamental error of law* or *for other reasons specified by the procedural laws*.[18]

As expounded by Yoseph GebreEgziabher, Deputy Attorney General at the time, review of a final judgment by cassation was introduced to correct fundamental errors committed by courts; a process for the justice system to

[12] Duxbury (*supra* note 4) 25 – 28.

[13] *Special Prosecutor v Leut. Yihe'alem Mezgebu et al* (15 April 1983, Crim F No 24/75, Special Court of First Instance) (1) the property said to be misappropriated is a state property, (2) defendant was entrusted with such property incidental to his responsibilities, (3) such state property is appropriated or alienated with intent to procure benefit to himself, and (4) defendant did this while he is a state appointed official.

[14] *Special Prosecutor v Maj. Tefaye Atilabachew* (12 March 1984, Crim App F N 29/75, Special Court of Appeals).

[15] *Special Prosecutor v Mulugeta Girma* (8 December 1982, Crim F No 15/74, Special Court of First Instance). It might be argued it was the product of personal qualities of the judges both in the special court of appeals and the regular courts who were committed to the consistency and predictability of the courts decisions. Also see text for notes 21 – 24 infra.

[16] Arts 100-102 cum.

[17] *Supreme Court Establishment Proclamation No 9/1987.*

[18] Id., Art 4(4).

correct itself, not as a right to the parties.[19] Thus, such cassation may be heard only when the President of the Supreme Court decides or the Procurator General submits a protest.[20] However, the occurrence of such fundamental error of law may be known to the President or the Procurator General only upon petition of the parties.[21] Such a decision or protest may be filed within six months of the final decision; however, where there are 'special reasons' or the petition would benefit a defendant sentenced to a term of imprisonment, the court is not bound by such time limit.

The review of cases by cassation appears to have been made by an ad hoc bench rather than by a specialised division.[22] Article 20 provides that the cassation bench would be constituted 'by at least four judges of the Supreme Court with the President or one of the Vice Presidents presiding.' Further, whether such a decision of the cassation bench is binding on lower courts was not provided for.

As it was reported by the President of the Plenum of the Supreme Court (in 1987), the uniform application of the law is left to the directives to be issued by the Plenum of the Supreme Court.[23] The review of cases by cassation is just one input to this responsibility of the Supreme Court. There were also other cases decided by the plenum of the Supreme Court.[24] The President of the Supreme Court had the power 'to cause the publication of selected and educative judgments and decisions of every year.'[25] It can be argued that those judgments selected for publication would also include cassation decisions.

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[19] Yoseph GebreEgziabher (1989), 'The Hearing of a Final Judgment by the Supreme Court by Way of Cassation: Another Rights of Appeal Granted to Anyone of the Parties?', 15 *J Eth L* 161.

[20] Proc No 9/1987*, supra* note 17, Art 5(1).

[21] Yoseph, *supra* note 19, 169.

[22] **የጠቅላይ ፍርድ ቤት ዝክረ ጉባዔ (አዲስ አበባ፣ ሐምሌ 1981 ዓ/ም)** ('Minutes of Plenum of the Supreme Court') 13.

[23] Id., 14 - 21; Proc No 9/1987, *supra* note 17, Art, 22(2; Yoseph, *supra* note 19, 164-66.

[24] *See* for instance, Negatu Tesfaye (1986), 'Assessment of Sentence in Cases of Concurrent Offences Entailing Loss of Liberty: A Case Comment on Criminal Appeal No 1569/74' 13 *J Eth L* 83. The 1957 Penal Code was not clear whether punishments for materially concurrent crimes punishments would be summed up or used for aggravation or one is subsumed in the other. The Plenum of the Supreme Court gave its elaborated decision in the hope that other courts would follow the decision. Also see Ibrahim Idris (1986), 'Applicability of Foreign Civil Laws in Ethiopia: A Case Comment on Civil Appeal No 852/73' 13 *J Eth L* 113.

[25] Proc No 9/1987, *supra* note 17, Art 24(13). The Court published those decisions in a journal called **ሕግና ፍትሕ** ('Law and Justice') which also includes directives of the Plenum of the Supreme Court, and research works. Minutes, *supra* note 22, 15 - 17.

The cassation process, as we currently have it, was laid down in the proclamation establishing Central Courts of the Transitional Government.[26] Two elements of the process are outstanding. First, it is made clear that such cassation petition may be filed by parties, and such claim is limited to fundamental error of law. Yet, it is not made clear whether such process is handled by an ad hoc bench established for each case or a dedicated division would be established.

Cases at the Central Supreme Court are heard by three judges. However, the law had a list of cases to be heard by at least five judges of the Supreme Court, one of which was a cassation hearing. The benches would be presided by the President or Vice President of the Supreme Court. Such interpretation of law by the Central Supreme Court rendered by a bench constituted by at least five judges is binding on lower courts.[27]

The second element of the process relates to the Cassation hearing from a final judgement and such case shall be heard by at least five judges.[28] However, there are also other cases to be heard by at least five judges. One of those is "where a case related to a provision of a law with regard to which there is a fundamental difference in interpretation between divisions of the Central Supreme Court."[29] In all cases, the law required to be heard by at least five judges, and the bench would be presided by the President or the Vice-President of the Central Supreme Court.[30]

The practice of the PDRE courts was maintained. Thus, Article 24(4) provides that "an interpretation of law made by a division of the Central Supreme Court constituted by no less than five judges shall be binding." Article 29(6) provides: the President of the Central Supreme Court shall "cause the publication of selected and educative judgements and decision of every year". It is assumed those cases were not necessarily that of the Supreme Court nor are cases decided by cassation because Article 31(2) provides that Presidents of Central High and First Instance Courts shall "submit to the Central Supreme Court selected and educating judgments and decisions of every year."

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[26] *Central Government Courts Establishment Proclamation No 40/1993* (Proc No 40/1993), Art 39.

[27] Id., Art 24.

[28] Id., Art 24(2)(d). It should be noted that the Central Supreme Court would have a president, a vice-president and eleven other judges. Id., Art 22(1). This is in contradistinction to the 54 judges of the PDRE Supreme Court. Minutes, *supra* note 22.

[29] Id., Art. 24(2)(c).

[30] Id., Art 24(3).

The current cassation power is introduced by the provisions of FDRE Constitution Article 80(3) which grants jurisdiction to the Federal Supreme Court to correct fundamental error of law. The procedure is laid down in *Federal Courts Proclamation No 25/1995*, Articles 21 and 22. However, the binding consequence of cassation decisions is solidified in *Federal Courts Proclamation Reamendment Proclamation* 454/2005, Article 2(2). Both are taken over by Courts Proclamation No 1234/2021. There are, however, two unsettled questions; *first*, all the rules discussed make reference to possible misinterpretation of the law; they do not make specific reference to the application of the law. Whether the application of the law is understood in the context of the interpretation of such rules of the law or the two notions are treated as distinct from each other is not made clear.[31] *Second,* where such decisions are made binding on lower courts, and such decision is required to be published, the fate of those decisions not so published is not clear.

3. Modus Operandi of Courts

3.1 Cassation Division's understanding of its own jurisdiction

The FDRE Constitution claims to have established an independent judiciary; it also provides that, judicial power, both at federal and state levels, is vested in the courts.[32] The Amharic version is clear in that it provides that "all judicial power" is vested in "courts only". Further, the Constitution specifically establishes the Federal Supreme Court; the establishment of Federal High and First Instance Courts is left to the decision of the House of Peoples' Representatives.[33] Yet, the judicial power of the court emanates from the Constitution.

The Constitution provides that "[e]veryone has the right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power."[34] From the reading of this and other constitutional provisions, one may harbour a significant reservation regarding independent and exclusive judicial power. First, judicial power does

[31] Courts Proc No 1234/2021, *supra* note 1, Art 2(4)(b) defines basic or fundamental error of law as 'misinterpreting a legal provision or … applying an irrelevant law to the case'.
[32] FDRE Const., Arts 78(1), 79(1), and 80(1), (2).
[33] Id., Art 78(2). The Federal First Instance and High Courts were established only in Addis Ababa and Dire Dawa. Federal Courts Proclamation No 25/1995, Arts 11(1)(b), 12(2), 15(2) and 24(2). Federal High Courts were established in selected 'emerging' regions, such as Afar, Benishangul, Gambella, Somali and SNNRS as per Proc No 322/2003. Those courts are not actually established; circuit benches are dispatched to those states.
[34] Id., Art 37.

not seem to be exclusive; it may be granted to other organs too. The second relates to the fact that the power to interpret the Constitution is reserved to the House of Federation which is assisted by the Council of Constitutional Inquiry.[35] The realisation of such a right to access to justice is very much influenced by the institutional role of the court itself. It is, therefore, appropriate to address this matter first.

'Judiciary' versus 'courts' – its behaviour

Despite such lofty provisions of the Constitution establishing an independent judiciary, the Cassation Division does not have a high view of the judicial role and responsibilities of the courts in general and the Cassation Division in particular. The general position of the court is that 'courts do not have inherent judicial authority'; they only have statutory authority. This position of the Cassation Division is, however, reflected in three different scenarios discussed below.

The *first* scenario involves judicial review of decisions of administrative agencies and administrative tribunals where statutes do not expressly grant or deny judicial review power. The Cassation Division holds that individuals have the right to bring a justiciable matter and obtain a judgment before a court of law. However, in those cases, the Cassation Division held that courts only have statutory power of judicial review. Therefore, it held that where review of such decisions of administrative agencies or tribunals is not expressly granted to courts, courts do not have judicial review power.

