THE BINDING INTERPRETATION OF THE FEDERAL SUPREME COURT CASSATION DIVISION: A CRITICAL ANALYSIS TO ITS' NOVELTY AND RICKETY**

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ABSTRACT

In Ethiopia, the Federal Supreme Court is endowed with the power of Cassation over any court decision, be it federal or state courts. Moreover, its' decision is declared to be binding on courts at all levels. While many pragmatic considerations can be, and indeed have been, given for the existence of the Cassation Division under the auspices of the Federal Supreme Court and making its decision binding, it has been found that numerous fouling factors surround the Division. Evaluated against relevant literature, legislation, interviews, and observation, the defects of the Cassation Division are proved to be so severe that if left uncorrected, they will defeat the very purpose for which the institution of Cassation was established. In this piece, these defects are critically evaluated both from theoretical and practical vantages. After pinpointing the significant shortcomings, which the author labelled as 'rickets' and explored them, this article has suggested general and specific measures that must be employed if the need is sought to rescue the FDRE Cassation Division from the menaces by which it is to be swallowed and help prove its worthiness.

Key Words: *Binding decision, Cassation, Cassation Division, Ethiopia, Legal System, Judicial Lawmaking, Interpretation of Laws, Precedent*

** This piece is a refined version of my LLB Thesis written few years back. At that time, the Federal Court Proclamation 25/1996 (as amended) was in force, and it was written based on that Proclamation. However, as the piece remained unpublished since then and now the new Federal Court Proclamation has come out, an extra effort is made to make sure that the points raised in the initial version do not lack significance in light with the newly enacted Proclamation.

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INTRODUCTION

The Cassation Division has attained constitutional recognition under the FDRE Constitution.[1] The Federal Courts Proclamation (1234/2021)[2] has provided that the Federal Supreme court has a power of Cassation over any final decisions (from court or other adjudicative organs) so far as it exhibited a fundamental error of law. More importantly, such decisions are given a binding status under Art. 10(2) of the same proclamation.[3] Indeed, that seems generally justifiable for such decision rendered expectedly with 'extra ordinary' caution by the pinnacle of justice shall not simply be '*a restricted railroad ticket good for this day and train only'*.

The main objective of this piece is to critically analyze the binding effect of the critical decisions of the Federal Cassation Division and consider certain procedural feeble. Given this objective, the remaining part of this work is organized under three main sections. In the first section, general introductory matters will be dealt with. As such, the section will discuss the framework of our Cassation (Division). Then comes the second section, where the decision-making process of the Division is evaluated from the screening stage to its final disposition. The third section will, more extensively, deal with the positive impacts of these binding decisions and the challenges surrounding the ambit of our Cassation system. Finally, a conclusion of the entire piece and recommendations are provided.

1. BINDING INTERPRETATION OF THE FEDERAL SUPREME COURT CASSATION DIVISION

The Ethiopian legal system predominantly subscribes to the civil law legal system, although, in real sense it is a cocktail of laws in continental bottles. In the old Ethiopia, judges were assumed to render justice, through adjudicating cases, on behalf of the Emperor or the King, and thus the Chief Justice was referred to as *afenegus ('the mouthpiece of the king';* for the king was deemed

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[1] FDR Constitution, Art.80 (3).
[2] The Federal Courts Establishment Proclamation No.1234/2021.
[3] It must be noted that the same thing was provided for under the repealed Federal Courts Amendment Proclamation No. 454/2005. See the Federal Courts Re-Amendment Proclamation No. 454/2005, Art. 2 (4).

to be a fountain of justice.[4] The conceptual underpinning decisions were taken as a law principle and were followed in the subsequent adjudications. These substantive and procedural norms were referred to as *atse-ser'at* (the law or the work of sovereign); Jembere has defined the term as a *precedential jurisprudence that developed out of case law or judge-made law.*[5]. The understanding of the emperor as the ultimate source of justice and his decision should be revered in the subsequent judgments, supplemented by the old-aged Amharic saying which goes "a case is further supported by a case as a thorn is pulled out by a thorn" has served as a vindication of the practice of precedents.

The order that lower courts must abide by the decisions of the superior courts was instilled and practiced almost until 1942, when Ethiopia altered its procedural laws.[6] Changes in procedural laws in 1942 have somehow relegated judicial decisions [even of superior courts] to merely an object of cognizance, relieving them of a duty to be abided by them. It was, however, resurrected by the Imperial Court Proclamation of 195/1962, Art. 15 of which declared the decisions of the superior courts to be binding on subordinate courts on matters of law. Coming to the *Dergue* period, the power of Cassation was conferred upon the Supreme Court. Thus, through its establishment proclamation, the Supreme Court had a power of setting an 'interpretative precedent'. The goal was to maintain a uniform interpretation of laws across the country.[7] Then came the Transitional Government Court Establishment Proclamation, proc. No. 40/1993 (1985 E.C), which has classified courts at different tiers and provides that "an interpretation of the law made by a Division of the Central Supreme Court constructed by no less than five judges shall be binding". Art. 10(2) of the Proc. No. 1234/2021 provided that the interpretation of law by the Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is

[4]Aberra Jembere, Legal History of Ethiopia, Some Aspects of Substantive and Procedural Laws 1434-1974, Addis Ababa University (1998), P81.
[5] *Ibid.*
[6] See *id*, P96. See also Anchinesh Shiferaw, The Legal Effects of the Decisions of Cassation Division of the Federal Supreme Court under Proclamation No.454/2005. Its Constitutionality and Prospect (LL.B. Thesis, Addis Ababa University Law, 2006), P31.
[7]Bisrat Teklu and Markos Debebe, *Change for Aptness: Fighting Flaws in the Federal Supreme Court Cassation Division,* Jimma University Journal of Law (2013), Vol. 5, P1.

rendered. However, the Cassation Division may render a different legal interpretation some other time.

