Fee-Shifting Under the Ethiopian Civil Procedure Law

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Abstract
This article depicts an aspect of cost jurisprudence called fee-shifting. Fee-shifting is an arrangement of awarding the winner party for his cost by the loser in the civil court case and has two model rules at international level: the English two ways rule model and the American one way rule model. In deed to which of the two models our legal system adheres is not clear. Two of the fee-shifting models do have their own rationale and bases of cost determination. Still, however, our cost jurisprudence is not clear in addressing cost allocation rationale and standards of assessment. Hence in this article an ephemeral review on fee-shifting conceptual frameworks has been made and against these backdrop, an appraisal of cost law of Ethiopia has been done. As a descriptive-doctrinal approach, it attempts to define fee and fee shifting, explore and analyze the laws/questions in order to illuminate the stance taken by Ethiopian law in relation to the fee shifting model and explore the circumstances and bases of cost award that the law shall consider at practical level. It also explores several main rationales and critical evaluation of rationales of fee shifting as an intellectual effort to contribute for Ethiopian judges, practitioners, legislators and academics as they may apply fee shifting. The major law related problems are identified and described. And it is found out that the laws are not clear to consign it in either of two models. The bases of cost assessments are not laid down and rationales are found to be very conflicting and confusing that brings about practical variation in the court practice. Thus, the author recommends legislative resolution shall be given.

INTRODUCTION
This article is meant to discuss an aspect of economic framework of civil litigation referred to as fee-shifting. The rule refers to the system of awarding the winner party for his cost by the loser in the civil litigation. It is an aspect of cost law which refers to the rules that determine who shall bear the costs of civil litigation before courts of law. It is also referred as the economic framework of allocating the private costs of civil litigation. It is thus an aspect of cost law in the civil litigation under the civil procedure law of Ethiopia too. Indeed there is no literal reference to fee-shifting than metaphoric in the Ethiopian civil procedure. Plus in the Ethiopian civil procedure law clear standards and policy rationales are not set.

In the Ethiopian civil litigation process, the practice of cost allocation is unbridled and has been a source of confusion between practicing lawyers. The heterogenous and un-harmonized nature of the

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1 Kathryn E. Spier, Pretrial bargaining and fee shifting mechanisms: A Theoretical Foundation for Rule 68, (Harvard University press, ISSN-1945-6333). This discussion paper shows that fee-shifting is the rule of allocating private cost in the civil litigation, pp 1.

2 In the Ethiopian civil procedure law fee-shifting is said to be otherwise addressed in the provisions dealing with cost(462-466). According to these provisions fee shifting may be understood and treated one time as a rule and another time as not a rule. This is because the principle under article 462 mandated it courts discretion whilst the standards for doing and not doing are not set. There is no obligatory rule that obliges a judge to order for the payment of costs to the winner. On the other hand, however, the judge may not be praised for doing justice unless he runs decision that refers the loser to pay costs that the winner has incurred because of litigation. Article 462 stated as: Unless otherwise expressly provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.
bench practice is not without predicament on the cost jurisprudence of the country. And hence as an effort to articulate and/or explore the Ethiopian cost jurisprudence and associated problems, this article is made to answer questions such as: What is fee and fee shifting in the civil litigation? Why and how is fee shifting made? What model rules do exist in the fee shifting practice? What are the standard rules to shifting the costs of the creditor to the judgment debtor? How is fee shifting treated under the Ethiopian legal system? what problems do exist in our law and to which model rule of fee-shifting may ours be more associated?

The economic framework of civil litigation referred as “the cost and fee system” or “cost law”- “cost and fee jurisprudence” basically covers three aspects: the way in which court fees are calculated and charged, the way in which advocate fees and disbursements are financed through the course of litigation and lastly the way in which costs are ultimately allocated between litigants through cost award- fee shifting. Under the realm of cost law fee shifting is critical and shows practical variation in the legal practice of different countries worldwide. It also has contributed for the coming into birth of two models: the English two-ways rule and the American one way rule models.

In some countries the two ways conventional English rule applies while others apply one way American model with different fee shifting rationales. The first follows the rule “cost follows the event” on the bases of which the winner is compensated for the vindication of his position whilst the second tends to want affirmative justifications to support fee shifting or at least treat differently advocate fee and other costs.

Whereas Ethiopian cost law remains exceptional and fallen short in that it lefts the discretion only to the court whilst there is no guiding rules for cost assessment. Further courts in Ethiopia experienced heterogeneous fee shifting practice. And the courts choice of policy for requiring or not requiring the losing litigants to pay winners’ legal fee and the sorts of reasons while doing and not doing, are not clear. Further it has come to be unpredictable for parties including for advocates.

