Economic Analysis for Regulating Legal Service Pricing: the Ethiopian Case

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Abstract

This paper evaluates the inter link between law and economics in the legal service industry. By assessing how the legal service price is determined between the client and the advocate, it evaluates the fairness and effectiveness of the existing law governing legal fees in light of the basic economic theories in market regulation. By employing both doctrinal and non-doctrinal legal research methods it, was established that the Ethiopian legal service market on pricing is prone to market failures, and regulation must be in place to avoid the gaps of market inefficiency. The theoretical underpinnings on legal service markets have been found to be strongly substantiated in the practical base and justifications. Finally, it was found that the Ethiopian legal framework on pricing was less regulated than what economics suggested, thereby increasing the risk of market failure.

Keywords: Advocacy service, Legal service pricing, Regulation, Economic analysis

1. Introduction

This part will discuss the research question, the methodology employed and the structure of the paper.
The paper has the following research questions to address:

1. What is the current legal structure governing legal service pricing in Ethiopia?
2. What is the justification for regulating legal service markets on advocate's fee?
3. Assessed from economic perspective, does the existing legal fee structure offer fairness and efficiency?
4. What should be done to fill the gaps in the regulation of legal service pricing?

The research employed a mixed research design where in a doctrinal analysis of primary sources i.e., relevant laws and a case that deals with legal service fees as well as secondary sources of legal and economic literatures on price regulation was

made. To substantiate or refute the findings from the doctrinal approach, a focus group discussion was held with advocates and clients.

The advocates were selected from a list provided by the Ministry of Justice, while clients were randomly selected from among those who have concluded advocacy contracts with the selected advocates. The focus group discussion had six core questions which helped to identify whether the doctrinal analysis finding was supported or refuted from the experience of the principal parties in legal service markets. Six focus group discussions, each involving 6 advocates, were carried out, while four focus group discussions involving 10 clients were held. Accordingly, a total of 36 advocates and 40 clients participated in the focus group discussions.

The groups of advocates and clients were made homogeneous as per the type of practice and the kind of case they had. Yet, heterogeneity of groups was ensured by assigning variety of cases to each group. Accordingly, the six focus groups of advocates was organized as: advocates who work in federal courts, advocates who work in federal and state courts, advocates who represent company clients, advocates who work in groups/law offices, advocates on criminal cases, and advocates who do not appear in court but do consultancy work. Similarly, four client groups were organized to constitute clients with civil cases, clients with criminal cases, company clients, and clients with non-court issues i.e. looking for advocacy service other than litigation (See the attached template of the FGD). The validity and reliability of FGD was controlled by employing care on range, specificity, depth, and personal context.

The following were major points raised by the researcher in line with the research question to help collect relevant data from advocates:

1. What is your general view on legal service pricing?
2. What is your understanding of the current legal service pricing in Ethiopia?
3. How do you evaluate the efficiency of the existing framework from the perspective of the societal welfare?
4. What type of modalities have you used so far, and how do you evaluate the efficiency of your choice?
5. What factors determine the fairness and reasonableness of a legal service fee?

6. What shall be done to rectify the gaps you noticed in legal service pricing in Ethiopia?

The following were major points of discussion raised in line with the research question to help collect relevant data from clients who have bought advocacy services from advocates under study:

1. How do you determine the fee you pay for advocacy service?
2. How do you evaluate the fairness and reasonableness of the fee you have paid for advocacy?
3. What factors should be taken into account when lawyer's fee is determined?
4. Do you think price regulation in legal service is needed? If so, what form shall it take?
5. Do you suggest any improvement to the existing legal framework governing legal service pricing?

Finally, the result is presented following the findings of analysis of the substantive law to enable us appreciate the fact on the ground with theoretical underpinnings on the core research question.

The paper is organized in the following manner. The first part was the introduction with research questions and methods. The second part explains the current legal framework on legal service pricing in Ethiopia. The third part explains how pricing of legal service is done in different legal systems. The next part is devoted to review of the traditional critical legal literature on legal service pricing and modalities. Economic analysis is the fifth part of the paper, whereby the case for regulation as well as the possible effects of different modalities of legal service pricing is discussed. The sixth part of the paper will establish the law economics nexus and evaluate the efficiency of the Ethiopian legal framework on legal service pricing. The case analysis is made in this part. The final part of the work presents the findings of empirical study on core research questions in tabular and discussion form. The last part provides final remarks as conclusions.

2. Legal Service Pricing in Ethiopia

Legal service can simply be defined as the work performed by a lawyer for a client.[51] The Ethiopian law governing advocates defines it as:

> "*Advocacy service means the preparation of contracts, memorandum of associations, documents of amendment or dissolution, of same, or documents to be adduced in court, litigation before courts on behalf of third parties, and includes rendering any legal consultancy services for consideration or without consideration, or for direct or indirect future considerations*." [52]

Accordingly, the broad listing can be narrowed down to three major activities i.e., litigation[53], consultation[54] and document preparation[55]. Although legal service can be provided in the absence of consideration,[56] in most scenarios, it is a contract for consideration. As the theme of this paper is legal service pricing, emphasis shall be given to consideration of advocacy service. The major governing laws of Federal advocates in Ethiopia[57] do not state the issue of legal pricing as a major aim the law

[51] https://dictionary.law.com/Default.aspx?typed=legal%20service&type=1

.https://dictionary.cambridge.org/dictionary/english/legal-services

[52] Federal Courts Advocates Licensing and Registration Proclamation, 2000, Art 2(2), Proclamation No 199, *Federal Negarit Gazeta*, Year 6, No.27. Note that the law prefers to use the term advocacy service than legal service. Yet for the purpose of this paper the two have a similar meaning.

[53] Litigation refers to appearance in courts and quasi court organs like arbitration tribunals and all procedures carried there in.

[54] Consultation may lead to litigation but not necessarily as a client may want a clarification on different legal issues and seek the advice of an advocate

[55] Document preparation is when an advocates renders service of drafting different papers for purpose of making transactions eligible in the eyes of the law and concerned organs of government like contracts, memorandum of associations, due diligence and so on.

[56] Federal Court Advocates Code of Conduct Regulations, 1999, Article 49, Council of Ministers Regulations 57, *Federal Negarit Gazeta*, Year 6, No.1. This Provision makes it mandatory for every advocate to provide at least 50 hours of free legal service in a year. Here the absence of payment/consideration from the client side does not take away the character of the service from being advocacy service.

[57] *Supra* note 2 and 6.

wants to address.[58] Yet provisions on legal service fee are located here and there within the laws.[59]

Advocacy service is a contractual agreement between the advocate and the client.[60] Hence, the general rules of contract law stated in the Civil Code of Ethiopia governing obligations will have an application so long as it is not explicitly stated otherwise by laws governing legal services for reason of special law applicable for special type of professions.[61]

Under the umbrella of the age-old freedom of contract principal parties are left free to determine the object of their contract.[62] Pricing is also a component of this freedom of object.[63]

When a nation declares that it follows a market economy,[64] it further strengthens the freedom of contracting party's doctrine as the hall mark of the market economy that calls for the non-interference of third parties in the market in a multitude of factors, one among being price determination.[65]

Contrary to the above assertion, the advocates market in most jurisdictions is tightly regulated to the extent of determining the pricing of legal services.[66] The major fields of regulation in the legal service include entry restrictions, restrictions on

[58] *Supra* note 6 Art 3, *Supra* note 2 Preamble

[59] *Supra* note 6 Art 4,6,34(7),41,42,43,44,45,46,47,49,57 These are provisions which directly or indirectly discuss legal service pricing.