In Ethiopia, while Cassation was officially introduced in 1987, it is constitutionally entrenched only as of 1995. It is not a full-fledged court, nor is it the fourth tier of Court. It is a Division within the Federal Supreme Court that shall see the exactitude of the decisions; verifying whether the final decision rendered synchronize with the letter [and spirit] of laws. The Cassation is assumed as a special Division.[8]

The primary reasons for having a Cassation system were provided for by the Constitutional Assembly that drafted the constitution itself. One of them is to rectify the errors in the proper application of laws.[9] Though the existence of Cassation would not guarantee, toto, the removal of any errors committed, for the human mind is all we know, the fact that a 'final decision'[10] of the Court is to be evaluated and reviewed by well-experienced judges with a more significant number [of constituency] would foretell us to have such a system. The second goal was to maintain a 'national and uniform' interpretation of laws.[11] This is to be achieved because any final court decision, be it federal or regional, would ultimately have to be pass through the scrutiny of the Cassation if they contain a fundamental error of laws.[12]

As far as the binding effect of the decisions of the Cassation Division of the Federal Supreme Court is concerned, the newly enacted Proc. No. 1234/2021 merely reinforced what has already been provided by the Federal Courts' Re-amendment Proclamation No. 454/2005. The rationales of conferring binding status to the findings of the Cassation Division are meant to fulfil the goal of

[8] See Muradu Abdo, Some Questions Related to the Cassation Powers of the Federal Democratic Republic of Ethiopia Supreme Court: A Comparative and Case Oriented Study, (LL. B Thesis, Addis Ababa University Law Library, 1998), P38.
[9] Minutes of the Constitution of the Federal Democratic Republic of Ethiopia, Vol. 5 (*Hidar* 21-24,1987 E.C).
[10] Here, by a ‘final decision’, the author refers to the Court's decision concerning which appellate remedies have been exhausted and whose merit has already been settled instead of being an interlocutory issue.
[11] *Ibid*
[12]ውብሸት ሽፈራው እና ሐይሌ አብርሃ, በኢፌዲሪ የፌዴራል ሰበር ስርአት- አላማው ፤አተገባበሩ እና ተግዳሮቶቹ ፣ (Unpublished material with the author), ነሀሴ, 2007 E.C), P64.

Cassation- the goal of attaining uniform interpretation of laws in the country. The Minutes of Proclamation No. 454/2005[13]- provides the rationale as:

> "የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዓላማ የተለየያ ትርጉም ለሚሰጣቸዉ የህግ ድንጋጌዎች ትርጉም በመስጠት በአገሪቱ ወጥ (uniform) የሆነ የህጎች አተረጎጎም እናአተገባበር እንዲኖር ማድረግ ነዉ፡፡ይህም ዓላማ የተሳካ እንዲሆን የችሎቱን ዉሳኔዎች በየትኛዉም ደረጃ ላይ የሚገኙ ፍ/ቤቶች ሊከተላቸዉ ይገባል፡፡….አንዳንድ ሕጎች ዝብርቅርቅ ባለ መንገድ በተለያዩ ፍ/ቤቶች እንዲተረጎም የተደረጋ ሲሆን የዜጎችን በሕግ ፊት በእኩል የመታየት ሕገ-መንግስታዊ መብት መጣስ አስከትሏል፡፡ተከራካሪ ወገኖችም አስፈላጊ ላልሆነ ወጭና እንግልት ተዳርጎዋል፡፡ የፍርድ ቤቶችን ዉሳኔም በአንዳንድ ጉዳዮች ጨርሶ የማይተነበይ (unpredictable) እያደረገ ነዉ፡፡ይሕም ሀገሪቱ በተያያዘችዉ የልማትና ዲሞክራሲየዊ ስርዓት ግንባታ ጥረት ላይ የሚደቅነዉ ችግር በቀላሉ የሚታይ አይሆንም፡፡እነዚህን ችግሮች ለማስወገድ የሰበር ችሎቱ ዉሳኔዎች በየትኛዉም ደረጃ ላይ የሚገኙ ፍርድ ቤቶች ላይ አስገዳጅ ማድረግ አስፈላጊነቱ አሳማኝ ሆኗል፡፡ይሄንን በማድረግ ወደ ሰበር ችሎቱ በተደጋጋሚ የሚመጡትን ተመሳሰይ ጉዳዮች በማስቀረት የሰበር ችሎቱን ጊዜ በአግባቡ ለመጠቀም ያስችላል፡፡"

This can roughly be translated as:

> *The Cassation Division of the Federal Supreme Court aims to interpret interpretations adopted by different courts and maintain uniform interpretation and application of laws. And for that purpose, the decisions it renders should be binding on all lower courts. Chaotic interpretations by the lower courts concerning some provisions of the law have seriously impaired citizen's constitutional right to equality before the law. Moreover, the decisions of courts are, at times, proved to be unpredictable at all. Hence the challenge it poses to its developmental and democratic endeavors is not negligible. To do away with these flaws, it is found necessary to make the decisions of Cassation Division binding. Doing so would also reduce the caseload at the Division and allow the Division to utilize its time efficiently.*

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[13] It is believed that the same rationale persists as far as the newly enacted Federal Courts Proclamation No. 1234/2021 is concerned. This author has tried to consult the Minutes of this new proclamation but in vain.