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6 Clarity in fact has its own message. It shows us that there is no standard. When private litigant has the information about the trial outcome, it provides powerful incentive for settlement. See Kathryn E. Spier on pretrial bargaining mechanisms: a theoretical foundation for rule 68 (ISSN) pp 01.
7 The cost law of Ethiopia in general and book VII of the civil procedure code in particular declares “courts discretion as to costs: including whether costs are payable by one party to another; about the amount of those costs, and when they are to be paid, but it doesn’t describe the basis of assessment and circumstances and under what property costs will be paid. It simply stated as:

"Unless otherwise expressly provided, the costs of and incident to all suits shall be in the discretion of the court and the court shall have full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect". From this, it is not clear whether what circumstances are given regard by courts in deciding order to make about costs and whether there are exceptional situations in refusing order for costs. Still the court doesn't have legislations to this effect. The problems considered here fall into three broad categories. First, what are the bases for shifting attorney fees? Second, who is entitled to fee awards, and how is liability to be allocated among different parties? Third, how are fees to be calculated?
As an economic aspect of civil litigation, fee-shifting or otherwise cost allocation practice, however, is believed to have tremendous impact not only between parties but also on the overall court proceeding and practice.

As a descriptive-doctrinal approach, this article attempts to define fee and fee shifting, explore and analyze the laws/questions in order to illuminate the stance taken by Ethiopian law in relation to the fee shifting model and explore the circumstances and bases of cost award that the law shall consider at practical level. It also explores several main rationales and critical evaluation of rationales of fee shifting as an intellectual effort to contribute for Ethiopian judges, practitioners, legislators and academics as they may apply fee shifting.

To this end, section two examines definition accorded to the notion of fee and fee shifting as a subject matter of cost jurisprudence, a brief reason out and overview of fee shifting rationales. The purpose of this section is to show the basic rationales that commonly appear as a justification for fee-shifting and give remark for those shall apply to Ethiopia.

In the third section, the two fundamental models of fee shifting and the implications of the rationales to Ethiopia will be discussed. And last, but not least the Ethiopian approach and the major problems are treated.

2. Fee and Fee-Shifting Defined
2.1. Fee
The word fee has different meaning while used in different forms. It could mean estate, charge, compensation, cost and title to land. However, here the definition that relates to payment to lawyers service and cost of litigation are considered. In fact I can't hit upon definition from cost jurisprudences literatures and hence I used to describe it using dictionaries. Accordingly by the west's encyclopedia of America it is understood to mean "a compensation paid for particular acts, services, or labor, generally those that are performed in the line of official duties or a particular profession." From this we can see that fee is payment in the form of compensation paid in return to professional service such as advocates fee. It is also referred to as; "charge for services, compensation, compensation for labor, compensation for professional service, consideration, cost, disbursement, dues, exactments, expenditure, expense, fare, fixed charge, merces, payment, price, recompense, reward, toll and wage." From this definition fee in the civil litigation process is said to be understood as all category of payments in return to services and includes court fee, advocate fee, payment to witness's cost and all disbursements in the civil litigation process. And hence all costs and payments(expenses that a judgment creditor has incurred because of litigation) are said to be fees. It is thus a sum (which includes all expenses of the judgment creditor) paid or charged

In the face of the reading of such a provision and devoid of standard of assessment and specified conditions either to cost award or refusal in Ethiopian cost law, one would want to ask or inquire about the state of fee shifting, about the circumstances under which the court exercise its discretion to consider or dismiss cost award for succeeding party, and the bases of assessment of cost. Further to which cost award model Ethiopian cost jurisprudence resides may be asked. As practicing lawyer I have good observations here. Some judges do consider the amount of subject matter of the suit while others do consider the stand of the opposite party. Some others do not order fee-award including the advocate fee while other give order but to a very insignificant amount. Still there are also judges who grant you 10% of the subject matter of the suit. And hence its unpredictability has continued varied.

8 West's Encyclopedia of American Law, edition 2, Copyright 2008 the Gale Group, Inc. All rights reserved.
for a service. In our civil procedure code fee is described as cost rather. The civil procedure law considers all expenses that the judgment creditor has spent in the civil litigation as costs. Specifically court fee, advocate fee, witness allowance and other related expenses in relation to civil litigation are all considered to be costs. And hence court fee, advocate fee and other disbursements are in general said to be costs.