[60] *Supra* note 6 Art 6 (1)

[61] The part of the Ethiopian civil code entitled obligations i.e. book four discuss contracts in general by setting rules to be applied for all types of contractual relationships. Yet it has a book on specific types of contracts with special rules to apply in book five.

[62] The Civil Code of Ethiopia, Proclamation No.165 of 1960, Art 1711.

[63] Ibid Art 2632 and Art 2610. A combined reading of the two provisions puts price as a quint essential element of contracts of professional services like the one under discussion.

[64] FDRE, Growth and Transformation Plan GTP I, II (2010-2020). Available at http://www.mofed.gov.et. The plan contemplates the role of market economy in achieving the ambitions plans the nation sets in various sectors of the economy.

[65] https://fee.org/articles/the-five-institutions-of-the-market-economy/ Hennery Hazlitt, 2016, The five institutions of market economy

[66] It suffices to surf the experience of most state experiences in the US.

advertising, restriction on fees, and restriction on organizational forms.[67] One can locate these restrictions on the Ethiopian advocacy service legal structure.[68] Leaving the reasons for such restrictions on wide areas aside, this paper will proceed with exploiting whether there are any restrictions in legal service pricing under the Ethiopian system.

Article 42 of Regulation 57/99 states the fee any advocate requires from a client to be fair and reasonable. Although no clear definition is given as to what constitutes fairness and reasonableness, the provision lists factors that need to be considered in determining the amount of fee. The list is not exhaustive but illustrative.[69]

Here is the list of the factors:

1. The time and labour required of the service given to the client;
2. The skill required to perform the service properly, the novelty and difficulty of the case;
3. The likelihood that the particular agreement with a client will preclude the advocate from dealing with other clients' case;
4. The fee customarily charged for similar legal services;
5. The amount of the claim involved and the results obtained;
6. The length of the professional relationship with the client;
7. The experience, reputation and ability of the advocate; and
8. Similar other factors.[70]

The reading of the law calls for a cumulative consideration of all listed factors before reaching in to a fee agreement which is a basis to determine the total amount of

[67] Lauren Bowen (1999) "Advertising and the legal profession", *The justice system journal*, V.18. No.1. p. 43- 54, Gillian K. Hadfield (2008) "Legal barriers to innovation: The growing economic cost of professional control over corporate legal markets" *Stanford law Review*, V.60. No.6. pp. 1689-1732. The first article provides the restrictions on the advertising while the second article goes to state the entry restrictions and organizational form restrictions.

[68] *Supra* note 2, Article 8, 9 and 10 for entry restriction Art 18 for organizational form restriction and Supra note 6 Article 52, 53 for advertising restriction.

[69] *Supra* note 6, Art 42(8) states similar other factors leaving the room open for interpretational chance of employing other factors not listed in the law.

[70] *Supra* note 6 Art 42

money, salary, reimbursement, reserve payment or other mode of payment to be made by the client.[71]

Although the factors that need to be considered in fee fixing are stated, the mode of payment does not have clarity in the Ethiopian legal structure. Article 43(2) states about the method of payment by leaving it open to the parties to determine, while Article 6(1) of the same law states the need to state the amount of fee together with way of computation and mode of payment. This can lead to a safe conclusion that the mode of payment of advocacy service is a matter left for the client and advocate unless the fee is contingent on the amount of money to be obtained from the litigation.[72]

The general legal framework of advocacy service on pricing in Ethiopia is a liberal one in approach as it does not encroach on the pricing or go to tell parties to employ this or that type of modality. This statement is seen in reservation if one looks at the practice of the courts. The Supreme Court of the nation cassation bench has a ruling in a dispute about the fairness or otherwise of a fee agreement whereby it ruled in reducing the agreed sum by employing an argument that it is excessive.[73] Considering the fact that decisions of the bench are to be considered, laws for similar disputes and are binding on courts of all level,[74] one can conclude that the court is empowered to reduce the fee agreed between a client and an advocate on the basis of fairness and reasonability.[75]

[71] *Supra* note 6 Art 43(1)

[72] *Supra* note 6 Art 44(1) (2) states the conditions that need to be taken in to account when employing contingent fees while article 45 prohibits contingent fee agreements in family matters when the contingency is up on securing divorce or alimony or support for child upkeep, property settlement as well as decisions and penalty of criminal cases.

[73] W/o Aster Araya Vs Ato Girma Woyejo, case no.17191, FDRE Supreme Court Cassation Division, 1997 EC.

[74] Federal Courts Reamendment Proclamation,2005,Article 2(1), proclamation No. 454, *Federal Negarit Gazeta* , Year 11,No. 42. Cassation court proclamation and provision

[75] See below Part 6 for a detailed discussion of fairness and reasonableness.

3. Modalities of Legal Service Pricing

In majority of jurisdictions, the criteria for valuing legal services are divided into four categories: time, labour, case value, and result.[76] Time refers to the amount of hours spent by the advocate on the case, while labour refers to the activities the attorney is engaged in, like difficulty of involved issue, and information gathering.[77] Case value is the importance of the case estimated from the amount at stake when the case can be valued with money, while result is a reference to the anticipated and realized goals of the service measured from the client's demands.[78]

These being the cornerstones of price determination in the legal service market, the mode of payment varies from jurisdiction to jurisdiction. An evaluation of most literature in the area reveals the following as the widely used modalities of advocate's fee determination.

3.1 Hourly Billing

Hourly billing arose out of client's frustration by irregularity and arbitrariness of advocates' billing because[79] advocates require clients to pay for the general amount of time which took them or the firm[80] to accomplish the task. This method is credited for being simpler to account, more predictable and comprehensible for the client.[81] Alternative fee arrangements with in the billable hour paradigm have developed through time. The discounted hourly rate, blended hourly rates, billable hour with fee cap, and volume or tier discount could be mentioned in this regard.

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[76] Robert A. (1982), Attorney-client Fee arrangements: Regulation & Review, *ABA Journal*. 68. No3, p285.

[77] Ibid.

[78] Ibid.

[79] Robert L.Haig & Steven R.Caley (1993), "What's a Fair Fee for a Litigator?" *Litigation*, V.20, No.1, p37.

[80] Although the law governing legal service green lights on the functioning of law firms, so far there is no law firm in Ethiopia. Lawyers come together and open offices on mutual terms working under a de facto law firm. A discussion of legal service fee in almost all literature assumes the workings of lawyers with in law firms which can be cited as a limitation to transplant same literature in its entirety to the current Ethiopian context of advocacy service.

