

## **An Unconstitutional Judicial Power of State Courts over Federal Matters: A Comment on Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen**

**Yenew B Taddele\***

### **Abstract**

*Although it had delegation power, Awi Zone High Court provided a judgment on a dispute between Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen as if it had inherent judicial power; and Amhara National Regional State Supreme Court confirmed the former's decision. However, Amhara National Regional State Supreme Court, Cassation Division heard the petition and reversed the lower courts' decision stating that such courts lack jurisdiction to hear the case since it is a federal matter because one of the litigating parties-Nile Insurance S.C. is a federally registered business organ. Thus, the Ethiopian Federal Democratic Republic Supreme Court Cassation Division confirmed the decision made by the Amhara National Regional State Supreme Court, Cassation Division. The author has concluded that the Federal Cassation Division failed to appreciate two procedural issues: (1) it is not because Awi Zonal High Court and Amhara Regional State Supreme Court have inherent judicial power but it is because they have a delegation power they heard the case; and (2) Amhara Regional State Supreme Court, Cassation Division has no judicial power over federal matters. The Federal Cassation Division relied on the justification that regional supreme courts cassation divisions have judicial power to amend or order otherwise regional courts under them – which has not explained how it works on federal judicial power yet. The division of judicial power in Ethiopia between federal and state courts is not subject to the shifting needs of time and circumstance, rather it is well allocated. The allocation of judicial powers avoids the overlapping of jurisdictions. Unless such allocation is kept and respected, state and federal judiciaries do not resolve disputes well but, with their overlapping jurisdictions, themselves engage in inter-system power struggle.*

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\* Lecturer in Laws, Bahir dar University School of Law. The author can be reached at [yenew.taddele@gmail.com](mailto:yenew.taddele@gmail.com)

## 1. Introduction

The Federal Democratic Republic of Ethiopia Constitution (hereinafter, FDRE Constitution) provides for the establishment of an independent judicial system both at federal and state levels, which is “one of the fundamental institutions of any democratic constitutional system”<sup>1</sup>. This shows that the Ethiopian judicial system is designed with parallel court systems in which regional states and the federal government have their own set of independent court structures and administrations<sup>2</sup>. Division of adjudicative responsibility is a fundamental component of Ethiopia’s federal system. The FDRE Constitution establishes tiers of federal and state courts and gives an overview of their jurisdiction leaving the details to be determined through legislation<sup>3</sup>. These courts have specified jurisdiction in different subject matters and applicable laws in their judicial competence. Federal courts are authorized to see cases of federal matters while state courts are entitled to handle regional matters.

In addition to state matters, regional state courts handle federal matters through delegation by applying federal laws<sup>4</sup> where as state supreme courts and high courts have delegation to see judicial power of the federal high court and state Supreme Court respectively over federal matters<sup>5</sup>, and decisions rendered by a state high court exercising the jurisdiction of the federal first instance court are appealable to the state supreme court<sup>6</sup>.

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<sup>1</sup>Semahagn Gashu, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology, and Democracy in Ethiopia*, Ashgate Publishing Limited, USA, 2014, P. 218 [here in after, Semahagn Gashu, *The Last Post-Cold War Socialist Federation*].

<sup>2</sup>Assefa Fiseha, ‘Separation of powers and its implications for the judiciary in Ethiopia’, *Journal of Eastern African Studies*, 2011, Vol. 5, No. 4, PP. 702-715, P. 704 [Assefa Fiseha, Separation of powers and its implications for the judiciary in Ethiopia].

<sup>3</sup>Federal Constitution of Ethiopia, 1994, Federal Negarit gaz., Proc. No. 1, 1<sup>st</sup> year, No. 1, Art. 78/ 2 and 3 [Here in after FDRE Constitution, 1994].

<sup>4</sup>Ibid

<sup>5</sup>Id, sub-Art. 2

<sup>6</sup>Id, Sub-Art.4

The state Supreme Court has the power of cassation over any final court decision on state matters which contain a basic error of law<sup>7</sup>. Similarly a decision of any court (including the state Supreme Court cassation division) in Ethiopia can be reviewed by the Cassation Division of the Federal Supreme Court (hereinafter named Federal Cassation Division) if it manifests ‘prima facie case’ and it is a final decision<sup>8</sup>.

A case, Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen<sup>9</sup> sought the author’s attention to write this comment. This case comment examines an issue of whether the cassation divisions of regional state supreme courts have adjudicative power to make “void *ab initio*” or order otherwise lower courts’ decision with a justification of lack of jurisdiction to have such case though the latter heard in their delegation power- over federal matters.