2.2. Fee- Shifting
Fee-shifting refers to the allocation of costs of litigation to a party; usually by the unsuccessful party to the successful party-judgment debtor to the judgment creditor. And hence it is mode of cost allocation in the civil litigation. Cost allocation is a method to determine the cost of services provided to users of that service. The basic elements of costs (which are subject of allocation) in every litigation system include: charges for the use of court, and its personnel- court fee, evidential costs for witnesses and experts, and lawyers' fees.
Hence fee shifting implies the act of awarding a successful litigant an amount to compensate him or her for costs he/she has incurred. What is going to be shifted is very clear in that the costs said to be borne by the successful party because of litigation. This includes court fee, advocate fee and other costs borne at time and because of litigation. And hence the word compensation sometimes may not be appropriate in fee shifting, for it may show beyond covering of the actual cost, i.e., beyond making the successful party whole. Fee shifting thus implies the shifting of three aspects of litigation costs.
While the amount to be shifted indicates the attorney fee only it is referred as attorney fee shifting. Attorney fee-shifting is a payment arrangement provision whereby the losing party of a lawsuit pays attorney fees for the prevailing party. When the judgment debtor is obliged to cover the costs of judgment creditor including the attorney fee it is referred as fee-shifting. And hence it amounts to the action of awarding legal costs (of a court) to the successful party in a lawsuit (the losing party has to pay the winning party's legal fees as well as his/her own). In fact the term is not clearly referred to in our civil procedure code and is inferred only indirectly from article 463(1).

3. The Basic Fee- Shifting Rule: to shift not to shift dichotomy?
In looking at cost and fee allocation in the civil procedure, the first question must be which of the parties has to bear which kinds of litigation expenses. Two of the fundamental model rules at international level are: the English two way rule and the American one way rule. This depends primarily on the basic rules about cost shifting. Yet, one must also consider the many exceptions and modifications to which these basic rules are often subject. Beyond that, we will look at the avowed policies that underlie the various cost distribution regimes.
Underlying the question “to shift and not to shift” lays the fee shifting dichotomy: system that shifts the winner's litigation costs to the loser “the English rule”, and the system that makes each side bears its own costs "the American rule". The dichotomy, in fact, is not watertight and virtually useful.

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11 See book VII of the Ethiopian Civil Procedure Code as titled Costs.
12 And it is clear that cost in our case refers to fees. Fee shifting is cost allocation in the civil litigation at time of decision. See also article 362- 364 of the Civil Procedure Code.
14 Ibid, See also from http://lawbrain.com/wiki/attorney_fee-shifting.
15 Article 463 (1) reads as: where the court has ordered the unsuccessful party to pay the costs, the successful party shall prepare an itemized bill of costs showing the expenses he has incurred in the suit.
16 This is because the reality and/or actual fee shifting practice is complex in that on the one hand no system makes the winner fully whole, and on the other hand even in USA there exists minor fee shifting practices. See also James R. Maxiener, Cost and fee allocation in civil procedure, University of Baltimore School of law 2010, Germany. James R.
It, indeed, suggests that exclusive part of the legal system adhere to the loser pay principle. And hence fee-shifting is the rule, albeit the amount of cost shifted may be major, partial and minor. Some of the jurisdictions announcing the “loser pays” principle arguably charge the loser for no more than in the United States. The world of cost and fee shifting is much better described as a broad spectrum in that there are systems that shift nearly all of the winners’ litigation, substantial part of the expense and last only few parts of the expenses. Still, however, there is in all the scenario-big and small, one can see that there is fee shifting in the English rule and in Americans rule there is different justification and no fee shifting law.

3.1. The English Two-Ways Rule
This fee shifting approach, though referred as English rule, is adopted and practiced in almost all jurisdictions. And the general position is that the loser pays the costs of the court, evidence, and the lawyer. The rule underlying the English two ways model is “cost follow the event”\(^\text{18}\). Thus in cases that don’t settle and instead proceed to a judgment, generally “cost follows the event so that the successful party is entitled to seek an order that the loser party pay his or her costs”\(^\text{19}\). Should the case settle, then the parties can seek to agree costs, with the general rule that the losing party pays costs. The costs the unsuccessful party is ordered to pay include:
- Fees and charges of the attorney, which may be hourly daily or an agreed sum;
- Disbursement including barriers (counsels’ fees);
- Witness allowances including fee for expert witnesses;
- Lawyers’, success fees” allowable by the court under a valid conditional fee agreement; and
- After the event insurance premium\(^\text{20}\).

The English rule is not without criticism. It has been condemned to hinder access to justice by increasing the risks of litigation, both by setting up the risk of having to pay both parties’ full costs in the event of losing, and by creating incentives for parties to sink ever increasing resources into their respective cases in order to win the action and avoid paying any fees, a strategy that can’t succeed under American rule, thereby increasing the overall cost-risk of litigation.

3.2. The American One-Way Rule
The United States of America is almost alone in maintaining a rule that each side pays their own costs, save where one-way cost shifting has been expressly provided by congress under a range of statues that encourage private enforcement\(^\text{21}\). The American Rule does not allow a prevailing litigant to recover an attorney fee from the losing litigant. Expressing its uniqueness and nature of the model, Thomas D. Rowe stated as: “with its general rule that each side in the civil litigation has ultimate responsibility for its own lawyer’s fees and that the system will not require the loser to pay anything

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\(^\text{17}\) Christopher Hodges and Stefan Vogenauer, Findings of a major comparative study on litigation funding and costs, University of Oxford, 2010, p 4. It can also be accessed at www.fljs.org.