2. NOVELTIES AND RICKETS OF THE BINDING INTERPRETATION OF THE CASSATION DIVISION

2.1. NOVELTIES OF THE BINDING DECISIONS OF THE CASSATION DIVISION

2.1.1. Uniform Interpretation of Laws

This has been the most compelling reason to make the decisions of the Cassation Division binding on all tiers of courts in the country.[14] Enwrapped in it was that if the findings of the Cassation Division are binding on all level of courts, then the latter would have to interpret laws uniformly, taking note of the position held by the former. "My exposure to Cassation Division's binding decisions on labor laws and extra-contractual liability law", says Dr. Mehari, "shows that the importance of the Cassation Division to maintain uniform interpretation and application of laws is unquestionable".[15] Mehari further noted that the Division is thankful with regards to the merit of the decisions as well. However, Mehari did not get-through without mentioning that the inaccessibility of the Division's findings in many respects has significantly affected the Court's compliance to the rule adopted by the Division and thereby resulted in the ununiform interpretation of laws. Many legal professionals share this point, too.[16]

The Division has also settled specific controversial provisions of laws by rendering binding interpretation of those provisions. Moreover, it has also been noted that the lower courts' reference to the interpretation adopted by the Cassation Division is gradually increasing. It has also been understood that the Division sometimes adopts different interpretation even with regards to the same provision of the law, which would put the lower courts in confusion as to which of the positions of the Cassation Division to uphold. This is attributed to, says Mehari, the fact that the Division does not have a supporting staff (assistants) who would help them in tracing the track record of the decisions

[14] Minutes of the former Federal Courts Amendment Proclamation (454/2005).
[15] Interview with Dr. Mehari Redae, Professor of Law at Addis Ababa University, School of Law and Legal Practitioner, on December 1, 2017
[16]Tewdros Meheret, *supra* note 7 and other two legal practitioners who sought anonymity.

and identify what has been said in earlier interpretation. In their absence and given limited nature of human memory, we cannot blame these judges.[17]

2.1.2. Equality of the Citizens before the Law

As per Art. 37 of the FDRE Constitution, everyone has the right to bring a justiciable matter to Court or any other judicial body and obtain decision or a judgement. Furthermore, Art.25 of the same document enshrined that all persons are equal before the law and deserve equal protection. If that is the case, it is the right of all persons to be treated alike if their cause is alike. This equality of citizens would only be ensured if and only if the Division treats similar issues similarly, i.e., the position held yesterday when a person was a defendant should be held today when he is a plaintiff so long as the problems are the same and of course in so far as there is no compelling reason to reverse the previous position.

Moreover, the equality maxim dictates that parties shall be treated without discrimination on status or other attributes. There are also rumors which purports that the Division sometimes, with a conscientious drive to preserve the government interest, deviates from the precise rules in the legislation. One Practitioner, who requested anonymity, has held that it is hard to expect the outcome of the case before Cassation if the dispute is between government enterprises (say government banks such as a commercial bank or tax authority) and a private individual.[18]

2.1.3. Predictability

The concern of predictability and certainty of the Cassation Division's decisions stems from the fact that the Division may reverse its own previous decisions. The writer is not essentially against the power of the Division to change its own previous decisions. Instead, what concerns him most is that if

[17] Mehari, *supra* note 15.

[18] This author also shares, to some degree, the rumors concerning the partiality of the Division. However, in arriving at this conclusion, one should not lose sight of some special legislation that is meant to limit the power of the judiciary. For instance, see "Property Mortgaged or Pledged with Banks Proclamation, Tax Proclamations, Anti-Terrorism Proclamation by which the legislator is limiting the power of the judiciary to review decisions of some institutions. The legislator is somehow excluding the intervention of the Courts by promulgating laws to that end.

decisions are frequently reversed by the Division and the mechanism and requirement of reversals are not transparent, the legal system would risk itself to capriciousness, which would disturb the justice system and wash out the confidence that the litigants would otherwise have in courts.

