Title . . . . . 1

Table of Contents . . . . . 2
Editor’s Notes . . . . . 3

Advisory Editors . . . . . 5-6

Announcement for Mustang Las Vegas Conference . . . . . 8

Announcements for Mustang Journals . . . . . 9-13

Best Paper Award Winners . . . . . 14-16

Alexandria Zylstra . . . . . 18
Collaborative Law and Business Disputes: A Marriage of Equals?

Joseph Solberg and Karen Hosack . . . . . 37
Cigarettes, Coffee and Cars: A Path to Student Understanding of Punitive Damages

Tamara Zellars Buck . . . . . 54
Shar’ia Law And The International Free Expression Ideal

Melese Wondmagegnehu Belete . . . . . 71
What should be the Fate of the Current Provisions governing Joint Venture in the Forthcoming Revised Commercial Code of Ethiopia? Retention or Exclusion?

Style Sheet. . . . . . 95

The Mustang Journal of Law and Legal Studies is an Official publication of Mustang Journals, Inc., PO Box 2193, Edmond OK 73083 www.MustangJournals.com
Print ISSN: 1949-1751
Online ISSN: 1949-1743
From the desk of the Editor-in-Chief. . . .


All articles that appear in this volume of the *Mustang Journal of Law and Legal Studies* have been recommended for publication by the Reviewers/Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Reviewers/Advisory Editors for all their hard work and dedication to the Journal. Without their work, the publication of this Journal would be impossible.

This is my fourth year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation for all the support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Marty Ludlum of the University of Central Oklahoma, for his efforts in coordinating the entire process. The publishing of this journal is an intense educational experience which I continue to enjoy.

Congratulations to all our authors. I extend a hearty invitation to submit your manuscripts for the future issues of *Mustang Journals*.

To further the objectives of Mustang Journals, Inc., all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the authors for allowing me the opportunity to serve you as editor-in-chief of the Journal.

**William Mawer**  
**Editor-in-Chief**  
*Mustang Journal of Law and Legal Studies*  
www.MustangJournals.com
Our Advisory Editors

Mustang Journals could not exist without the hard work and timely effort of our peer reviewers. Mustang Journals is seeking scholars willing to volunteer. Mustang Journals recognizes the importance of the peer review process in shaping the reputation and credibility of the journal and the individual papers. Reviewers will be expected to review no more than three papers a year. If you would like to become a peer reviewer, please contact us at MustangJournals@aol.com

Mustang Journals wishes to thank our Peer Reviewers.

- Dr. Jennifer Barger-Johnson, Legal Studies, U. of Central Oklahoma
- Dr. Linda Barton, Marketing, Brenau U. (GA)
- Dr. Susan Baxter, Marketing, LIM College (NY)
- Dr. Chris Birkel, Accounting & Legal Studies, College of Charleston (SC)
- Dr. Christie Byun, Economics, Wabash College (IN)
- Roger Chao, Ethics, Curtin University, Australia.
- Dr. Michael D. Chatham, Accounting, Radford University
- Steven I-Shuo Chen, Business & Management, National Chiao Tung U., Taiwan.
- Dr. Wanda J. Corner, Management, Walden U. (GA)
- Dr. Shivakumar Deene, Business Studies, Central U. of Karnataka, India
- Dr. Mohinder C. Dhiman, Management, Kurukshetra U., India
- Dr. Khalid M. Dubas, Marketing, Mount Olive College (NC)
- Meredith Bagby Fettes, Art, U. of Arkansas - Little Rock
- Dr. Rita A. Fields, Human Resources Management, Central Michigan U.
- Dr. Aikyna Delores Finch, Management, Strayer U. (CA)
- Dr. Clifford Fisher, Business Law, Purdue University
- Dr. Darrell Ford, Legal Studies, University of Central Oklahoma
- Dr. James Gadberry, Sociology, Athens State University
- Dr. P. Ganesan, Marketing, Mburabuturo School of Finance & Banking, Rwanda
- Dr. Poog Garg, English, Post Graduate Government College, Punjab, India
- Dr. Andrew S. Griffith, Accounting, Iona College, New York.
- Dr. David Hartmann, ISOM, University of Central Oklahoma
- Dr. Randal Ice, Finance, University of Central Oklahoma
- Dr. Suresh Reddy Jakka, Business Management, Mahatma Gandhi U., India
- Z.E. Jeelani, Business Studies, Islamic U. of Science & Technology, India.
- Dr. Stellina Jolly, Legal Studies, Punjab University, India.
- Epameinondas Katsikas, Accounting, Oxford Brookes U., Ohio
- Dr. Stuart MacDonald, Legal Studies, University of Central Oklahoma
- Michael Machiorlatti, Economics, Oklahoma City Community College
- Dr. Bashar H. Makawi, Intl. Trade Law, Hashemite U., Jordan
- Dr. William Mawer, Dean, School of Education & Social Sciences, Southeast Oklahoma State
- Dr. Laura Mays, Business, Tiffin U. (Ohio)
- Dr. Nicholas Miceli, Human Resources, Park U. (Missouri)
- Dr. Sergey Moskalionov, Economics, Ulyanovsk State U. (Russia)
- Dr. Zlatko Nedelko, Management, U. of Maribor (Slovenia)
Mohammad Nurunnabi, Accounting, Edge Hill University, UK.
Dr. Raj Parikh, Dean of Business, Southern Oregon U.
Dr. William L. Quisenberry, Management, Ottawa U. (KS).
Dr. A.F.M. Ataur Rahman, Economics, North South U. Bangladesh
Vijayan Ramachandran, Management, Oklahoma City Community College
Dr. Suresh Reddy, Management, Vivekananda C. of Comp. Sciences, India
Dr. Mark R. Riney, Education, West Texas A&M University
Dr. David Ritter, Business Law, Texas A & M - Central Texas
Dr. Ali Saeedi, Accounting, Taylors Business School, Malaysia
Amir Mohammad Sayem, Research Methods, Bangladesh Institute of Social Research
Cherie Ann Sherman, Business Law, Ramapo College of New Jersey
Karen Sneary, Business, Northwest Oklahoma State University.
Dr. Cathy Taylor, Management, Park University, Missouri
Dr. Yu Tian, Business, Wesley College (DE)
Dr. Lee Tyner, Management, University of Central Oklahoma
K.E.Ch. Vijayasagar, Biomedical, Nandurkar College of E&T, India
Dr. L. Vijayashree, Dept. of MBA, PES School of Engineering, Bangalore
Dr. Aubree Walton, Accounting, Cameron University (OK)
Dr. Zulnaidi Yaacob, Management, University Sains Malaysia.
Yue Yuan, Economics, U. of Chicago,
Dr. Shishu Zhang, Economics, U. of the Incarnate Word (TX)

If you are interested in serving as an Advisory Editor, please contact us at MustangJournals@aol.com
Call for Papers
Seventh International Academic Conference

Dallas, Texas – October 15-17, 2015

Deadline for Submission is September 1, 2015

You are cordially invited to our upcoming conference in Dallas, Texas. Our Seventh International Conference will provide a friendly and supportive environment for new and established academicians an opportunity to share their research and works in progress with members inside and outside their disciplines.

The Conference and the Journals invite submissions in all business and social science disciplines, including accounting, anthropology, business, finance, communication, criminology, cultural studies, economics, education, management, international business, marketing, history, political science, psychology, sociology, social work, business ethics, and business law, in all areas domestic and international. Pedagogy, case studies, teaching notes, book reviews, cross-disciplinary studies, and papers with student co-authors are especially welcome.

The Conference is affiliated with our six peer-reviewed journals:
The International Journal of Social Science Research,
The International Journal of Economics and Social Science,
The Mustang Journal of Management and Marketing,
The Mustang Journal of Accounting and Finance,
The Mustang Journal of Business, and
The Mustang Journal of Law and Legal Studies.

All accepted presentations will be published in the Conference Proceedings!

Top 3 Papers will receive a Distinguished Paper Award!

Students receive a discounted registration!


Submit an abstract for quick review to MustangJournals@aol.com

Can’t join us in Dallas? Our spring, 2016 conference will be in New Orleans!
Call for Papers: We are now accepting submissions for the Mustang Journal of Accounting & Finance. Two issues per year, April and October. All submissions undergo a blind, peer-reviewed process. The ISSN is 1949-1794 print and 1949-1786 online. The MJAF is listed in Cabell's Directory and Ulrich's Directory, and is available in full text on Ebsco Host as well as on our website.

The scope of this journal is the discussion of current controversies and trends in all fields of accounting and finance, both teaching and practice, in both the domestic and international sphere.

Papers are welcomed which use original research, add to existing theory, or discuss pedagogical innovations developed for the classroom. Innovative research ideas which span discipline areas or which incorporate other nations or cultures are especially encouraged. In addition, we welcome case studies, teaching tips, book reviews, and multi-disciplinary papers.

The Editor of MJAF is Dr. David Ritter, CPA, JD, and DBA, Texas A&M University - Central Texas. The Mustang Journal of Accounting & Finance had its premiere issue in 2011. To submit, email your submission to MustangJournals@aol.com
Call for Papers: We are accepting submissions for Mustang Journal of Business & Ethics. Issues are twice a year, April and October. All submissions undergo a blind, peer-reviewed process. The ISSN is 1949-1735 print and 1949-1727 online. The MJBE is listed in Cabell's Directory and Ulrich's Directory, and is available in full text on Ebsco Host as well as on our website.

The scope of this journal is the discussion of current controversies and trends in all fields of business, including accounting, finance, management, ethics, marketing, and economics in both the domestic and international sphere. Papers are welcomed which use original research, add to existing theory, or discuss pedagogical innovations developed for the classroom. Innovative research ideas which span discipline areas or which incorporate other nations or cultures are especially encouraged. In addition, we welcome case studies, teaching tips, book reviews, and multi-disciplinary papers.

The editor of MJBE is Dr. Brad Reid, Lipscomb University.

The Mustang Journal of Business and Ethics was started in 2009. Past authors have been from 25 universities and 12 countries.

To submit, email your submission to MustangJournals@aol.com
Call for Papers: We are accepting submissions for the Mustang Journal of Law and Legal Studies. Two issues per year, April and October. All submissions undergo a blind, peer-reviewed process. The ISSN is 1949-1751 print and 1949-1743 online. The MJLL is listed in Cabell's Directory and Ulrich's Directory, and is available in full text on Ebsco Host as well as on our website.

The scope of this journal is the discussion of current controversies and trends in all fields of law and legal studies in business, including the domestic and international spheres. Papers are welcomed which use original research, add to existing theory, or discuss pedagogical innovations developed for the classroom. Innovative research ideas which span discipline areas or which incorporate other nations or cultures are especially encouraged. In addition, we welcome case studies, teaching tips, book reviews, and multi-disciplinary papers.

The Editor of MJLL is Dr. Will Mawer, Dean of School of Education, Southeast Oklahoma State University.

The Mustang Journal of Business and Ethics was started in 2009.

Past authors have been from 25 universities and 12 countries.

To submit, email your submission to MustangJournals@aol.com
Call for Papers
The Mustang Journal of Management & Marketing

Call for Papers: We are accepting submissions for the Mustang Journal of Management & Marketing. Two issues per year, April and October. All submissions undergo a blind, peer-reviewed process. The ISSN is 1949-176x print and 1949-1778 online. The MJMM is listed in Cabell's Directory and Ulrich's Directory, and is available in full text on Ebsco Host as well as on our website.

Papers are welcomed in all areas of management and marketing which use original research, add to existing theory, or discuss pedagogical innovations developed for the classroom. Innovative research ideas which span discipline areas or which incorporate other nations or cultures are especially encouraged. In addition, we welcome case studies, teaching tips, book reviews, and multi-disciplinary papers.