\(^\text{18}\) Supra note 15, p 3


\(^\text{20}\) The English Civil Procedure Rules 1998(CPR) define costs in rule 43.2 as follows: “Costs includes fees, charges, disbursements, expenses, remunerations, reimbursement allowed to a litigant in person under rule 48.6, any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track.

\(^\text{21}\) Supra note 18, p, 654
towards the winners representation, this country (United States), stands in a small, minority among the industrialized democracies.  

By the model, thus legal fees may be sought only if the parties agree by contract before the litigation, or some special act or statute allows the successful party to seek such fees. Otherwise the rule is that each party shall cover the litigation cost of his position. And often the United States is almost alone in maintaining a rule that each side pays their own costs, save where one-way cost shifting has been expressly provided by congress under a range of statutes that encourage private enforcement.

The rule is justified by the right of access to justice. But it has been suggested that the American rule contributes to making the US a litigious society. Individuals have little to lose beyond filing fees and a retainer to start a lawsuit, and they are not at risk of having to pay their opponents fees if they lose.

3.3. Fee Shifting Rationales- Policies

In the above section, an attempt is made to describe the two models of fee shifting. This two models can be taken as policy rationales of their own. Thus in this section an attempt is made to justify the rationales of fee shifting.

Fee shifting reflects certain underlying procedural policies. However, the policy reasons of fee-shifting are not, most of a time clearly articulated in literature but still the underlying policies could be presented to include: fairness, incentive and defacto encouragement of access to justice, punitive, indemnity and encouragement of settlement.

These underlying policies stated above can roughly be divided into two categories: consideration of fundamental fairness to the winner (the English rule) and instrumental (the U.S.A. model) goals of encouraging or discouraging litigation. Of course, these policies are not mutually exclusive, and in fact, most systems covered here appear to pursue a mix of them. The United States, however, stands by and large apart in its almost completely instrumentalist position. In fact the discussion may not be limited to the two classifications and hence some other related rationales are also described for the sake of comprehensiveness and clarity.

3.3.1. Basic Fairness and Indemnity

As we have seen, the vast majority of systems embrace the loser-pays principle. In most of them, this principle reflects primarily an idea of basic fairness in the sense of substantive right: it seems just that the loser must compensate the winner. Awarding fee is not to punish a losing party but to indemnify for the winner. It arises from the idea that justice requires that the losers pay winners’ counsel fees. The amount of fee is to the extent of actual expense of the winner- as the principle of indemnity implies. The rationale is very clear in that the prevailing party should not suffer financially for having to prove the justice of his position. In fact the losing party’s justifiable and reasonable claim pressing a strong but ultimately unsuccessful claim or defense may pose critics on such rationalization. Still, however, by making the amount of payment fair the critics will be reduced.

3.3.2. Instrumentalist Considerations

Most jurisdictions covered here also base their cost shifting rules on instrumentalist grounds: these rules are meant to provide incentives for potential litigants to behave in a particular manner. Here we

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22 Id
23 Supra note 15
24 http://lawbrain.com/wiki/attorney_fee-shifting, America will never have a blanket rule of fee shifting because we're afraid that it would chill citizens' constitutional right to their day in court.

25 Broadly Mathias Riemann categorized the policy rationale in to three: basic fairness, instrumentalist and pure instrumentalist. On the other hand Thomas D. Row of Duke University under his article entitled “the legal theory of attorney fee shifting: a critical overview” (Duke law journal volume 1982:651 pp 652) described that among other things equity and incentives are the two general types of fee-shifting rationales. Indeed in his further clarification of the justification fairness, indemnity, compensation for legal injury, punitive fee shifting and others that are in effect synonymous to Mathias Riemann expression are mentioned.
have to distinguish two categories: discouragement of non-meritorious, and encouragement of meritorious, litigation. In the majority of systems, the loser-pays rule is seen as a means to discourage non-meritorious claims. The underlying logic seems simple enough: since the loser will pay twice (i.e., his or her own as well as the opponent’s costs), someone with a dubious claim will also think twice before taking it to court. Suffice it to mention that a loser-pays rule also encourages parties to sue if they expect to win, and that over optimism in that regard is of course wide spread. In all likelihood, the deterrent effect of the loser pays rule is not primarily due to the parties’ perception of their respective position’s merits. Instead, such deterrence is probably mainly the result of general risk averseness: by doubling the stakes, the loser-pays rule scares off parties who, like most, shy away from high downside-risks. A few systems also see their loser-pays rule as an encouragement of meritorious lawsuits: a party who is right should stand his or her ground even in court without fear of uncompensated litigation costs. To put it differently: access to justice should be free of charge for those with meritorious claims or defenses. Apparently, these systems do not regard litigation as on balance socially undesirable and thus do not wish to discourage it in principle.

