

**THE HEARING OF FINAL JUDGEMENT BY THE
SUPREME COURT BY WAY OF CASSATION :
ANOTHER RIGHT OF APPEAL GRANTED TO ANY
ONE OF THE PARTIES?**

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One of the jurisdictions of the Supreme Court of the People's Democratic Republic of Ethiopia is :

to hear by way of cassation a final decision of the Supreme Court or other courts, where such decision contains fundamental error of law, or for other reasons specified by procedural laws.¹

As regards the discharging of this function by the Supreme Court the law provides :

A final decision of the Supreme Court or any other court may be heard in cassation by a *chilot*² constituted by at least four judges of the Supreme Court with the president or one of the vice presidents presiding.³

Concerning the authority empowered to initiate such a hearing by way of cassation, it is provided :

a final decision shall be heard by way of cassation as provided in Article 4 of this proclamation where the president of the Supreme Court so decides or where the Procurator General submits a protest

An examination of these provisions of the proclamation raises the issue : What is the role of the parties to a case that has been finally **decided but** that is found, upon an examination by either the procurator General or the president of the Supreme Court, to contain a «fundamental error of law» ?

Put differently, this general issue can be split into the following issues :

- (1) Is the hearing another appeal like any other ordinary appeal where the Supreme court must summon the parties as appellants and respondents?
- (2) If so, will the hearing depend on the wishes of the parties like any other appeal?

If our answer to the issues in (1) and (2) is in the negative :

- (a) Does it mean that the parties have no role in the hearing of the final decision by way of cassation?

b) If so, who will be the parties in the hearing of the final decision by way of cassation?

The issue as regards the role of the parties becomes all the more relevant when it is noted that review by way of cassation of a final judgement is not limited to criminal cases. It is possible in civil cases as well. In regard to criminal cases their adjudication is, obviously, within the jurisdiction of the procuratorial office.⁵ It thus becomes reasonable to expect that the hearing of a final judgement in criminal cases would in most instances be submitted by the procurator General's protest. This view becomes all the more tenable, at least normatively speaking, when it is recalled that ensuring the full realization of the rights of individuals, be it legal or physical, is one of the duties of the procuratorial office.⁶ It can thus be expected that one of the parties to the case, the procurator, would request that the procurator General submit a protest for a hearing of a final judgement in a criminal case by way of cassation in cases where it « contains fundamental error of law ». The procurator would be expected to do this as part of his normal duty even if it is the interests of the accused defendant that are at stake as a result of the fundamental legal error. In civil cases, however, most of the time no representative of a state organ with such similar duty appears as one of the parties. Thus, a final judgement in civil cases that contains « fundamental error of law » may remain valid so long as one of the parties fails to bring such a judgement to the attention of the Procurator General or the President of the Supreme Court. It is also possible that either of the two officials could in some way come across such a final judgement in a civil case. Outside these possibilities, however, a final judgement in a civil case that « contains fundamental error of law » would remain in force, despite the fact that it is illegal. This would be true in the absence of a mechanism that would enable bringing the existence of such a final judgement to the attention of the concerned officials. Yet, it seems to be clear from the law that it is one of their duties.

A civil case being a private concern of the aggrieved parties it could appropriately be asked, why should such high state officials be concerned about a final civil judgement that « contains fundamental error of law » ? However, it is clear that the above cited provisions on the hearing of final judgements by way of cassation are applicable to final judgements in civil cases as well.

It is also important to note the period within which an application for a hearing by way of cassation by the special chilot of the Supreme court. It can be made.

... within six months from the date on which the decision protested is rendered. The Court may not be bound by the time limit set forth herein where there are special reasons and where the application is beneficial to a defendant sentenced to a term of imprisonment.⁷

As already pointed out above, the rectification of a final judgement in civil cases that contains « fundamental error of law » without a mechanism that could bring about its realization would, to a large extent, remain academic. This would be the case, since individual parties to such a case would not, for obvious reasons, worry themselves to see to it that such « fundamental error of law » is rectified unless they find it expedient. Neither should the concerned state officials be mechanically duty minded so as to rectify « fundamental error of law » contained in any final court judgement if it is known that the parties will not take advantage of such rectification. This does not, however, help us to fully resolve what the role of the parties to a final judgement that contains « fundamental error of law » should be.