The editor of MJMM is Dr. Perwaiz Ismaili, College of Business, College of St. Scholastica.

The Mustang Journal of Management & Marketing had its premiere issue in 2012.

To submit, email your submission to MustangJournals@aol.com
All submissions to the IJESS and IJSSR undergo a blind, peer-reviewed process. Papers are welcomed in all areas of the social sciences, including anthropology, communication, criminology, cultural studies, economics, education, history, human geography, political science, psychology, sociology, and social work which use original research, add to existing theory, or discuss pedagogical innovations developed for the classroom. Innovative research ideas which span discipline areas or which incorporate other nations or cultures are especially encouraged. In addition, we welcome case studies, teaching tips, book reviews, and multi-disciplinary papers. The International Journal of Economics and Social Science and the International Journal of Social Science Research each are published in April and October. Submissions are accepted now.

To submit, email your submission to MustangJournals@aol.com
Distinguished Paper Awards

Mustang International Academic Conferences!

We are pleased to announce our Distinguished Papers winner for our Spring 2015 Las Vegas conference:

Bernard McNeal, Bowie State
Revisiting the Financial Vulnerability of Nonprofit Business Leagues Post-2007 Recession

Craig Randall, Florida Gulf Coast University
Exploration/Exploitation during Development: Linking CEO Behavior & Poor Outcomes in SME’s

Bree Morrison & Ranjna Patel, Bethune-Cookman University
Rethinking the Brain: An Applied Emotional Intelligence Model using expanded choice sets for improved decision making

Nashville, Fall 2014 Conference:

Wilburn Lane, Christopher Manner, Union University
Who Tends to Forward Viral Advertising Videos? The Effect of Demographics, Social Media Use, and Personality on the Intent to Forward Viral Video Ads

Hui “Harry” Xia, University of St. Joseph (Macao)
Coping with Emerging and Advanced Market Risks

Richard Monahan, American Public University
Brand Equity Valuation for Prospective Candidates in the 2016 U.S. Presidential Race
Distinguished Paper Awards

Mustang International Academic Conferences!

Past winners include:

Las Vegas, Spring 2014 Conference:

Thomas Liesz, Scott Metlen, University of Idaho
Using Excels Solver to Enhance Student Understanding of the Financial Planning Process

Patrick Rishe, Webster University
Pricing Insanity at March Madness: Exploring the Causes of Secondary Price Markups at the 2013 Final Four

Joseph Blake, Jelena Vucetic, University of Phoenix
The Influence of Financial Literacy on Faith-Based Epistemology: A Case Study of Arizona Church Members

Distinguished Paper Awards

Dallas, Texas, Fall, 2013 Conference:

Richard Hauser, Gannon Univ. & John Thornton, Kent State Univ.
Dividend Policy and Corporate Valuation

Thomas Krueger, Texas A&M University - Kingsville
Paying for Acceptance: A Study of Academic Management Journals

Aimee Tiu Wu, Teachers College, Columbia University
The Balancing Act of Dr. Mommy
Distinguished Paper Awards

Mustang International Academic Conferences!

Past winners include:

Las Vegas, Spring 2013 Conference:

Joseph Groch, Florida Gulf Coast
Satisfaction: A Path to Success for the Golf Industry

Shawn Schooley, Auburn University
Appreciative Inquiry: Answering the Call of the New Public Service by Creating a Democratic Discursive Space through Positive Storytelling wherein Direct Citizen Participation can Flourish

Yue Yuan, University of Chicago
Examining Stock Returns through Anomalous Volume: 1966-2009

Distinguished Paper Awards

Oklahoma City, Fall, 2012 Conference:

Kusum Singh, LeMoyne-Owen College
Paper: Distance to the Border: The Impact of Own and Neighboring States’ Sales Tax Rates on County Retail Activity

Daniel Adrian Doss, Russ Henley & David McElreath, University of West Alabama

Ralph Bourret & Dana Roark, Northwest Oklahoma State University
Paper: Are Routine Retiring CEOs More Closely Monitored in their Last Year?
COLLABORATIVE LAW AND BUSINESS DISPUTES:
A MARRIAGE OF EQUALS?
Alexandria Zylstra, J.D., LL.M. *

In 2011, I authored an article cautioning against the use of collaborative law in family law disputes, absent sufficient research establishing actual benefits to the clients in the collaborative law process. After that piece was published, I began wondering where collaborative law may be beneficial, without posing the significant risks it poses to many family law clients, where the parties are often financially disparate and first-time legal consumers. One such area where these risks may be mitigated is within the business field, specifically in some employment and commercial law disputes. However, there is very little written on this topic, beyond a handful of industry newsletters and a few law journal articles, and very few firms offer collaborative law to their business clients. Additionally, no case studies of collaborative law have emerged outside the family law setting.

Why has there been minimal expansion of collaborative law beyond the family law arena? More importantly, could the risks of collaborative law I, and others, have identified be mitigated in some business disputes? This paper re-examines the concerns raised in my 2011 article regarding the use of collaborative law to resolve family court disputes, evaluating whether those concerns may be mitigated in certain business disputes. ¹ This examination is followed by a review of literature suggesting reasons why collaborative law has not spread to new areas of law. My hypothesis, as so little collaborative law practice and even less research is being conducted in this field, is that collaborative law is likely most beneficial in business disputes involving the need for an ongoing relationship, where the parties are somewhat legally sophisticated, and have similar financial resources, such as labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes (Group A). While some authors advocate for the use of collaborative law in other business settings, such as family business disputes, landlord/tenant disputes, discrimination or disability claims, sexual harassment claims, and medical malpractice cases ² (Group B), I caution against using it in these instances, as

* Alexandria Zylstra is an Associate Professor of Business Legal Studies at George Mason University. She earned her J.D. and LL.M. in Dispute Resolution from the University of Missouri-Columbia, and has published several articles concerning alternative dispute resolution.

¹ Much of the following discussion re-examining the process of collaborative law, and the concerns and case studies regarding collaborative law within the field of family law, was taken from Alexandria Zylstra, A Call to Action: A Client-Centered Evaluation of Collaborative Law, 11 Pepp. Disp. Resol. L.J. 547 (2011).

² See, e.g., R. Paul Faxon & Michael Zeytoonian, Prescription for Sanity in Business Restructuring Case, COLLABORATIVE LAW JOURNAL (Fall 2007), (authors describe the successful use of collaborative law in a family business dispute); Richard A.B. Gleiner, Using Collaborative Law to Resolve Disputes in Family Businesses, FAMILY FIRM PRACTITIONER (Nov 2009) (also advocating using collaborative to resolve family business disputes); Lawrence R Maxwell, Jr. & William B. Short, Jr., Collaborative Law: It’s Here and the Consensusdocs Are, Too, CONSTRUCTION LAW JOURNAL (Winter 2008) (advocating collaborative law for construction disputes); Christopher M. Fairman, Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics, 30 CAMPBELL L. REV. 237 (2008) (advocating
this latter group raises some of the same concerns seen in family law cases. That is, this group contains at least one party that may be financially disadvantaged and/or a first-time legal consumer.

I. The Collaborative Law Process

Collaborative law (CL) has spread across the United States and Canada in the past twenty-five years, and most practitioners (and clients) are concentrated in the field of family law.3 In a typical collaborative case, each party hires separate legal counsel, both of whom agree to limited representation.4 That is, the attorneys and parties sign an agreement, sometimes called a participation agreement or disqualification agreement, to settle the legal issues solely through cooperative negotiation and without litigation. 5 No court filings are made until the collaborative law process settles all raised issues.6 Should either party decide to litigate, or even threaten litigation, both collaborative lawyers (and all other hired professionals) are disqualified. Both parties must hire new counsel and new professionals.7 It is this disqualification provision that defines collaborative law. It is the “one irreducible minimum condition” for CL.8 CL advocates argue that the disqualification agreement, by closing the door to the courthouse, shifts negotiations toward settlement and away from legal gamesmanship.9 The CL agreement signed by parties and attorneys generally requires, upon punishment of withdrawal, good-faith negotiation and full and voluntary discovery.10 Most of the work of CL is done in four-way meetings in which clients and attorneys actively participate.11 Thus, the goal of CL is an interest-based negotiation involving the dynamic participation of both legal counsel and parties that results in finding “common ground for solutions” without the threat of litigation looming over them.12


5 Id. at 7.

6 See generally id. at 69 (describing the end stage of collaborative law representation).

7 Id. at 3-4.

8 Id. at 5-6.


10 Tesler supra note 4, at 3.


12 Tesler, supra note 3, at 330.
Collaborative law is the brainchild of Stu Webb, a Minnesota family lawyer who, after practicing traditional family law for nearly two decades, was “approaching burn-out” in the late 1980s.13 Webb began experimenting with different methods of conflict resolution for dissolution cases until finding that the “most promising model” was attorney as settlement lawyer, meaning one who would withdraw from the case if settlement could not be reached.14 “I saw the possibility of creating a settlement specialty bar consisting of lawyers who would take cases only for settlement.”15

Webb’s concerns about adversarial litigation are not unique. Extensive literature paints a picture of traditional litigation as “dominated by hard-line positions reflecting zero-sum assumptions which drive a culture of competition and widespread expectations of zealous advocacy among both lawyers and clients.”16 “Position-taking in litigation . . . tends to reduce creativity and the capacity for accommodation.”17 Such position-taking often leads to denial of allegations detrimental to one’s own side, leveling of allegations detrimental to the opposing side, granting of only small concessions, and unpredictable outcomes. In response to this long list of adversarial shortcomings, CL promises a different way means to resolve legal disputes. Thus, it is not surprising that many family law practitioners, disheartened by the adversarial model of litigation, are attracted to an option that seems to shut the courthouse doors, at least until all legal issues are settled.

II. Benefits and Risks Regarding the Use of Collaborative Law

CL practitioners cite many benefits to the clients, including financial and temporal savings, and the preservation of relationships18, although few studies of such benefits have been conducted. One of the earliest references to the value of collaborative law beyond family cases is found in a short 2001 Lawyer’s Weekly article.19 A specific reference to the use of collaborative law in business disputes can be found in David Hoffman’s 2003 article, in which he suggests that some of the same benefits of collaborative law could apply to many business disputes: common interests, limited resources, need for the preservation of an ongoing relationship, and the desire for private resolution of disputes, among other reasons.20 Other

13 Webb, supra note 11, at 156.

14 Id.

15 Id. at 157.


17 Id. at 1488.


19 Laurie McMurchie, Collaborative Law Holds Promise for Areas Other Than Family Law, LAWYERS WEEKLY (Jan 12, 2001).

benefits that may make collaborative law attractive to business litigants include: the opportunity for creative problem solving, the ability for the parties to control the process, and financial savings, especially in cases in which protracted litigation would threaten business relations. Despite the potential benefits of CL, it poses several risks to many family law litigants, and to at least one party involved in the Group B business disputes (family business disputes, discrimination or disability claims, medical malpractice cases, etc.).

A. Informed Consent

The first concern involves informed consent. The CL model has proven so attractive to some family law practitioners they tend to speak about it with an almost religious fervor. “[CL] helps clients and attorneys evolve from their lower-functioning isolated selves into higher-functioning integrated people.”

Pauline Tesler, who has written the leading texts on CL, glows that “collaborative lawyers find themselves becoming members of a healing profession—and in so doing, heal themselves.” Such fervor about CL, with only anecdotal and small sample evidence of actual benefits to clients, presents a risk of pressuring clients to choose CL, even if it is not in their best interest. In Julie Macfarlane’s four year study of CL, she found this religious conversion-type language with which many CL lawyers speak “fuels a desire to persuade their clients to use the collaborative process.”