3.3.3. Pure Instrumentalism
In all this, the United States stands by and large apart: it is not only, as we have seen, the only system covered here which openly rejects the loser-pays principle: it is also the only system that does not justify its basic rule (that each side bears its own expenses regardless of outcome) on fairness grounds – and it would be hard-pressed do so. It is thus the only country predetermining its basic cost rule purely on instrumentalist grounds. Accordingly fee-shifting shall not work while parties are exercising their constitutional right of access to justice. Parties have two options while bringing the case before court: to won or to lose. In fact it is over the law that litigation has been run and hence the decision of the judge shall not be the reason for the other party to be cover both of the costs. If we do that parties may not appear before court for fear that they may be required to cover cost that usually may exceed the subject matter of the suit. Accordingly declaring cost follows the event is not justified.

3.3.4. Equity and incentives
Equity rationales refers to the sense of justice obtained while the loser, who has been on the wrong track is ordered to pay the costs of the winner following last decision by court. Of course it has litigant incentive criterion and hence both are treated same in this article. As Thomas D. Rowe, stated considerable equitable appeal attaches to the idea of making the successful party whole. The loser may have no good standing while appealing before court and as a result the winner might have suffered legal injury because of the conduct of the loser. He might have acted in not proper manner. And thus fee shifting in such scenarios, making- whole relief, punishing for aggrieved primary party whole has both equity and incentive feature. Still, however, whether the party was not good or not is complex procedure to prove.

3.3.5. Encouragement of settlement
As per such policy rationale the use of cost awards that penalize the party who has refused to accept a reasonable offer of settlement deem to encourage otherwise settlement. The purpose is to provide an

26 Mathias Reimann, Cost and fee allocation in the civil procedure, University of Michigan law school, Ann Arbor, Mi, USA, p 207
27 Ibid
28 Ibid
29 Ibid
30 Ibid
31 Kathryn E. Spier, Pretrial bargaining and fee shifting mechanisms: a theoretical foundation for rule 68 Harvard University press(ISSN-1945-6333). This paper shows that fee-shifting rule provides powerful incentives for settlement when the litigants possess private information about the trial’s outcome.
incentive to parties to make offers that reflect a reasonable element of compromise, and to motivate parties to reconsider their settlement positions as litigation moves forward. Accordingly the party who refused settlement and is won at decision will suffer to cover the cost of the winning party. Further the party who has been requesting for settlement will not be required to cover the cost of the opposite party provided he was requesting the winning party for settlement. In fact the time to request shall matter. And request to settle shall begin at the earliest possible time. When we see our civil procedure in this regard it is not clear whether it has included such rationality or not. In fact, though, there is any no reference whether the court can /can't give an order of payment against a party refused the offer of settlement, it doesn't mean that the civil procedure law doesn't encourage settlement by parties. This is because from article 274-280, parties are given full regard of their right to settle their case through settlement.

3.3.6. Discouraging nuisance litigation and prevention of frivolous suits-punitive rationales
A party shall not bring a claim before court frolicsome and annoyance suits that only address bad message to the litigants. And hence if the party who brings such suit is not made to cover at list the cost of litigation it will be against justice. The inclusion of fee shifting has advantages to discourage nuisance and frivolous suits. Courts shall also have a room to give decision which have counter effect on case preparation. It has also impact on qualities. Most civil procedure laws including ours include such a provision.

3.4. The Determination of Cost and Fees, How Much?
Whether a system shifts the winners’ litigation costs to the loser (in whole or in parts) tells only half the story. A realistic picture of what cost shifting means must include the sums at stake. How much money are we actually talking about? Only if we look at that question can we understand the actual impact of cost shifting.

Mathias appreciating that determination of costs and fees has significant role and is the only major part in cost-shifting law to understand fee shifting has remarked as mentioned above. The mode of computation of litigation cost depends on the types of jurisdiction and nature of cost decided to be recovered. Some jurisdictions, for example, use schedule for court fee determination while other use flat fee system which doesn’t relate to the sum in dispute -the amount in controversy. Thus relating to the court fee charging, the computation is made on the bases of predetermined cost.