Regarding administrative decisions, the Cassation Division, for instance, held whether to issue or revoke a title deed on an immovable property, as per Civil Code, Articles 1195 and 1196, is an administrative decision. Thus, in its first published case, *Tsige Atnafe*,[36] the court held that the power to cancel a title deed granted on false grounds is within the jurisdiction of the administrative agency and not a 'justiciable matter'.[37]

There are also cases where statutes grant judicial power to administrative tribunals. For instance, the Ethiopian Privatization Agency was given the power to decide whether an unlawfully expropriated urban house should be returned to its prior owner as per Proclamation No 110/1995, Article 5(3). In

[35] Id., Arts 82, 83(2).

[36] *Tsige Atnafe v Balambaras Wube Shibeshi* (December 29, 2005, Cass F No 14554 in Volume 3). The publications of the Cassation Division are hereinafter referred to by their volume number only.

[37] It should be noted that justiciability is one of the fundamental constitutional doctrines that define access to justice. However, it is nowhere interpreted by the court, and in subsequent decisions non-justiciability and finality clause are confused.

Heirs of Nour Beza,[38] the respondents' petition was rejected by the Board of Privatisation Agency. They took their case to the Federal First Instance Court which reversed the decision of the Board. The High Court affirmed the decision with a minor change. The Cassation petition was against these decisions of the courts, exercising jurisdiction over the decision of the Board.

The Cassation Division held jurisdiction of matters regarding houses expropriated unlawfully are vested in the Agency, and appeal from such decision would be heard by the Board whose decision is final and binding. The Cassation Division further held that where there is no statutory legal provision authorizing judicial review, courts do not have the power to review the decisions of quasi-judicial organs because their jurisdiction is statutory, not inherent.[39] The Cassation Division affirms this holding in *Nigist Haile,*[40] *Maj. Assefa Belay*,[41] *Abadit Lemlem*,[42] and *Heirs of Mohammed Hussen*.[43]

The *second* scenario relates to the judicial review of cases decided by administrative tribunals whose enabling statute provides for the finality of such decisions. For instance, regarding retirement pension, the Social Security Agency is given the power to review decisions before its administrative tribunal and appeals would be heard by the Appellate Tribunal. Thus, the Cassation Division in *Birhanu Hiruy*[44] held that the decisions of the Appellate Tribunal are final and not subject to judicial review. This is affirmed in *Wubayehu.*[45] The Cassation Division elaborated that from the decision of an administrative tribunal, an appeal lies to the Appellate Tribunal. The decision of the Appellate Tribunal is final and not subject to appeal to regular courts.

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[38] *Ethiopian Privatisation Agency and Supervising Agency v Heirs of Nour Beza Terega* (12 January 2008, Cass F No 23608 in Volume 5). This case is also reproduced in volume 6 apparently by mistake but it shows how important the case is considered to be.

[39] The court used both the Amharic and English phrases 'no inherent jurisdiction' to express its holding.

[40] *Nigist Haile v Legesse Alemu* (5 February 2009, Cass F No 37339 in Volume 9).

[41] *Maj. Assefa Belay v Court Martial Prosecutor* (18 November 2008, Cass F No 33368 in Volume 9).

[42] *Abadit Lemlem v Zalanbessa City Admin, et al* (26 October 2010, Cass F No 48217 in Volume 11).

[43] *Heirs of Mohammed Hussen v Government Houses Agency, et al* (February 4, 2011, Cass F No 37964 in Volume 12).

[44] *Social Security Agency v Birhanu Hiruy and Kebede G/Maryam* (26 December 2005, Cass F No 18342 in Volume 3).

[45] *Social Security Agency v Wubayehu Abebe* (4 December 2007, Cass F No 27623 in Volume 5).

The Cassation Division uses the provisions of the Civil Procedure Code (Article 4) and FDRE Constitution (Article 37) as a justification. Article 4 of the Civ Pro C, provides that "the courts shall have jurisdiction to try all civil suits other than those which their cognizance is expressly or impliedly barred." Moreover, the provisions of Article 37 are understood to authorize the establishment quasi-judicial organ and jurisdiction may be apportioned to such quasi-judicial body accordingly. Such allocation of jurisdiction to quasi-judicial organs is understood by the Cassation Division as a preclusion of judicial review.[46]

The special nature of facts involved in such disputes may indeed require or justify the establishment of quasi-judicial organs for the determination of the facts involved. However, their decision should be reviewed by courts on matters of law.[47] If there is a finality clause, it should be interpreted in either of two ways – the decision of the agency is final regarding the agency and judicial jurisdiction begins, or the decision of the agency on matters of fact is final and the court may review the decision to address only errors in law.[48] However, the Cassation Division treats the finality clause as though it precludes judicial review.[49]

The *third* scenario relates to administrative decisions in which the law expressly precludes judicial review.[50] The first such case is *Aberro Irgano*,[51] where the Cassation Division held that the Council of Ministers Regulations preclude employees of the Ethiopian Customs Authority from seeking and

[46] Legislative and judicial power may be given to the executive. The rules they adopt need to be harmonized with the enabling rule, and their decision would be subject to judicial review.

[47] A W Bradley & K D Ewing (2006), *Constitutional and Administrative Law* (Princeton Hall) 695 – 99.

[48] Finality clause in constitutional and administrative law is understood to be a requirement of exhaustion of administrative remedies before seeking judicial remedies; it is not an ouster clause. See for instance, Diane Longley and Rhoda James, *Administrative Justice: Central Issues in UK and European Administrative Law* (Cavendish Publishing Ltd, 1999) 160-62; Bradley and Ewing, *supra* note 47, 775 -76.

[49] Yemane, *supra* note 3.

[50] *Ethiopian Revenue and Customs Authority Establishment Proclamation No 587/2008*, Art 19(1)(b); *Administration of Employees of the Ethiopian Revenue and Customs Authority Council of Ministers Regulation No 155/2008*, Art 37 precludes any resort to any judicial or administrative tribunal seeking remedy, including the Federal Civil Servants Administrative Tribunal. The Cassation Division held that it is 'executive prerogative'.

[51] *Ethiopian Customs Authority v Aberro Irgano* (22 March 2007, Cass F No 23339 in Volume 4).

obtaining legal remedies from any judicial organ.[52] This is affirmed in *Wolday Zeru, et al*[53] wherein the court expressly stated that the subject 'is not a justiciable matter'. It further held that neither the court nor the Federal Civil Service Commission has jurisdiction on such matter.[54]

Where the Constitution provides that an independent judiciary is established, one may assume the judiciary, as a third branch of the state would have inherent power to hold the other two branches of the state to account. This might make sense in light of the provisions of Article 37, the right to access to justice. However, the Constitution itself signals the limitations to this power of the judiciary by denying it the power to interpret the Constitution.[55] In the above-mentioned cases, the Cassation Division holds that its jurisdictions are determined by statutes, not by the Constitution. Thus, in none of those and other cases did the court invoke its authority from the Constitution.

3.2 A change of heart? Revising its own decisions

Those decisions which the court precludes itself from judicial review of administrative decisions with varied reasons were standing for several years and affected several lives. Decisions of the Cassation Bench are binding on lower courts. The Cassation Division in *Senay Leoulseged* and similar other cases held that those decisions are standing until they are reversed or a different decision is rendered by the Cassation Division.[56] In several of those cases, the changes are made without express reference to prior decisions; and

[52] *Administration of Employees of the Ethiopian Revenue and Customs Authority Council of Ministers Regulation No 155/2008.*

[53] *Wolday Zeru, et al v Ethiopian Revenue and Customs Authority* (24 May 2011, Cass F No 51790 in Volume 12).

[54] Under ICCPR, Art 14, this is part of the right to a fair hearing that guarantees a person against arbitrary dismissal. It also includes hearing by a competent, independent and impartial tribunal established by law. Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd revised edn, N.P. Engel 2005) 314-21. The House of Federation on 13 February 2019 ruled this provision of the Regulations unconstitutional.

[55] FDRE Const., Art 62(1). After a long inaction on the Constitution, the court now is empowered to address claims based on constitutional rights. Accordingly, a special division is established in the Federal High Court for this purpose. *Courts Proc No 1234/2021, supra* note 1, Art 11(3).

[56] *Senay Leoulseged et al v Tigist Haile et al* (23 November 2010, Cass F No 52530 in Volume 11); *Mulugeta Abay v Federal Inland Revenue Authority* (27 May 2009, Cass F No 37866 in Volume 9); *Ethiopian Electric Power Corporation v Amare Gelaw* (6 August 2010, Cass F No 36730 in Volume 9).

in its recent practice, it makes reference to prior decisions.[57] Thus, it has made minor changes to some of its prior decisions; the following are discussions on those changes.

Regarding decisions made by quasi-judicial tribunals, the Cassation Division in *Spouse and Heirs of Wasihun Mekonnen et al* held that the quasi-judicial organs have a duty to comply with the principles of fair hearing.[58] Thus, in *Aberra Kidane*,[59] *Aberra Boken, et al*,[60] and *Abjeta Shala Soda SC*,[61] it is held that the Cassation Division has the responsibility to ensure those administrative tribunals uphold principles of fair hearing.[62] Therefore, decisions of administrative tribunals are subject to judicial review for procedural irregularity.