Given such fervor/passion, several commentators have questioned whether true CL believers, with a mindset that litigation is failure, properly can advise a prospective client about the advantages and disadvantages of litigation versus CL. “If attorneys practicing collaborative law allow their own personal distaste for litigation to cloud their judgment regarding the suitability of collaborative law for their clients, they may be ‘selling’ a dispute resolution approach to their clients.”

Even Tesler admits that CL practice tends to flourish among lawyers whose “enthusiasm and conviction about [collaborative practice] were so genuine and intense that [they simply] could not contain their excitement when they spoke about how relationships, and result in time and cost savings). One of the earliest mentions of collaborative law being used to resolve a business disputes is in a 2004 issue of the Collaborative Law Journal, in which the attorney-author explains how he utilized collaborative law while representing a client involved in a commission dispute with an employer. Michael Zeytoonian,

\[ \text{Getting to Collaboration in Business and Employment Disputes, COLLABORATIVE LAW JOURNAL, Summer 2004.} \]

21 Zeytoonian, supra note 20.


collaborative law works.” 27 Could such ardent enthusiasm diminish the CL attorney’s presentation of material risks, as required by ABA Model Rules when entering limited representation agreements? 28 At least one state ethics committee has identified this risk. 29 Even the best-intentioned, best trained collaborative lawyer may unconsciously—and unfairly—present diminished risks and heightened benefits of CL. 30 “The danger is that a lawyer committed to the collaborative law process may lack the capacity, even unconsciously, to provide a client with a fair representation of the risks and benefits of utilizing such a process.” 31 Such unfair presentation of the risks could lead to detrimental consequences for the client.

This risk of pressuring clients may be compounded by the fact that most dissolution clients, and at least one party in the Group B disputes, are often one-time, first-time, legal consumers, with little or no prior interactions with a lawyer or traditional litigation. This places the attorney in a very influential position.

Attorneys, after all, wield technical expertise, enjoy exclusive or privileged access both to other lawyers and to officials of the state, and bring familiarity and detachment to situations in which clients are often frightened, angry, and uninformed. Often social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due. 32

Beyond the danger of inappropriately “selling” CL to a client is the danger identified in at least one case study—CL clients may not fully comprehend the impact of the CL commitment. 33 For example, Macfarlane’s study suggests clients may not understand completely the full and voluntary disclosure commitment requiring disclosure of information the party never believed would be revealed, the extent to which discussions with one’s own lawyer will be kept confidential in a team model, and the emotional and financial costs emanating from the termination of the CL process. 34 This study also found a mismatch between the lawyer’s values and the client’s practical expectations of the CL process. Clients in the study expressed frustration regarding collaborative lawyers’ reluctance to give legal advice and not understanding the extent of information that would be required disclosure. 35 If the expectations of attorneys and clients are so dissimilar, does this mark a failure to obtain informed consent? 36

27 TESLER, supra note 4, at 37.

28 MODEL RULES OF PROF’L CONDUCT R. 1.0(e) & 1.2(c) (2010).


31 Id.


33 Macfarlane, supra note 24, at 209.

34 Id. at 209-10.
Lastly, choosing CL requires a certain amount of prognosticating not required in mediation or traditional litigation models. Because of the disqualification agreement, both attorneys and clients must first conclude that the settlement of their issues is best handled outside the adversarial process, a difficult task even for the most seasoned attorney. A failed prediction about CL has significant financial and time consequences to the client because of the disqualification agreement, which calls into question the client’s ability to truly give informed consent. Additionally, might attorneys be willing to risk a failed prognostication (thus, disqualification) because family law clients and at least one party in each of the Group B categories are usually one-time clients, rather than repeaters?37

All three of the concerns regarding informed consent are predicated on the notion that many clients are rarely litigation savvy consumers. While the zealous fervor with which many CL advocates represent CL to their clients would likely not change within the business setting, the issue of informed consent may be mitigated by the fact that many business parties in Group A (labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes) are not one-time, first time legal consumers, thus, perhaps, the influential power of the attorney is diminished. Thus, these parties may be able to better assess the risks of CL.

B. The Disqualification Agreement

In addition to questions of informed consent, another danger to clients is posed by the very hallmark of CL: the disqualification agreement (DA). The DA is the single most identifiable characteristic of collaborative law.38 CL advocates contend that the DA, by temporarily closing the courthouse doors, can enhance a party’s commitment to settlement, create an environment allowing for creative problem solving without the fear of court, and create an equal incentive for all parties to cooperate (as both lawyers must withdraw if one party chooses litigation).39 The DA “truly creates the energy shift necessary to allow all the creative resources of the parties and counsel to focus squarely on solutions tailored for the parties.”40

In my view, the disqualification requirement is the engine that drives collaborative law. The disqualification provision provides the positive settlement

35 Id. at 207.

36 Of course, attorney underestimations of negotiating skills are not unique to CL. Negotiators tend to “underestimate the costs to themselves of not reaching agreement and to overestimate the costs to the other side.” ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 78 (1994). Within CL this underestimation, however, could be significantly more risky to the client than such underestimation in other dispute resolution models.


38 See Webb, supra note 11, at 168.


40 SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 37, 52 (2004).
tone and a check on the lawyers’ mind-set and activities. Disqualification requires the lawyers to act differently. They don’t have to be concerned about trial strategies. Without the disqualification rule, the behavior of the lawyer is likely to be influenced by our trial/court instincts.\textsuperscript{41}

Despite these claimed benefits, there are at least three potential dangers to family law litigants, and to at least one party in the Group B categories, posed by the DA: client misunderstanding of the meaning and impact of the DA, potential financial and psychological coercion of the DA, and, to a lesser extent, the diminished BATNA resulting from the signing of the DA.

1. **Client Misunderstanding of the Meaning and Impact of the DA**

Even if a potential CL client understands the meaning of the DA, which at least one study mentioned earlier describes as highly questionable, John Lande noted in his CL study that the client may not believe disqualification will happen in his or her case.\textsuperscript{42} This underestimation may be fueled by the zealousness of the collaborative lawyer. If disqualification does occur, Lande suggests the client “may have difficulty appreciating in advance what the impact would be when the agreements would be invoked.”\textsuperscript{43} Invoking the DA requires both parties to seek and hire new lawyers and professionals, pay new attorneys’ fees, and educate new lawyers about the case. “Collaborative law . . . can require a significant investment. This investment is no more, perhaps, than litigation costs, but if the negotiation is unsuccessful, this investment is lost and the litigation costs remain.”\textsuperscript{44} Significant time and emotional investment are lost also if CL fails.

While the added cost of retaining new counsel will impact both Group A and B litigants similarly, parties in Group A that have past legal experience, especially repeated experience with a particular law firm, may be able to understand the risk of disqualification more easily then Group B parties, as these disputes may contain at least one party who is likely to be a first-time legal consumer. Additionally, the parties in Group A are more likely to be interested in preserving business relations with the other party, as they may have future interactions; thus, the time investment of CL would be less concerning. Yet, the Group B participants often do not have an interest in an on-going relationship, making the time commitment of CL undesirable.

2. **The DA’s Potential Financial and Psychological Coercion to Settle**

Given the significant temporal and financial consequences of the DA, there is clearly a heightened risk of coerced settlement. Parties, mindful of the financial consequences of disqualification, may remain at the negotiating table even when it would no longer be in their best interest.\textsuperscript{45} In fact, Macfarlane questions whether the CL investment amounts to “entrapment that prevents clients from withdrawing from the process.”\textsuperscript{46}

\textsuperscript{41} Webb, \textit{supra} note 11, at 168.

\textsuperscript{42} Lande, \textit{supra} note 37, at 1358.

\textsuperscript{43} \textit{Id}.

\textsuperscript{44} Fines, \textit{supra} note 26, at 146. In fact, at least one author questions whether invocation of disqualification unfairly prejudices the client’s rights. Spain, \textit{supra} note 30, at 162.

\textsuperscript{45} Macfarlane, \textit{supra} note 9, at 194.
The DA may be particularly burdensome to the party with fewer financial resources. Although the few CL studies conducted do show that CL is utilized almost exclusively by middle to upper income clients, there is, still, often one party with a financial advantage in family law cases or with disputants in Group B. Given the significant investment noted above, financially disadvantaged parties may be forced to concede because of their inability to afford hiring another lawyer if CL is unsuccessful.\(^{47}\) While there is, of course, a financial incentive to settle in the traditional litigation model as well, the DA adds to that extra cost the price of retaining and re-acquainting a new lawyer with the case, plus additional indirect costs such as lost work, lost time, etc..

Some authors have even questioned the appropriateness of CL for any financially disparate clients.\(^{48}\) At least one commentator questions whether the DA may even violate Model Rule 1.2 in cases of financially disparate parties:

> It seems likely that in some circumstances such [disqualification] provisions are not ‘reasonable under the circumstances.’ For example, if retaining new counsel imposes extremely asymmetrical costs on the two parties—one party can do it cheaply, the other only at great expense—then these limited-retention agreements may work serious strategic disadvantage on the cost-sensitive party.\(^{49}\)

Note, however, that Macfarlane’s study did not find that CL resulted in weaker parties “bargaining away their legal entitlements,” although only eleven cases that reached final resolution were followed in this study.\(^{50}\)

In fact, the DA itself may become an extremely powerful coercive tool, as one party’s ability to fire the other party’s lawyer can mean one party’s financial ruin. “[W]hile the agreement purports to remove litigation as an alternative, it does not. Its possibility remains a powerful threat that can be strategically used by one party to foul the process.”\(^{51}\) Lande echoes this concern. “Although the disqualification agreement is undoubtedly helpful in many cases, it

\(^{46}\) MACFARLANE, supra note 24, at 69.

\(^{47}\) Susan B. Apel, Collaborative Law: A Skeptic’s View, 30 VT. B.J. 41 (2004). The Uniform Collaborative Law Rules and Act does permit another lawyer in the firm to continue representation of low-income clients after a failed CL, so long as the participation agreement includes this provision and the CL lawyer is isolated from the case following the failed CL. Uniform Collaborative Law Rule and Uniform Collaborative Law Act (amended 2010), Rule 10, available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.htm


\(^{50}\) MACFARLANE, supra note 24, at 78.

\(^{51}\) Apel, supra note 47, at 43.
also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to litigate.”^{52} Lande expresses further concern that the DA may “actually undermine some clients’ interests in cooperative negotiation if the other party will act reasonably only in response to a credible threat of litigation . . . .”^{53}

The coercion to settle within CL may not just come from the parties’ financial risk. Even with relatively equal financial resources, CL parties may feel unique pressure from the lawyers. “Unlike any other kind of family law representation, the risk of failure is distributed to the lawyers as well as to the clients in collaborative law.”^{54} As Lande has pointed out, this could potentially risk a good settlement in favor of any settlement. He writes, “CL theory calls for interest-based negotiations, but the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements satisfying the parties’ interests.”^{55} Despite such concerns, William Schwab’s CL study (mentioned later in this article) found that over fifty percent of CL participants said the DA “did not keep them in negotiations when they otherwise would have left,” although this study involved only twenty-five client surveys.^{56} Additionally, at least one CL advocate believes that, because disqualification is so rare, and settlement rates with CL so high, the actual lost revenue from utilizing CL would be a nominal risk.^{57}

As for business disputes, again the parties in Group A may be more able to bear the financial risk involved due to the disqualification agreement, as both parties are likely to have similar financial resources. Further, the psychological coercion may be lessened in this group if both parties are legally savvy, thus understanding the risks of litigation as compared to the risk of disqualification. Lastly, Group A business parties are often already skilled negotiators, and this risk of coercion may be diminished. Note, however, even in Group A business disputes, the DA itself may become an extremely powerful coercive tool, as a savvy business party has the ability to fire the other party’s lawyer, potentially causing the other party’s financial ruin. A savvy party may utilize this in a business dispute quite easily against an unsophisticated negotiating party.