32 Ibid
33 Article 465(1) reads as: “where in any suit or proceeding, a party objects to claim or defense on the ground that it is, in whole or in part, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and such a claim or defence is subsequently disallowed, abandoned or withdrawn in whole or in part as against the objector, the court may, if it thinks fit and after recording its reason for holding such claim or defence false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence was put forward, of costs by way of compensation up to an amount not exceeding five hundred dollars.
34 Supra note 25 p 208
36 It shall be remarked that court costs, among others, are always shifted to the loser including in USA. The variation exists on the very determining cost: the attorney fee which is fundamental cost element and the mode of computation is very variant. In Ethiopia the position of the law is not clear and most of a time 10% of the subject matter of the suit has been claimed and practically rewarded to advocates.
37 See Mathias Riemann, most jurisdictions determine the court fee under the schedule by amount in controversy while the united states usually charge a flat fee.
schedule\textsuperscript{38} almost in all jurisdictions while it has been made through flat fee system exceptionally in America. Whereas determining attorney fee is very complex and indeed has two basic approaches\textsuperscript{39}: scheduled based and market based determination approach.

The schedule based system relies on the official schedule tied to the amount in controversy. It takes into consideration the monetary value of the subject matter of the case, in fact whether it is valued in terms of money or not doesn't matter. In both there is predetermined amount.

In the later scenario the lawyer fee vary greatly, depending on the mode of charging, location expertise and reputation, case complexity and sometimes the clients’ resources. Thus it is more of subjective and situational which analysis is difficult.

\textbf{3.4.1. Bases of Cost Assessment in Fee-Shifting}

There are about two ways of bases of cost assessment in fee shifting: \textit{standard bases of cost assessment and indemnity bases of cost assessment}. In both of the approaches courts will not allow costs which have been unreasonably incurred or are unreasonable in amount. The details of each of the approaches are discussed as follows.

\textbf{3.4.1.1. Standard Bases of Cost Assessment}

Here costs awarded on the standard bases must be “proportionate to the matters in issue”. On standard basis of assessment, the court will only allow costs which are proportionate to the matters in issue. And costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred, and the court will resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favor of the paying party.

In fact the court while deciding the amount of costs, take factors such as the following into account. These factors/circumstances taken into consideration are based on whether costs were: proportionately and reasonably incurred and proportionate and reasonable in amount.

The other important factors considered includes the conduct of parties (before, as well as during the proceedings, the effort made, if any, before and during the proceedings in order to try to resolve the dispute), the amount or value of any money or property involved, the importance of the matter, the skill, effort, specialized knowledge and responsibility involved, the time spent on the case, the receiving party’s last approved or agreed budget and lastly the place where and the circumstances in which work or any part of it was done. Any doubt as to the costs is resolved in favor of the paying party.

\textbf{3.4.1.2. Indemnity Basis of Cost Assessment}

In this approach whether the cost incurred is reasonably incurred and reasonable in amount is the main and fundamental thing considered. No regard is given to the proportionality of the cost to the subject matter of the suit. And hence the factors fundamentally important are whether the cost of litigation is incurred reasonably or is reasonable in amount. In fact the factors mentioned above are also considered here in deciding the amount of costs. Reasonableness is assessed against “\textit{all the circumstances}” and in particular the seven pillars of wisdom”:

- Conduct of the parties: before as well as during proceedings and efforts made to resolve the dispute

\textsuperscript{38} In our country Ethiopia one can see Regulation No. 177/1945 that determines the court fee arrangement. As per article 215 of the civil procedure code it has been clearly described that one shall pay court fee before presenting his case before court. To this effect the regulation has scheduled the amount of court fee through table.

\textsuperscript{39} While fee-shifting is almost revisited, the constitutes with major impact is attorney fee and not others. And hence the reason for one shift model referred American rule is because the American practiced don’t shift the attorney fee which paramount and huge compared to other costs.
4. Fee-Shifting Under the Ethiopian Civil Procedure Law

In Ethiopia, the fee and cost allocation part of the law “the economic framework of civil litigation” is not exclusively regulated based on the rules of the civil procedure. The court fee, for instance, has been determined based on separate legislation and is based on schedule.\(^40\) and hence the amount of court fee is determined based on the amount of claim. Notwithstanding, as an aspect of cost jurisprudence, fee-shifting is regulated by the provisions in the civil procedure code. It is in particular, found enshrined in chapter one of book VII of the code, 1965. A critical exploration of the code does reveal that there is no clear definition provided for the term fee shifting. And as discussed above it is found referred to otherwise; the principle of cost determination including fee shifting is said to be made under the court discretion.\(^41\)

May stand exceptional, fee shifting is not a rule in Ethiopia. Nor American one way rule is adopted. The civil procedure law under book VII chapter one stated that the cost and incident of all suits are under the court discretion. But whether the court allocates costs to the winner as a rule is not clearly stipulated. Being civil law country, however, the rules shall describe the policies under which courts are made in discretion to exercise against.

Further the reasons for courts to order the unsuccessful party to pay the costs of the winner are not set in the law. It simply stated under article 463(1) as “when the court ordered the unsuccessful party to pay the costs, the successful party shall prepare an itemized bill of costs showing the expenses he has incurred in the suit.”