The case Comment is divided into four sections. The first section is the introduction part through which preliminary remark depicts, the one being discussed here ; The second part is summary of facts of the case-that narrated what happened; the third part is analysis through which the comments are provided in; and the last part is conclusion which brings the paper to an end by making some general remarks.

## **2. Summary Facts of the Case**

W/ro Bitewush Mekonnen (hereinafter named Plaintiff) sustained a bodily injury while she was traveling from Mankusa to Bahir Dar by a vehicle owned by Ato Fekadu Azemeraw and Ato Tesfa Fetene on Yekatit 17, 2006 E.C. The Respondent instituted a tort suit and claimed 720,600 Ethiopian Birr at Awi Zonal High Court in Amhara Regional State against Ato Fekadu Azemeraw and Ato Tesfa Fetene and

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<sup>7</sup>Id, Art. 80/3/b

<sup>8</sup>FDRE Constitution, 1994, *supra*-4, Sub-Art.3/a. See also Murado Abdo, ‘Review of Decisions of State Courts over State Matters by the Federal Supreme Court’, *Mizan Law Review*, 2007, Vol.1, No 1, PP.60-74, P.1[Here in after, Murado Abdo, Review of Decisions of State Courts over State Matters by Federal Supreme Court].

<sup>9</sup>*Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen*, Federal Supreme Court, Cassation Division, 2010, Civil Case No’ 145175[unpublished] [Herein after, Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division]

Nile Insurance S.C. (which gave vehicle insurance against a 3<sup>rd</sup> party insurance coverage) (hereinafter named Defendants).

The Defendants appeared before the Awi Zone High Court and submitted their statement of defense in which they argued that the dispute has been settled through mediation; however, neither of them objected to the material jurisdiction of the court. Awi Zonal High Court pronounced its decision in favor of the defendants stating that the dispute between them has been already settled through mediation made by the plaintiff and defendants.

The plaintiff had appealed to Amhara National Regional State Supreme Court and sought relief from such court to reverse the lower-Awi Zonal High Court's decision. The Appellate Court rejected the appeal justifying that it finds the lower court's decision as not appealable.

The plaintiff took the case before Amhara National Regional State Supreme Court, Cassation Division, and sought relief from such Cassation Division to reverse and correct the basic error of law that lower courts have made while they were pronouncing their decision. Amhara National Regional State Supreme Court, Cassation Division found the lower courts' decisions containing basic error of law and ordered Defendants including Nile insurance S.C. to defend.

One of the Defendants, Nile Insurance S.C. brought, inter alia, a preliminary objection alleging that Amhara National Regional State Supreme Court Cassation Division lacks material jurisdiction over federal matters. However, The Cassation Division rejected the objection and continued to listen to the cassation petition. It later pronounced its judgment and declared lower courts' decisions as "*void ab initio*". It detailed that Awi Zonal High Court and Amhara National Regional State Supreme Court lack material jurisdiction to hear the case in their first instance and appellate jurisdiction respectively. Because the Cassation Division reasoned out that the claimed amount is ETB 720,600 and one of the litigants is "a business

organization registered and formed under the jurisdiction of a federal government organ” it stated that these courts should have rejected the suit.

Defendants (herein after named Applicants) lodged a cassation petition before Federal Cassation Division, cassation over cassation, and sought a relief from the Federal Cassation Division to reverse and correct the basic error of law that Amhara National Regional State Supreme Court, Cassation Division committed. The applicants claimed that as Nile insurance S.C. is a federally registered business organ, the material jurisdiction over the case is for federal courts. Consequently, the Amhara National Regional State Supreme Court Cassation Division lacks the power to adjudicate federal matters entertained by lower courts in their delegation power.

However, the Federal Cassation Division confirmed the Amhara National Regional State Supreme Court, Cassation Division’s decision by reasoning Regional Supreme Courts Cassation Division has judicial power to reverse and correct all decisions made by lower courts, including cases of federal matters.