3. Diminishing the Client’s BATNA

A final and significant concern posed by the DA is the diminishment of a client’s negotiating ability. If, as advocates claim, the purpose of CL is interest-based negotiations in hopes of finding “common ground for solutions,” then credible analysis of CL must involve assessment of the parties’ negotiating positions within CL as compared to other forms of

^{52} Lande, supra note 37, at 1315. Lande goes further by suggesting the DA may in fact violate ethics rules, which the Colorado Bar Association later agreed with. Id. at 1329.

^{53} Id. at 1360.

^{54} TESLER, supra note 4, at 11.

^{55} Lande, supra note 37, at 1364. In fact, Macfarlane echoes his concern, especially for the weaker party who may be “pressured to agree to an outcome that does not recognize their needs.” MACFARLANE, supra note 24, at 59.


^{57} Abney, supra note 2, at 512.
conflict resolution. Utilizing Fisher and Ury’s seminal book in this field, *Getting to Yes*, determining each party’s negotiating ability depends, in large part, upon assessment of each party’s BATNA. The stronger a party’s BATNA, the less likely that party will be to make a bad agreement. “Whether you should or should not agree on something in a negotiation depends entirely upon the attractiveness to you of the best available alternative.”

In a typical legal dispute, the parties hire lawyers who attempt to negotiate an agreement, or perhaps the parties try mediation to resolve the issues, knowing that their BATNA is litigation, an unattractive, but sometimes necessary, way of settling legal disagreements. Despite the many disadvantages of litigation, with this traditional model, the parties, at least, know that their lawyers will, if necessary, pursue litigation, having already been retained and knowledgeable about the issues. If the parties choose CL, however, the lawyers demand that the parties sign away this BATNA. In fact, CL is designed to “diminish the value of both parties’ BATNA in an effort to keep them at the table.” This seems to be counterintuitive to Fisher and Ury’s argument that the best way to ensure a settlement in a party’s best interest is to improve, not diminish, one’s BATNA. This diminished BATNA could force acceptance of any settlement rather than risk loss of attorneys and experts.

This loss of the litigation alternative is particularly onerous for family law clients, as most of these disputes (divorce, custody, and paternity) require court intervention. Unlike many business disputes, most family law issues cannot be resolved without judicial approval. Thus, litigation for family law clients is not only a BATNA, but is really the only alternative to a negotiated agreement. If the parties cannot reach consensus, whether through CL, mediation, or litigotiation, then litigation becomes necessary. Thus, by signing a DA and closing the courthouse gates, even temporarily, CL imposes a significant encumbrance to case resolution should CL fail that is not present in many other areas of the law. Such risks posed by the DA have caused several authors to question its value. After concluding her research, Macfarlane asked whether the DA is “essential to produce the cooperative characteristics” claimed by the CL advocates.

Clearly, however, this risk is diminished in most business disputes, as they can often be resolved without legal intervention. Thus, the reduced BATNA may not pose such a significant financial and legal risk to parties in both business groups A and B, as it does for family law litigants.

### III. Available Analyses of Collaborative Law


60 *Id.* at 102.

61 *Id.* at 101.


63 FISHER & URY, *supra* note 59, at 103.

64 Macfarlane, *supra* note 9, at 200.
Despite more than two decades of CL, “[t]here is as yet no empirical research that compares client outcomes and perceptions in collaborative cases with those in other dispute-resolution modalities.”65 Examining the few available studies of CL confirms this.

1. William Schwab published his CL study in 2004 involving surveys of both CL clients and lawyers. While the lawyer sample included seventy-one respondents, the client sample consisted of only twenty-five respondents.66 In the survey, lawyers were asked about CL training, the number of CL cases handled and withdrawn, and hours spent on CL cases.67 Clients were asked how they learned about CL and their experiences with CL, including cost, whether the DA affected the negotiation, and satisfaction with the process.68

Schwab’s study found 87.4% of CL cases settled, averaging 6.3 months to reach settlement, with an average cost of $8,777 per case.69 Schwab’s small sample of clients was “white, middle-aged, well educated, and affluent.”70 Of the clients who reached settlement in CL, 54.5% said the disqualification provision did not keep them at the negotiating table, while 45.5% said it did,71 suggesting more than half did not find the DA coercive, but this was a very small sample size and involved no control group.

2. Carl Michael Rossi collected data in 2004 primarily from attorneys, in addition to a handful of coaches and financial advisors who were involved in 160 collaborative cases.72 His study examined client income, settlement rates, and the cost of CL as compared to projected costs of litigation, among other issues.73 Where client income was provided, 93% of the clients had combined annual incomes (for the divorcing couple) over $50,000.74 Approximately 85% of cases reached agreement or the parties reconciled.75 Of the 138 cases in which fees were provided, 50% of the cases cost the

65 TESLER, *supra* note 4, at 8 n.20.
67 *Id.* at 369.
68 *Id.*
69 *Id.* at 375-77.
70 *Id.* at 373.
71 *Id.* at 379.
72 Carl Michael Rossi, Collaborative Practice Case Reporting Data (2004) (on file with author). Clients were not interviewed as part of Rossi’s research..
73 *Id.*
74 *Id.*
75 *Id.*
client $10,000 or less for attorneys and all other professionals.76 Lastly, respondents were asked to project what the estimated cost for each client would have been if the case had been litigated. Of the 133 responses, 68% reported that they believed litigation would have cost the client more than CL.77

3. The most comprehensive study of CL, conducted by Julie Macfarlane, involved 150 interviews conducted between 2001 and 2004 with U.S. and Canadian collaborative lawyers, collaborative clients, and other collaborative professionals.78 These interviews were conducted at various stages of the case, and, although involving a significant amount of time, included only sixteen CL cases and failed to include a control or comparison group.79 Her study found that the primary motivation for clients choosing CL was cost and time savings, cautioning that some clients may be “bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution.”80 However, Macfarlane concluded, “To date, evidence suggests that the collaborative process fosters a spirit of openness, cooperation, and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations.”81 But she questioned whether this is because of the DA, the hallmark of CL or simply because of “the need to commit to a particular period of negotiation outside litigation, rather than an absolute commitment not to litigate.”82

4. David Hoffman examined 199 family law cases that his own law firm (Boston Law Cooperative) handled between 2004 and 2007.83 The information he collected was taken from billing records, and thus only examined CL cost, time, and contentiousness (as estimated by lawyers or paralegals).84 Hoffman concluded that mediation cost one-third what collaborative practice cost at his firm, but both were substantially less than litigotiation and litigation.85 Hoffman found that contentiousness levels among divorce

76 Id.
77 Id.
78 MACFARLANE, supra note 24, at 13-15.
79 Id.
80 Id. at 25.
81 Macfarlane, supra note 9, at 200.
82 Id.
84 Id. at 28.
85 Id. at 30-34.
mediation (scoring 2.5), CL (2.3), and litigation (2.9) varied by only 0.6 on a scale of 1 (lowest contentiousness) to 5 (highest contentiousness).\textsuperscript{86} Hoffman concluded that the "data suggest that most of these processes are quite similar in the measures that clients seem to care about—i.e., cost, contentiousness, and delay."\textsuperscript{87} Note, however, that this study involved a very narrow sample—cases from a single law firm—and had no comparison or control group.\textsuperscript{88}

5. Lastly, John Lande’s 2007 study (published in 2008) of CL was based on a very small number of interviews, surveys, and data collected from \textit{cooperative} lawyers at Wisconsin’s Divorce Cooperation Institute.\textsuperscript{89} Cooperative law is similar to CL but does not include the DA. Lande looked at why lawyers seek or reject CL, how cooperative practitioners view the DA used in CL, and how CL is viewed differently from cooperative law.\textsuperscript{90}

The cooperative lawyers surveyed expressed two sets of criticisms about CL: that the DA is problematic and that CL is "more cumbersome, rigid, and expensive than necessary."\textsuperscript{91} Cooperative lawyers also pointed to the time consuming nature of CL, particularly the overuse of four-ways.\textsuperscript{92}

As for client concerns, 83% of those who practice cooperative law only (not CL) “believed that a substantial number of parties in Collaborative cases are likely to feel abandoned by their lawyers if they need to litigate and that the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach agreement in Collaborative law . . . .”\textsuperscript{93} Half of cooperative-only attorneys felt “[c]ollaborative process puts too much pressure on a substantial number of parties, especially weaker parties . . . .”\textsuperscript{94} Lande concluded “[c]ollaborative practitioners [should] seriously consider concerns and criticisms expressed by

\textsuperscript{86} Id. at 32.

\textsuperscript{87} Id. at 34.

\textsuperscript{88} Id. at 27.


\textsuperscript{90} Id. at 206.

\textsuperscript{91} Id. at 217.

\textsuperscript{92} Id. at 222-23.

\textsuperscript{93} Id. at 218.

\textsuperscript{94} Id.
Cooperative practitioners.95 Note, however, this study is also a very small, and narrow, sample of surveys.

Each of these studies96, while producing beneficial observations used in this paper and elsewhere, lacks at least one of two criteria for effectively evaluating CL: a sufficient sample size or scope, and control groups. By using a small sample, or a very narrow sample (i.e., a single law firm or only cooperative lawyers), these studies amount to no more than anecdotal evidence. Without the use of a control group participating in some other form of conflict resolution, particularly in studies of CL client opinions and outcomes, it is impossible to discern which views or outcomes can be attributed to CL independently. Absent controlled studies, professionals and clients would have great difficulty determining whether CL is as beneficial, or more beneficial, than other methods, or whether it is simply “a creative way for attorneys to charge their clients more than necessary for legal matters.”97 Several CL authors have highlighted this lack of evidence. “[T]here has been very little detailed assessment of outcomes resulting from the use of collaborative law processes.”98 Even staunch supporters, such as Tesler, acknowledge, albeit in a footnote, that claims of enhanced problem-solving and communication skills, as well as other benefits espoused in the first few pages of her book, are entirely derived anecdotally.99 However, Tesler later downplays the significant lack of critical CL research, stating “[CL] has not been shown to have harmed any clients and that seems to serve remarkably well the interests of those who have chosen it.”100

Examining two of the claimed CL client benefits highlights the dangers of advocating benefits without supporting research. In Tesler’s book Collaborative Law, the client handbook offered in the appendix assures prospective clients that CL will cost between one-third and one-fifth the cost of traditional litigation.101 But this claim of cost (and time) savings has yet to be proven, as Macfarlane points out.102 Additionally, the lack of judicial deadlines increases the

95 Id. at 207.

96 A sixth study just published in 2014, , involving an international survey of CL, will be briefly discussed in the next section of this paper.

97 See Elizabeth F. Beyer, Comment, A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation, 40 ST. MARY’S L.J. 303, 309 (2008). Macfarlane concluded from her sample of eleven cases that there simply did not appear to be much difference between the outcome reached from CL and what would have been expected in litigation. MACFARLANE, supra note 30, at 57.

98 Spain, supra note 30, at 154.

99 TESLER, supra note 4, at 8 n.20.

100 Id. at 147.

101 Id. at 354.

102 MACFARLANE, supra note 24, at 26. “Whether CL proves to be cheaper and faster in such cases is still unproven.” Id. Thus, Macfarlane cautions, “[T]he CFL movement should generally be cautious in making such [time and cost] claims and especially when using them as a basis for obtaining consent to participate in CFL.” Id.
length of the CL process, often leading to client frustration. Macfarlane’s study found, “With negotiations removed from any case management requirements or constraints imposed by the court or other parties’ pretrial motions, the process sometimes slows down further than one or both parties desire.”103 Her study also found CL client frustration with the length of time CL takes to get to substantive issues and with attorneys who were not willing to “hurry up” the stalling party.104 This slowdown “may raise problematic legal issues in custody cases, where the stalling party wishes to establish a pattern of custody, or in relation to the date of a divorce agreement for the purpose of calculating assets.”105 At a minimum, such frustration likely detracts from any client-perceived cost and time savings.