And hence what the expense constitute is not clear plus under what circumstance the court gives order of cost award and under what circumstance it refuses are not known. Whether attorney fee is considered expense to parties and how much the court is going to decide poses difficulty in Ethiopian cost law.

In Ethiopia the cost law is not always clear to deduce and categorize in the two models\(^42\), as discussed above. It is not also clear whether it is exceptional too. The civil procedure code has made the power clearly courts discretion on one hand while on the other side, even for vexatious claims which are considered unfounded, the maximum amount of money to be paid for the successful party is set to be a maximum of 500 dollar. This implies that there is legislative determination and the courts are not at full discretion too.

Furthermore the court practices show variation and there is short of consistent practice to conclude whether Ethiopia follows either of the models. Still, however, the likelihood to adhere the English rule outweighs American rule normatively speaking.\(^43\) Practically speaking it is not conventional to say one

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\(^{40}\) See the 1945 Regulation that determines court fee payment in Ethiopia, Court fee arrangement Regulation No. 177/1945. This regulation was enacted following and on the bases of the proclamation that deem to regulate judgeship services in Ethiopia. Still, however, we don't have any amendment or new court fee payment arrangement after 70 years.

\(^{41}\) Without referring to what it is about the code has made the Ethiopian courts duty bound to determine as to cost of litigation. One of the pertinent provision in this regard is 462 and make a look at of the provision.

\(^{42}\) The English Two Ways Model and the American one way model.

\(^{43}\) See art 463(1) and 465. It shows the possibility for courts to give order that grants the winner for his costs to be covered by the loser.
is better practiced than another and is in between or is exceptional. Indeed it may require to go through empiric assessment to pass decision.

4.1. Major cost jurisprudential tribulations

4.1.1. Unqualified Court Discretion

The civil procedure law under article 263 has made fee shifting under courts discretion. It stated as: 

Unless otherwise expressly provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.

Although such language apparently authorizes the judge to grant or deny the award, this discretion has been judicially encumbered. The court is given full discretion to decide who shall bear the cost of litigation and determine the amount of cost to be paid without law that delimit the list of and set circumstances and standard of payment. The author contends that the court shall have rather (at least) directive that can qualify the circumstances under which they can either reason out their refusal or award the cost. It is author's believe that such unqualified discretion has caused the practical variation/heterogeneity between courts. 

And at least underlying principles on the bases of which court discretion could be exercised should have been reflected in the civil procedure. It also lays further litigation and court burden for the court shall hear and decide on the bill presented by parties. As per the above provision the court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they shall be paid. However, whether the court as a rule may decide the unsuccessful party to pay the costs of the successful party and when may it make a different order is not clearly stipulated. In deciding, circumstances such as conduct of parties and its detail description, whether the party has succeeded on part of its case even if that party has not been wholly successful and admissible, offer made by one party to settle the case the court shall take all in to considerations.

4.1.2. Policy Confusion: indemnity, compensation or fairness or else?

As discussed above, the underlying rationale of fee shifting has tremendous value in shaping the conduct of litigation and for the attainment of justice. Our civil procedure code while ordering on one hand the successful party to prepare itemized bill of cost, for indemnification, it otherwise declared court s to put forward of costs by way of compensation up to an amount not exceeding 500 dollar.

Here whether the underlying policy rationale is indemnity for the successful party, compensation or both or punitive is not clear.

44 This is because courts in Ethiopia are in difference in the cost order decision. Sometimes they appear to order for the payment of costs while for some other time they appear to deny without justified reason.

45 From my experience/observation at ARS East Gojjam Zone between wereda and high court benches there is huge variation in rendering cost order. In most of the cases there is decision that states “parties shall bear their own cost which includes court fee, advocate fee and other expenses such as witness allowance etc. If you see the cassassion division decisions both the regional and federal, we could observe that the American experience seem to be adopted. There is no fee shifting order, but order for parties shall cover their own costs.

46 See article 364(1) of the civil procedure code. It stated that on the filing of the bill, the court shall fix a day for considering the bill and shall summon the parties to appear on such day. And hence there is hearing to be conducted and the court assumes further session to decide on. Indeed the court may order the registrar(cost officer in others experience) to consider the bill and hear the submission pursuant to 364(5). But still final say shall come from the court that demands further time and energy for setting standards and decide on the amount.

47 Civil Procedure code of the empire of Ethiopia (1965) Article364

48 Id, Article 367
The caption of article 365 says compensatory cost and indeed for false or vexatious claims. Under its sub article one, however, it declared that the court has discretion to decide the compensatory cost over vexatious claims. Thus in the episode of similar cases, there is possibility for same court to run different decisions. From this one can see that possible practical variation and differentials party’s treatment could be reflected in vexatious claims. And it may be either on the merit or amount. Thus, three issues remain unsettled: whether compensatory cost shall be awarded for discouraging frivolous suits, whether two parties with frivolous suit could be equally discouraged for their conduct and whether such a payment arrangement is made as punitive, compensatory or else.