### **3. Analysis and Comments**

Federal courts can receive cases of federal matters and cases originating from Addis Ababa and Dire Dawa City Administrations where they are physically located in Addis Ababa, the capital, and Dire Dawa.<sup>10</sup> Regional state supreme and high courts can also receive cases of federal matters, in their delegation of judicial power, from regions where such courts are located.<sup>11</sup>

FDRE Constitution reserved the highest judicial power over state matters to state courts.<sup>12</sup> To guarantee the right of appeal of the parties in a case, decisions rendered by state high courts exercising the jurisdiction of the federal first instance court are appealable to the state supreme court where as decisions rendered by a state supreme

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<sup>10</sup>FDRE Constitution, 1994, *supra* 4, Art. 3/3

<sup>11</sup> FDRE Constitution, 1994, *supra* 4

<sup>12</sup>*Id.*, Art. 80/2

court on federal matters are appealable to the federal supreme court.<sup>13</sup> The Federal Courts Proclamation allocates subject-matter jurisdiction to federal courts based on three principles: laws, parties, and places. It stipulates that federal courts shall have jurisdiction over, first, —cases arising under the Constitution, federal laws, and international treaties; and second, over parties specified in federal laws. Article 3(3) of the Federal Courts Proclamation states that federal courts shall have judicial power in places specified in the FDRE Constitution or federal laws.<sup>14</sup> Proclamation No' 25 of 1996 was the most important legislation regulating the federal judiciary and determining its powers. Under this legislation, federal courts are given original and appellate jurisdiction over cases arising under the Constitution, international treaties, and federal laws. They also have jurisdiction over parties and places specified in the Constitution or federal laws.

Federal courts are generally said to have “*federal questions*”<sup>15</sup> jurisdiction, which means that federal courts will hear cases that involve issues touching on the Constitution or other federal laws. The source of “federal question” jurisdiction can be found in Article 3 of Federal Courts Proclamation 25/1996.<sup>16</sup> Article 5/6 also states that the “judicial power shall extend to all cases, in federal law and business organizations established and registered by such laws.”<sup>17</sup>

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<sup>13</sup>Id, Sub-Art. 4 and 5

<sup>14</sup>Federal Courts Proclamation, 1996, Federal Negarit gaz., Proc. No. 25, 2<sup>nd</sup> year, No 13, Art. 3 [Here in after, Federal Courts Proclamation, 1996]. This proclamation is repealed by Federal Courts Proclamation, 1234/2021, Federal Negarit gaz., Proc. 1234, 27<sup>th</sup>, No. 26. However, the Proclamation has been enacted with no change about the subject matter and issues of this case comment. It is because the judgment had been pronounced before Proclamation 25/1996 was repealed the author cited provision of Proclamation 25/1996.

<sup>15</sup>“Federal question” jurisdiction is one of the two ways for a federal court to gain [subject-matter jurisdiction](#) over a case (the other way is through [diversity jurisdiction](#)). Generally, for federal question jurisdiction to exist, the cause of action must arise under federal law. More specifically, however, both constitutional and statutory requirements must be met before jurisdiction can be found. Thus, it may be an equivalent phrase to “A jurisdiction over the federal subject matter.

<sup>16</sup>Federal Courts Proclamation, 1996, *supra* 15, Art.3

<sup>17</sup>Id, Art.5/6

In Fekadu Azemeraw and Ato Tesfa Fetene vs. Bitewush Mekonnen<sup>18</sup>, one of the defendants \_Nile Insurance S.C. at Awi Zonal High Court is a business organization that has been established by federal laws. When the Insurance Company had litigated, the court's jurisdiction was automatically changed from regional courts' jurisdiction to federal courts' jurisdiction and Awi Zonal High Court heard the case as if it is a federal first instant court.

The Respondent appealed to Amhara Regional State Supreme Court. Here, the appellate court heard the case not in its inherent jurisdiction but in its delegation jurisdiction as if it is a federal high court, and the court confirmed the lower court's decision. The only option of the respondent to appraise hereafter would have been appearing before Federal Court Cassation Division.<sup>19</sup> The respondent appealed against the applicants before Amhara Regional State Supreme Court Cassation Division. It has "power of cassation over any final court decision on state matters which contain a basic error of law"<sup>20</sup> but not over the final decision of lower courts' that they have rendered in their delegation power. Thus, the cassation division of the regional supreme court shall have a jurisdiction to entertain and decide only on the following regional cases providing there is a fundamental error of law; "cases that have been given a final decision, in appeal, by the woreda court; regional cases that have been given a final judgment by the high court; and regional cases that have been given a final judgment, by a regular bench of the supreme court" in their inherent judicial power.<sup>21</sup>

However, coming to the case at hand, Amhara regional State Supreme Court Cassation Division should have rejected the case because it doesn't have either

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<sup>18</sup>Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division, *supra*- 1.

<sup>19</sup>Federal Courts Proclamation, 1996, *supra* 15, Art. 10/1.