A second benefit many CL advocates cite is the high settlement rates achieved by CL—often between 85% and 90%.106 While this number is high, the reality is that more than 90% of civil cases settle, regardless of dispute resolution method, suggesting CL settlement success is on par with other methods. Additionally, examining settlement rates alone can be deceptive, as CL by definition “encourages” parties to stay at the table until settlement is reached or acknowledge “failure.”

Consequently, CL advocates often point to the difference in settlement quality. Tesler emphasizes that, while nearly all traditionally litigated family law cases do settle, “those settlements generally have taken place on the courthouse steps . . . after most of the damage of litigation has occurred[,] inflammatory court papers have been filed[,] . . . positions have polarized, clients have been encouraged to believe the black-and-white oversimplifications of reality[,] . . . large sums of money have been spent, and the children have been at best forgotten . . . .”107 Thus, courthouse-step settlements are often viewed as being limited in scope and creativity because of court rules, deadlines, and unaddressed emotional issues.108 While these observations are possibly true, this does not necessarily prove that CL agreements encompass scope, creativity, and emotional acknowledgement, at least not without proper study.

103 Macfarlane, supra note 9, at 199.

104 Id. at 211.

105 Id. at 199.


107 TESLER, supra note 4, at 1.

IV. Expansion of Collaborative Law to Group A Disputes

Despite the lack of research in this field, the benefits of CL for some business disputes, and the reduction of the risks discussed in this paper for litigants in Group A, suggest that many business parties could greatly benefit from this alternative dispute resolution model. As advocacy for using CL in business disputes has been published for over a decade now, why has CL not spread more rapidly? This lack of expansion is not unique to the U.S.. Dr. Paola Cecchi-Dimeglio and Peter Kamminga recently published a study based on surveys of 226 collaborative law practitioners in 19 countries. Of the respondents, 86.7% reported that family law is the primary use of collaborative law in their country. Other areas included: labor relations, real estate, tort law, healthcare law, insurance law, environmental law, and financial disputes, but all in much smaller percentages of practice.109

One reason CL has grown rapidly in family law, but not in other areas, according to one collaborative law working group, is because family practitioners have been exposed to alternative dispute resolution, such as mediation, for many more decades than any other area of law.110 Exposure time may, in fact, play a significant role in acceptance of new models of legal practice. The Cecchi-Dimeglio study found that 90% of respondents “reported that collaborative law is perceived negatively or is a practice unknown to other members of the legal community.”111 But the study also found that “the longer a collaborative professional is active in the field of collaborative law, the more positive the professional perceives the environment [meaning the perception of CL in the legal community].”112

In addition to lack of exposure, CL may be growing more slowly because, unlike mediation, courts cannot mandate that parties participate in collaborative law, as this would require parties to sign a contract (the DA) potentially against their wishes.113 Without the backing of the courts, this voluntary process will likely see slower growth rates than court-ordered forms of ADR.

The voluntary nature of this process may be further hampered by what David Hoffman refers to as a “reverence for trial as the lawyer’s ultimate test.”114 That is, the trial litigator still is often revered as the ultimate status in a law firm, as opposed to “lesser” settlement counsel. Lawyer mindset may impact the growth of CL in other ways as well. The adversarial bias, “or


111 Cecchi-Dimeglio & Kamminga, supra note 109, at 192.

112 Id.

113 Sherrie R. Abney, Moving Collaborative Law Beyond Family Disputes, 38 J. Legal Prof. 277, 290 (2014).

the need ‘to be right’” has been cited by the collaborative law working group mentioned above as indicating a lack of attorney training and comfort with CL, another potential hindrance to its growth.\textsuperscript{115} Additionally, fear that the disqualification agreement would cost a law firm a significant business client if the CL process fails, may discourage many law firms from offering CL to business clients.\textsuperscript{116} However, Sherrie Abney dismisses this fear, arguing the DA would only disqualify the law firm from representing the client in the specific matter at issue in the CL case. It would not prevent representation of that client in other matters.\textsuperscript{117}

Further, attorney reticence to adopt and expand CL may be the result of the lack of statutory framework for implementing CL in non-family cases. Only a handful of states have state statutes creating such a framework for CL, and a few other states have court rules allowing for CL. Without such a statutory or judicial framework, some authors contend attorneys are reluctant to pursue a new model of practice.\textsuperscript{118}

However, not all of the reluctance to adopt this new practice may be attributed to the bar. Several authors suggest that business clients may be reluctant to use CL. Just as attorneys have not had significant exposure or training in CL, members of the business community also are unfamiliar with CL.\textsuperscript{119} Additionally, the disqualification agreement may discourage business clients from utilizing CL. “[B]usinesses often have well-established relationships with attorneys who routinely represent them in a variety of matters… Such firms may be understandably wary of a process requiring them to risk discharging familiar counsel…”\textsuperscript{120} Fear that the DA will cause the dismissal of their law firm likely poses a significant deterrent for some business clients. However, the same collaborative law working group citing this concern also dismisses it, finding that given most CL cases end successfully, disqualification would occur very rarely.\textsuperscript{121} Despite such dismissal, at least one industry periodical suggests that this fear is real, and that a need to retain separate settlement and litigation counsel (to protect against disqualification) could potentially double a business’ costs.\textsuperscript{122}

V. Conclusion

The causes of collaborative law’s slow growth outside family law can be easily alleviated. Attorney training in collaborative law could expand via CLE or other offerings, as it will be the practitioners who will drive collaborative law into these new legal areas. Granted, changing the common attorney mindset that favors litigation can be difficult, yet we saw just

\textsuperscript{115} DiFonzo, supra note 110, at 602.

\textsuperscript{116} Collaborative Law Applied to Disputes as Alternative to Litigation, HR FOCUS (June 2013) at 10.

\textsuperscript{117} Abney, supra note 2, at 511.

\textsuperscript{118} ABNEY, Supra note 18, at 21.

\textsuperscript{119} Maxwell & Short, supra note 2, at 36. See also, Zeytoonian, supra note 20 (citing lack of education among both attorneys and business persons as a roadblock to expanding collaborative law to business disputes).

\textsuperscript{120} DiFonzo, supra note 110, at 603.

\textsuperscript{121} Id.

\textsuperscript{122} Collaborative Law Applied to Disputes as Alternative to Litigation, supra note 115.
such a shift when mediation proved a valuable dispute resolution tool. Changing opinions among business persons will likely also occur slowly, with education from attorneys and colleagues, and experience with the process itself.

Finally, analysis of the risks of collaborative law suggests that the process is most beneficial to business disputants that need to preserve business relations, are somewhat legally sophisticated, and are on similar financial footing as the opposing party. Thus, disputes such as labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes seem to be the best fit for collaborative law. Many of the contracts produced within these contexts already contain mandatory mediation or arbitration clauses, a sign the business community is eager to utilize alternatives to costly, time-consuming litigation. Thus, the assessment of whether collaborative law may provide more beneficial outcomes can be easily addressed in the future drafting of such documents.

However, proper assessment of those risks would be greatly aided by comprehensive, controlled studies of collaborative law to assess actual costs, risks, and benefits, which, as identified here, is quite lacking. Yet, this impediment is also easily resolved, given the twenty years of collaborative law case history and the rising number of collaborative practitioners. Studies are needed, not just comparing collaborative law to other dispute resolution models, but also seeking client-centered answers to the practical and ethical concerns expressed here and elsewhere.
CIGARETTES, COFFEE AND CARS:
A PATH TO STUDENT UNDERSTANDING OF PUNITIVE DAMAGES

Joseph J. Solberg
Illinois State University

Karen A. Hosack
Illinois State University

ABSTRACT

This paper discusses a technique that enables students in a legal environment course to develop an appreciation of the law related to punitive damages as well as the role of juries in determining appropriate awards. The technique requires students to apply the law to well-known cases in which punitive damages were awarded.

INTRODUCTION

The legal environment course provides students with an overview of the American legal system in the context of business. A variety of topics are taught, with critical thinking and writing exercises often included depending on the learning objectives of the course, the size of the class and the desires of the teacher. One subject typically covered during a semester is damages, compensatory and punitive. This paper discusses a technique that enables students to develop an appreciation of the law related to punitive damages as well as the role of juries in determining appropriate awards by requiring students to apply the law to well-known cases in which punitive damages were awarded.

The paper first provides a brief review of the history of punitive damages. Then, two significant Supreme Court cases are set out, with emphasis on the constitutional guidelines developed by the justices for appellate courts to follow when reviewing punitive damage awards given by juries. Next, real life case studies in which punitive damages were awarded are outlined. Their fact patterns were provided to students to enable them to reach their own determination with regard to punitive damages in the context of the law. The cases from which facts were drawn are the McDonald’s coffee spill case, the Ford Pinto case, and a cigarette case, Williams v. Philip Morris.

1 Compensatory damages are intended to reimburse the plaintiff for injuries caused by the defendant. Punitive damages are those awarded over and above compensatory to punish a defendant who has acted intentionally or maliciously. See CHARLES R. McGUIRE, THE LEGAL ENVIRONMENT OF BUSINESS 16 (1989).
HISTORICAL OVERVIEW

The concept of punitive damages has existed for thousands of years, perhaps beginning as many as four millennia ago with the Babylonian Code of Hammurabi.\(^5\) Around 1000 B.C. Hittite law also allowed for punitive damages,\(^6\) as did the Code of Manu in 200 B.C.\(^7\) Numerous passages from the Bible discuss situations in which money and livestock beyond what compensatory damages would call for should be given. For example, the Book of Exodus talks of requiring a man to pay five oxen for one he has stolen and four sheep to compensate for stealing one.\(^8\) In the Gospel of Luke a tax collector, Zacchaeus, offered to pay an amount four times what he cheated out of taxpayers.\(^9\) Roman law allowed for exemplary damages in cases of usury and killing slaves.\(^10\) Finally, in England, a system of civil fines was established by the government in civil and criminal cases.\(^11\)

The first discussion of something akin to punitive damages in recorded opinions occurred in two 1763 English cases. \textit{Huckle v. Money},\(^12\) involved a man who was arrested and falsely accused of printing a libelous article against the king. In his review of a jury award well in excess of what compensatory damages would permit, the Lord Chief Justice wrote, “I think they have done right in giving exemplary damages.”\(^13\) In \textit{Wilkes v. Wood},\(^14\) a plaintiff was awarded punitive damages in a case in which his house was searched and property removed under an inappropriate warrant. The opinion of the Lord Chief Justice still resonates, with the statement, “damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceedings for the future and as proof of the detestation of the jury to the action itself.”\(^15\)

Punitive damages made their way into American jurisprudence during the late 1700s. One case, \textit{Genay v. Norris},\(^16\) from 1784, involved a plaintiff who was injured when a physician laced a glass of wine with Spanish Fly. Seven years later, in \textit{Coryell v. Colbaugh},\(^17\) a 1791 New Jersey decision, punitive damages were awarded in a breach of a promise to marry case in which the defendant, after impregnating the plaintiff’s daughter, did not follow through on his promise to subsequently wed the woman. The Chief Justice instructed the jury not to limit themselves to


\(^{7}\) \textit{Id.}

\(^{8}\) \textit{Exodus 22: 1.}

\(^{9}\) \textit{Luke 19: 1-8.}

\(^{10}\) Michael Rustad and Thomas Koenig, \textit{The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 AM. U.L. REV. 1269, 1286 (1993).}


\(^{13}\) \textit{Id.}


\(^{15}\) \textit{Id.}

\(^{16}\) 1 S.C.L. (1 Bay) 6 (1784).