Neither does it help us to understand why the Supreme court is empowered with this extraordinary power of review of judgements and why the duty to put this power into motion is imposed upon the Procurator General and the President of the Supreme Court.

It thus becomes necessary to examine those objectives and powers and duties of the supreme court and the procuratorial office that could help us see if either or both state organs have objectives or powers and duties such that the non-rectification of final judgements in civil and criminal cases that contain « fundamental error of law » become detrimental to the attainment of such objectives or to the discharge of such duties. Both state organs could also have objectives or powers and duties that the attainment of such objectives or the discharge of such duties require the rectification of final judgements in civil and criminal cases that « contain fundamental error of law. » In the absence of such objectives and powers and duties that necessitate the rectification of such final judgements so as to, at least, enable courts learn from their errors; we will have no alternative but to leave their rectification to the entire discretion of the parties to such final judgements except those where the procuratorial office is represented as one of the parties. Let us, therefore, examine those objectives and powers and duties of these two state organs that could help us see if both or either of them have such objectives or powers and duties.

The procuratorial office has, among others, the following objectives :

to ensure that laws, regulations orders and directives of the people's Democratic Republic of Ethiopia are correctly and uniformly applied in all places ; to protect the rights and freedoms of citizens guaranteed by the constitution and other laws. . . .⁸

As regards powers and duties the procuratorial office is, among others empowered to :

supervise over the observance and correct application of the Constitution, other laws, regulations and directives by ministries, other organs of government, production, distribution and service rendering

enterprises, cooperatives, regional executive organs, officials thereof as well as individuals so as to ensure socialist legality.⁹

The Supreme Court, on the other hand, has, among others, the following objectives:

to safeguard the legally guaranteed rights, interests and freedoms of individuals; to strengthen the maintenance of law and order and the observance of socialist legality.¹⁰

When it comes to powers and duties, the Supreme Court in its plenum has; among others, the powers and duties to:

issue directives to the courts with the view to improving the administration of justice and ensuring the uniform application of laws¹¹

It can be noted from the above that both the Supreme Court and the Procuracy have the powers and duties of ensuring the correct and uniform application of laws.

Ensuring the correct and uniform application of laws, regulations and directives in all places in Ethiopia requires the working of all state organs, including obviously, the courts, mass organizations, enterprises engaged in production, distribution and rendition of services, and other institutions in the country in strict observance of the country's laws that are relevant for the proper discharge of their duties.

In other words, in order for there to be a uniform application of laws, regulations, orders and directives throughout the country, all state organs, mass organizations and all other institutions in the country must exercise their powers and duties in accordance with the law. This means that similar sets of occurrences should, by being governed by similar decisions, be treated in similar ways; irrespective of the individuals empowered to render decisions and irrespective of the individuals affected or expected to be affected by the decisions. Such decisions that need to be made in accordance with the law ensuring its correct and uniform application include, among others:

- a) administrative decisions that must be made to grant a license to trade, to delimit areas of economic activities that are to be left to the private sector, to decide salaries that must be paid for similar posts, and the like; and
- b) judicial decisions that must be made to redress wrongs suffered by individuals, to hold persons accused of crimes guilty, to arrive at penalties appropriate for crimes committed by persons found guilty of such crimes, and the like.