Mehari notes that the Division is by far less effective in terms of ensuring predictability. He further held that sometimes the Division takes itself in what one may call 'implied' reversal of rulings. The rule is that the Cassation Division must constitute itself in seven judges to reverse its previous position. However, it has been noted that sometimes the Division renders decisions that overrule the previous position, though it is not declared that the last position is repealed. Because of this, says Mehari, it is not possible to predict what the proper position of the Cassation Division concerns the interpretation of the specific legal provision. In this regard, Hankinson has observed that the less predictable the court decisions are, the more likely individuals will transgress the decisions.[19]

At this juncture, a frazzling issue is an ever-increasing flow to and reversals of these decisions by the Council of Constitutional Inquiry (CCI) and House of Federation (HoF). The CCI was established to be an advisory body to the HoF on constitutional disputes. In 1991 E.C, only 3 cases were taken to the CCI from Cassation Division. But this number was increased to 274 in 2005, 388 in 2008, and 572 cases in 2009 E.C. Only between Hamle 1, 2009 – *Meskerem* 30, 2010, about 192 cases have been reverted to the CCI. The finality of the decisions of the Division has been significantly affected. Even if what percentage of these reverted cases have been reversed by the HoF remains another inquiry of its own, the fact that significant number of decisions will be referred to the HoF after being decided by the Cassation Division clearly shows that the finality of decisions is at risk.

2.1.4. Speedy and *Apropos* Justice

This shall be understood to mean if the Cassation Division renders a binding interpretation for a given law, then that would be utilized by all courts and parties do not have to make trials until Cassation, for its position has already

[19] Deborah G. Hankinson, *Stable, Predictable and Faithful to Precedent: The Value of Precedent in Uncertain Times* as cited in Workneh Alemnew Alula, infra-note 35

been known and taken note of by the lower courts. That way, it would help parties get speedy justice; they would get from the first instance court what they would have otherwise, theoretically, secured from the Cassation Division, which sits in Addis Ababa only. Though it has contributed a lot in this regard, legal practitioners believe that much is desired. The Cassation has enormous contributions to shaping the legal system, not to be an ungrateful biped.

2.2. THE RICKETS OF THE BINDING INTERPRETATION OF THE CASSATION DIVISION

Rickety commonly refers to something inclined to shake due to weakness or defect. Thus, the writer is interested in exploring more the imperfections of the binding interpretation of laws of the Cassation Division. One may thus analogize these shortcomings or defects that obstruct the Division's decisions from being good precedent with needful quality with the effect of rickets on a child in standing upright because of lack of vitamin 'D'.

2.2.1. Institution Related Rickety

The first institutional rickety to mention is the absence of specialized benches. The Cassation Division judges are assigned to entertain every sort of cases, be it criminal, civil, commercial, labor, tax and revenue, etc. The Federal Supreme Court has three Cassation Divisions but not specialized ones, and the existing divisions among the Division do not seem sufficient. Moreover, the judges are distributed randomly, and one can imagine how a single judge can properly appreciate rules on all kinds of legal issues.

As one goes through the decisions of the Cassation Division, one can quickly notice that the findings are disposed of by the same judges presiding, i.e., judges that presided over civil cases are also the ones presided over the criminal, commercial, tax and labor issues. For instance, in the decisions published in volumes 1 and 2, the judge named Menberetsehay Taddesse has presided over the entire cases. He was also absent only in few cases in subsequent books. One survey was also done, and it has been reported that in decisions reported in Vol. 12, out of judges that tried contractual issues, only two of them were absent in criminal matters.[20] Furthermore, it has also been

[20]Bisrat Teklu and Markos Debebe, *supra* note 7.

said that the same judges that dominated Vol. 11 dominated subsequent volumes.[21] If the Division does not have specializations and no cluster of cases is there; if judges are called upon to entertain every sort of cases regardless of their inclination and competency, errors in Division's decisions seem to me unglamorous, for we cannot expect a mortal to be omniscient.

The Cassation Court of France, for instance, has three civil chambers, one commercial chamber, one criminal chamber and one labor chamber (total of 6 chambers).[22] It is noteworthy that the Cassation Court of France does not review "public law matters involving national or local governments, including matters between a citizen and a public authority (including the government, regional departmental or administrative bodies) or State-owned Company, financial contracts involving public investments, and any litigation between a civil servant and the administration he or she serves".[23] Only cases other than these would be brought to the attention of the Court (these six chambers). In Ethiopia, on the other hand, every sort of decision, be it public or private, regional, or federal, court decision or an arbitral award, would be seen in Cassation so long as it is a final decision and exhibited a *prima facie* fundamental error of law. This author would like to suggest that there must be specialties of divisions of the Cassation Benches for them to give a well-reasoned decisions with in-depth analysis that will, not only serve as binding decision, but as tool to enrich the jurisprudence.

2.2.2. Personnel Related Rickety

There is a general agreement that the number is far below the required amount in terms of judges administering the Cassation Division.[24] To begin with, the fact that the number of screening judges is three has caused many cases not to be appropriately filtered for Cassation. And because of this, more than 60% of cases that these screenings judges licensed to appear before a panel of five judges have been utterly rejected. The higher the number of judges, the more they would have had the time and propensity to see a case from different angles and correctly identify cases that should be seen in Cassation. It has been

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[21] *Ibid*

[22] Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example, Commentary No. 17,* Stanford Law School (2006)

[23] *Ibid*

[24]ዉብሼት እና ሐይሌ *supra* note 12, P108.

disclosed that most of the time, the screening judges would have to form 1:2 ratios to decide a case, i.e., a case would appear before the Cassation bench if two judges believed that it contained a fundamental error of law.