\(^{17}\) 1 N.J.L. 77 (N.J. 1791).
compensating merely for the actual loss “but to give damages by example’s sake, to prevent such offenses in the future….“\(^\text{18}\)

The United States Supreme Court acknowledged the concept of punitive damages in *Day v. Woodworth*,\(^\text{19}\) decided in 1852. The case involved an action for trespass in which the defendant unlawfully entered the plaintiff’s land to pull down a milldam. In dictum, Justice Grier wrote, “It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.”\(^\text{20}\) The Justice continued, “In actions for trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention….“\(^\text{21}\)

At this point, an instructor may wish to explore the relationship between due process and punitive damages. Due to time constraints existing in the course and the ultimate goal of the project we elected not to do so and proceeded to a discussion of the guideposts announced by the Supreme Court in *BMW of North America, Inc. v. Gore*\(^\text{22}\) and further addressed in the 2003 case, *State Farm Mutual Automobile Insurance Co. v. Campbell*.\(^\text{23}\) Briefly, however, it can be pointed out to the students that the Supreme Court has concluded that due process requires judicial review of punitive damages awards to prevent the “arbitrary deprivation of property.”\(^\text{24}\)

**BMW OF NORTH AMERICA V. GORE**

After exposing students to the history of punitive damages the stage is set to prepare them to work towards applying the law to the *McDonald’s, Ford and Philip Morris* cases. The *Gore* case facilitates this well. In addition to setting out the Supreme Court’s guidelines for the imposition of such awards, its fact pattern and arguably excessive punitive award help illustrate why the Court deemed it necessary at times to reign in damage awards.

*Gore* involved the purchase of a new automobile that had been damaged by acid rain and touched up prior to sale without the purchaser being made aware of the situation. The plaintiff, Dr. Ira Gore, Jr., purchased a new BMW from a dealer in Alabama. He later discovered that several panels on the car had been touched up before the vehicle was delivered to the dealer due to damage caused by acid rain on its trip across the Atlantic to America.\(^\text{25}\) He sued the company, alleging that its failure to disclose the repainting constituted fraud under Alabama law.\(^\text{26}\) Evidence at trial showed that BMW had sold almost 1,000 repainted cars nationwide. The jury awarded Dr. Gore $4,000 in compensatory damages and tacked on an astounding $4 million in

\(^{18}\) Id.
\(^{19}\) 54 U.S. 363 (1852).
\(^{20}\) Id. At 371 (dictum).
\(^{21}\) Id.
\(^{22}\) 517 U.S. 559 (1996).
\(^{23}\) 538 U.S. 408 (2003).
\(^{25}\) See supra note 22 at 563.
\(^{26}\) Id.
punitive damages. 27 This amount was reduced to $2 million by the Alabama Supreme Court, which determined that it was improper for the jury to use sales from other states as part of its damages calculation. 28

_Gore_ eventually reached the United States Supreme Court, which reviewed the punitive award. In the majority opinion written by Justice Stevens, the Court set out three guideposts to be utilized by appellate courts when reviewing punitive awards:

1. the degree of reprehensibility of the defendant’s misconduct;
2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 29

The Court emphasized that the reprehensibility of the defendant’s conduct is the most important guidepost, noting that some behaviors are simply worse than others. 30

It is helpful to analyze the facts of _Gore_ in conjunction with the law enunciated by the Court. This allows students to evaluate how the Court views economic damage versus physical injury in the context of a potential finding of reprehensibility. BMW’s behavior only lead to property damage, whereas the behavior of _McDonald’s_, _Ford_ and _Philip Morris_ involved severe injuries caused by the defendants.

In _Gore_, the Court reversed the $2 million punitive damages award, noting that the harm in _Gore_ was economic rather than physical. 31 The Court also noted the wide disparity between the actual harm, $4,000, and the punitive award, which was 500 times the compensatory damages given to Dr. Gore. 32 While not desiring to impose a “mathematical bright line,” Justice Stevens stressed that there should be a meaningful relationship between the actual harm and the punitive damages award. 33 The Court did note that a high ratio would pass constitutional muster if, for example, the actual harm caused was not dramatic but the behavior was particularly reprehensible. 34 The Court finally noted that there was a wide gulf between the punitive award given and the maximum civil penalty that might have been imposed on BMW. 35

At this point it may be pointed out to students that the Alabama Supreme Court reduced the punitive award in _Gore_ to $50,000. 36 It might, on the other hand, be just as beneficial to say

---

27 _Id._ at 565.
28 _Id._ at 567.
29 _Id._ at 574-75.
30 _Id._ at 575-76. The opinion set out aggravating factors to consider when assessing punitive damages. They include whether: (1) the harm caused was physical; (2) the defendant’s conduct was intentional or showed a reckless disregard for the safety of others; (3) the target of the conduct was financially vulnerable in cases involving economic harm; or (4) the conduct was recidivistic in nature. _Id._ at 576-77.
31 _Id._ at 576-80.
32 _Id._ at 580-83.
33 _Id._ at 580.
34 _Id._ at 582.
35 _Id._ at 584.
nothing, so as to not have them feel constrained when doing the case analyses to follow. Our students were not informed of the decision of the Alabama Supreme Court. We also did not discuss the ratio component of the guideposts to a great degree, determining that at this juncture it was more important that they focus on the degree of reprehensibility existing in the defendant’s behavior. Similarly, we did not discuss the possible imposition of civil penalties, again to keep the focus on reprehensibility.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL**

Seven years after its *Gore* decision, the Supreme Court revisited the issue of punitive damages, further refining its guideposts formula. The case involved a State Farm insured, Campbell, who caused an accident in which one person was killed and a second severely injured. State Farm refused to settle the matter after receiving an offer to do so at the policy limits, and took the case to trial. The jury returned a verdict in excess of the policy limits. State Farm initially refused to pay the excess amount. Eventually, Campbell and his wife sued State Farm for bad faith, fraud and the intentional infliction of emotional distress. The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages. The punitive award was reduced by the trial court but reinstated by the Utah Supreme Court.

The United States Supreme Court, after reiterating that due process places limits on excessive awards, attempted to provide clarification regarding the application of the guideposts announced in *Gore*. It noted again that the degree of reprehensibility is the most important component, writing that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” It disagreed with the trial court’s admission of evidence regarding lawful out-of-state conduct by State Farm, writing that the “reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.” With respect to the second guidepost, the Court noted that very few punitive awards with a ratio in excess of nine times compensatory would satisfy due process, particularly when the harm caused is not physical, as was the case in *State Farm*. The Court reversed the Utah Supreme Court’s reinstatement of the $145 million award, concluding that the case was “neither close nor difficult.”

---

37 See supra note 22 at 413.
38 Id.
39 Id at 413. The verdict of $189,849 was more than three times the amount for which State Farm could have settled the case. The Campbells were personally liable for $135,849. Id.
40 Id.
41 Id. at 413-14.
42 Id. at 415.
43 Id.
44 Id. at 416.
45 Id. at 419.
46 Id. at 424.
47 Id. at 425
48 Id. at 418.
At this point, students should have a working knowledge of the guideposts, particularly that regarding reprehensibility. With this background having been provided, students are now in a position to analyze the case studies related to McDonald’s, Ford and Philip Morris.

CASE STUDIES

We selected cases that faculty and perhaps modern students would be somewhat familiar with as our fact situations. Most students and faculty have a working knowledge of the McDonald’s coffee spill case regarding the elderly woman who placed a cup of coffee she ordered at a drive through between her legs to steady it while she added cream / sugar. The lawsuit that she filed as a result of the burns she received when the coffee spilled received much attention nationally and is still a topic of discussion in legal environment classes across the country. The Grimshaw v. Ford Motor Company case, while not so well known by current students due to the passage of time, is often used as an example of egregious corporate behavior in ethics classes as well as legal environment courses. Its facts are also nicely juxtaposed to those of McDonalds in the sense that some, including the jury, believe the plaintiff in the coffee spill case to have been at least partly at fault for her injuries, while the plaintiff in the Ford case was unquestionably an innocent victim. Finally, the Philip Morris case involves diverse elements, including behavior by a defendant that was found to be particularly reprehensible, a punitive damages award of $79.5 million, which was ninety-seven times the compensatory award, and a decedent who died of cancer after forty years of smoking the defendant’s product.

PROCEDURE AND REVIEW

The introductory material covered in our legal environment courses included a discussion of compensatory and punitive damages. Students were informed of the law regarding the necessity that a defendant’s behavior be willful and wanton or demonstrate a conscious disregard for people or property before exemplary damages are appropriate. The case studies were distributed in class, one per student, to approximately one hundred and fifty students in a legal environment course. Students were told to carefully read the facts provided, review the jury instructions included along with the facts and then answer the questions. They were first asked to determine if punitive damages were appropriate under the law. If so, they were given a variety of amounts to guide them in determining how much to award. Finally, if they determined that punitive damages were not appropriate, they were asked to briefly explain their decision. The student responses were collected and the results were tabulated (see appendix for the case studies and the results).

RESULTS

Fifty-four students responded to the coffee spill scenario. Forty answered that punitive damages were warranted and fourteen felt that they were not. Of those who answered affirmatively, the majority, twenty-three of the forty, would have given the least amount provided for on the form, $100,000 to $500,000. No student chose to award more than $2.5 million. A variety of reasons were provided by the fourteen students who would not have awarded punitive damages. Most, however, decided it was simply her fault and / or that compensatory damages were all that were necessary under the circumstances.
As expected, the Ford Pinto scenario led to the highest percentage of students who would have awarded punitive damages. Fifty-one of the fifty-two students who responded determined that punitive damages were an appropriate remedy. The majority selected amounts between $2.5 and $10 million dollars, with two students going as high as $25 to $50 million. The student who decided not to give punitive damages did so because “accidents and injuries were not caused completely because of the way Ford Motor Company designed the car.”

Somewhat unexpected, however, were the results obtained from the cigarette case, although the trial court’s determination of the facts made this worse than the imagined stereotypical smoker case. Fifty-one of fifty-four students responded that punitive damages would be an appropriate remedy. Amounts awarded spanned the entire list provided with eighteen deciding that $1 to $2.5 million would suffice and two students electing to award over $100 million. The three who chose not to award punitive damages did so because they thought the smoker should have known of the danger, other companies showed the danger even if the defendant did not and it was his choice to smoke.

The results were provided to the class to initiate a discussion of various topics and to take questions. Specific topics included the results from the actual cases upon which the case studies were based, jury selection, jury instructions and damages, which helped reinforce the differences between compensatory and punitive awards. The idea of limiting damage awards via tort reform also was discussed. The importance of jury selection proved most interesting to the class. How, for example, does a lawyer determine during voir dire that a jury is more or less likely to vote for punitive damages? This allowed for the class to discuss the importance of using challenges for cause and peremptory challenges wisely in an effort to get a fair and impartial jury.49

CONCLUSIONS, CONCERNS AND FUTURE CONSIDERATIONS

We believe this is a good method of introducing students to the roles of judges, juries and lawyers in the legal system. The cases selected provide historical context and memorable examples from the not too distant past. The discussions held in the aftermath of the analysis enabled the instructors to explore additional topics as indicated above.

We had two concerns with respect to the use of this teaching technique. We provided options for damages rather than leave the dollar amounts questions open ended. This was intended to reflect that in court there will be some guidance given to jurors regarding the amount of punitive damages sought. It also might be valuable to have the students do this in groups during class to better replicate the jury deliberation process. In a class of over 150 students, this would be difficult, but for smaller sections, it would make for a good in class exercise.

49 Peremptory challenges allow attorneys to excuse potential jurors without needing to state a reason. These are limited in number depending upon the nature of the case. Challenges for cause are utilized to excuse potential jurors when there is a specific reason for dismissing a juror other than for a discriminatory purpose. Supra note 1 at 74.
APPENDIX

PUNITIVE DAMAGES DECISION (COFFEE)

Please review the facts and jury instructions. Then please select an appropriate amount of punitive damages based on the facts in light of the instructions.