That Courts conduct trials to arrive at final decisions is obvious. That there are laws that govern the conducting of trials of both civil and criminal cases is

equally obvious. Thus, courts also must conduct trials in civil and criminal case- such that the whole judicial process is based on the correct and uniform application of the relevant laws. What the parties to any case would be interested in is, however, in the uniform and correct application of the law by the courts in their final decisions that dispose of a given case. So long as final decisions of courts are based on the correct and uniform application of the law; parties will not bother themselves as to whether or not courts conducted trials by applying the relevant laws correctly and uniformly. If there is to be correct and uniform application of laws by state organs under supervision for its realization; there is no reason why the application of laws by the courts during the trial of civil and criminal cases should be an exception. The above cited powers and duties of the plenum of the Supreme court are thus, as can be clearly seen from its reading, intended to exactly achieve this. In other words, ensuring the correct and uniform application of laws by courts during the whole judicial process is not the duty of the procuratorial office. It is one of the duties of the plenum of the Supreme Court.

As can be inferred from the above cited powers and duties of the procuracy, socialist legality cannot mean anything else than strict observance and correct and uniform application of the country's laws by everyone expected to play any role, be it as an interacting member of the society or as an official entrusted with the rendition of decisions, so that legal norms will be effectively implemented.

Ensuring the correct and uniform application of the laws of the country, thereby achieving socialist legality, is thus one of the objectives and powers and duties of the two state organs mentioned just above. It must, however, be noted that the duty of the plenum of the Supreme Court of ensuring the correct and uniform application of the laws of the country by overseeing the discharge of functions of state organs is limited to the courts. The procuracy's duty of ensuring correct and uniform application of laws by state organs,¹² on the other hand, does not include supervision over the judicial activities of courts. That the Supreme Court in plenum can also ensure the uniform and correct application of laws, when it is so requested by the Procurator General under his protest or when the president of the Supreme Court so decides, cannot be doubted. However, ensuring the uniform and correct application of laws by lower court in the discharge of their judicial function is viewed by the legislator as one of the duties of the Supreme Court in plenum which it must perform irrespective of any appeal made to it by any party to a case. This becomes true since parties to any case, be it civil or criminal, would resort to their legal rights of appeals only as regards the final decision of lower courts. A protest by the Procurator General or a decision by the president of the Supreme Court equally applies only to final decisions of lower courts as well as the Supreme Court.

It being provided that the President or one of the Vice Presidents should participate in the plenum of the Supreme Court,¹³ the hearing of final judgements by the Supreme Court by way of cassation could be viewed as a mechanism at the disposal of the plenum that would facilitate the discharge of its above stated duty. However, it could equally be argued that uniform and correct application of laws by Courts in their final judgements is the duty of the procuracy. It can be argued that the Supreme court's duty, as regards final judgements of lower courts, is to strengthen socialist legality after its attention has been drawn by the procurator General or the accused person in criminal cases and by either of the parts in civil cases, to the existence of final court judgements that «contain fundamental errors of law». If the hearing of final judgements by way of cassation is viewed thus (a view that would be fully based on the justifiable ground that amendment of judgements would make sense if, and only if, at least one of the parties is willing to take advantage of such an amendment), it follows that the plenum of the Supreme court does not have the duty to review final court judgments by way of cassation unless, at least, one of the parties to any final judgement, be it by a protest or a petition, indicates its interest in a review of such a judgement.

It must, however, be recalled that even as regards the rectification of final court judgements that « contain fundamental error of law», all the party that shows interest in their review can do is to appeal to the sense of socialist legality of the plenum of the Supreme Court, so as to ensure socialist legality by the courts in their final judgements. The same holds true, in the case of normal appeals as well. Thus, the Procurator General may not, as indeed no other party may do, render decision the way he sees it fit for the realization of socialist legality and demand its implementation. The plenum of the Supreme Court is, on the other hand, legally empowered, like any court, to replace the final judgement of any court, including the Supreme Court, by its judgement and demand its execution. It should thus follow that the plenum of the Supreme Court has the power and duty to quash final court judgements even in criminal cases that, in its view, «contain fundamental error of law» and replace them by its judgements on the basis of a decision of the president of the Supreme Court for their review even in cases where the Procurator General objects. The view of the parties, including that of the Procurator General, as to whether or not a given final judgement «contains fundamental error of law» is, except for its usual power of persuasion, irrelevant as regards the final disposition of the final judgement under review.