[81] *Supra* note 26

Under the discounted hourly rates, depending up on the client at hand, the usual hourly rates may be lowered. This could be to a client who promises to send a large volume of cases to the firm, a loyal client for many years, or a client who cannot afford the firms usual hourly rates.[82]

In a blended hourly rate, the cost of legal service which demands the efforts of different lawyers with in the firm are combined such that all are billed at a certain fixed one blended rate.[83] The clients principal cost concern becomes the overall number of hours, not the distribution of hours among lawyers or different people within the law firm assigned to work on the client's case.[84]

In another version of billable hours, called billable hours with fee cap, the client and the law firm agree that the fee will not exceed a certain amount under any condition.[85]

The rate may also be discounted if the volume of work exceeds a certain sum. Then the client will be entitled to get a reduction on the hourly basis for the extra volume. This is named as volume or tire discount.[86]

3.2 Fixed Fees/Flat Rates

Under this technique, the attorney and client agree at the start of the relationship to a fixed amount to be paid for the entire matter.[87] Unlike the billable hour modality under the flat fee rate, the fee is charged for a defined package of legal service irrespective of the time spent to perform the task.[88] This does not mean though the fees will be determined arbitrarily. The estimate of time involved and the attorney's

[82] David McDowell(), "*Alternative fee arrangements: A Primer*" Available at https://rcdmlaw.com/wp-content/uploads/2014/05/afa.pdf

[83] Ibid.

[84] *Supra* note 29, p38.

[85] Mike Burks & David A. Rueff, (2013) "*Value based legal services*" available at https://www.bakerdonelson.com/files/Uploads/Documents/burks_rueff_reprint.pdf

[86] Ibid.

[87] *Supra* note 29, p 40.

[88] Linda J .Ravdin & Kelly J Capps (1999), "Alternative pricing of legal services in a domestic relations practice: Choices and Ethical considerations*", Family law quarterly*, V.33, No.2, p394.

familiarity with the case developed by doing similar services multiple times can be a starting point for fixing the flat rates.[89]

The flat fee rate can be set either in prospective or retrospective way. Under the former, budgeting based on minimum hourly rate is set to reflect time estimate involved in each phase of the matter, while in the later, identification of prior matters similar to the current case is done via review of past bill record, and fee is set in that context.[90]

Similar to the hourly rates, fixed fees have also different formulations or evolutions. In a unit or task-based pricing, the attorney and client agree upon flat rates for certain phases of the service.[91] In another variation, each phase of the representation will be priced differently, yet at a flat rate.[92]

3.3 Contingent Fee Rates

Under the contingent fee rate method, the attorney receives a specified percentage of the recovery as payment for successful service, hence making compensation dependent on recovery.[93] The attorney's fee is contingent upon the success of the claim, calculated as a certain percentage of the amount recovered.[94] Unlike the hourly billing and flat rates, in many jurisdictions, restrictions are in place as to the types of cases to which contingent fees are applied.[95] Accordingly, contingent fee arrangements generally are not allowed in criminal and domestic relations.[96] The contingency may take a variety of forms,[97] the following three taking the lions share:

a. A lawyer is paid a fixed hourly rate or specified sum based on the number of hours worked, but only if s/he is successful.

[89] *Supra* note 32, p 4.
[90] Ward bewer (2004), Pricing Legal Service, altman will inc, p.11.
[91] Id., p 25.
[92] *Supra* note 38, p 395.
[93] *Supra* note 26, p286.
[94] Eyal Zamir & Ilana Ritov (2011), "Notions of Fairness and Contingent Fees", *Law and contemporary problems*, V. 74.No 2, p.1.
[95] Frank H.Stephen& James H.Love (1999), "Regulation of the Legal Profession", p.1001.
[96] *Supra* note 26, p 286.
[97] Adam Shajnfeld (2010), "A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements" *New York Law school Law Review*, V 54, p .775.

b. A lawyer charges a flat or hourly fee with a bonus accruing to him if he is successful (also called result/success or retrospective fee)[98]
c. A lawyer is paid only a percentage of any recovery obtained from a client.

3.4 Other Types of Modalities

Although the common modalities and their variation is discussed above, it is also worth mentioning other existing modalities. The following paragraphs will briefly discuss these modalities.

Under a 'fee schedule arrangement', state or responsible bodies overlooking the functioning of advocates will be entitled to set a minimum fee schedule, also referred as reasonable fee schedules that will serve as a guideline or, in certain instances, mandatory basis for fee agreement. [99] Accordingly, any fee agreement between a client and an attorney is expected to start at the minimum amount stated in the schedule. A maximum fee schedule or a scale where an advocate is given the liberty to call a price within the scale is also another variation of the fee schedule.[100]

'Retainers' is another mode of payment where a client agrees to pay a flat monthly rate in exchange for the attorney's service of handling all the routine tasks that arise during that month.[101]

A 'combined billing' or 'hybrid billing' modality is in place when the client and advocate agree on two or more types of the different modalities discussed so far in preference to a teaming arrangement.[102]

The traditionally labelled "American rule" term, which states each client to pay the attorney fee, may under some circumstances be an exception where in the loser in

[98] *Supra* note 38, p 397.

[99] Jhon M.Ferren & Allen R. Synder (1972), "Antitrust and Ethical aspects of lawyers minimum fee schedules" *real property, probate and trust journal*,V.7.No.4,p. 727.

[100] Ibid.

[101] *Supra* note 32, p.6.

[102] ABA (1998), "Business and ethics implications of alternative Billing practices: Report on Alternative Billing Arrangements", *The Business Lawyer,* V.54. No.1, p. 187.

litigation pays all or some of the winner's legal service fee.[103] This mode referred as lawyers fee shifting is a widely used one as literature on the topic is enormous.[104] Keeping the argument of treating it as a modality in question, it is a point worth stating in legal service pricing discussion.[105]

4. Literature Review on Evaluation of Fee Modalities

This part presents the general approach employed by scholars regarding the different fee modalities. After a careful evaluation of the literature on pricing of legal services, it can be observed that the majority of literature tends to evaluate the structures from a legal ethics discourse. However, a negligible number of certain scholars tend to employ a non-ethical justification to accept or reject a certain modality.[106]

David Mc Dowell, in an exhaustive listing of fee modalities, has presented the strength and weakness of all and has concluded by claiming:

> "*While competition may require an attorney to consider these alternative models, they are not interchangeable and some cases are clearly not appropriate. Careful consideration of the case, the goal of the client, and the ability of the attorney to successfully work under each arrangement must be considered*."[107]

In an article discussing pricing of legal service in domestic relation practice, Linda & Kelly listed the following as major limitation of hourly billing practice:[108]

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[103] David A. Root (2005), "Attorney fee shifting in America: Comparing, Contrasting, and combining the "American RULE" and "ENGLISH RULE" " *Ind.int'l & comp.L.Rev*. V.15.No 3, p. 583-617.

[104] Kathryn M. Christie (1984), "Attorney fee shifting a bibliography", *law and contemporary problems*, V.47.No1, pp. 347-351. More than 100 books, articles and notes on fees shifting is listed in these bibliography showing how the issue is dealt in serious attention in the discussion of legal service pricing.

[105] Whether the 'loser pays' the legal service fee or not, the basis of payment is already determined using one of the aforementioned modalities. What is new here is the fact that the loser pays it as determined by the winner in his contractual agreement for legal service. This is the reason why we should not state this as a modality per se.

[106] The legal community culture of addressing legal issues in multidisciplinary or interdisciplinary approach is weak. This fact has contributed for most legal literature to emphasis on the morality or not of legal fees than economic or other investigation.

[107] *Supra* note 32, p.9.

[108] *Supra* note 38, p.389-393.

a. Conflict between interest of client and attorney, i.e., quick resolution v. lengthy representation;
b. Failure to adequately account for technological advance;
c. Failure to give effect to evolving consumer demand for more autonomy in the conduct of their legal matter;
d. Absence of economic incentive for efficiency;
e. Incorrect assumptions of all tasks having the same value; and
f. Clients taking all the risks.