The Cassation Division distinguishes its interpretation of the finality clause in *Birhanu Hiruy* precluding judicial review. Thus, in *Akele Mihiretu*,[63] the Cassation Division held that the preclusion of judicial review in *Birhanu* does not include a review of such final administrative decision by cassation for possible fundamental error of law.[64] This is restated in the Courts Proclamation No 1234/, Article 2(4)(g) where administrative decisions made contrary to law are defined to contain fundamental error of law. The Cassation Division is yet to address matters of judicial review of decisions of administrative tribunals.

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[57] The practice of the Cassation Division is that it often changes decisions without making specific reference to the previous decision to be changed. It is an exception when it makes reference to prior decision for revision. *Sofia Mohammed v Endrias Gashu* (4 April 2019, Cass F No 119851 in Volume 23); *Alemshewa Abate v Milliion Abate* (1 April 2019, Cass F No 157560 in Volume 23); *Wosenie G/Yohannes v Yeka Sub-City Woreda 7 Consumers' Cooperative* (7 April 2020, Cass F No 165289 in Volume 24).

[58] *Spouse and Heirs of Wasihun Mekonnen et al v Government Houses Agency* (2 November 2012, Cass F No 43511 in Volume 14).

[59] *Abera Kidane v Gamo Gofa Zone Social Security Branch Office* (19 October 2012, Cass F No 72928 in Volume 14).

[60] *Government Employees' Social Security Agency v Abera Boken, et al* (2 November 2012, 80964 in Volume 14).

[61] *Abjeta Shala Soda S C v Abjeta Soda Trade Union* (10 January 2013, Cass F No 83425 in Volume 14).

[62] *Abera Kidane, supra* note 59; *Abera Boken*, *supra* note 60; *Abjeta Shala Soda SC, supra* note 61; *Wolday Zeru*, *supra* note 53.

[63] *Akele Mihiretu v Social Security Agency* (2 October 2012, Cass F No 61221 in Volume 14).

[64] This appears to be the current understanding of the Cassation Division regarding finality clause. See, for instance, *Sileshi Walelign v Amhara Ethics and Anti-Corruption Commission* (3 April 2018, Cass F No 149962 in Volume 22).

In *Birhanu Belay Dinegde et al*[65] the Council of Constitutional Inquiry held that where the organ vested with jurisdiction refuses to exercise such jurisdiction, the court cannot refuse jurisdiction which would be contrary to the provisions of Article 37 of the Constitution.[66] The Cassation Division held the same position in *Abebe Ali* and in *Selamawit Yilma et al*.[67]

The Cassation Division further held that courts may review decisions of administrative agencies. Accordingly, in *Abrehet Dikriya,* it held that courts may review the legality of granting or cancellation of title deeds to immovables.[68] In subsequent decisions, the Cassation Division held that disputes relating to titles to immovable properties, claims for the issuance or cancellation of title deeds to immovables,[69] inappropriate issuance of title deeds,[70] the legality of titles to immovable property,[71] challenging the presumption of title[72] and titles to immovable, in general,[73] are justiciable matters falling under the jurisdiction of courts. These decisions are still in conformity with its prior holding that individuals may bring 'any justiciable matter' to court unless such jurisdiction is granted to another institution.[74]

The Cassation Division is the pinnacle of the justice system. The Constitution states to have established an independent court and all justiciable matters would be resolved by courts only. This provision is understood in the

[65] *Birhanu Belay Dinegde et al v Bole Sub-City, Woreda 5 Administration* (27 May 2017, CCI File No 1763/2008 in *1 Decisions of the Council of Constitutional Inquiry No 1* in Amharic).

[66] *Spouse and Heirs Wasihun Mekonnen v Government Houses Agency* (2 November 2012, Cass F No 43511 in Volume 14).

[67] *Abebe Ali v 08 Kebele Peasant Association et al* (25 December 2008, Cass F No 37281 in Volume 12); *Selamawit Yilma et al v Ethiopian Red Cross Association, Butajira Branch and Butajira City Administration* (4 November 2019, Cass F No 169716 in Volume 24).

[68] *Abrehet Dicriya v Fatuma Jemal et al* (27 May 2014, Cass F No 99071 in Volume 18).

[69] *Government Houses Agency v Heirs of Merse'ea Menberu* (13 November 2008, Cass F No 31906 in Volume 9), and *Dessie Town Blind Association v Ethiopia Blind Association* (6 August 2018, Cass F No 142594 in Volume 23), respectively.

[70] *Bole Sub-City Land and Development Admin v Gimja Bedane* (19 May 2009, Cass F No 39529 in Volume 9).

[71] *Warite Subusa v Goljota City Administration et al* (1 November 2012, Cass F No 75414 in Volume 14).

[72] *Wogayehu Tamiru v Askale Wosene et al* (28 November 2013, Cass F No 88084 in Volume 15).

[73] *Zeyneb Jemal v Bole Sub-City Design and Construction Admin Office et al* (11 June 2014, Cass F No 97464 in Volume 16).

[74] *Hagos Shigo'e et al v Shemene Municipality* (19 February 2013, Cass F No 80202 in Volume 15).

context of a constitutional doctrine of separation of powers, and check and balance –that the judiciary would hold the other two organs to account.[75] In that sense, the court would be understood as 'the judiciary'. However, the Cassation Division argues courts have only statutory jurisdiction; they do not have inherent jurisdiction. As such courts very much defer to the decisions of administrative tribunals and agencies. This reduces the institution to 'a court'; it does not maintain the status of 'a judiciary'.[76]

3.3 Defining its own jurisdiction

Studies indicate that since the introduction of the doctrine of separation of powers, the development of a judicial institution passes through several stages. Once the judiciary is established by a constitution as an independent third branch of the state, courts are empowered to exercise a monopoly of judicial power including constitutional interpretation and inherent judicial review.[77] In this process, the court specialises in addressing diverse subject matters in expanded jurisdiction applying judicial procedure and exercising judicial discretion. Courts render decisions that are binding on the government, individuals and corporate entities. In some instances, the judiciary addresses social and political issues in order to help the executive, yet, without compromising its core responsibility for respecting individual freedom and maintaining the rule of law.[78]

The institutional development of the judicial organ in Ethiopia requires a separate study.[79] The discussion here is based on how the Cassation Division sees its role and indeed the role of courts, in the Ethiopian state structure.

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[75] *See*, in general, Charles M Fombad 'An Overview of Separation of Powers under Modern African Constitutions' in *The Separation of Powers in African Constitutionalism* (Charles M Fombad, Ed., Oxford UP 2016) 73 -81.

[76] Further, *see* Simeneh Kiros Assefa, 'Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia' (2021), 15 *Mizan L Rev* 379, 406 - 407.

[77] Justin Crowe (2012), *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton UP).

[78] The court defers to the state's use of criminal law to enforce administrative measures. Simeneh Kiros Assefa (2020), 'Non-Positivist 'Higher Norms' and 'Formal' Positivism: Interpretation of the Ethiopian Criminal Law', 14 *Mizan L Rev* 85, 99 ff. Likewise, the US Supreme Court had shown acquiesce to the state's administrative policy in the aftermath of WWII economic crisis. Neal Davins (2013), 'Group Formation and Precedent' in, *Precedent in the United States Supreme Court* (Christopher J Peters, Ed, Springer).

[79] Yalelet Teshome (2021), 'Assessment of Ethiopian Judiciary' in *Diagnostic Study of the Criminal Justice System of Ethiopia* (FDRE Attorney General). Simeneh 'Conspicuous absence', *supra* note 76.

However, one can make a few generalisations and argue that the Constitution does not establish 'an independent judiciary' as a third branch of the state that engages in check and balance; the courts are not empowered because they do not have a judicial monopoly; jurisdiction is also granted to other administrative and quasi-judicial organs whose decision is said to be 'final', i.e., not subject to judicial review.

It can also be argued that the courts are not empowered because they often defer to administrative decisions of the government and refuse to exercise judicial review power. The review of the decisions of the Cassation Division is, thus, made based on these fundamental assumptions of the court, and to advance the utility of decisions of the Cassation Division.

Cassation on a final judgement

It is often stated that the cassation petition may be admissible against a final judgment.[80] This appears to be a requirement of exhaustion of remedies that the case passes normal stages of litigation beyond which there is no remedy. Thus, in *Girmay Desta* petitioner was granted a suspended sentence.[81] The appeal court, in a default proceeding, decided that the petitioner should serve his sentence. On cassation, the petitioner challenged his conviction, among others. The Cassation Division held that the petitioner did not appeal against his conviction, even by a cross-appeal, and decided that his petition is not in accordance with the procedure.

Cassation on error of law

A Review of a final judgment on cassation may be sought only for fundamental/basic errors of law. The Cassation Division in *Trans Africa Transport SC* held that matters of fact are not under its jurisdiction.[82] However, whether a case contains an error of law is defined by negation, that matters relating to the evaluation of evidence are matters of fact not falling under the jurisdiction of the Cassation Division. Thus, the Cassation Division held in *Senayit Temesgen* that the evaluation of evidence is an issue of fact,

[80] See Yosef (*supra* note 2) for discussion on 'final decision/judgement' subject to review by cassation.

[81] *Girmay Desta v Public Prosecutor* (22 May 2008, Cass F No 34280 in Volume 7).

[82] It is to be noted that the cassation decisions of state supreme courts are also reviewed in cassation by the Federal Supreme Court Cassation Division. *See* Muradu (*supra* note 2); Mehari (*supra* note 2). Also see *Zewdu Gizaw v Ayelech Desta* (28 November 2011, Cass F No 55273, in Volume 13); *Trans Africa Transport S C v Mulu Electornics Eng. PLC* (10 May 2010, Cass F No 41526 in Volume 9).

which is not under the jurisdiction of the Cassation Division.[83] The court made a fine distinction that whether those facts as established before the lower courts were given legal effect is an issue of law.