<sup>20</sup>FDRE Constitution, 1994, *supra* 4, Art. 80(3/6)

<sup>21</sup>Amhara National Regional State Courts Establishment Revised Proclamation, 2015, Proc.No.223, 20<sup>th</sup>, No. 4, Art. 17/2 [Here in after, Amhara National Regional State Courts Establishment Revised Proclamation, 2015].

inherent or delegated constitutional judicial power over federal matters. Regional state supreme courts have not inherent or delegated constitutional judicial power over federal matters. Unfortunately, the Federal Supreme Court, Cassation Division also failed to correct this error. It confirmed the Amhara Regional State Supreme Court, Cassation Division decision. In its decision, it stated that the latter has judicial power and responsibility to correct decisions pronounced by lower courts.

የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎትም ጉዳዩ በዚህ ሁኔታ ከቀረበለት በኋላ የፌዴራል ፍ/ቤቶች ስልጣን መሆኑን አወቆታል። በስሩ ያሉት ፍ/ቤቶች የክልል ፍ/ቤቶች ስልጣን እንደሆነ በመወሰድ በክልል ፍ/ቤቶች ስልጣን ክርክር ሲደረግበት ቆይቶ አቤቱታ የቀረበለትን ጉዳይ ተቀብሎ በሰበር ፍ/ቤቶች የተፈጸሙትን ስህተቶች በማረም ክርክሩ ስልጣኑ ለሆነዉ ፍ/ቤት እንዲቀርብ ማዘዙ ስህተት የተፈጸመበት ዉሳኔ አይደለም።<sup>22</sup>

In this case, the Federal Supreme Court, Cassation Division failed to appreciate two procedural issues, (1) it is not because Awi Zonal High Court and Amhara Regional State Supreme Court have inherent judicial power, though they mistakenly assumed as if they have material jurisdiction, by forgetting their delegation power they heard the case<sup>23</sup> and (2) Amhara Regional State Supreme Court, Cassation Division has no judicial power over federal matters.<sup>24</sup> Irrespective of regional courts' assumption of having material jurisdiction over federal matters mistakenly, a qualified reading of Article 3 and 5(6) of the Federal Courts Proclamation, “which works out the details of Article 80 of the Constitution under consideration by (inter alia) vesting in” the federal courts' judicial power over federal matters.

Amhara Regional Supreme Court, Cassation Division, one may argue, has judicial power to confirm, reverse, or otherwise correct lower courts' decisions that they pronounced by their delegation judicial power only to review whether the latter has

<sup>22</sup> Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division, *Supra*- 1.

<sup>23</sup> FDRE Constitution, 1994, *Supra* 4, Art.80(3/6).

<sup>24</sup> Amhara National Regional State Courts Establishment Revised Proclamation, 2015, *supra*-22



jurisdiction to have the case.<sup>25</sup> In vertical judicial power division, the highest judicial organ i.e. Amhara Regional Supreme Court, Cassation Division, shall oversee lower courts' decisions whether they rendered it in their jurisdictional competence,<sup>26</sup> so what Amhara Regional Supreme Court, Cassation Division provided is not to touch upon the merits of the case that the lower courts decided but make the case “*void ab initio*” as if no judgment has been pronounced and leave the parties to institute a fresh suit before competent courts.<sup>27</sup>

However, the above justification can't escape criticism. Because (1) when Awi Zonal High Court heard such case, it should have assumed federal first instance court jurisdictional power and the appellate court-Amhara Regional Supreme Court should have received the appeal through its delegation judicial power, not with their inherent judicial power because a legal/judicial note is easily taken that regional zone high courts and supreme courts acted as a delegate of federal first instance and high court respectively. The fact that they were not aware of and just proceeding on the assumption that they are dealing with state matters can't grant them inherent judicial power over federal matters. Thus, Amhara Regional Supreme Court, Cassation Division has no constitutional judicial power to make “*void ab initio*”, reverse, confirm, amend, remand or order otherwise against decisions rendered by lower courts in their delegation power; (2) Amhara Regional Supreme Court, Cassation Division has already learned that the claimed amount is ETB 720, 600 and Awi Zonal High Court had no delegation material jurisdiction to have such case. But the former made the latter's decision “*void ab initio*” knowing that Awi Zonal High Court had such case in its delegation of judicial power and the judicial power to make “*void ab initio*” Awi Zonal High Court's decision is vested in Federal Supreme Court Cassation Division.

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<sup>25</sup>Interview with Tajebe Getaneh, Lecturer in Law at Bahir Dar University, School of Law, on Constitutional Judicial Power of Regional States Supreme Court, Cassation Divisions over Federal Matters, July 22, 2021[Here in after, Tajebe Getaneh, Lecturer in Law].