Generally, critics claim that hourly billing is excessive to clients as it rewards inefficiencies, including overstaffing, excessive research time, and unnecessary busy work to produce high billable hours.[109]

After assessing the pros and cons of alternative billings, the writers reached to a conclusion which makes the best fee setting modality is one that takes into account the interest of the client and the advocate, which is a vague statement of endorsing all modalities as worth employing. It reads:

> "*The lawyer who approaches the setting of fees with sensitive to the client's interest, with recognition that the lawyer's own long-term interests require satisfied clients, will set correct fees most of the time whether those fees are determined by hourly rates, contingent fees, flat fees, result fees or some combination of these methods*."[110]

Others have gone to state the need for extensive empirical study to decide on a better valuation method. Arguing that many rules on legal fees are premised on the assumption of what is best for the public, whose accuracy is not proved, they found it not proper to side with a certain modality.[111]

This claim should not, however, be taken to mean there is no empirical evaluation done so far on legal service pricing. Walter and James in the 1970's have done an

[109] *Supra* note 29.

[110] Id., p.417, 418.

[111] *Supra* note 26, p.287.

empirical assessment of pricing behaviour of attorney's.[112] Based on the response of 60 attorneys in Dallas, they established that when setting fees, lawyers give major emphasis for time, labour, degree of professional service required, and difficulty of task.[113]They concluded their study by citing the limitation of advocate's knowledge on areas of cost, billable hours, and client's responsiveness to different fees and stated that, "These findings suggest that substantial opportunities exist for analysis and improvement of fee setting procedures"[114]

Though nearly four decades have passed after these conclusions were made, much seems to remain the same regarding the legal service pricing discourse.

The South African Law Commission, bestowed with the task of assessing the countries contingent fee arrangement, has presented the arguments for and against contingent fee modality.[115] Canvassing over relevant literature, it stated the following as advantages of contingent fee arrangements:

> "They *will increase access to justice, will spread the risk involved in litigation, may bring about greater public satisfaction, will promote freedom of contract, may encourage lawyers to engage more effort in litigation and may contribute towards deregulation of the legal profession by removing existing restrictions*."[116]

On the other hand, it cited the following as disadvantages :

> "I*t may create a conflict of interest in terms of a lawyer's responsibility to his client, and the lawyer's duty to courts; may result in fees out of proportion to the work actually done by lawyers on behalf of their clients; may give rise to*

[112] Walter Steele & James T.Rothe (1979) "Pricing behaviour of attorney's: an empirical study" *the forum*, V.14.No.5, pp.1060-1075.

[113] Id., p.1074.

[114] Ibid.

[115] South African Law Commission (1973), *Report on speculative and contingency fees.*

[116] Id., p. 29.

> *an increased load of frivolous, spurious and unmeritorious litigation; and may encourage 'ambulance chasing.'"*[117]

Flat rates have been credited advantageous for clients as they remove the fear of not knowing in advance the cost of representation as well as allowing clients to make price comparisons for services rendered by different attorneys.[118]

Generally speaking, it can be concluded that legal literature on pricing legal service ends up evaluating the moral or ethical aspect of fee setting with emphasis on protecting the interest of the client.

5. Economic Analysis of Regulating Legal Service Pricing

The current inclination of economic thought is towards a perfectly competitive free market system.[119] Under this system, the market must be free from interference and led by the normal rule of supply and demand.[120] Of many factors that determine the nature of economic welfare and market performance, price takes the central place.[121] This is the basic reason that calls for the evaluation of pricing in the legal service sector in terms of economics.

Generally speaking, economists begin a regulation discussion by stating that economic activities must be free from regulation unless it can be shown that it is subject to market failure. It means that if it is left unregulated, it will not generate

[117] Ibid.

[118] Adam C. Altman (1998), "To bill or not to bill? Lawyers who wear watches almost always do, although ethical lawyers actually think about it first", *geo.J.Legal Ethics*, v.11.No.203, pp.228-229.

[119] Perfectly competitive market is one in which goods and services are distributed by sellers or providers with no ability to influence price under condition of full information. The current economics literature claims that this system is one which can maximize consumer welfare hence referred as welfare economics.

[120] As there are many sellers of a product no seller has a control over price, they supply identical product where consumers have information and cost of transaction is zero and market entry or exit is with no barrier and no externalities in production or consumption exist.

[121] Richard J.Arnould (1972), "Pricing professional services: A case study of the legal service industry", *Southern Economic Journal*, V.38 No.4, p.495.

socially efficient levels of output.[122] Accordingly, the case for the need to regulate the legal service market, in general, and pricing, in particular, must flow from showing the weak links of the service that causes fear of market failure.

A different approach from market failure, there is the institutional economics approach which treats the failures discussed so far as market features and are considered problematic only when there is actual danger to economy policy objectives, or at least, a strong potential for harm.[123] The six characteristics of the legal service market[124] will not then by themselves be treated as problematic that calls for interference and regulation, unless it can be proved substantially that they are barriers to societal welfare. This demands a case by case study of individual country's legal service markets in order to find credible factual and empirical evidence on the general effect brought as a reason of market features. This limitation will make the doctrinal analysis of legal service pricing discussion best served by the market failure approach.[125]

Regulation refers to the mechanism governing social and or economic interactions in a particular area of economic activity capturing both formal and informal rules, norms and behaviours whether such is done by the economic sector itself, i.e., self-regulation, and public or governmental regulation.[126]

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[122] Frank H Stephen, "An Economic Perspective on the Regulation of Legal Service Markets", Evidence Submitted to the Justice 1 Committee's Inquiry into the Regulation of the Legal Profession. Available at http://archive.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/j1-lps-pdfs/lps-099.pdf.

[123] Alex Roy (2011), Legal service Board discussion of a report by Dr. Christopher Decker & Professor George Yarrow appearing at Understanding the economic rationale for legal services regulation- a collection of essays, *Legal services Board*.

[124] See below page 17.

[125] Further empirical research can show the workings of legal service markets in particular jurisdictions employing the institutional economics approach which calls for on the ground fact based quantitative legal or interdisciplinary research. For this paper though already set economic theories on market structure and market failures will be employed.

[126] Christopher Decker & George Yarrow (2010), "Understanding the economic rationale for legal services regulation", *Regulatory Policy Institutes*, P.5.

The policy objectives planned to be achieved through the instrumentality of regulations are [*Efficiency, Equity & Access], rectifying imbalances of knowledge and power* and *equity and market participation*.[127] Efficiency worries about maximizing the value of total production, while equity is concerned with the distribution of economic resources in specific terms accessible to legal services.[128] Imbalance of knowledge and power is concerned about the risk of specialization of knowledge and information asymmetry[129] exposing the consumer to be exploited by service provider. Equity and market participation is more a matter of fairness and morality, which in economic terms, can be related to quality of service.[130]

In arguing for the cause to regulate the legal profession, Frank has summarized the core arguments put forward by economists as two: [131]

A. Markets for professional services, as a rule, are subject to market failures calling for regulations.(Public interest theory of regulation)
B. Regulation of professional markets, especially when it is self-regulated, in most cases of legal profession leads to various restrictions on competitions leading members of the profession to earn economic rents(Private interest/capture theory of regulation)[132]

Making the benchmark for the perfectly competitive market, Gillian has exhaustively discussed the unique structural features of the legal service market that leaves the terrain of perfectly competitive markets and opens the possibility of intervention to correct market failures.[133]

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[127] Frank H. Stephen (2013), *Lawyers, Markets and Regulation*, Edward Elgar Publishing, UK.