In *Samuel Fekadu,* the Cassation Division made another fine distinction; it held that because it has a fundamental impact on the outcome of the case whether evidence is evaluated in accordance with the basic principles of evaluation of evidence is an issue of law.[84] Similarly, it was held that decisions entered by lower courts without framing appropriate issues, or without the party having the burden of proof discharged his obligation are subject to review by the Cassation Division.[85]

Cassation on fundamental error of law

The jurisdiction of the Cassation Division is defined by fundamental error of law. In the cases discussed above, issues of law and the fundamental nature of error of law are mingled. The court in *Daniel Zemikael* affirmatively and in general statement defines a fundamental error of law as one that would bring fundamental change in the rights of parties.[86] Article 2(2) of the Courts Proclamation No 1234/2021 lists final decisions constituting fundamental error of law that 'grossly distress justice'. The list includes both the interpretation and application of those rules. Yet, the question still remains whether this list is exhaustive, particularly those relating to criminal matters.

3.4 The binding nature of cassation decisions

Article 80(3)(a) of the Constitution provides that the 'Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.' The Amharic version is clear that the power of the cassation court is to 'correct' such final judgment containing a fundamental error of law. The details were left for subsidiary legislation. Thus, Federal Courts Proclamation No 25/1995 provides the process of hearing such matters. However, the binding nature of such a decision was provided for in Article 2(1) of the *Federal Courts Proclamation Reamendment Proclamation No 454/2005*, which provides: "4. Interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be

[83] *Senayit Temesgen v Etifworq Bekele* (14 October 2010, Cass F No 44804 in Volume 11).
[84] *Federal Public Prosecutor v Samuel Fekadu* (30 January 2015, Cass F No 89676 in Volume 17).
[85] *Workneh Kenbato v SNNRSP Ethics and Anti-Corruption Commission* (17 April 2012, Cass F No 63014 in Volume 14).
[86] *Daniel Zemikael v Bihary Babulal* (28 June 2013, Cass F No 86187 in Volume 15).

binding on federal as well as regional [courts] at all levels." It also provides that it may "render a different legal interpretation some other time."

The statute also has an interesting provision which provides that "[t]he Federal Supreme Court shall publish and distributed decisions of the Cassation Division that contain binding interpretation of laws to all levels of courts and other relevant bodies." The effect of this provision is not clear from the practice of the Cassation Division. This author believes that only cases that the Supreme Court selects to be binding are compiled and published; those decisions not so published are binding only on the parties, not others because it may have an element of surprise. However, the cassation division treats all its decisions as binding, as long as they are decided by at least five judges, rendering the provision of publication ineffective.

There is the need for caution when decisions of the Cassation Division are referred to as 'precedent' because this word cannot convey the same meaning it carries in other common law jurisdictions where courts have both the power to interpret statutes and to fill gaps by interpretation that constitute judge-made law. The Ethiopian Supreme Court is empowered to correct a fundamental error of law by declaring the applicable rule, and by defining the content of such legal rule. It is not empowered to make law or to depart from the clear provisions of the law.[87] However, as depicted in the discussions that follow, such error may relate to the application of the law or its interpretation, and the lower courts are required to follow the interpretation of a particular provision of the law.

3.5 What then is interpretation?

In jurisdictions where *precedent* is a well-developed judicial doctrine, decisions are binding only on the parties; it is the reason for the decision, *ratio decidendi*, that is binding on others.[88] The reasons for the decision are essentially methods and manner of interpretation of a particular rule, including giving content to those rules so that such rules are linked to the facts of the case. The rules relating to precedent do not define what interpretation is; it appears interpretation is assumed. Although there is a widespread practice of interpretation of statutes, there are a few specific rules of interpretation[89] and

[87] It should be noted that there are judges who consider the Supreme Court interpretation is the law. See for instance, *Sofia Mohammed* (*supra* note 57). That takes us to the unending argument regarding the nature of law.

[88] Duxbury, *supra* note 4, 22 -30; 58 -66.

[89] The Civil Code contains provision for the interpretation and application of Contracts in General (Civ C, Arts 1732-1739). However, it should be noted that those rules of interpretation are circular in that they themselves are in want of rules of interpretation.

a few articles written on interpretation of statutes.[90] The practice of interpretation can be generalised into two activities; the first practice of interpretation relates to the identification of applicable rule/s, and the second relates to giving content to such rule/s.

Those statutes may generally be classified into two: those statutes governing private relations are private law, including civil and commercial statutes; those governing relations between the state and the citizen are public law, including criminal and administrative statutes. The two branches of law are interpreted and applied differently.

Krzeczunowicz restating rules of interpretation, which appear to be influential to date on civil matters, stated that where the law is clear, it needs no interpretation, i.e., the court just applies the law and cannot depart from the commonly understood meaning of such rule. Interpretation is warranted to give meaning to the law where there are gaps and ambiguities, or where the law is silent or the provisions are contradictory; the court interprets the law in a manner trying to establish the intent of the lawmaker.[91] If these statements are shared assumptions among professionals, interpretation is judicial rationalisation of the law based on the presumed intent of the lawmaker and certain assumed fundamental principles.

Rules governing state-citizen relations appear to be in want of interpretation because rules that justify the exercise of state power over its citizens have fundamental political and legal theoretical justifications.[92] For instance, in order to give content to the provisions of the criminal law, there are always general principles the court needs to take into consideration.[93] Graven, thus, argues that the structure and arrangement of the Code itself presuppose interpretation because it is systematically organised.

Based on the general reading of the decisions of the Cassation Division and in light of the academic literature on interpretation, one can abstract a few

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[90] Krzeczunowicz's writing is interpretation of civil statutes while that of Graven and Strauss were on interpretation of criminal statutes. George Krzeczunowicz (1964), 'Statutory Interpretation in Ethiopia' 1 *J Eth L* 315. Jean Graven (1964), 'The Penal Code of The Empire of Ethiopia' 1 *J Eth L* 267; Peter L Strauss (1968), 'On Interpreting the Ethiopian Penal Code' *J Eth L* 375.

[91] Krzeczunowicz, *supra* note 90.

[92] Simeneh 'Non-Positivist 'Higher Norms'…, *supra* note 78.

[93] Id.; Graven, *supra* note 90, 281-87; Simeneh Kiros Assefa (2017), 'Methods and Manners of Interpretation of Criminal Norms', 11 *Mizan L Rev* 88; Jan Sieckmann (2013) 'Legislation as Implementation of Constitutional Law: A Foundation for the Demand of Legislative Rationality' in The Rationality and Justification of Legislation (Wintgens, LJ and Oliver-Lalana, AD, Eds, Springer).

rules of interpretation when rules appear to contradict. For instance, in civil statutes, special provisions of the law prevail over the general provisions, and the rules adopted later are preferred provisions than older ones. In public law, the Cassation Division held that rules providing for the rights of the individual are to be interpreted broadly, and restrictions to such rights, as exceptions, are to be interpreted narrowly.[94]

One would then ask about the scope of interpretation. What is the role of the Cassation Division in rendering interpretation? Is it limited to mere declaration of the law or can it deviate from the black letters of the law in giving content to those provisions? How are principles abstracted and applied to particular cases? There is no effort here to provide answers to these broad questions. However, in the following cases, an attempt is made to illustrate the challenges the Cassation Division faces in rendering judgment.

4. Review of Selected Decisions of the Cassation Division

Interpretation involves the identification of applicable law and giving content to such a rule. Once such rule is identified and given content in a prior cassation decision, the applicability of such a rule and its content are followed in subsequent cases for parties in similar standing. This helps in maintaining the stability of the law, uniform application of the law, consistency in the application of the law and certainty of the law. This is not necessarily treating like cases alike; it is rather creating consistency of judgments as a whole.[95]

The efficacy of binding statutory interpretation (BSI) is dependent on two factors – accessible case reporting and effective hierarchy of courts. Those decisions need to be public and accessible to professionals so that they are applied authoritatively.[96] The authoritative nature of BSI is in the *ratio decidendi* of the decision which demands quality of judgement writing.

The following section reviews exclusively decisions of the Federal Supreme Court Cassation Division. In *Spouse and Heirs of Wasihun Mekonnen et al*, the Cassation Division held that the decisions of the House of Federation are binding;[97] however, other than incidental mention, they are not considered here.

[94] *Seid Yemer v Amhara Ethics and Anti-Corruption Commission* (18 March 2008, Cass F No 34077 in Volume 7).
[95] Duxbury, *supra* note 4, at 49.
[96] Id., 57.
[97] *Spouse and Heirs of Wasihun Mekonnen* (*supra* note 66).

4.1 Decisions reaffirming established legal principles

The contemporary substantive and procedural laws of Ethiopia are relatively developed and expansive. Yet there are apparent gaps in certain areas and in some instances. The unwritten principles are applied by the courts to help the understanding and application of rules. Those principles relate to the fundamental assumptions of justice, such as decision by a competent, independent, and impartial body; or they relate to the framework of a specific branch of law, such as the principle of legality in criminal law or unity of legal system in constitutional law; or the principles may relate to institutional values, such as the enforcement of the rights of citizens and maintaining the rule of law.[98] Most parts of Cassation Division decisions reaffirm or restate those established principles and values even though these principles are not part of the positive law.