Facts of case:

1. Plaintiff, Stella Liebeck, received third degree burns as a result of a coffee spill.
2. Defendant, McDonald’s, is the restaurant chain that sold the coffee.
3. The incident and other details:
   A. Plaintiff was 79 years old at the time of the accident.
   B. Plaintiff was a passenger in a car who purchased a cup of coffee at the restaurant’s drive through area.
   C. The car pulled into a parking spot after the purchase so the plaintiff could add cream to her coffee.
   D. The plaintiff attempted to steady the coffee by placing the cup between her legs.
   E. Upon taking the lid off, the coffee spilled on her thighs.
   F. Plaintiff received third-degree burns over 16 percent of her body.
   G. Plaintiff was hospitalized for eight days, received skin grafts, and had scarring.
   H. Defendant purposely kept its coffee between 180 – 190 degrees, which can cause third-degree burns in three to seven seconds. This temperature was approximately twenty degrees hotter than other area restaurants served their coffee.
   I. The defendant was aware of other cases of serious burns caused by coffee spills. More than 700 people had received burns, some serious, from coffee spills during the previous ten years.50

Jury Instructions:

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that the defendant’s conduct was fraudulent, intentional, and/or willful and wanton to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish the defendant and discourage it and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible (terrible) was the defendant’s conduct? In making this determination, you should consider:
   A. The facts of the defendant’s misconduct.
   B. The duration of the misconduct (for how long did it go on).
   C. The frequency of the defendant’s misconduct.

D. Whether the harm was physical as opposed to economic.
E. Whether defendant tried to conceal the misconduct.

2. What actual and potential harm did defendant’s conduct cause to the plaintiff in the case?

NOTE: the jury in the case upon which this is based awarded $200,000 in compensatory damages.

3. What amount of money is necessary to punish and discourage defendant and others from future wrongful conduct?\textsuperscript{51}

\textsuperscript{51} Jury instructions were adapted from 35.00 Punitive Damages, www.state.il.us/court/CircuitCourt/CivilJuryInstructions/default.asp
QUESTIONS

1. Punitive damages should be awarded in this case (please check “yes” or “no”):
   
   A. Yes: 40
   B. No: 14

2. If you answered yes to the above, please indicate the amount you feel should be awarded:

   A. $100,000 - $500,000: 23
   B. $500,000 - $1,000,000: 6
   C. $1,000,000 - $1,500,000: 5
   D. $1,500,000 - $2,000,000
   E. $2,000,000 - $2,500,000: 6
   F. $2,500,000 - $3,000,000
   G. $3,000,000 - $4,000,000
   H. Over $4,000,000

3. If you answered no to question one, briefly explain your decision.

   A. Already got $200,000 in compensatory.
   B. You know it’s hot.
   C. Own fault.
   D. Warning.
   E. Not willful.
   F. Just pay compensatory.
   G. She took the lid off and assumes responsibility.
   H. She should have been more careful.
   I. Not done on purpose.
   J. Why should McDonald’s pay for her ignorance?
   K. Compensatory will be enough to get McDonald’s to change.
   L. Her fault.
   M. McDonald’s not at fault for her actions.
PUNITIVE DAMAGES DECISION (CAR)

Please review the facts and jury instructions and then select an appropriate amount of punitive damages based on the facts in light of the instructions.

Facts of case:

1. Plaintiff is a 13-year-old boy named Richard Grimshaw.
2. Defendant is the Ford Motor Company, manufacturer of the car in which the boy was riding when injured.
3. The incident and other details:
   A. The plaintiff was a passenger in a Ford Pinto, which was being driven by Mrs. Lilly Gray.
   B. The car unexpectedly stalled on a freeway and was struck from behind, after which it burst into flames.
   C. Mrs. Gray died from fatal burns.
   D. The plaintiff suffered severe and permanently disfiguring burns on his face and entire body.
   E. The Pinto was designed with the gas tank behind the rear axle, leaving only 9 or 10 inches of crush space.
   F. The Pinto’s rear structure also lacked reinforcing members, making it less crush resistant than other vehicles.
   G. The Pinto also had an exposed flange and a line of exposed bolt heads in the differential housing, which were sufficient to puncture a gas tank driven forward.
   H. The problem could have been remedied by inexpensive fixes ($4 to $8 per car) but Ford produced and sold the car to the public without doing anything to remedy the defects in an effort to save money and enhance profits.
   I. Ford officials were aware of the situation.\textsuperscript{52}

Jury Instructions:

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that the defendant’s conduct was fraudulent, intentional, and/or willful and wanton to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish the defendant and discourage it and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible (terrible) was the defendant’s conduct? In making this determination, you should consider:
   A. The facts of the defendant’s misconduct.
   B. The duration of the misconduct (for how long did it go on).
   C. The frequency of the defendant’s misconduct.
   D. Whether the harm was physical as opposed to economic.

E. Whether defendant tried to conceal the misconduct.

2. What actual and potential harm did defendant’s conduct cause to the plaintiff in the case? **NOTE**: the jury in the original case awarded Richard Grimshaw $2,516,000 in compensatory damages.

3. What amount of money is necessary to punish and discourage defendant and others from future wrongful conduct?\(^{53}\)

\(^{53}\) See supra note 49.
QUESTIONS

1. Punitive damages should be awarded in this case (please check “yes” or “no”).
   
   A. Yes: 51
   B. No: 1

2. If you answered yes to the above, please indicate the amount you feel should be awarded:
   
   A. $1,000,000 - $2,500,000: 9
   B. $2,500,000 - $5,000,000: 24
   C. $5,000,000 - $10,000,000: 13
   D. $10,000,000 - $25,000,000: 3
   E. $25,000,000 - $50,000,000: 2
   F. $50,000,000 - $100,000,000
   G. Over $100,000,000

3. If you answered no to question one, briefly explain your decision.
   
   A. Accident and injuries were not caused completely because of the way Ford Motor Company designed the car.
Please review the facts and jury instructions and then select an appropriate amount of punitive damages based on the facts in light of the instructions.

**Facts of case:**

1. Plaintiff is the widow of Jesse Williams, who died of cancer in 1997 after having smoked cigarettes manufactured by Philip Morris for forty years.
2. The defendant is Philip Morris.
3. Jesse Williams began smoking Marlboros in the early 1950s while stationed in Korea.
4. Williams’ wife and children tried to get him to quit but he refused, citing reports he had seen on television that smoking did not cause cancer.
5. Philip Morris knew that smoking caused lung cancer, yet publicly claimed that the issue was unresolved.
6. Philip Morris was aware of the addictive qualities of nicotine.
7. Philip Morris avoided research that would have demonstrated the health effects of smoking.
8. Others in Oregon, where Jesse Williams lived, were also harmed.
9. Cigarette sales provided Philip Morris with a large profit margin.
10. The court determined that Philip Morris knowingly spread false or misleading information to keep smokers smoking.
11. The defendant’s actions were not isolated, but were rather a carefully calculated program spanning decades.\(^5^4\)

**Jury Instructions:**

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that the defendant’s conduct was fraudulent, intentional, and/or willful and wanton to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish the defendant and discourage it and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important regarding punitive damages.

1. How reprehensible (terrible) was the defendant’s conduct? In making this determination, you should consider:
   A. The facts of the defendant’s misconduct.
   B. The duration of the misconduct (for how long did it go on).
   C. The frequency of the defendant’s misconduct.
   D. Whether the harm was physical as opposed to economic.
   E. Whether defendant tried to conceal the misconduct.

2. What actual and potential harm did defendant’s conduct cause to the plaintiff in the case?  
   \textbf{NOTE:} the jury awarded $821,000 in compensatory damages.

3. What amount of money is necessary to punish and discourage defendant and others from future wrongful conduct?\textsuperscript{55}

\textsuperscript{55} See \textit{supra} note 49.
QUESTIONS

1. Punitive damages should be awarded in this case (please check “yes” or “no”).
   
   A. Yes: 51  
   B. No: 3  

2. If you answered yes to the above, please indicate the amount you feel you should be awarded:
   
   A. $1,000,000 - $2,500,000: 18  
   B. $2,500,000 - $5,000,000: 14  
   C. $5,000,000 - $10,000,000: 7  
   D. $10,000,000 - $25,000,000: 3  
   E. $25,000,000 - $50,000,000: 5  
   F. $50,000,000 - $100,000,000: 1  
   G. Over $100,000,000: 2  

3. If you answered no to question one, briefly explain your decision.
   
   A. Other companies showed the danger.  
   B. He should have been aware.  
   C. His choice…already got $821,000.
SHAR’IA LAW AND THE INTERNATIONAL FREE EXPRESSION IDEAL

Tamara Zellars Buck
Southeast Missouri State University

Abstract

The American model of free expression stands as one of the most liberal in the world, and it is the foundation for a widely adopted international law standard. While many Shar’ia law-based countries have agreed to follow the international law ideal in theory, practicing free expression while honoring Islamic traditions is impracticable. This paper will compare the American, international and Shar’ia law models of free expression, and demonstrate the inability of Shar’ia law-based countries to meet the international law standard in practice. The paper will conclude with a realistic determination of whether the amount of convergence between these interpretations of free expression will permit development of an operable international law model.

Introduction

American law generally defines free expression as the ability to freely possess and express opinions in any medium, and the ability to have full and free discourse with few permissible prior restraints. Freedom of expression, under this legal framework, is a fundamental human right every individual possesses regardless of citizenship.

The American model of free expression stands as one of the most liberal in the world. As such, investigations into governmental activities and access to government-held documents and meetings are permissible and expected without prior restraints – that is, governmental interference before publication – and with only narrowly defined punishments post-publication. By comparison, the faith-based jurisprudence known as Shar’ia law permits both prior restraints and harsh punishments for broadly defined “anti-Islamic” expression. Yet even in nations which follow the Shar’ia law model, free expression is recognized as an important human right, albeit a right restricted by the constraints of the Muslim faith.

The extremity between these two legal systems demonstrates the impossibility of current international models of free expression that many countries, both Westernized and governed by Shar’ia law, have pledged to honor. Modern international law developed under the American law framework, and it broadly recognizes free expression as a fundamental

1 See U.S. Const. amend. I; “Congress shall make no right … abridging the freedom of speech, or of the press ….”
2 Shar’ia law is the anglicized spelling of this term. The Cairo Declaration of Civil Rights spells the term Shar’iah.
3 See Article 24, Constitution of the Islamic Republic of Iran, “Publications and the press have freedom of expression …”; Article 22(a) Cairo Declaration of Human Rights in Islam, “Everyone shall have the right to express his opinion freely ….”
human right that should be restricted only in the narrowest of circumstances.⁴ Although several countries which either follow Shar’ia law or have Shar’ia-derived legal systems claim to adhere to this model in theory⁵, the practices and statutory laws of these nations prove otherwise. What’s more, the modern international models fail to account for the fact that Shar’ia law restrictions are not bound by rules of sovereignty, and they may be applied to restrict or punish the Muslim violator regardless of his or her nationality.

The nature of convergence between Shar’ia law and American law models of free expression is an important one, given the growing contentious relationship between Islamic and non-Islamic nations in the midst of a global war on terrorism. This paper will compare the American and Shar’ia law models of free expression, and demonstrate the inability of Shar’ia-based countries to meet the international law ideal in practice. The paper will conclude with a realistic determination of whether the amount of convergence between these two interpretations of free expression will permit development of an operable international law model.