[128] Paul A.Grout et al., (2007), "Governance reform in legal service markets", *The Economic Journal*, V.117 No.519 p. 93-113. The author makes an empirical discussion of the basic problems in the market which has affected the efficiency of the legal service market.

[129] Ibid.

[130] Ibid.

[131] *Supra* note 77 p.12.

[132] See below p.18 paragraph 3.

[133] Gillian K. Hadfield (2000), "The price of law: How the market for lawyers distort the justice system" *Michigan Law Review*, V. 98.No 4, pp. 953-1006.

Here are the main characters of the legal service market:

1. *Complexity*- refers to the intellectual subtlety of legal rules, mass factors contingencies which are needed in determining legal strategies, arguments, and expectations that increase the total cost of service which, in turn, narrows access to law and lawyers.[134]

2. *Credence good*[135]- Legal services are credence goods.[136] Hence clients cannot judge the quality and effectiveness of the service they receive. This makes the way for ordinary competitive mechanisms to operate effectively impossible.[137] Yet some scholars tend to differentiate among consumers since some clients may not experience the same degree of asymmetry, and may well have the means to monitor and meter the lawyer's performance.[138]
3. *Winner take all market:* These are markets where small difference in relative quality results in large difference in price. As the impact of a lawyer in a legal outcome is a function of not the lawyer's absolute quality, rather his quality relative to the other lawyer in litigation, the fee will reflect the amounts clients have at stake not the opportunity cost of the service creating market power for the lawyer.[139]

[134] Id., p.965. The author notes that this complexity will exist even in a perfectly competitive legal market as role of judges and individual lawyers in a case making complexity interplay of host of factors raises cost.

[135] Economists term the problem arising from credence goods 'Information asymmetry.'

[136] A credence good is one where the buyers needs are determined by the seller as buyers are unable to assess how much of the service they need or assess whether the service was performed or how well.

[137] *Supra* note 62 p.970 the point being competition is likely to work in a market characterized by certainty about value of service.

[138] Julian Webb & Abby Kendrick, "Agency, bounded rationality and the moral economy of professional regulation", as it appear in supra note 62. The reference in here is usually for repeated business clients who have a better anticipation ability of the service they are to receive as well as the quality of the provider.

[139] Id., p972, 973, 976. This narration may not work in anon adversarial setting where relative performance is not relative.

4. *Sunk cost and opportunistic behaviour*- Once a client chooses a lawyer, it is costly to switch because it enables lawyers to exploit the cost of switching and creating opportunism, which is a deviation from the hypothetical perfectly competitive market.[140] This behaviour of the lawyers is in economics referred as Rent seeking.[141]
5. *The sunk cost auction*-Legal expenses billed by the hour or any other incremental amount have a structure for sunk cost auction that once the legal action started, it costs money to keep going where your decision to stop participating may result in losing the whole amount at stake making legal fees to exceed the amount of money at stake. This makes lawyers find themselves in a position to extract money governed not by the value of service they render, but rather by the client's wealth.[142]
6. *Monopoly*- Monopoly and pure economic rents are the basic characters of the legal market resulting in supply restrictions emanating from artificial barriers to entry to practice of law like licensing restrictions, natural barriers to entry to practice of law as legal education, practical experience cognitive ability and state monopoly on coercive dispute resolution mechanisms.[143] After evaluating the legal service price system, which is characterized by monopolistic structure, Richard has concluded that the system promotes inefficiency in allocation of resources by elevating the price high enough above competitive price to maintain marginal lawyers in business at less than full capacity, by the lack of providing checks on attorney or law firm efficiency and by inflating the entire price structure.[144]

6. Economic Analysis of the Ethiopian Legal Regime on Legal Service Pricing

The previous section of the paper established what an economic analysis is interested in the study of legal markets. A regulatory framework is in place to check the efficiency, equity, access, market power imbalance and market participation.

[140] Id., p977.

[141] Robin Paul Malloy (2004), *Law in a market context: An introduction to market concepts in legal reasoning*, Cambridge University press, p. 175.

[142] Id., p981-982.

[143] Id., p982-994.

[144] *Supra* note 71, p 495.

Therefore, this part of the paper evaluates the existing legal framework from the economic point of view on regulation and efficiency.

As stated in part one of this paper, the law that governs pricing in legal services requires the fee to be fair and reasonable.[145] This is generic reference which needs to be quantified further in order to be economically assessed. The law does not define what fair and reasonable is. It rather proceeds to list the factors that need to be taken into account while fee is determined.[146] The understanding is that if those factors are considered while a client and advocate set fees, it follows that the fee is fair and reasonable. This phrase can be taken as indicative to the economically justified aspect of the fees in a way that a fair and reasonable fee is an economically efficient, equivalent and access oriented. The question remains: Does the economic analysis support the legal statement?

The factors listed are all qualitative not quantitative rates.[147] The Ethiopian case makes the issue a bit complex by the addition of sub article 8 of article 42 which reads: similar other factors which open the door for fee setters to employ standards not even clearly set as factors in the law so long as they can justify it as a similar factor with the one listed by the provision. Such approach will add the market power argument to the advocate's advantage by enabling the service provider to employ the

[145] *Supra* note 6 Art 42.

[146] See above page 2 paragraph 2.

[147] *Supra* note 71 p.498 The factors listed as basis of determining reasonable fee in RULE 1.5(a) OF THE ABA model rules of professional conduct seems the source for the Ethiopian listing as it states

1. *The time and labour required ,the novelty and difficulty of questions involved and the skill requisite to perform the legal service properly*
2. *The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer*
3. *The fee customary charged in the locality for similar legal services.*
4. *The amount involved and the result obtained*
5. *The time limitation imposed by the client or by the circumstance*
6. *The nature and length of the professional relationship with the client*
7. *The experience, reputation, and ability of the lawyer or lawyers performing their services; and*
8. *Whether the fee is fixed or contingent*

existing knowledge barrier of the client to an unnecessary and excessive fee unless the advocate voluntarily refrains from doing so.

Article 4 of the regulation states that an advocate must evaluate facts and evidence to determine whether the case has a legal ground to take to court.[148] If there is a ground, we presume the advocacy contract be made and fee determined. Even when such is not the case, i.e., when the advocate dismisses the client after explaining the case has no merit, the advocate is entitled to collect a reasonable fee for the legal advice he has given.[149] As the definition of reasonable fee is not , specified, the risk of the lawyer setting unreasonable fees is wide. Unless one can argue that the qualitative factors listed under article 42 are used to determine what constitutes reasonable, the risk is left uncovered.[150]

Let us now list down the specific economic arguments raised for the regulation of the legal service market and evaluate if the arguments hold true in the Ethiopian legal service market context; more specifically, if they are related to the pricing of legal services.

We start with *public interest theory of regulation*.[151] This argument constitutes *the information asymmetry argument, public goods and externalities argument,* and *the insufficiency of non-regulatory mechanisms approach.*[152]

6.1 Information Asymmetry Argument

We have already established the credence good nature of legal services.[153] Hence, the quality cannot easily be judged either by prior observation or even by

[148] Although this provision speaks about one aspect of advocacy service that is litigation we can apply the same rules for document preparation and consultancy.