In civil matters, written pleadings need to be filed by a plaintiff in order to obtain judicial relief. Likewise, it is constitutionally required that criminal proceedings may be initiated by a written charge. The Cassation Division in *Mulu Electronics Eng. PLC* held that the relief sought needed to be stated in the pleadings. What is not stated in the pleadings cannot be demanded or asserted at the hearing nor can it be a ground for relief.[99] The court is also required to specifically rule on a relief expressly sought by the parties in their pleadings.[100] Further, it is after an oral hearing that issues may be drawn up by the court for disposition of the matter. Thus, the Cassation Division in *Seyoum Mamo et al* held that a court of law should frame the issue that helps in the disposition of the case.[101]

In *Mekonnen Girmay et al* the Cassation Division held that every case may be disposed based on the rules of the law and the evidence presented.[102] Any decision made without proper evaluation of the evidence presented is not

[98] Simeneh 'Higher Norms…', *supra* note 78.

[99] *Mulu Electronics Eng. PLC v Tikur Anbesa Specialised Hospital* (25 June 2013, Cass F No 86510 in Volume 15).

[100] *Leoulseged Bonnie v Ethio Leather Industry PLC* (2 April 2009, Cass F No 39144 in Volume 8); *DejyiTnu Almayehu v Azalech Debebe* (9 July 2010, Cass F No 51866 in Volume 10).

[101] *Ethiopian Airlines v Seyoum Mamo et al*,10 February 2009, Cass F No 37391 in Volume 8.

[102] *Ethiopian Electric Power Corp v Mekonnen Girmay et al* (21 October 2008, Cass F No 36848 in Volume 8).

appropriate.[103] It is part of the judgment that the court is supposed to state the evidence admitted and rejected as presented by the parties. Thus, in *Hilina Haile et al* the Cassation Division held that the court is required to give a reason for admitting or rejecting each item of evidence presented by the parties.[104] Likewise, the court may order the production of relevant evidence where it deems such evidence helps in the disposition of the case.[105]

The Cassation Division in several decisions reaffirms the principle of legality, and it held that there is no crime or punishment unless it is provided for in the law.[106] Consequently, where the law is repealed and the conduct is decriminalised, there is no crime.[107]

Likewise, the hierarchical integrity of the court is essential in the effective administration of justice and application of binding statutory interpretation (BSI). Thus, the Cassation Division held that it would be inappropriate for a lower court to disregard the decision of superior courts.[108] Equally, it would be inappropriate for appellate courts to reverse decisions of lower courts without proper examination into the matter or without giving reason.[109] A party cannot appeal on matters that were not litigated before the lower courts.[110] The appellate court cannot grant relief nor can a relief be sought if the matter is not litigated at the lower court.[111]

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[103] *Midrock Construction PLC v Solomon Abebe Kokeb* (4 November 2008, Cass F No 37105 in Volume 8), *Misganaw Assege v Ayinalem Assege* (1 January 2020, 2012 EC, Cass F No 168094 in Volume 24).

[104] *Amhara Justice Bureau v Hilina Haile et al* (16 March 2016, Cass F No 113143 in Volume 20).

[105] *Hitse'at FisehaTsion v Almaz Terefe et al* (23 January 2020, Cass F No 29861 in Volume 8).

[106] *Worku Fekadu et al v Benishangul Gumuz Prosecutor* (25 January 2013, Cass F No 75387 in Volume 14); *ERCA v Kebede Tesera et al* (1 October 2013, Cass F No 81178 in Volume 15); *Ahmed Adem Beshir v Amhara Prosecutor* (19 February 2014, Cass F No 91535 in Volume 15); *Ermiyas KaTiso et al v Kembata Tembaro Revenue Authority Branch Office* (9 October 2014, Cass F No 96607 in Volume 17); *Goshu Yohannes v Federal Ethics and Anti-Corruption Commission* (24 June 2015, Cass F No 97291 in Volume 18*)*; *ERCA v Amico Consumers' Association*, 4 March 2016, Cass F No 111086 in Volume 19).

[107] *ERCA v Seife Abebe* (15 November 2016, Cass F No 111960 in Volume 21).

[108] *Midrock Construction* (*supra* note 103).

[109] *Addis Ababa Roads Authority v Gad Business PLC* (2 July 2009, Cass F No 38844 in Volume 8).

[110] *Tesfaye Adela v Public Prosecutor* (25 June 2010, Cass F No 48617 in Volume 10).

[111] *Gewnie Enterprise PLC v Yesufe Yimam* (17 December 2009, Cass F No 37762 in Volume 8).

4.2 Decisions relating to sale of immovables

The sale of immovable property is required to comply with certain strict requirements. The first requirement is an agreement made in writing and authenticated as per Civ C, Article 1723. Further, Article 2877 provides that such a 'contract of sale of an immovable shall be of no effect unless it is made in writing.' Such agreement may be made anywhere; likewise, the authentication may be made by any branch of such office. Thus, the law requires that such authenticated sale agreement be deposited in the register of the immovable property as per Civ C, article 2878. There appears to be a contradiction between the provisions of Article 1723 and the rest of the contract law provision, and between the provisions of Articles 1723 and 2877 thereby requiring a careful interpretation.

One of the most frequently cited cases of the Cassation Division relating to the sale of immovable property and the application of those provisions is *Gorfe Workneh*.[112] The case involves the alleged buyer and heirs of the alleged seller of an immovable property. The Cassation Division framed the issue as what is the formal requirement for the sale of immovable.

The court held that the sale of immovable, including the creation and transfer of other rights relating to immovable, such as usufruct and servitude, need to comply with the required form. Thus, it has to be made in writing and should be authenticated. The Cassation Division held that where the agreement does not meet the requirements under Article 1723(1) of the Civil Code, it remains a mere draft, citing the provisions of Article 1720(1). The court further held that there is no contradiction between the provisions of Article 2877 and 1723.

In *Kebede Aregaw*, the Court held that in order for the sale of immovable have an effect on third parties, the agreement needs to be deposited in the register of the immovable property. It further stated that this juridical act does not require special formality; it is just depositing the agreement in the register of the said immovable property.[113]

Gorfe is invoked and affirmed in *Muhedin Faris*.[114] In this decision, the Cassation Division made it clear that a contract for the sale of immovable property, if it is not authenticated, is considered a pre-contractual document

[112] *Gorfe Workneh v Aberash Dubarge et al* (8 May 2007, Cass F No 21488 in Volume 4).

[113] *Kebede Aregaw v Commercial Bank of Ethiopia* (20 April 2007, Cass F No 16109 in Volume 4). The agreement in this transaction does not meet the requirements of Art 1723 as in *Gorfe* (*supra* note 112).

[114] *Muhedin Faris v Iyasu Be'edemaryam* (15 May 2008, Cass F No 29233 in Volume 7).

or a *mere draft of a contract* as per Article 1720(1) and there is no contract in existence. The court ordered the reinstatement of parties on the ground that a party may demand performance from the other party after performing his part. This argument is contrary to the original position of the court because reinstatement may be ordered based on cancellation or avoidance of the contract which is not decided here.

In those decisions, the holding of the court is that authentication of the agreement is essential for the validity of the contract between the parties, and its placing into the register of the immovable property is necessary to make it effective against third parties.

Gorfe is still standing; it is not replaced. Thus, in *Mekuannent Worede,* the longest dissenting opinion, so far, elaborates the predicaments of the holding of the majority affirming *Gorfe*.[115] The dissenting judge puts the fundamental principles of contract law and the nature of such provisions. He continues to argue that the provisions of Article 1723 are directory not mandatory; non-compliance does not make the contract void. He argued, such an approach would help harmonise with the provision of Articles 2877 and 2878 which are mandatory provisions. While the lawmaker defines the formal requirements for the sale of immovable under Articles 2877 and 2878, the majority is making additional form applicable when requiring authentication under the provisions of Article 1723 as mandatory.

Authentication requires three things, one of which is posting a duty stamp on the document. However, Article 1720(2) provides that not complying with this requirement does not make the contract invalid. Further, if the agreement is considered a mere draft of a contract, there is no relationship between the parties. Therefore, it makes other ancillary provisions, such as those providing for actions for invalidation and period of limitation, irrelevant. Likewise, reinstatement of parties may be possible if the contract is determined either void or voidable. He concluded that such agreements are valid and binding as between the parties. This dissenting position is accepted by the bench and reflected in *Fekadu Delero*[116] wherein the seller of an immovable property demanded the cancellation of the contract which was not authenticated and registered. The Cassation Division held that because a substantial part of the obligation was executed by the buyer, the contract cannot be cancelled.

[115] *Mekuannent Worede v Meskerem Dagnaw et al* (20 October 2008, Cass F No 34803 in Volume 8).

[116] *Fekadu Delero et al v Negussie Worku* (18 December 2007, Cass F No 24974 in Volume 9).

Minor changes with consequences

The Cassation Division made minor changes that vary from the strict interpretation of Article 1723 of the Civil Code regarding the authentication requirement for the sale of immovable property resulting in significant consequences. The first change to such a rigid position of the Cassation Division was introduced in *Solomon Ketema et al* from a different angle.[117] The court held that issues may be framed from the pleadings of the parties; therefore, where the existence of a contract for sale of an immovable is admitted, the court may not raise matters of formality.