Tewdros Meheret, who has been a practitioner at the federal courts, including the Cassation Bench itself, notes that added to the number issues, there has to be tailored trainings for these judges.[25] Though they are trained in law and trainings related to specific areas of law do not seem acute, it seems critical in areas specific to Cassation such as what fundamental error of law means, how to write Cassation judgment, how to separately set the *ratio* of the judgment and so on. It has been suggested that meaningful capacity building training is needed for the judges presiding over the Cassation Divisions so long as we aspire to have a binding interpretation of laws that would positively affect the legal system. Aschalew has already found that lack of specializations accompanied by lack of unique and Cassation Division's focused training for the judges has resulted in erroneous and inadequately analyzed decisions.[26]

2.2.3. Absence of Cassation Particular Procedure/Guideline

The Cassation Division does not have any guideline which would assist it in discharging its duty of bringing about uniform and predictable interpretation of laws through decisions it renders. No task of the Cassation Division is definitively provided except for the legislatively determined bindingness of its understanding of laws. The details, such as the quality of judges, the parameter for filtration of cases, manner of judgment writing, qualification of judges, the standing issue before the Division, etc. are not answered formally.[27] We have even accepted that when a given decision is to be reversed, the Cassation must be constituted by seven judges, but this was not legislatively determined until

[25] An interview with Ato Tewdros Meheret, an Attorney at Federal Courts and Instructor at Addis Ababa University School of Law on November 21, 2017.

[26] Aschalew Ashagre, *Precedent in Ethiopia* as cited in Muradu Abdo (ed.), *supra* note 8, P 32

[27] In my interview, Ato Tsegaye Asmamaw, the former Vice President of the Federal Supreme Court noted that they select judges of Cassation on random basis. In fact, Ato Tsegaye has also admitted the absence of any guideline on who should sit for Cassation and the necessary requirement is causing problems and informed that it should not be like that. Because of this, a judge may be appointed as a 'Cassation judge' for all kinds of cases -be it civil, criminal, commercial, labor, tax, or any others (Interviewed conducted with Ato Tsegaye Asmamaw on Nov.2, 2017 in his office).

the newly enacted Proclamation No.1234/ 2021 tried to clarify this. Aschalew, who is conversant with the Federal Court of Ethiopia in general and the Cassation Division in particular, has censoriously recommended providing the particularities of Cassation Procedures in a legislative manner.[28] This newly enacted Federal Court Proclamation has also tried to give answer to some fundamentally outstanding questions left unanswered by its predecessors such as what such as a fundamental error of laws is, but some others such as what *ratio decidendi* is, and how to distinguish it still remains unanswered.

Finally, who should enact this Cassation Guideline was also a question of concern in the past. Whether this enactment of Cassation guideline should be left to the Federal Supreme Court, or should it be done so by the superior body, perhaps the parliament in the form of General Cassation Procedure Proclamation, was an issue out there as well.[29] However, Art. 27 of this Proclamation envisaged that it is the mandate of the Federal Supreme Court to come up with this Guideline. To the best of the knowledge of this writer, the Federal Supreme Court has not yet come up with this Guideline.

2.2.4. The Decisions Lack Necessary Qualities

Court decisions are bound to bear necessary contours; regardless of whether it has a precedent value for the lower courts or not. The arithmetic expectation of the findings of the Cassation Division is high because it is to resolve not only an instant case before it but also other cases yet to arise. However, the decisions of the Cassation Division are blamed for lacking necessary qualities both in terms of its content and analysis. Tewdros, for instance, believes that with its current form and the level of research employed, the decisions would not add anything to the jurisprudence at all.[30] Geza shares this view. In that

[28] Interview on January 3, 2018, in his office

[29] Geza Ayele, a former Counselor for the Commercial Bank of Ethiopia, Interview conducted on December 28, 2017 in his office

[30] An interview with Ato Tewdros Meheret, *supra* note 21. The Division must overcome this challenge and render decisions supported by well and adequate reason, and relevant and proper laws are interpret/applied. But there is a debate as to giving long and detailed analysis or short in the decision of Cassation Court of France. France Cassation Court is criticized for giving short decisions. And there is argument in favor or against giving short decisions. Some say the Court is only expected to state not more or less of what is stated under the provisions of the law. And Some argue that the Court must give more detailed decisions. This author believes that both sides should be weighed properly to arrive at a desired one.

case, the Division is merely ruling on instant cases, which would hardly enhance the jurisprudence.

The judgments are sometimes overly abridged while sometimes contained details of the analysis of facts and few legal constructions. If the purpose is to persuade lower courts to take its footsteps, the Cassation Division must support its decisions with detailed analysis and reasoning rather than just devoting a page and half, which is, at times, merely a summary of facts of the case. Tamirat Kidanemariam, who has long years of legal practice, believes that the Division should see 'out of the box' in deciding cases; it shall refer to its past decisions, literature, and foreign experiences, among others.[31]

It has also been discovered that sometimes the Cassation Division does not even refer to the appropriate provision of the law. Yoseph Amero, former high court judge and currently consultant and attorney at law at federal courts, is of the opinion that the Division often renders decisions that do not involve any interpretation of the law at all.[32] The Division shall act with maximum comfort by getting rid of this obliviousness. Moreover, the unimaginable caseload at the Division has seriously impaired the efficiency of the case disposition. It has been noted that the decisions of the Cassation Division are not well elaborated considering the appropriate jurisprudence and scholarly writings, and experience of foreign courts. Often, it is mechanically limited to analysis of legal provisions. As a result, in addition to inconsistent decisions it renders, it has been found that the Division sometimes gives judgment that contradicts its reasoning.