That hearing of final court judgements by way of cassation would, on the other hand, serve the Supreme Court in the discharge of its function of ensuring the uniform application of laws by lower courts could not be doubted. This becomes true for the simple reason that this mechanism would, as indeed do normal appeals, enable it to realize its above mentioned function. It would thus be reasonable to expect that the Supreme Court in plenum will, irrespective of the wishes and expectations of the parties to any final judgement, review any final judgement so as to improve the administration of justice by ensuring the

uniform application of laws. It would thus be wrong, it seems reasonable to state, to view the hearing of final judgements by the plenum of the Supreme Court by way of cassation as another right of appeal granted to anyone of the parties to a final judgement of a court, be it civil or criminal.

It could, however, be persuasively argued that examining the judgements of lower courts to ensure the « correct and uniform application of laws» does not inevitably entail revision of final judgements as is needed in cases where the final judgements « contain fundamental error of law» and at least one of the parties shows interest in their revision by way of cassation. The plenum of the Supreme court can thus issue directives to lower courts on how they should apply the law so as to ensure its uniform application after examining their final judgements that « contain fundamental error of law», it can convincingly be argued, without necessarily rendering its judgement on the case. If, at least one of the parties to a final court judgement shows his interest in its review by way of cassation, the argument would go on, the plenum of the Supreme court would examine the final judgement by way of cassation.

That the plenum of the Supreme court must examine those final judgements on which the parties have exhausted their right of appeal as well, so as to effectively discharge its duty of ensuring uniform application of the law by the court must, however, be noted. It follows that the plenum of the Supreme court must, to teach all other divisions of the supreme court and lower courts so that they may not commit similar « fundamental error of law» in the future, check their final judgements as well. Should it, however, resort to rendering its judgement on those final judgements of lower courts that « contain fundamental error of law»; or would it be enough if it were to notify such lower courts on such errors in its directives?

To answer this, it becomes necessary to raise the question: What rationale, if any, could there be that must have forced the legislature to impose the duty of ensuring strict and uniform application of the country's laws by all organs of state, mass organizations, enterprises engaged in production and distribution of goods and in the rendition of services and by private persons? To answer this question, a brief examination of the guiding principle of socialist societies and societies that follow the socialist path of development becomes necessary.

The guiding principle in such societies is socialism. Their aspiration is to bring about an accelerated societal development by guiding their development in accordance with the tenets of socialism. Thus, societies that have attained the societal stage of development of socialism guide their development to attain the communist stage of societal development in a planned manner. Likewise pre-capitalist societies that opt for the socialist path of development guide their development programmatically to attain the socialist stage of societal development, by overpassing other stages, including capitalism; as the history of development of the developed countries in Europe shows.

Under the tenets of scientific socialism, societies can attain higher stages of societal development provided the appropriate guidance is exercised by a state that is guided in accordance with scientific socialism. Once such a state comes into existence, development of the level of consciousness of the individual members of such a society and its economic development so that it attains the desired stage of societal development in as short a period as possible, calls for strict compliance with the rules of conduct of societal interaction designed in accordance with socialism. In other words, designing rules of societal interaction that would accelerate the attainment of the aspired stage of development is indispensable. Such rules of societal interaction, it seems obvious to state, must be rules of societal interaction that are adhered to by all the members of such societies, if the development aspired at is to be realized. That this, in turn, would call for the strict and uniform application of norms of societal interaction sanctioned by law either positively or negatively so that socialist legality will be insured seems to be clear. A mechanism that would ensure the realization of socialist legality in the administration of justice so that state officials intervene and remedy the illegality of final court judgements that may not be « disturbed » in accordance with the legal system of capitalist societies, and societies that follow the capitalist path of development, becomes necessary.