[149] *Supra* note 6 Article 4.

[150] The others side of the argument being the factors listed must be employed whenever a fee is determined in a legal professional service despite the establishment of a future advocacy client relation or not.

[151] See section 4 paragraph 6.

[152] Alessandra Caron (2008), "The legal profession between regulation and competition," Dipartimento di Scienze giuridiche CERADI – Centro di ricerca per il diritto d'impresa, pp.5-9.

[153] See above foot notes 83 &84.

consumption or use due to lack of information accompanied by lack of experience in repeated purchase from the client's side. This creates two repercussions called 'Adverse Selection' and 'Moral Hazard.'[154] Adverse selection is about a client's choice of professionals in which the best professionals will be pushed out of market, while moral hazard is about client's information asymmetry. Here, lawyers perform both the agency function and service function which lead to supplier induced demands where lawyers are more likely to oversupply services, and the market fails to provide the socially optimal amount of legal services, hence the quest for case for regulation.[155]

The same case of regulation can be argued for the pricing of the legal service. The credence good character and the resulting information asymmetry hold true for legal service anywhere. Clients cannot assess the quality of service they receive from an advocate. Although reputation of the advocate could be an indicating factor, it cannot be a conclusive evidence for the performance of the advocate to the case at hand. Under this circumstance, clients will be pushed to go for the advocate who is willing to provide the service with the price they consider proper, usually, the cheapest one. This is what is termed as Adverse Selection, in our case Adverse Selection of price. The more clients run after lower fees, the advocates who provide quality service will be pushed out of market ending the profession itself in the hands of next best professionals, hence opening the door for inefficiency.[156]

The information asymmetry has put the lawyer in a double position of agent and service provider. As an agent, the lawyer demarcates whether a legal service is

[154] Camille Chaserant & Sophie Harnay (2013), "The regulation of quality in the market for legal services: Taking the heterogeneity of legal service seriously" *The European Journal of comparative Economics*, V.10.No2, p.270.

[155] *Supra* note 89 p6-7

[156] George A Akerlof (1970), "The market for Lemons: Quality uncertainty and the market mechanism" *the quarterly journal economics*, V. 84. No.3, pp 488-500. This ground breaking economic work has established the market failures arising out of information asymmetry and adverse selection that Akerlofs lemons has become the common term that describe similar situations.

needed, and if so, what type of service is needed and what shall be done.[157] As a service provider, he provides the service. This opens the door for the advocate to render non-optimal services which simply ensures the securing of higher service cost. This is what is referred as Moral Hazard.

Article 7 of the regulation, which assures the possibility for the rise of moral hazard, might also end up in a supplier induced demand and market failure. It becomes necessary to make sure that the prices advocates call for service they provide are economically fair and reasonable, thereby discourage the behaviours of advocates from exploiting information asymmetry and create artificial demand.

6.2 Public Good and Externalities Argument

Legal service has the attributes of public goods as it is a provision of information.[158] As the nature of public goods is non-rivalry and non-exclusive, economics proves that the market may be under supply or inadequately supplied costing the professionals more to provide the information than it is worth to the consumer.[159]

The law that governs advocates' conduct clearly prohibits an advocate from declining service on grounds of moral character of the client, the serious or heinous nature of the crime committed, or the belief that the client is guilty of the crime he is charged with or on the basis of the clients political, economic, social or moral standing.[160] This is a clear manifestation of the law's consideration of legal services as public service enabling clients to purchase it with as little barrier as possible.

A regulation on pricing of legal services is the best way to make sure of the application of this provision since if lawyers are left unregulated, they may make

[157] *Supra* note 6 Article 7 states an advocate shall have the obligation to assist his client reach on the proper decision by giving him explanations based on the law as to the possible result or alternative results of the matter, and the type and scope of representation that must be assumed to obtain the desired result.

[158] The legal aid and clinics discussion is a centre of legal service discussion for this apparent reason.

[159] Ibid.

[160] *Supra* note 6 Article 5.

high legal fees as a pretext to deny the client a service.[161] So when the law demands advocacy fees to be fair and reasonable by listing factors to consider when setting them, it, in effect, is ensuring provision of the service to all via a means of price regulation.

Externalities may arise from the provision of legal services as the social value of the advocacy service goes beyond what accrues to the professional and the client.[162] The quality of the legal service provided by the lawyers affects social costs or benefits and the social values of the services exceed the private value it has for the client. Efficient outcome will be achieved if the market values the service takes into account has effect on social welfare.

When the law regulating advocates' conduct widens the horizon of advocate's obligation to include responsibility to encompass assisting organs of justice administration towards other lawyers, opposing party, court, the profession and society in general, it is within the view that the task of the advocate must incorporate the interests of the social welfare, too.[163]

The prohibition on contingent fee agreement in Ethiopia in family matters and criminal cases can be cited as clear examples for the externality case of regulation.[164] One can imagine the social havoc that will result in if service fee depends up on factors like securing of divorce, amount of alimony secured, property settlement, and

[161] The word economic standing of the client may be a point worth noting here. Yet an advocacy service presumes the client's ability to pay and a client who has no standing to pay is treated in another paradigm of a free legal service discussion.

[162] Advocacy service impacts not only the parties under contract .It has a far reaching implication. Just imagine a contract not well drafted, or a consultancy provided for a board of directors of a company with thousand members. In certain terms we can state that what an advocate does has an impact that surpass the immediate client. This is what is referred as externality.

[163] *Supra* note 6 Article 3 These law is with provisions which try to protect the interest of society at large

Vis a Vis the client in an advocacy representation.

[164] *Supra* note 6 Article 45.

decision or penalty given in a criminal case.[165] Regulation of such nature on fee contracts can be justified on the basis of avoiding the inefficiency and social welfare deconstruction that would have resulted if left ungoverned.

6.3 Insufficiency of Non Regulatory Mechanism

Economics argues that market failure is a necessary but insufficient condition on its own for the imposition of regulations.[166] The point is that by employing non-regulatory mechanisms, it is possible to remedy failure. The widely cited non-regulatory mechanisms are warranty, possibility of repeat purchase and reputation, and civil liability rules.[167]

Warranty is embedded in the legal framework governing advocates in a form of professional indemnity insurance.[168] Accordingly, an advocate must enter a professional indemnity insurance serving as a warranty if he fails in the service he delivers.[169] But the information asymmetry problem discussed above makes warranty to be an effective tool of remedying market failure nearly impossible. The conditions that need to be fulfilled to invoke the benefit of the warranty in advocacy service are issues that require technical ability. This acts as a barrier for the client to take full advantage of the protection.[170]

The possibility of using repeat purchase and reputation may not work in legal services as clients are usually a onetime service seekers and mechanism of evaluating reputation may not be that simple for a non-lawyer as the working of information asymmetry is still in place.

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[165] Ibid.

[166] Supra note 122, p 9-12.

[167] Ibid.

[168] *Supra* note 2 Art 12

[169] Note that the law calls for a detailed rule to be published in a regulation to be published while the regulation did not mention a single issue about indemnity insurance. So far this provision is inapplicable.