2.2.5. Retrospective Effects of the Ruling

It has also been discovered that decisions of the Cassation Division bind retrospectively to the instant case which triggered reversal itself. But the party or even both parties to the current litigation may have relied honestly on the Division's position in the old precedent.

There are many claims and counterclaims elsewhere and whether to adopt retrospective or prospective effects in judicial rulings. Jeremy Bentham has avowedly blamed the retrospective effects of judicial order. On the other hand,

[31] Interview held on January 2, 2018

[32] Interview held on December 28, 2017 in the premise of the Federal Supreme Court

there are convincing reasons why prospective effect shall not be adopted, one of them being that it is nonsense to apply a precedent that the Court itself has admitted being wrong. It is also held that it discourages individuals from starting legal proceedings challenging the presumptively bad precedent since the party that initiated the proceeding by investing his/her time, money, and effort would not benefit from them.[33] However, because of the seriousness of the repercussions resulting from retrospective application of decisions, some countries have opted for flexibility in their applications. They provide a kind of an exception in which the prospective effect would be adopted if applying it retrospectively would seriously affect businesses and legitimate parties' expectation.

Our Cassation Division does not have such an excuse at all, i.e., where a prior position is reversed, the transactions that are based on the former precedent set, which is now being challenged would not apply at all. The new precedent would start to apply as of the instant case that triggered reversal. The only cases on which the interpretation of the Cassation Division would not be applied are in relation to cases that are already disposed, and this rule has been held by the Division itself in File No. 68573.[34] By implication, today's position would apply to other cases, including instant case at hand, other pending cases, and future cases yet to arise. Art. 27 of the Proclamation No. 1234/2021 stated that interpretation of law rendered by the Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered.

2.2.6. Inconsistent Decisions

It has also been found that the decisions of the Division are located below the bar in terms of expected consistency. The Division reverses its position so frequently that it has hard to identify which position is overruled and which one stands.[35] For example, because of inconsistent positions that it adopted at

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[33]Sarah Verstraelen, The Temporal Limitation of Judicial Decisions: The Need for Flexibility Vs. the Quest for Uniformity, *German Law Journal*, Vol. 14, No. 9, P1701.

[34] Getachew Deyas and Fentu Tesfaye vs. Rukia Kedir, Federal Supreme Court Cassation Division, Vol. 13 (2012), Pp.623-625.

[35]Workneh Alemnew Alula, *Contract Form Concerning Immovable: Analysis of the Cassation Decisions of the Federal Supreme Court* in Muradu Abdo (ed.), *the Cassation Question in Ethiopia*, P167.

different times concerning Arts. 1000(1) and (2) and 1723 of the Civil Code, parties could not be sure which position to trust.[36] If inconsistency of the decisions of the Division persists as it is right now, says Indalkachew Worku, from the Federal Attorney General, it would undeniably defeat the very purpose for which we sought the precedent in the Ethiopian legal system.[37] On top of all these reasons, says Gutema Mitiku, judges do not refer to past precedents unless and until brought to their attention by the lawyers or the parties have caused such inconsistencies.

2.2.7. Inaccessibility of the Decisions (Week Case Reporting System)

In the previous section, it has been explained that only a few (insignificant, to be honest), out of bulk, cases are being published to the public. At times less than 1% of the cases decided by the Division in a year were published.[38] However, it has also been underscored that irrespective of whether it is published or not, they are binding regarding interpretations adopted by the decisions. That is very much troubling as there is no way to take cognizant of the findings until they are published.[39] Moreover, even the ones published are not sufficiently accessible as it is published only in Amharic (as discussed below) and circulated in limited places.

Art.10 (3) of the newly enacted Proclamation is hoped to help a lot in this regard although the realization of it yet to be seen. This provision stated that the Federal Supreme Court shall publicize decisions rendered by its Cassation Divisions on binding interpretation of laws by electronics and print Medias as soon as possible.

For instance, in 2007 E.C, 12,140 cases were entertained by Cassation Division, but only 78 cases have been published. In 2008, out of 15,515 cases seen by the Cassation Division, only 255 cases were published. In the same fashion, out of 16,778 cases seen by Cassation Division in 2009 E.C, only 88

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[36]ዉብሸት እና ሐይሉ *supra* note 12, P115.
[37] Interview with Indalkachew Worku, Federal Attorney-General Prosecutor at Legal Study and Dissemination Coordination Office Coordinator, on November 14, 2017.
[38] There is an attempt to ensure a better accessibility of the decisions by making the decisions available online as well. That being a good move, the fact of internet access limitation should also be considered.
[39] Interview with Mekesha Dereje and judge Hassan Nasebo, the Federal High Court, Lideta Division, as well as Adugna Kebede, prosecutor

cases have been reported. In terms of percentage, only 0.6% in 2007 E.C, 1.6% in 2008 E.C and 0.5% cases have been reported.[40]

2.2.8. Language Barrier

While the decisions of the Cassation Division are being published only in Amharic, they are declared to be binding on courts at all levels, both at federal and regional levels.[41] Implicit in it is that Amharic is the working language of not only the federal government but also the regions-which does not hold water. The regions have their working language and so do their courts. For instance, courts in Oromia Regional State could, and should indeed, only entertain cases using *Afan* Oromo. The *status quo* dictates that judges, lawyers, and litigants in Oromia should read and act according to the rules propounded by the Cassation Division in Amharic.