Further, in *Nyala Insurance SC*, the formal requirements as defined above were not met; yet, the avoidance of the contract would require reinstatement of the parties to their original position. Because of significant time-lapse and high inflation, the court held reinstatement is made impossible, making the contract remain valid.[118] In *Seble Mamo et al* the court held that if the requirement of authentication is made part of the agreement and it could not be made in the agreed form, the contract remains a mere draft.[119] In *Asha Farah*, the Cassation Division moved away from its original position, getting closer to the dissenting opinion in *Mekuannent*, when it held that for a sale of immovable to have an effect on third parties, it needs to be registered as per Civ C Article 2878 without which it will be voidable.[120]

The reasons for such a strict position of the court are not stated in any of the judgments discussed above. Ideally, the position of the Cassation Division is expected to be based on certain principles, some of which might not be written and not accessible to lower courts. Both the provisions of Articles 1723 and 2878 require registration. The court was supposed to harmonize them with the rest of the provisions of the Code based on the intended objective of authentication and registration as stated in the dissenting opinion in *Mekuannent*.

If a contract that is not authenticated is to be considered a mere draft as between the parties, the contract is no more privy as between the parties and the provisions governing offer and acceptance would have to be re-written.

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[117] *Solomon Ketema et al v Central Venue PLC et al* (15 January 2009, Cass F No 32299 in Volume 8).

[118] *Nyala Insurance S C v Adugna Ejigu et al* (6 November 2008, Cass F No 34803 in Volume 8).

[119] *Seble Mamo et al v Heirs of Corporal Tesfaye Bezabih* (7 March 2016, Cass F No 99124 in Volume 19).

[120] *Asha Farah v Abdurahmand Tahir et al* (9 October 2018, Cass F No 153664 in Volume 23).

However, this privy of the parties may be protected against third parties, if third parties are given proper notice. Thus, the agreement is binding as between the parties even when it is not authenticated, provided it is free from other forms of contractual defects. Denying it effect as between the parties is contrary to the principle of freedom of contract. The Cassation Division finally addresses one important exception in *Qey Afer Monasteries*,[121] stating that if there is no such registration institution, and where the agreement is made in accordance with the custom of the community, such agreement cannot be held to have no legal basis.

Registration of entitlements

The importance of registration is seen in other cases of the Cassation Division not as a matter of validity but as a protection of rights against third parties' claims, right to priority. This is seen in mortgage and pledges of shares-related cases.

The Cassation Division in *Walelign Ayalew et al* decided how priority is determined where there are competing claims based on mortgage created by law, by a court order (Civil Procedure Code, Article 154) or by contract (Civil Code, Article 3081).[122] The court held that there is no preference for any specific type of mortgage. However, irrespective of the nature of the mortgage, the priority of registration of rights determines the priority of satisfaction of the right. The manner of registration is further elaborated in *Kinde Afraso et al*.[123]

The Court in *Commercial Bank of Ethiopia*, and *United Bank SC* held that in accordance with the provisions of Article 1723 of the Civil Code mortgage must be made in writing and authenticated, and the agreement needs to be deposited in the register of the immovable property as per Article 3044. Once

[121] *Qey Afer Monasteries v Ermiyas Gessesse* (25 June 2014, Cass F No 98079 in Volume 16).

[122] *Commercial Bank of Ethiopia v Walelign Ayalew et al* (26 October 2007, Cass F No 29269 in Volume 7).

[123] *Commercial Bank of Ethiopia* (*supra* note 122). The court affirms its decision in *Ethiopian Development Bank v Commercial Bank of Ethiopia* (6 November 2007, Cass F No 25863 in Volume 7). Despite both are securities for other obligations, provisional attachment for execution of judgment and mortgage for the performance of a principal agreement, respectively, Aschalew in his comment 'Provisional Attachment Order v Judicial Mortgage in Ethiopia: Comments on the Cassation Bench of the Federal Supreme Court' 28 J Eth Law 97 argues attachment is a provisional measure that does not give rise to mortgage.

the right is registered it is effective either for execution of a judgment or transfer to third parties.[124]

The court affirmed its decision shortly thereafter in *Ethiopian Development Bank* regarding a property to be auctioned for the satisfaction of debts. The court held that both judicial and contractual mortgages are meant for the satisfaction of their credit but priority is given to the party who had his mortgage or attachment registered first over such mortgaged/attached property.[125]

Likewise, regarding the priority of execution of judgment against pledged shares, the court in *Mossa Negash et al* rendered a decision based on the priority of registration of the right in the register of such shares.[126] The overall observation of the court's holding is that the rigid requirement of registration is moving away from constituting a ground of validity of the agreement as between the parties to the protection of third parties. In none of those cases, has the court made it clear why it is moving in that direction.

4.3 Criminal cases

It is alluded already that the criminal law, by its very nature, is in want of interpretation for its application; and its interpretation depends on several principles. Decisions of the Cassation Division apply some of those principles by way of affirmation. However, the Court seems to be a little bit heavy-handed against the individual in certain cases. Among the following decisions discussed under in three categories, the first category relates to substantive criminal law and the other two relate to procedural law.

Substantive criminal law

The *principle of legality*, containing different elements, is a core principle both defining the nature of the criminal law and helping in the understanding of the same. The Cassation Division, on several occasions, has defined and applied this principle. For instance, in *Jemila Mohammed* et al[127] it held that there is no crime if it is not already provided for in the law. Likewise, in *Worku*

[124] *Commercial Bank of Ethiopia v Kinde Afraso et al* (6 August 2009, Cass F No 39170 in Volume 8); *United Bank SC and Abyssinia Bank SC* (1 August 2009, Cass F No 39778 in Volume 8).

[125] *Ethiopian Development Bank* (*supra* note 123).

[126] *Commercial Bank of Ethiopia v Mossa Negash et al* (9 July 2009, Cass F No 39256 in Volume 8).

[127] *Jemila Mohammed et al v Federal Public Prosecutor* (26 February 2009, Cass F No 38161 in Volume 9). The court appears to have confused the requirements of the provisions of Crim C, Arts 2 and 23.

Fekadu et al[128] the court held that there is no punishment other than the one defined by the law.

However, *Daniel Mekonnen*[129] is a case with wider ramifications because it disregards the principle thereby amounting to criminalisation by the court. The respondent was charged with contraband, attempting to smuggle 46.96 kgs of gold out of the country, and in the alternative for violation of Directive CTG/001/97. The Directive was issued by the National Bank of Ethiopia as per the Monetary and Banking Proclamation No 83/1994, Article 59(2)(b). The Federal First Instance Court convicted Daniel for violation of the Directive and sentenced him to a term of imprisonment as per the Proclamation. On appeal, the Federal High Court reversed the conviction on the ground that the Directive is not published in the official Negarit Gazeta, not available in Amharic as a notice to the public, and the decision was affirmed by the Supreme Court.

The Cassation Division reversed the lower courts' decisions, affirming the decision of the Federal First Instance Court. It argued that legislation is classified into primary and subsidiary legislation. Directives are not customarily required to be published in the Negarit Gazeta and this state of affairs does not deny them the quality as 'law'. It further argued that the Directive is in harmony with the enabling statute, Proc No 83/1994. It, thus, held that the lower courts erred in holding that the Directive is not law because it is not published in the Negarit Gazeta and not written in Amharic.

This is a clear case of wrong application of criminal law contrary to the principle of legality by elevating directives, not published in the *Negarit Gazeta*, into criminal law.[130] This is *de facto* criminalisation by the court. In the analysis of fundamental error of law, the court needs to make a distinction between the formal requirements of law in general and criminal law.[131]

[128] *Worku Fekadu et al v Benishangul Gumuz Prosecutor* (24 January 2013 Cass F No 75387 in Volume 14).

[129] *ERCA v Daniel Mekonnen* (21 July 2010, Cass F No 43781 in Volume 10).

[130] See the arguments made elsewhere. Simeneh 'Methods and Manners' (*supra* note 93) 104-107; Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017), '"Over-criminalisation": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' 29 J Eth L 49, 63 – 65. There is a distinction between directives used to interpret the rules of criminal law, such as abuse of power, and directives providing for elements constituting the crime, establishing criminal rules.

[131] Even in outside of the bench discourse, some judges do not make such distinction. See for instance, Ali (*supra* note 2).

Directives may help in the interpretation of the criminal law by giving content to particular provisions, but cannot define elements of a crime.[132]

Procedural Law

Despite variations in the features of the substantive and procedural criminal law, both relate to the state's use of its coercive power, and this needs careful analysis and valid justification. In as much as the state is authorised to arrest citizens based on justification, bail is a safety valve. Thus, bail is provided as a constitutional right for the accused or a person against whose interest an adverse decision is made. Certain basic principles that guide the criminal justice system – there is no equality of arms assumed; however, every effort is made to make the process fair. Therefore, the Criminal Procedure Code is clear when it provides that appeal is limited to a decision denying bail. Further, the provision requires the petition should state 'the reasons why bail should be granted.' Thus, there were no such appeals against a decision of granting bail until recently.

The issue was addressed in *Srgt. Mekonnen Negash*[133] where the respondent was denied bail by the Woreda Court. He appealed to the Gondar Zonal Court which accepted his appeal for bail. The Public Prosecutor appealed to the State Supreme Court against such a decision. The State Supreme Court, stating its reservation whether the public prosecutor has the right to appeal against a granting of bail, rejected the prosecutor's petition on the ground that there is no second appeal as per Article 75(2) of the Criminal Procedure Code. The Amhara Justice Bureau submitted a cassation petition claiming a fundamental error of law.