[170] Even in situations advocates are brought before the disciplinary council responsible to see the conduct of advocates which include professional fault it is difficult for clients to prove the fault of the advocate. (Focus group study held with W/o Tigist Belay, DMC construction Plc Legal Department Head. Ato Mulugeta Dula, Ato Eyob Amede, Ato Gedion w/youhannes all federal court advocates)

Civil liability rules are incorporated in the civil code of Ethiopia under professional fault provision.[171] Although it is not stated in clear terms for advocacy as it works for all professional services, having due regard for scientific facts or accepted rules of the profession if one is guilty of imprudence or negligence constituting definite ignorance of his duties, he shall have civil liability.[172] The regulation expects advocates to show high level of professional competence and skill in the advocacy service they render. They should employ their legal knowledge and work experience to protect the interest of clients, to follow up the case diligently and take all the necessary measures carefully and timely to obtain a quick and just decision.[173] This reading gives a highlight as to when one can claim that an advocate is committing professional fault. Yet this also faces problems of proving the presence or absence of negligence/imprudence and battling on what the rules of the profession say and don't say.

In fact, it is better and efficient to protect such problems from arising if it is possible to control them ahead or decrease their occurrence by employing regulatory mechanisms. From legal pricing angle, a civil liability rule and related litigation could easily be avoided if price regulation is in place which guarantees the fee paid for a service is fair and reasonable. The Ethiopian law governing advocacy service employs two approaches with regard to prohibition of contingent fee setting in certain services and listing factors that need to be considered in fee setting. These mechanisms will bar a possibility of professional fault discussion regarding pricing.

6.4 The Private Interest Argument

The private interest theory argument for regulation is based on the assumption that professionals self-regulate.[174] As the regulatory agency comes to serve the interest of the industry by banning the entry of competitors in the market, and supply of new professionals are limited so that price rises and minimum prices are kept, the competition between existing practitioners in the market is reduced.[175] This

[171] *Supra* note 12 Art 2031

[172] Ibid.

[173] *Supra* note 6 Article 8.

[174] OECD (2009), Competitive restriction in legal profession.

[175] *Supra* note 100 p 12-13.

argument is against self-regulation. In the current context, advocates in Ethiopia do not self-regulate. Rather, a government agency is responsible for regulating the conduct of advocates.[176] This eases the fear of self-regulation and results inefficiency argument.

6.5 Regulation and Competition in Lawyers Market

The cases for regulation justified in the reasons narrated so far face severe criticism when the notion of competition arises. It is stated that by removing restrictions that hamper competition, the consumer interest is best served.[177] Although the deregulation touches on many aspects of the profession as our scope is on legal pricing, let us see how regulation and competition interplay in this field.

The basic concern of proportionality between regulation and competition in legal service pricing arises in fee fixing.[178] When fees are fixed as a mandatory minimum or maximum, or when a scale is recommended or restriction is in place on making fee dependent on case outcome, the core economic benefits secured are argued to take the following forms:

a. Protection of problem of Adverse Selection;[179]
b. Maximum fee schedule help in the problem of Moral Hazards;[180]
c. Recommended fees help inform clients the average price required to a service; and
d. Contingent fees improve access to justice in a no win no pay arrangement.

On the contrary from competition angle, fixed tariffs/minimum tariffs are deemed to create concern since they are likely to have the most detrimental effect on

[176] Ministry of justice is currently the body governing advocates with other disciplinary committees and bureaus who are responsible to the ministry of agency.

[177] Trade competition and consumer protection proclamation, 2013, Article 7, Proclamation No. 813, *Federal Negarit Gazetea*, Year 20, and No.28. Note that the major aim of the law is to ban all kinds of acts by goods and service providers generally referred as business which have a likelihood of hampering competition. The cited provision clearly prohibits price fixation.

[178] The other restrictions would affect the competition paradigm yet cost is the important aspect of any economic competition.

[179] Supra note 124.

[180] Ibid.

competition reducing the benefits that competitive markets deliver to consumer, and are even labelled by economists as the least controversial prohibitions in competition law.[181]

Fee schedules constitute a means of reducing price competition among practitioners, or at least serve to soften price competition between professionals.[182] Same holds true for recommended scale fees as they end up being the actual fees charged in practice.[183]

They are treated as forms of price collusion implying that resource transfer from consumer to supplier creates a deadweight loss/allocative inefficiency in market by reducing incentive to keep production cost low and innovative. This will, in the end, reduce economic efficiency.[184]

These economic challenges are not established in the Ethiopian legal frameworks that govern advocates. The pricing of legal service is not up for any distinct fee schedule, mandatory or recommended. It is the freedom of the contracting parties to determine fee as long as it does not go contrary to the 'fair and reasonable' requirement. Some might argue that there has been a maximum fee tariff one can claim in a contingent fee arrangement.[185] The case that has given birth to such thought will be discussed in the next paragraph.

A contract of legal services was made between Mrs. Aster Araya, the advocate, and Mr Girma Wedajo, the client. A combined billing was agreed where a flat rate of

[181] Louis Kaplow (2011), "An economic approach to price fixing", *Antitrust Law Journal*, V. 77.No.2, P.343-449.

[182] Supra note 102, p. 20.

[183] Ibid.

[184] Ibid.

[185] Focus Group Discussion see *Supra* note 120. This is a wide believe held by lawyers. On top of the focus group discussion an informal discussion with different lawyers was made which reveals an argument to the effect that a 10% maximum rate shall be considered as a thing of law in cases of contingent arrangements. This is a very erroneous believe which has come from the wrong reading as well as understanding of the cassation court decision. The bottom line is in Ethiopian legal service pricing there is no mandatory fee schedule.

35,000 birr to be paid at start of service and 20% of the amount to be secured from the service if the advocate is successful in securing the rights to the house under dispute. Hence, a blend of fixed fee and contingent fee was employed. The case was won in favour of the client who refused to pay the 20 % of the value of the secured house as agreed in the contract. The advocate took the case to court. The Federal High Court ordered the client to comply with terms of contract. Dissatisfied by the ruling, the client, Mr Girma took the case to the Federal Supreme Court via appeal and secured a decision in his favour. The Supreme Court claimed that a fee arrangement contingent on outcome of a case is neither lawful nor justified. It, thus, nullified the decision of the Higher Court releaving the client from the contingent fee.

Mrs Aster Araya now took the case to the Cassation Court of the Supreme Court, the final justice organ of the nation, which is in charge to correct fundamental errors of law. The Court framed the issue as to what the role of courts is in professional service fee arrangement cases. By narrating the basis for any contractual relation as freedom of contract, and that what parties freely agreed is treated as though it is law, it validated the contingency agreement as lawful. But it questioned the amount by citing the necessity to look at the special nature of professional service arrangements. The court went to substantiate its argument by providing the case for medical services in the Civil Code of Ethiopia, which allows the court to reduce the agreed fee when the amount is excessive and contrary to the professions value. Adapting the argument for legal services, the court claimed that the 20% contingent fee added with the already paid amount rises to a 37% of the property secured from the litigation and labeled such amount excessive from the net worth of the property as well as the customary fee charged for similar purposes. Accordingly, as per the discretion given to courts to correct improper fees as they think fit, it ordered the payment not to exceed 10% of the total worth of the property secured from the litigation with the already paid 35,000 Birr at the start of the service taken in to account.[186]

Though the decision is very clear as to how the 10% ruling is to be understood, it has become a thing of common sense to call this decision on every contingent agreement as if it is a maximum fee schedule. If any, the decision only sets a precedent as to the

[186] *Supra* note 23

power of the courts to reduce legal service fee when such is deemed excessive; it does not set a certain percentage as a maximum or minimum amount of contingent fee modality.