2.2.9. Ultra- virus to Its' Mandate

Perhaps this is the most perplexing issue among the legal communities whenever the theme is the decisions of the Cassation Division. Its mandate is clear; that it shall ensure the proper interpretation and application of laws by the lower courts by rendering binding understanding of laws through cases that appear before its table. However, at times, the Division acts as a veritable lawmaker.[42] Mehari has observed that "courts, no matter how high they are situated in the judicial hierarchy, cannot amend laws".[43] Similarly, Cardozo

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[40]It is to be noted that the Division is entertaining more cases than the regular divisions of the Federal Supreme Court itself. For instance, in 2007 E.C, while 12140 cases have been brought to the Cassation Division, only 2,905 cases have been brought to the Court in the form of appeal. In 2008 E.C, while the Cassation had to entertain 15,515 cases, the regular Divisions of the Court only had to see 3,618. In the same fashion, during 2009 E.C, while 16778 cases have been brought to Cassation, the regular court division had to see only 3924 cases. I think, the decisions of Cassation Division in the Division gave binding interpretation of laws must be properly published and made accessible to public, particularly, to judges, lawyers, advocate, legal community in general. The Federal Supreme Court must organize department which is entrusted with task of publication and making precedents to the public. The decisions of the Divisions that need publication should be those with binding interpretation of laws; those decisions which were simply confirming decisions of the lower courts and do not have binding interpretation of laws, or a repetition of an already rendered precedent need not be published.

[41]The Federal Courts' Proclamation No.1234/2021, Art. 26 (3).

[42]ዉብሼት እና ሐይሉ፣ *supra* note 12, P110

[43] Mehari Redae, *Case Comment: Dissolution of Marriage by Disuse: A legal Myth*, Journal of Ethiopian Law (2010), Vol. 22. No. 2, P45

has once stated that *"the judge is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his ideal of beauty or goodness. Therefore, in their task of interpreting and applying a statute, judges have to be conscious that in the end the statute is the master and not the servant of the judgment".*[44]

However, the Cassation Division is widely blamed for exceeding its mandate. It has gone to the extent of setting a new rule which goes even contrary to the intent of the legislators. Bisrat and Markos have even contended that Cassation Division has evaded its reasons for existence.[45] The introduction of *de facto* divorce by the Cassation Division in file no. 20938,[46] where it is stated that marriage can be dissolved by *de facto* separation (without court approval) is a clear example of the Division's introduction of rules not intended by the legislator at all. On the other hand, the Revised Family Code recognizes divorces only through a court judgment. With apparent disregard to this stance of the law, the Cassation Division held that marriage can also be dissolved through *de facto* separation.

2.2.10 Conciliatory Trend to Its Mandate and Failure to justify Its Privilege

Not only is the Division encroaching on the legislative mandate of the lawmakers, but also it concedes its constitutional and legal mandate to be guardian of citizens' rights from executive usurpation. Sometimes, seemingly not to confront the executives, the Division takes a rather waffling position and takes a position that would not vindicate the role of courts *vis-a-vis* administrative agencies. For instance, in its decision in file no. 14554, it has set a precedent that it may not overrule the title deed issued by the administrative authority even if it was issued counterfeitly.[47] Kumelachew Dange, consultant and attorney at law at federal courts, thinks that this is an

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[44] Benjamin Cardozo, *The Nature of Judicial Process as cited in Guru Prasanna Singh, Principles of Statutory Interpretation,* 5[th]ed, Wadhwa and Company Law Publishers (1992), Pp.16-17

[45]Bisrat Teklu and Markos Debebe, *supra* note 7, P49.

[46]Shewaye Tesamma vs. Sara Lenagena, Federal Supreme Court Cassation Division Decision Vol. 4, 2008.

[47] W/ro Tsige Atnafe vs Balambaras Wube Shibashi, Federal Supreme Court Cassation Division decisions, Vol. 3, File No. 14554

erroneous interpretation of the law and a backlash from its constitutional and legal berth to ensure that the citizens' rights are protected.[48]

3. CONCLUSIONS AND WAY FORWARD

The Cassation Division's business of rendering binding interpretation of laws through its decisions shall be seen within the broader framework of the convergence of the two major legal traditions. Within that context, the FDRE Constitution has mandated the Federal Supreme Court to have a power of Cassation over any final decisions so long as available remedy has already been exhausted and exhibited *a prima facie* fundamental error of law. The decisions of the Cassation Division are declared to be binding on all tiers of courts at any level through the Federal Courts Proclamation Re-Amendment Proclamation No.454/2005 and the same position is held by the newly enacted Federal Court Proclamation 1234/2021. Since its inception, and more importantly, since its decisions were declared binding, the Division has taken enormous steps in rescuing the justice system from many menaces, the job which the author referred to as the novelty of the Cassation Division.

The Division will play and is playing, irreplaceable role in ensuring uniformity of interpretation of laws. It has been found through the study that the four primary goals purported to be achieved upon conferring binding force to the decisions of the Cassation Division, i.e., uniform interpretation of laws, equality of the citizens before the law, predictability, and speedy justice, have been, though not as much as desired, somehow addressed by the Division.