The Cassation Division did not frame the issue to be resolved, it rather directly proceeded to interpreting the provisions of Crim Pro C, Article 75. The court interpreted the provisions by going beyond the decision of the lower courts. While the State Supreme Court did not rule on the prosecutor's power of appeal, the Cassation Division held that interpretation by analogy is prohibited for substantive criminal law, not for procedural law. Therefore, if an appeal is allowed for the arrested person who is denied bail, so is it allowed for the public prosecutor when bail is granted. Such a statement can be

[132] The cassation division does not make a distinction between the contents of the provisions of Arts 2 and 23 of the Criminal Code, which requires further study. See for instance, *Ahmed Adem Beshir* (*supra* note 106), and *Jemila Mohammed* (*supra* note 127).

[133] *Amhara Justice Office v Srgt Mekonnen Negash* (15 July 2008, Cass F No 35627, Decision of the Cassation Division). This case was once published on the website of the Federal Supreme Court, not included in the printed case compilation.

regarded as invoking the principle of equality contrary to its rationale. Moreover, the decision attaches such restriction on the state's appeal power to the provisions of Sub-Article (2), while the rule prohibits a second appeal on which the State Supreme Court established its decision. The Cassation Division held that a second appeal is prohibited where bail was initially denied, and such a decision is affirmed by the appellate court. It, thus, held that those decisions of the State Supreme Court contain fundamental errors of law.

The issue was raised again in *Habtamu Deju*,[134] who was released on bail by the High Court. The public prosecutor appealed against the decision, and the appellate court reversed the decision. The cassation petition was brought based on the provisions of Article 75(1) on the ground that the High Court erred in hearing the appeal. The Cassation Division held that the provision allowing appeal on bail for the arrested person cannot be read as *a contrario* prohibition of appeal by the state against such a decision granting bail.[135] The Court held there is no provision prohibiting such an appeal while the provisions are clear enough that an appeal on bail is allowed if bail is denied. The Cassation Division affirmed the Supreme Court's decision.

In this case (*Habtamu Deju*) the Cassation Division's reading of the provision is in contradiction to the letter and the spirit of the provisions. As the parties in criminal cases are the state and the individual, the process is inherently imbalanced. The individual is afforded protection of rights that are intended to maintain the fairness of the process. Today, an appeal by the state against the granting of bail appears to be a settled practice. Accordingly, in several decisions granting bail, the Federal Police Central Investigation Department takes its petition to the appellate court by keeping the person under detention. This wrong application of the law is made possible by the decisions of the Cassation Division.

The second procedural issue relates to objections to a charge. Such objections to a charge are purely legal issues, and a decision is supposed to be made based on records of the court. Often, those objections relate to harmonisation of the facts stated in the charge and the facts constituting the

[134] *Habtamu Deju v Federal Public Prosecutor* (17 July 2017, Cass F No 110969 in Volume 18). This was the position taken by the Cassation Division also in *Akllilu Afework v Federal Public Prosecutor* (30 October 2017, Cass F No 146727 in Volume 22); and *Hasen Abedal v Federal Public Prosecutor* (2 November 2015, Cass F No 112725 in Volume 19).

[135] The court invoked Cass F No 113436; however, this case is not included in the printed case compilation of the Federal Supreme Court.

crime under the provision alleged to have been violated. The disposition of such objections needs no further evidence. In exceptional circumstances where evidence is required for the determination of the objection, the court may have to hear such evidence.

In *Te'oum Teke,*[136] the petitioner was charged with violation of Article 408(2) of the Criminal Code. Based on the facts stated in the charge, the petitioner argued that the charge should be bought under Article 408(1) which the court accepted, apparently resulting in bail. The Decision of the High Court was reversed by the Supreme Court and the cassation petition was against such reversal. However, the Cassation Division affirmed the decision of the Supreme Court on the ground that provisions of the law may be changed by the court after those facts are proved or disproved based on evidence heard.

In *Nebila Ahmed*[137] the respondent was charged for causing common wilful injury. Based on the alleged facts, the court ordered the public prosecutor to frame a new assault charge. Because the public prosecutor failed to draw and file the new charge as instructed, the court terminated the proceeding as per Article 122(3) of the Criminal Procedure Code. The prosecutor filed his appeal against such termination of proceedings to the Supreme Court which was rejected.

The prosecutor's cassation petition was against those decisions. The Cassation Division held that the lower courts erred in terminating the proceeding merely because the public prosecutor failed to draw and file a new charge as instructed by the court. The Cassation Division stated that the existence of those facts as alleged in the charge is a matter of proof; where the court finds those facts not proved, it could change the provisions and convict the accused under such provision as Article 113 of the Criminal Procedure Code. These decisions render a critical procedure relating to objection unhelpful.

It is good the Cassation Division in *Ayele Hafebo*[138] held that where the charge is not drawn up as per the provisions of the Criminal Procedure Code, the court on its own motion should order the public prosecutor to draw up a new charge. It further held that the defendant cannot be convicted based on such a wrongly drawn-up charge, and reversed the conviction of the petitioner.

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[136] *Teoum Teke v Federal Ethics and Anti-Corruption Commission* (27 January 2015, Cass F No 103452 in Volume 17).

[137] *Federal Attorney General v Nebila Ahmed* (31 October 2018, Cass F No 155789 in Volume 23).

[138] *Ayele Hafebo v SNNRP Prosecutor* (5 February 2020, Cass F No 165440 in Volume 24)

This is because such a defective charge restricts or nullifies defendant's right to defence.

In *Banti Ta'era,*[139] the Public Prosecutor temporarily withdrew its charge and petitioned the Federal First Instance Court to reinitiate proceedings. The court refused the prosecutor's petition which was affirmed by the Federal High Court. The Public Prosecutor submitted its petition to the Cassation Division against the decisions. The Cassation Division held that because Article 122(5) of the Crim Pro C, does not prohibit reinitiating a case withdrawn temporarily, the lower courts erred in deciding against the prosecutor's petition. This decision was in want of extensive explanations because the rules authorising prosecutors to temporarily withdraw charges were already repealed.[140]

4.4 Progressive decision of the Cassation Division

There are certain approaches the Cassation Division employed to effect progressive implementation of the law. These decisions broaden the frontiers of justice. There are several of them but only four are indicated here. Corporate criminal responsibility, liability for environmental pollution, the prohibition of detaining individuals for money debt, and common property of a married couple.

Corporate criminal responsibility is introduced in Article 34 of the 2004 Criminal Code. In *Equbay Bereha G/Egziabhe*[141] the Cassation Division held that a corporate entity may criminally be held liable if one of its officials or employees acts on behalf of the corporate entity either to unlawfully promote its interest or breaching its legal obligation. This is reaffirmed in *Josambin Trading PLC et al.*[142]

The corporate criminal responsibilities observed so far are tax-related crimes. Environmental pollution is rarely litigated before the courts.[143] The

[139] *ERCA v Banti Ta'era* (25 March 2008, Cass F No 28952 in Volume 7).

[140] The provisions of Crim Pro C, Art 122(2) are repealed by *Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No 39/1991*, Art 24(2).

[141] *Equbay Bereha G/Egziabher v ERCA* (13 March 2015, Cass F No 100079 in Volume 17).

[142] *ERCA v Josambin Trading PLC et al* (4 December 2015, Cass F No 94913 in Volume 19).

[143] Simeneh Kiros Assefa 'Corporate Criminal Responsibility in Ethiopia: A Brief overview of three subjects' in *Verfahrensgerechtigkeit für Unternehmen* (Nomos 2022, Eds Richard Soyer and Stefan Schumann).

Cassation Division in *Abbas Ibrahim*[144] affirmed administrative control of environmental pollution as entailing tort liability irrespective of permission of the victim. We look forward to seeing due attention to corporate criminal responsibility for environmental pollution.[145]

It is an established rule that there is no detention for money debts. However, tax-related tardiness was highly politicised and various courts were heavy-handed on such charges. Petitioners, in *G. Agripack PLC et al,* were a company and its manager. The regional tax office determined the principal, interest and administrative penalty to be paid by the taxpayer, and the company was late in effecting payment.[146] The company and its manager were then charged and convicted for failing to pay the said amount. The Cassation Division reversed the decision of the lower courts on the ground that petitioners did not evade their tax obligations; they rather failed to pay the said amount on time. The Cassation Division stated that administratively determined tax obligation is a civil debt; and as per Article 11 of the ICCPR, a person cannot be detained for failing to pay his debts.[147]

4.5 'Bizarre' decisions of the Cassation Division

It is settled both in the law and in judicial practice that a victim of crime may recover compensation either by a civil joinder claim to the criminal charge as per the provisions of Crim C, Article 101, and Crim Pro C, Article 155;[148] or the victim may institute a separate civil action because a criminal conviction is sufficient evidence of liability in civil claim, even though evidence may be heard regarding the amount to be recovered.

The Cassation Division rendered several decisions giving effect to these clear statements of the law. For instance, in *Semen District Customs*[149] the Cassation Division held that criminal convictions are relevant and sufficient evidence in civil claims on the same cause of action. Likewise, in *Tesfanesh Belay*[150] the Cassation Division held that acquittal from a criminal charge is not exoneration of civil liability in accordance with the provisions of Article

[144] *Abbas Ibrahim v Harar Beer SC* (9 October 2015, Cass F No 104512 in Volume 19).
[145] *Environmental Pollution Control Proclamation No 300/2002*, Art 16.
[146] *G. Agripack PLC et al v ERECA* (11 June 2013, Cass F No 84623 in Volume 15).
[147] The non-publication of those international bill of rights in the official gazette has been a barrier for direct application of those rules.
[148] Philippe Graven (1964). 'Joinder of Criminal and Civil Proceedings', 1 *J Eth L* 135.
[149] *Semen District Customs v Birehan Neway* (18 December 2008, Cass F No 37184 in Volume 9).
[150] *Tesfanesh Belay v Awash Insurance SC* (30 March 2009, Cass F No 43843 in Volume 10).