It is amazing how the court failed to mention the special law that regulates advocates fee and cite the article which enumerates the factors that enable to judge the fairness or reasonableness of a fee as its decision was made 5 years after the coming in to picture of the advocate's regulation.[187] Incidentally, the court has cited one of the many factors listed under article 42, which is the fee customarily charged for similar services.[188] This is just a single factor set in place that must have been substantiated by numerous other factors to reach at a proper interpretation of what constitutes an excessive fee.

Therefore, it can be argued that the court's restriction on contractual legal service fee may have legal basis; however, the proper articulation has not been done to make the decision free from criticisms.

The combined analysis of the existing legal framework structure and court decision has made it clear that the Ethiopian legal service pricing does not have a regulatory structure as the one found in other jurisdictions setting minimum or maximum fee schedules or scales either by the regulatory body or advocates association, thereby curbing the argument of regulation Vs competition not to arise at least in the future.

In short, the lack of clarity on the terms reasonable and fair fee as a result of qualitative factors is a source of continuous dispute leaving room open for interpretations.

7. Findings from Empirical Data

7.1 Tabular Presentation of Discussion Result with Advocates

[187] The decision was given on Hamle (July) 1997 EC while the advocate's code of conduct regulation was legislated on Meskerem (September) 1992 EC which is five years earlier than the decision.

[188] *Supra* note 6 Art 42(4).

QUESTION NO.	FG1	FG2	FG3	FG4	FG5	FG6
1	Not efficient compared to the input advocates provide		Not efficient compared to the benefit the client is securing			Consider existing practice fair and proper.
2	Good understanding of legal framework					
3	The market is not efficient.					
4	Fixed rates for non-litigation services and negotiated rates for litigation		Additionally retainers, rates are used with wide contingency rates in place		Contingent fees used in contravention of the law under a disguised contract	Fixed rates dominate the modality.
5	Factors are difficult to apply although we use cumulative factors.					

6	Minimum scales must be in place**.**	Regulation of lawyers and fee must be left for lawyers themselves	The factors stated in the law must be prioritized on basis of empirical study	Same	Courts' power to reduce unreasonable fees must be well exercised.	Independent guideline/ directive on fees must be developed

7.2 Tabular Presentation of Discussion Result With Clients

Qns	FG 1	FG2	FG3	FG4
1	Negotiate with the advocate after he calls a price.		Negotiating the price called being in place we usually know the market price for service we are requiring	We pay fixed rates advocates put.
2	Compare the price others pay for similar service		Assessed from the perspective of stake at hand	
3	Complexity or easiness of case/task, amount involved, time and labour the lawyer put to the case.			
4	Yes , government must regulate		It should be left free to competition.	

5	Minimum fee schedules must be introduced		The factors listed must be quantified with percentages to identify priority	

7.3 Discussion of Focus Group Findings

As indicated in the tabular presentation, many of the findings in one focus group were likely to be endorsed by the other. Thus, this part will focus on major points of agreements as well as points of difference.

With regard to the general view on legal services pricing, five groups out of six considered the current practice not efficient by employing the work they do to the client or the advantage the client secures from what clients pay. Only those groups of advocates in the non-litigation category considered the existing legal pricing as fair and proper. All the groups had knowledge of the current legal framework governing advocacy service pricing. While evaluating the efficiency of this framework from the welfare to society, they all labelled the pricing inefficient. They provided similar justifications they had provided for the first question.
The modalities employed by advocates were a fixed rate reached after negotiation with clients. Usually the advocates set a price after first encounter with client and make assessment of the case at hand. This price is usually counter offered by clients and after due negotiations, it is settled. For advocates with the company clients, retainer rates were widely used with some contingencies applied here and there. While fixed fee rates dominated the world of non-litigation advocacy service, contrary to the existing law, some advocates are engaged in contingent fees in cases of criminal litigation. The advocates claimed they incorporate eclectic factors when they set prices and could not specify or single out a major determining factor.

As a recommendation to the existing problems in the pricing of legal services, these were presented as issues to be seen by the advocate's focus group discussions:

- Introducing of minimum fee schedules;
- Enabling the lawyers' association to regulate lawyer's fee;
- Prioritizing the listed factors to make fee fair and reasonable based on empirical evidence;

- For the court, exercising widely the power of reducing unreasonable fees; and
- Developing a legal service fee guideline or directive.

Clients also confirmed the need for negotiation on a price quoted by the advocate as a means of determining lawyer's fee. Business clients deviate from other clients by claiming to know the market price because of repeat purchase. Clients for non-litigation service pay fixed rates. The mechanism of evaluating the fairness and reasonableness of the fee these clients pay was usually a comparison of what others pay for similar services, while business clients take the stake involved in the case.

Clients suggested the factors that need to be taken into consideration when lawyers determine fees: the complexity/difficulty of the case, the amount involved, the time as well as labour the advocate puts to the work.

With the exception of business clients, who call for a non-regulatory free legal service market, all others stressed on the necessity for regulation and delegating the government as a proper organ of regulating, since leaving the profession to the professionals will bear the danger of conflict of interest.

They forwarded similar solutions with advocates to solve what they deem as a problem in connection to lawyer's fee.

8. Conclusions

The economic case for regulation of legal service pricing is crafted around the welfare economics thoughts of remedying market failures. The legal service market in its nature is prone to market failure. The nature of service being a credence good and allowing for information asymmetry, builds up adverse selection and moral hazard. In another aspect, legal service as information provision and public good, as well as its effect on society at large, not limited to client and lawyer, has externalities and social costs that need careful weighing and evaluation. This has led many jurisdictions to regulate many aspects of the legal service including pricing. The different types of modes of payment as well as factors that need to be taken into account when fee is set are assessed from the perspective of their ability in bringing about economic efficiency and consumer welfare.

The Ethiopian legal framework on legal service fee is contained in few provisions of regulation number 57/99. Built on the traditional rule of contractual freedom with the criteria of qualifying of fees as fair and reasonable, client and advocate are left to determine the exact amount of fee. The law is open to the usage of any type of modality with the only exception of prohibiting the contingent fees in two explicitly stated conditions. Furthermore, factors that will help in the determination of what fair and reasonable are incorporated. These factors are replicas of what most jurisdictions employ in legal service pricing.

The Ethiopian legal service pricing sector differs in characters from other jurisdictions in two aspects. The first is the fact that the legal service market is not self-regulating. The task of regulation is carried out by a government executive enabling the fears of economic inefficiency emanating from self-regulation. The second feature is the absence of fee schedules whether voluntary or mandatory to be used by advocates. This absence of fee fixing has also avoided the possibility of resulting in inefficiency that will arise as a result of weakened competition.

These two factors should not be interpreted as signals of absence of risk of market failure in the legal service market. The nature of the market and its impact on pricing consideration has been established to justify regulation which aims at securing the utmost efficient result to the client and society at large from the service.

The empirical data collected from advocates and clients revealed that negotiation on a fixed rate quoted by the lawyer was the dominating mechanism of fee setting. Although business clients and advocates seemed to differ in some issues, the majority were, as a group, calling for a better regulation to protect the interest of all involved in the market. They found out that the current legal structure is affected by the inability of clarifying the fairness and reasonableness of fee despite its effort in listing factors of determination.