Further as one can see article 364(2) the court is given power to reduce itemized bill of the successful party where it believes that it is excessive, or may disallow such cost as in its opinion weren’t necessary for the attainment of justice or for the defending of the right of any party. Besides which of the costs are going to be considered unnecessary for the attainment of justice and which one is necessary are not pretty clear. One’s court and bench consideration of necessary cost may not necessarily be proper by another and hence the tendency of unpredictability of court decision and practical variation shall be underscored. Plus from the language of attainment of justice one could see that fairness rather than instrumental rationality seem to be observed. But it is the essence of the provision to indemnify the successful party for his costs.

The very fact of inclusion of interest rate for costs is another confusion created relating to indemnity rationale of cost award. Indemnity is for actual cost incurred and not more. It is on this point that compensatory rationale differs from indemnity. This is because compensatory rationale has the purpose of making the successful party whole. Further the analyses of fee-shifting based on the margin of victory: on frivolous suit and meritorious suit is not clear too. And hence in general one can conclude that there is policy confusion and the rationales are not clear and standard based.

4.1.3. Practical heterogeneity/Disparity of courts practice/
As practicing lawyer, he able to observe court practices at various level and there exists high degree of practical variations relating to fee-shifting. Sometimes they consider fee shifting and as a result the party won is ordered to pay the successful party costs such as: court fee, advocate fee and other expenses. Some other time the same court that ordered cost award, with no different reason orders no cost allocation to be made. In addition one can also see the federal cassation bench decisions; there is no cost award decision, rather they always order parties to cover their own litigation cost\textsuperscript{49}. In fact one may justify that parties are alleging otherwise for rule of law and ordering one party to cover the cost of another may amount to denying parties their right to inquire another mode of interpretation and access to justice. They are working seeking for best interpretation of law and for the rule of law than their own interests. Still, however, in either of the cases there is cost of litigation.

The variation in the court practice is not in fact without reason. Among others, the absence of separate cost law/rule (a section) that serves as working document/instrument for cost evaluation is the fundamental one. Especially advocate fee determination and determining litigation expenses are found to be difficult. Had it been the fact that cost evaluation techniques are designed (included), practical variation wouldn’t have existed. Or else uniformity would have been attained.

4.1.4. Problems in advocate fee shifting and lack of assessment modalities/techniques
In the civil procedure law the bases of cost assessment for deciding on the advocate fee is not clear. There is no provision that deals with advocate fee shifting and its mode of assessment. Thus, whether the contract between the advocate and the client or the subject matter of the suit is going to be taken in assessing and deciding an advocate fee shifting is not clearly articulated. The advocate code of conduct\textsuperscript{50}, under article 41-44 in fact, has described standards that one shall take in determining

\textsuperscript{49} See volume 1-15 of the Casasion bench decisions. It clearly shows that the bench has been accustomed to the practice of decision giving that award parties to cover their own cost.

\textsuperscript{50} EFDR Federal advocates code of conduct, regulation number 57/1999.
advocate fee with his client. These factors that shall be considered includes: but whether the court uses this conditions while deciding fee shifting order stays with a gap.
The issue, however, is whether the court could consider the subject matter of the suit or the contract, or its own guess in determining cost matters. And hence what are factors that shall be taken into account in deciding the amount of the cost shall be clearly regulated/set.
Relating to court fee, there is no problem for it has been already determined by law, as discussed above. Accordingly the mode of calculation and amount of court fee is determined based on the percentile of the subject matter of the suit.

Concluding Remarks
As it has been discussed in the above sections, the foregoing conclusions are drawn:

- To begin with fee-shifting is a big and critical concept in the cost jurisprudence. It refers to both the cost allocation and determination process in the civil litigation whilst the judgment debtor shall cover the costs of the successful party. It has its own model rules: the American one-way model rule and the English two-way model. These models have policy rationale of (not) requiring the unsuccessful party to cover the costs of the successful party. In determining the amount of fee, there are standard rules that could steer courts practice.
- In Ethiopian civil procedure law, however, the cost law is not clear relating to fee-shifting. Whether fee-shifting is a rule has no definitive answer. The policy rationales and the standards for requiring and not, are not premeditated properly in the way uniformity in the court practice could sustain.
- With the fact in mind major tribulations are identified as lack of comprehensiveness and clarity, failure to include mode and standard bases of cost assessment, policy and practical discrepancy and as unqualified court discretion. To same way the impacts that these problems could cause are highlighted.
- And hence the supreme courts in cooperation/consultation with the legislative bodies shall work on the area to resolve fee shifting and cost jurisprudence problems of the country. In fact while the law is developed it shall strike a chord in that standard setting and policy rationale shall be given special focus.

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51 Ibid