2149; and a person who is exonerated from civil liability cannot be held criminally responsible as per Civ C, Article 2149.[151] On the other hand, in *Getachew Asrat et al,* the Cassation Division held that a civil case and criminal case may be jointly heard only in accordance with the provisions of Crim C, Article 101 and of Crim Pro C, Article 155ff.[152]

In *Tamirat et al*,[153] there was no civil claim along with the criminal proceedings, brought by the victim, nor could the public prosecutor legally demand such relief on behalf of the victim. The alleged victim was rather a prosecution witness in the proceeding against the defendants. However, the court, after convicting the defendants, entered a decision that the sum which is said to have been taken from the victim shall be returned to him. The victim initiated judgment execution proceedings as per Article 378 of the Civil Procedure Code. Lower courts decided that the petitioner was not a party to the criminal case, and the litigation was not a civil litigation; therefore, the judgement is not meant for civil execution. However, the Cassation Division[154] reversed the decision of the lower courts, on the ground that the decision of the Supreme Court (on the criminal case) was clear that the money should be returned to petitioner; thus, the judgement is good for a civil execution.

The other case relates to the retroactive application of executive decisions denying individuals an established right. After Emperor Haile Selassie was deposed from power, the Imperial Family was made to leave the Palace. Thus, the Ministry of Urban Works and Development, in 1974, by a Directive, decided the Imperial Family be granted a housing allowance. This Directive was in effect until the case was finally decided by the courts in *Princess Tenagnework*.[155]

When political changes occurred in Ethiopia, Princess Tenagnework claimed the housing allowance that the lower courts granted. While the case was progressing, the Prime Minister of the Transitional Government of Ethiopia reversed the Directive. The Cassation Division held that the PM is the highest person in charge of the executive organ; it can correct

[151] *Tariku Chane v Federal Ethics and Anti-Corruption Commission* (15 April 2013, Cass F No 78470 in Volume 15).

[152] *Silte Zone Prosecutor v Getachew Asrat et al* (24 May 2011, Cass F No 59045 in Volume 12).

[153] Crim F No 1/89, Federal Supreme Court, 2000.

[154] *Sheik Mohammed Hussen Al Amoudi v Shadia Nadim et al* (5 January 2006, Cass F No 10797 in Volume 3).

[155] *Rental Houses Administration Agency v Princess Tenagnework Haile Selassie* (19 April 2007, Cass F No 16195 in Volume 4).

administrative errors potentially committed by the executive which the PM did by changing the Directive. It held that the Imperial Family is not entitled to the housing allowance.

5. Observations relating to Judgement Writing

A judicial hearing comes to an end with a judgment of the court. The content of the judgment is defined by a host of factors and it is a tool for achieving several ends. First, as stated in the Federal Courts Proclamation, the core values of federal courts are the enforcement of human rights,[156] maintaining the rule of law, and ensuring its independence, effectiveness, efficiency, accountability and predictability. Judgment is the single most important tool for pursuing those values.[157]

Second, the judgement is the means by which the court informs parties of its disposition of the case. Regarding decisions of lower courts, if the parties are unhappy with the decision of the court, the judgement should state the issues and their disposition. Finally, the Cassation Division is aware that its decisions are binding, and guide the lower courts on how they should interpret and apply the law.

The contents of a final judgment are provided for both in the civil and criminal procedure codes.[158] The judgments of the first instance court and the appellate court are based on the relief sought and the nature of the subject matter litigated. The judgement of the Cassation Division must be different from other courts' judgements because the subject of the litigation is for the purpose of correcting a fundamental error of law and such a decision is binding on other courts.

5.1 Procedural posture

Cassation petitions are ripe only if there is a final decision that contains a fundamental error of law. The judgment of the Cassation Division needs to contain a procedural posture stating the stages the case went through, the issues and holding of the lower courts that justify the involvement of the Cassation Division. This should include a summary of the cassation petition, including the alleged fundamental error of law, and reply of the respondent and the relief sought.

Most of the cassation decisions reviewed by the author make a good summary of both the process and the petition. However, the cassation

[156] FDRE Const, Arts 9(2) and 13(1).
[157] Nowak (*supra* note 54) 328.
[158] Civ Pro C, Art 181, 182, 183; Crim P C, Art 149.

decisions contain only the procedural posture, and in some instances, the reply of the respondent does not appear as well summarised as the cassation petition.

5.2 Framing the issue for disposition

Based on the matters summarised in the procedural posture, the Cassation Division is required to frame the issue to be addressed by the Cassation Division. In *Banti Ta'era* the Cassation Division has decided that it is not appropriate for a court to render judgment without framing issues.[159] To be framed by the Cassation Division, such issue should meet two requirements: the issue should exclusively be an issue of law, and it should be specific befitting the cassation decision. The framing of the issue needs to be seen in light of the objective of a cassation decision.

From the review of the decisions, there are instances where the Cassation Division rendered a judgment without framing an issue; however, the most recurrent problem is that the Cassation Division frames very broad and generic issues as though the matter is heard by the trial court. For instance, in *Gorfe* the Cassation Court stated the issue to be addressed by the court was 'legality of the contract'.[160]

If decisions of the Cassation Division can be binding on others, the issue to be addressed in each case needs to be as specific as possible. As highlighted earlier, the initial interpretation and application of Article 1723 of the Civil Code in *Gorfe* was very broad. It was progressively narrowed down to limit its impact on other provisions of the Civil Code. Prolonged problems and complexities in interpretation that followed the Cassation Division's decision in *Gorfe* could have been avoided by carefully framing the issue and by giving due attention to (i) the interface between Articles 1723 *cum* 2878 of the Civil Code that determine the admissibility of a contract (for the sale immovable property) as *conclusive evidence* (*ad probatum*) in disputes that involve third parties; *vis-à-vis* (ii) the hierarchy of application between Article 2877 and Article 1723. Apparently, Article 2877 (which only requires a written contract irrespective of registration) is a specific provision that prevails over Article 1723 –by virtue of Article 1676(2)– with regard to the validity of the contract (*ad validitatum)* between the two parties in dispute.

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[159] *Banti Ta'era* (*supra* note 139).

[160] *Gorfe* (*supra* note 112). Fuller's eight standards are useful standards for determination of good law. Thus, if the law is of broad application, it may be a bad law. Likewise, cassation decisions as binding interpretative decisions may be bad decisions for others if they are decided based on broad issues.

5.3 Determination of applicable law

In any litigation, the first issue, whether stated by the court or not, is the determination of the applicable law. This is more so with the Cassation Division because a petitioner's allegation is a fundamental error of law committed by the lower court/s. Determination of the applicable law is not often seen in the reviewed cases because parties often disagree on the interpretation and application of a particular rule of law, not about which rule is applicable. Yet, it is implicit in the argument of the parties that, it is incumbent upon the court to determine the applicable law before it ventures on the interpretation and application of such rule.

5.4 A reasoned judgement

In trial and appeal proceedings, particularly in criminal matters, publication of a written judgment is part of the right to public pronouncement of judgments.[161] However, review by cassation is not a right of the parties; it is an institutional mechanism for correcting its errors, and an instruction to lower courts.[162] Therefore, a written judgment is required, not as a right to the parties, but as a means to achieving those other ends.

Seen in that light, the judgement has elements that are meant to address two interrelated objectives. The decision part is mainly addressed to the parties, and the reasoning part is binding on lower courts. The content of the reasoning of the cassation decision is on the determination of the applicable law and the interpretation of such rule in order to address the alleged fundamental error of law.

6. Ending Remarks

Statutory provision interpretation that is binding on lower courts is not alien to the Ethiopian legal system. Review of decision by cassation is introduced as an institutional mechanism for self-correction of fundamental errors of law. The Cassation Division is expected to meet this objective commensurate with the need to solve substantial predicaments of the courts. As discussed in the preceding sections, the Cassation Division has unduly shown significant deference to executive decisions; even when it takes up such cases, there are gaps in rigor and consistency. In terms of formality, the decisions contain a procedural posture, a general issue for disposition, and there are patterns of judgment writing without stating the reasons leading up to the decision. Despite such challenges and gaps, a positive development relates to the

[161] Nowak, *supra* note 54, at 328.
[162] Yoseph, *supra* note 19; FDRE Const, Art 80(3)(a).

enactment of the Administrative Procedure Proclamation that renders administrative decisions subject to judicial review, and the establishment of a separate division of the Federal High Court to entertain claims of individuals based on the Constitution.

In order to elevate the courts to an independent judiciary based on separation of powers, the Cassation Division should allow lower courts to exercise jurisdiction on all matters as long as they are justiciable in the meaning of the Constitution. Effective usage of statutory binding interpretation envisages that the judgment of the Cassation Division should be befitting the court. This requires framing a specific issue, determining the applicable law and giving a reasoned judgment. Its reasoning should utilise principles of interpretation including giving content-based interpretation on legislative intent when it encounters absurd and ambiguous provisions so that they are harmonised among themselves and utilised consistently. ■

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