<sup>26</sup>Ibid

<sup>27</sup>Ibid

The justification may be sound only if disputants would have argued that Awi Zonal High Court has material jurisdiction to have a case. Then the issue framed by Amhara Regional Supreme Court, Cassation Division would have been whether Awi Zonal High Court has an inherent judicial power to hear a case at hand. But, in the meantime it received a cassation appeal, Amhara Regional Supreme Court, Cassation Division knew that Awi Zonal High Court lacks material jurisdiction to hear such case, because it is the federal high court's material jurisdiction.

In a federal government structure, the federal government and regional states have a horizontal division of judicial power. Save delegation/concurrent power given to the regional high and supreme courts, they should respect each other's autonomous judicial power. Thus, any cassation petition (including an issue of material jurisdiction) against federal lower courts or regional courts' (only for decisions rendered by their delegation power) decisions shall be submitted and lodged before Federal Cassation Division.

If the regional Supreme Court cassation division can hear cases arising over federal matters, it may result from jurisdictional overlaps between federal and regional state adjudicative bodies.<sup>28</sup> Jurisdictional overlaps can result from competing for jurisdiction between [federal] courts and [regional states] courts if they hear any subject matter irrespective of their perspective judicial competence and share the same personal jurisdiction.<sup>29</sup> To avoid duplicative or parallel proceedings involving the same (or essentially the same) parties on the same (or essentially the same) issues by federal and regional state courts, the FDRE Constitution and Courts Establishing Proclamations delineate both jurisdiction and merits judicial power of federal and

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<sup>28</sup>Chiara Giorgetti, 'Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?', *ICSID Review*, 2015, Vol. 30, No. 1, PP .98-117, P.104 [here in after, Chiara Giorgetti, Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?]

<sup>29</sup>Chiara Giorgetti, Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?, *supra* 29, P.105

state courts. Thus, either court can only deal with a dispute when it has personal and subject matter jurisdiction.

Division of judicial power among different courts in Ethiopia is not subject to the shifting needs of time and circumstance. At different times and for different purposes, the respective judicial power of federal courts and regional states courts have not changed unless the governing law is amended.<sup>30</sup> Surely Federal Cassation Division's tendency is without relevance to the effective organization of the judicial systems of Ethiopia. Rather it is an unconstitutional and arbitrary assignment of judicial power for regional courts over federal matters.

Therefore, the Federal Cassation Division should have reversed a decision by Amhara Regional State Supreme Court, Cassation Division. Because the latter lacks jurisdiction to hear cases that should have been instituted before the former. Although Awi Zonal High Court and Amhara Regional State Supreme Court entertained the case as if it is a state matter, it is a federal matter rather, irrespective of their wrong assumption, they heard such case in their delegation power so it is the Federal Cassation Division that should have reversed or order otherwise such lower courts' decision.

#### **4. Conclusion**

In Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen case, the Federal Cassation Division set an unfortunate precedent that hampers judicial powers vested in Ethiopian Courts. It has done this in complete disregard for Art. 5(6) of Federal Courts Proclamation No' 25/1996, Art. 17(2) of Amhara Regional State Courts Establishment Revised Proclamation No' 223/ 2015 and Art. 80(3)/a and b of FDRE Constitution. Thus, it has worked in favor of the validity of ultra-judicial power of regional courts cassation divisions to assume jurisdiction over federal matters.

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<sup>30</sup> Id, P.107.

In an ‘unconvincing fashion’, the Federal Cassation Division relied on the justification that regional supreme courts cassation divisions have judicial power to amend or order, otherwise regional state courts under it – which it has not explained how it works on federal judicial powers yet.

Since the basic principle of federalism is to form a dual government, the power should also be based on the federal principle that there must be judicial bodies in both federal government and regional states including claimed or objected jurisdictions. Not only should such a division exist, but also power should be exercised according to such division where the federal courts decide federal matters and state courts decide state matters.

Sometimes, the indispensability of the Federal Cassation Division in the federal judicial system to the maintenance of our federal scheme may be taken as a political postulate but the case at hand shall not be taken as a political postulate. In such cases, the Cassation Division’s specific functions ought to submit to the judgment of appropriateness to the needs and sentiments of the disputants, and course to laws especially, it should be saved from an excess of responsibility-ultra judicial power which may seriously impair judicial powers vested in federal courts.

The allocation of judicial powers avoids the overlapping of jurisdictions. Unless such allocation is kept and respected, “state and federal judiciaries not to resolve disputes well but, with their overlapping jurisdictions, themselves engage in intersystem power struggles”. Thus, federal courts in Ethiopia adjudicate federal matters while regional state courts adjudicate regional matters in their independent court structures and administrations, and only in their delegation of judicial power.