That law is considered as one of the instruments of the State for the aspired stage of societal development in such societies can be seen from the role that law is expected to play in the Soviet Union. This is what is termed as the heuristic function of law, which is the educational role that a legal system plays by making people learn the norms of societal interactions expected of them, so that law can contribute its share to the achievement of the stage of societal development that is aspired for.¹⁴ If law is to perform such a function, mechanisms that would, to the extent possible, ensure its strict and uniform application must be devised.

If the functioning of such mechanisms were to be left to private individuals, they may not, as already noted above, ensure their strict operation so as to bring about the strict and uniform application of laws. One can, it seems reasonable to state as regards this point, draw an analogy on the division of crimes into complaint crimes and serious crimes. Complaint crimes, it is believed, affect mainly private interests of individuals who are the victims of such crimes. This being the case, prosecution and punishment of criminals who commit such crimes is left up to the discretion of private individuals who are the victims of such crimes; serious crimes being, on the other hand, conceived as crimes that affect not only the individuals who are immediate victims of such crimes but mainly society at large, the prosecution and punishment of such criminals is usually entrusted to a state organ; the office of the prosecutor. This is for the reason that societies must prevent the commission of crimes by ensuring law and order which is a *sine qua non* for positive societal

interaction. However, if, despite this attempt, crimes are committed, the perpetrators of serious crimes must, it is believed, be punished by society at least for purposes of deterrence. To leave the punishment of the perpetrators to the discretion of the immediate victims of serious crimes could amount to jeopardizing the overall societal interest of prevention of the commission of such crimes in the future by giving a lesson to would be perpetrators of such crimes in the future. This becomes true since the immediate victims of such serious crimes may, for a variety of reasons such as getting the appropriate redress for their mishap, find it expedient to leave perpetrators of such crimes unpunished.

It can be stated that, once their premise on the prerequisite for societal development is accepted, socialist societies and societies that follow the socialist path of development must, to realize the maximum contribution from their legal systems for their aspired development, entrust the strict functioning of mechanisms such as the hearing of final judgements by way of cassation to the care of state officials. After all, that their hearing will, to the extent that errors of law are rectified by it, contribute to the ensuring of strict and uniform application of laws cannot be doubted.

It must, however, be noted that as always happens in reasonings by analogy, the rectifying of a « fundamental error of law » in a final judgement in a civil case, where the rectification brings about more benefits to one of the parties, may not be fully realized unless the party so favoured decides to execute the rectified final judgement. This does not, however, mean that such final judgements need not be rectified. This is because rectification of « fundamental error of law » in final judgements would enhance the discharge of one of the duties of the plenum of the Supreme Court already cited above; i.e. the issuance of « directives to the courts with the view to improving the administration of justice and ensuring the uniform application of laws » in the discharge of their judicial duties.

However, the argument that examining the judgements of lower courts to see if laws are uniformly applied does not necessarily entail revising these judgements to the extent that they « contain fundamental error of law ». A question as to whether the plenum of the Supreme Court can issue directives to lower courts instructing them on how they should have applied the law could, as already noted above, be raised. It thus becomes essential to concede the role of initiation by at least one of the parties to a final court judgement and a display of interest that the party requesting for its revision will demand execution of the revised judgement of the plenum of the Supreme Court, should the party requesting revision by way of cassation find the revised judgement of the plenum of the Supreme court more advantageous. The plenum of the Supreme Court may not demand anything more than this form the party that requests revision of a final judgement of any lower court, including the Supreme Court. This becomes justifiable for the main reason that

the plenum would, even in the absence of interest shown by a party to any final court judgement, examine such judgement so as to be able to discharge one of its duties, already cited, i.e.:

to issue directives to the courts with the view to improving the administration of justice and ensuring the uniform application of laws.¹⁵

The duty of ensuring uniform application by the courts in the discharge of their judicial function being that of the Supreme Court, it becomes essential to raise the question as to what meaning should be attached to one of the powers and duties of the procuracy, which is:

to follow up the legality of decisions or orders of the courts. ¹⁶

The following points must be taken into consideration when attempting to resolve this question. One of these points is, as already noted above, the mechanism made available to the procuracy to ensure correct and uniform application of laws. This is to appeal to the sense of duty of higher courts to annul those judgements, orders and decisions of lower courts that are not rendered in accordance with the law. Thus, that it is the higher courts, in general, and the plenum of the Supreme Court, in particular, that ensure the realization of socialist legality by quashing judgements, orders and decisions of lower courts that are not rendered in accordance with the law seems to be clear.