One of the most critical issues addressed in this article is the nature of binding interpretation that the Cassation Division renders. It has been argued that considering the extent and limitations of the power of the Division and purpose of establishment, the orthodox precedent under the common law legal tradition was not introduced. Moreover, the Cassation Division may only give interpretative precedent and not legislative precedent. However, the Cassation Division's interpretation with regards to provisions of the law should be pursued in similar matters by the lower courts and other judicial organs.

[48] Interview on December 28, 2017, in the premise of the Federal Supreme Court

Taken altogether, the author has tried to assess the novelties and rickets of the binding decisions of the Cassation Division. The piece is interested in purposive and pragmatic wonders of our Cassation Divisions' decisions. Hence, the following recommendations are hereby made:

1. Though I do not have courage to urge the Cassation Division to be an autonomous court of its own separate from the Supreme Court, as it is in some countries, I heartfully recommend the restructuring of the Division both in terms of personnel and institutional capacity. The Cassation Division shall structure itself in specialized divisions considering the varieties of cases that come before it. The judges should be assigned to the divisions based on their inclination and competency. It is now recommended that the same judge shall not preside over more than two divisions. Moreover, they shall be given some regular training on capacity building on critical issues.

2. The Federal Supreme Court shall have a Cassation procedure of its own. Unlike its predecessors that failed to tell us who shall assume this responsibility, the newly enacted Federal Court Proclamation 1234/2021 has already stated that it is the Federal Supreme Court that shall come up with the Cassation Guideline. This task of coming up with this Guideline may be facilitated by the plenum of the Federal Supreme Court.[49]

3. It has also been found that the Cassation Division is assuming by far much more cases than the regular divisions of the Supreme Court themselves. This high caseload, the writer thinks compromises the quality of decisions, as the judges would not have enough time to consider a case from different perspectives. Moreover, it is hard for these judges to remember the position they had in former precedents or decisions. Therefore, it is recommended to hire assistants for the Divisions of the Cassation Benches. For every Division that I have proposed above, it is recommended to hire at least two assistants (law professionals). The works of these assistants are to trace the records in relation to similar cases that the Cassation Division has decided and

[49] The Federal Court Plenum is, as provided for under Art. 42 of the Proclamation No. 1234/2021, a forum consisting primarily of the President, the Vice-President and judges of the Federal Supreme Court, the Federal High Court's Presidents and the Federal First Instance Court and the Presidents of Regional Supreme Courts.

undertake the research works, consult legislative history and jurisprudence on that specific issue and legal analysis and then write a memo to the judges concerning case before the Cassation Division.

4. Regarding publication, it has been underscored that only less than 1% of the cases decided are being published in a year. Yet and ironically, it has been held that the decisions of the Cassation Division remain binding even if they are not published. The writer has a firm belief that this must be changed. All decisions of the Cassation Division should be published. Of course, the *status quo* operation of the Cassation Division would make it impracticable in publishing the entire decisions. However, if we consider some of the recommendations that I have made above (such as making the number of screening judges five and equipping them with special pieces of training and adopt firm admission criterion, which would, in turn, reduce the number of cases the Cassation Division must entertain) publishing these cases would not be difficult.

5. The Cassation Division must adopt more stringent and tighter requirements for admission cases. With the current practice, in which the Cassation Division is overburdened than even other divisions of the Supreme Court, it may not have ample time to render quality decisions with detailed analysis. I believe that the number of cases that should be seen in Cassation should be significantly reduced. The study has uncovered that, as things stand now, the Federal Supreme Court Cassation Division is more of an additional appeal forum rather than a mechanism of rectifying severe legal defects which would unless addressed, affect the country significantly. Thus, it is suggested that the number of cases before the Division be reduced. Moreover, the writer recommends that the Division take its job more seriously as it plays a double function, i.e., settling the instant dispute and setting precedential rule. The writers' latter suggestion is best, and elegantly, explained by Schauer as:

   "An argument from precedent seems at first to look backwards. The traditional perspective on precedent, both inside and outside of the law, has therefore focused on using yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision

as a precedent for tomorrow's decision-makers. Today is not only yesterday's tomorrow; it was also tomorrow's yesterday".[50]

6. Given the decisive role that the Cassation Division and its binding interpretations would play in the country's justice system, I would like to recommend establishing a committee that is entrusted with a duty to make necessary evaluations on the performance of the Cassation Division and pinpoint the challenges. The committee shall make a regular evaluation of the functioning of the Cassation Division and call for any measures that should be taken. For the committee's task is purely to make evaluations, which might be annual or bi-annual, the writer would like to recommend the committee to be *ad hoc* to be constituted by credible personnel.

7. Finally, the writer would like to urge the Cassation Division to work together with other relevant stakeholders. Typical ones are law schools, regional Cassation divisions, government organs and law professional associations. I even suggest that it shall have a memorandum of understanding with these institutions. Instead of operating solitarily, it would rather be beneficial if the Cassation Division takes advantage of these bodies and professionals' research work and views.

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[50] Frederick Schauer, *Precedent* as cited in Mattias Derlén and Johan Lindholm, *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions,* German Law Journal, Vol. 16, No.5, P1075.