The second point that must be kept in mind, as again already noted above, is that the judicial system in socialist societies and in societies that follow the socialist path of development is such that it cannot be performed if the plenum of the Supreme court is « dormant » that needs to be « awakened » by either of the parties to a given case so as to examine such a case to ensure socialist legality. Enhancement of the role that law is expected to play under socialism demands that the plenum of the Supreme Court discharge its share of duty of ensuring socialist legality. This demands that the plenum examine judgements of lower courts, without the need for any complaint from the parties to court judgements, so as to issue appropriate directives to lower courts.

That the president of the Supreme court will be responsible to bring to the attention of the Supreme Court judgements that are not based on the uniform application of the law to enable the plenum issue appropriate directives is clear. That this task would include final court judgements as well as equally clear. Compared to the procurator General who will have access to final court judgements only in criminal cases, the president of the Supreme Court is the most appropriate official to decide which final court judgements should be rectified by the plenum of the Supreme Court because they « contain fundamental error of law. » This becomes true since the discharge of this duty of his is incidental to the main duty of the plenum of the Supreme Court of ensuring the uniform application of laws by lower courts.

On the other hand, it must be noted that the procuratorial office is in no position to be even aware of the existence of decisions and orders made by

courts in civil cases in the discharge of their judicial activities to arrive at a final decision that disposes of a case. Moreover, the plenum of the Supreme Court must, as already noted above, examine all orders and decisions rendered by lower courts while performing their judicial activities so as to ensure uniform application of the law by lower courts, including the Supreme Court. It thus seems to follow that the power and duty of follow-up of the legality of decisions and orders of lower courts being implicit in the discharge of its duty of issuing « directives to the courts, with the view to improving the administration of justice and ensuring the uniform application of laws», it should be left to the Supreme Court. This becomes all the more reasonable when we recall that all the procuracy can do is appeal to the sense of legality of other judges in higher courts.

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1. Art. 4/4/ of the Supreme Court Establishment Proclamation No. 9 (Proclamations indicated by such members are those of 1987 unless otherwise expressed Editor.)
2. An Amharic term that means a division of a court at any level within the hierarchy of courts. But here it means the Plenum of the Supreme Court.
3. Art. 20 of the same Proclamation.
4. Art. 5/1 of the same Proclamation.
5. See the Procuratorial office Establishment Proclamation
6. See Art. 10 of the same Proclamation.
7. Art. 5/2/ of the Proclamation cited above at note 1.
8. See Art. 4 of the Proclamation cited above at note 5.
9. See Art. 10/1/ of the Proclamation cited above at note 5.
10. See Art. 3 of the Proclamation cited above at note 1.
11. See Art. 22/2/ of the Proclamation cited above at note 1.
12. That there are other state organs the supervision of whose activities to ensure socialist legality is outside the Procuracy's jurisdiction should be noted. An obvious example is the Council of State.
13. See above at note 3.
14. For a discussion on the heuristic function of law, see James L. Hildebrand, *The Sociology of Soviet Law* (New York, 1972), pp. 71-111.
15. For the same duty of the Supreme Court in the Soviet Union, see P.Ia. Trubnikov, "Review of Decisions Through Judicial Supervision," *Soviet Law And Government* (vol. 9, No.2), pp. 188-204 and V.V. Kulikov, "The Supreme Court of the USSR-The Highest Link In The Soviet Judicial System," *Soviet Law And Government* (Vol. 17, No.2), pp. 57-74.
16. See Art. 13 of the Proclamation cited above at note 3.