American Model of Free Expression

1. **Summary**

   After gaining its independence from Great Britain in the 18th Century, the fledgling American government struggled with how and whether to provide for individual rights such as free speech and free press at the federal level.⁶ Initially, framers of the new government opted to permit states to make provisions for such rights, but by the late 1780s it was evident the people wanted a different plan. The U.S. Constitution was ratified in 1787, and after more deliberation and votes by state assemblies, 10 amendments called the Bill of Rights were ratified in 1791. Included was a First Amendment guarantee of five fundamental freedoms every American possesses: Freedom of religion, speech, the press, assembly, and the right to petition the government for the redress of grievances. All of the freedoms except the freedom of religion are collectively referred to as the “freedom of expression.”⁷

   The Free Speech Clause of the First Amendment specifically prohibits Congress from making laws which abridge the freedom of speech or the press. In general, then, the concepts of free expression articulated in this clause espouse the right of Americans to freely express ideas and thoughts without regard for their controversial nature. While the First Amendment initially applied only to federal governmental intervention, state governments were held to the same standard after the U.S. Supreme Court reasoned in 1925 that the Fourteenth Amendment’s Due Process clause incorporated free expression as a fundamental right.⁸

---

⁴ Art. 19, para. 2, International Covenant on Civil and Political Rights, “Everyone shall have the right to freedom of expression . . . .”
⁵ For example, Afghanistan, Pakistan, and the Republic of Iran, all of which recognize Shar’ia law either officially or informally, were signatories to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which espouse a liberal model of free expression.
⁷ See [http://topics.law.cornell.edu/wex/First_amendment](http://topics.law.cornell.edu/wex/First_amendment) “First Amendment, An Overview”;
⁸ The incorporation of free speech rights under the Fourteenth Amendment was first discussed in dicta by the Supreme Court in Gitlow v. New York, 268 U.S. 652 (1925). Free press rights were incorporated in *Near v. Minnesota*, 283 U.S. 697 (1931).
Over the past 80 years, the U.S. Supreme Court has actively delineated the breadth and depth of free expression. In this section, I will explore the parameters of free expression, as expressed in constitutional interpretations by the U.S. Supreme Court in relation to the concepts of opinion, information gathering and governmental access, defamation law, and national security and public order.

2. Limitations on Expression

The free flow of debate and opinion traditionally has been encouraged in the United States due to the tyrannical pressures experienced by colonists under British rule. The American model of free expression reserves high protection for opinion and debate, based upon the principle of content neutrality. The content neutrality principle is defined as “the rigorous objection to regulation of speech based on the content or the communicative impact of the message conveyed.” Adherence to content neutrality does not mean government can never regulate expression based upon a message or its impact, but it does require the government to demonstrate restrictions are narrowly tailored to serve compelling governmental interests.

As early as 1788, the U.S. Supreme Court recognized the right of the press generally to publish free from prior government restraints. This right remained undisturbed for nearly 150 years. Since 1931, the Supreme Court has held prior restraints of the press to be presumptively unconstitutional and permissible only in the narrowest of circumstances.

Similar to the right to publish free of government restraints is the right of public access to government-held meetings and records. Both rest on the belief that government action should be open to public view and critique. Many events related to organizing the federal government originally occurred outside of public view. Congress continues to hold secret meetings occasionally under an implied right believed to exist in Article I, Section 5 of...
the U.S. Constitution.\textsuperscript{15} While the Supreme Court has provided broad protection to publishers to operate free of prior restraints, the Court has limited the First Amendment protection for information gathering to a right of access to records directly related to criminal trials.\textsuperscript{16} Additional rights of access have been statutorily defined, but these laws have only a peripheral relation to rights of access under First Amendment theory.\textsuperscript{17}

As stated earlier, freedom of expression is not absolute under the American model. One area of legal restrictions that has been intensely developed is defamation law. Defamation pits the rights of expression against an ancient right of a person to protect his or her good name. It originated as a common-law action against insulting speech that imposed criminal or civil penalties.\textsuperscript{18} Punishment was warranted whenever expression criticized political leaders, and no defenses were recognized. From the ratification of the U.S. Constitution in 1791 to the latter half of the 20\textsuperscript{th} Century, defamation existed as a strict-liability tort.\textsuperscript{19}

Defamatory speech originally was not recognized as having constitutional protection.\textsuperscript{20} However, a constitutional baseline for defamatory speech was established in the landmark case of New York Times v. Sullivan in 1961.\textsuperscript{21} In that case, L.B. Sullivan, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in the New York Times newspaper. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. Sullivan won and was awarded damages, because under Alabama law, he did not have to prove that he had been harmed; additionally, a defense claiming that the ad was truthful was unavailable since the ad contained factual errors. Sullivan won a $500,000 judgment and the newspaper appealed, claiming free expression rights were infringed when Sullivan was not made to prove personal harm and the

\textsuperscript{15}Mildred Amer, “Secret Sessions of Congress: A Brief Historical Overview”, Code 98-718 GOV, Library of Congress, (July 17, 2003). Article I, Section 5, of the Constitution, says: “Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy....”


\textsuperscript{17} See also, Freedom of Information Act of 1966, which requires departments and agencies falling under the federal executive branch to publish rules, final decisions in contested matters, policy statements, and other sources of law unless prescribed exemptions permit the withholding of such information; Federal Privacy Act of 1974, which empowers individuals to require that government records about themselves are accurate and are not being misused; Government in the Sunshine Act of 1976, which mandates advance notice and open meetings when federal agencies conduct agency business; and the Ethics in Government Act of 1978, which requires the filing of detailed financial statements by federal government officials in order to identify potential conflicts of interest.


\textsuperscript{19} Rex Heinke, Media Law at d 2.1.

\textsuperscript{20} See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942): “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

truth defense was blocked due to factual errors in the advertisement. On appeal, the Supreme Court held that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice.

The Court’s decision was based upon the need to encourage and protect robust public debate regarding potential wrongdoing by public officials like Sullivan. As Justice Brennan wrote in the majority opinion:

“Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

The actual malice standard requires proof that defamatory speech was expressed with knowledge of falsity or a reckless disregard for its veracity. Following the Sullivan decision, the Supreme Court subsequently applied the actual malice standard to defamation cases involving public figures, and in a related tort, to claims of intentional infliction of emotional distress. In defamation cases involving individuals who lived outside of public view, the Supreme Court held the appropriate fault standard was negligence.

One of the most reviled prohibitions under British rule had been prosecutions for seditious libel, which punished publications that criticized the king or his activities. The most famous prosecutions of seditious libel in colonial America involved John Peter Zenger, a printer who attempted to use truth as a defense against the seditious libel charge. Alexander Hamilton, Zenger’s lawyer, argued that truth should be an acceptable defense against the prohibited speech, an argument unavailable under the law. A jury ultimately found Zenger not guilty, despite the legal requirements to do otherwise. The trial provided the spark that led to protections embodied in the U.S. Constitution and demonstrated the desire of the American colonists to speak openly about the politics of the day without fear of retribution.

The American model of free expression has been most contradictory on issues involving sedition and political criticism during wartime or times of political upheaval. Less than a decade after the Bill of Rights was ratified, Congress passed its first law regulating political criticism. The Alien and Sedition Acts of 1798 proscribed seditious libel, described as the publication of false, scandalous, or malicious commentary against the federal government, Congress, or the President. The legislation represented a clear attack by the legislative majority headed by President John Adams against political rivals, and more than a dozen people were convicted under the statute. The act remained in force a mere three years, and a change in political leadership saw the legislation expire naturally.

Seditious libel continued to appear in various laws, usually in times of war, throughout the 1800s. It arose again during World War I, when a series of federal laws targeting dissent and opposition to the war were passed. In Schenck v. U. S. (1919), the Supreme Court was asked to determine whether First Amendment rights were wrongly

---

infringed under the Espionage Act of 1917. The conviction was upheld, but in his majority opinion Justice Oliver Wendell Holmes wrote even speech that appears to be seditious should be protected unless the comments, under the particular circumstances, constituted a clear and present danger that Congress has a right to prevent. Over the next 50 years, Holmes’ test would be considered in other wartime sedition cases, as well as during periods of peace in which the United States government struggled to mute a growing socialist presence in the nation. In the 1969 case of Brandenburg v. Ohio, the Supreme Court finally determined laws prohibiting so-called seditious speech were unconstitutional unless the government could prove the speech constituted a clear and present danger, meaning it rose to the level of incitement to imminent lawless action. With such a high bar, the prosecutions for seditious libel nearly disappeared.

Shar’ia Law Model of Free Expression

1. Introduction

Shar’ia law is undeniably ingrained in the fabric of contemporary Islamic countries, regardless of their political makeup. The word “Shar’ia” means “straight path” in Arabic, and the legal system is intended to provide a comprehensive method of governance that is “an all-embracing social order where nothing is superfluous, and nothing is lacking.” Shar’ia law is the product of four separate sources of law: The Qu’ran, The Sunna, Ijima, and Qiyas. This section will provide a brief explanation of each source and how it fits into the overall scheme of contemporary Islamic jurisprudence.

The Qu’ran is the Holy Book of the Islamic faith. It is a collection of about 6,000 verses penned in the Saudia Arabian region beginning in 610 A.D. by the prophet Muhammad. The prophet Muhammad is not the author of the Qu’ran; rather, he is said to have written the book in dictation of the word of God as spoken by the angel Gabriel. The book’s contents include both religious duties, such as fasting, prayer, and privilege, as well as secular governance in areas like contract law, usury, slander, and war. It constitutes the primary source of Shar’ia law and was originally published in final version in 650 A.D.

The Sunnah, directly interpreted as “trodden path”, primarily is comprised of collections of oral traditions related to Muhammad’s life that were collected after his death by several different schools of Islam called Hadith. The Sunna is believed to represent the Prophet’s practices of Islam, as well as decisions by the Prophet explaining the Qu’ran on points in which the Holy Book was either silent, unclear, or subject to multiple

25 Id., at 97-98.
26 Id., at 100.
28 Id., at 3, quoting A’la Maulawa Maudoodi, Sayed Abu, The Islamic Law and Constitution, 3rd ed., Lahore, Pakistan: Islamic Publications, Ltd., at page 53, (1967). For a direct reference to the all-encompassing nature of Shar’ia law on the lives of Muslims, see the Qu’ran, Surrah 45, v. 17 (English translation): “...then we gave you a Sharia in religion, follow it, and do not follow the lust of those who do not know...”
29 De Seife, at footnote 1, page 1, which states: “This transliteration, which is phonetically correct, is preferred to “Koran” and will be used through this text.”
30 Id., at 26.
interpretations. As such, the Sunnah is a set of binding rules on Muslim life second only to the Qu’ran in legal authority.

After the prophet Muhammad’s death, a judicial system supervised by religious judges from several different schools of Islam was created to continue Muhammad’s work of interpreting the Qu’ran. The judges wrote legal opinions based first upon the Qu’ran itself, as interpreted by their particular school’s thoughts on issues not defined by the Qu’ran or the Sunna. By the 9th Century A.D., a need to converge the various decisions and end in-fighting amongst the Islamic schools was critical, and ultimately, rules of law were devised under a system of “infallible consensus” among the legal scholars of a particular generation. This system, called ijima, applies the Muslim concept of consensus, as a source of law, and it operates in a manner similar to European common law.

The final rung in the legal hierarchy of Shar’ia law centers on the concept of qiyas, or analogical reasoning. Qiyas was developed by Ibn Al Shafi’i, a Muslim scholar who questioned the reliability of the Sunna, and thus suggested Muslims apply analogical reasoning to formulate legal opinions and beliefs in situations where the other three sources of Shar’ia law have not provided an answer. This is considered a source of last resort, as it rests on decisions by fallible individuals rather than relying upon divine directives or religious consensus.

Although the Qu’ran, Sunna, ijima, and qiyas provide a holistic body of jurisprudence, it’s important to note, various schools of Islamic thought have developed over the years, and each may apply or interpret the law more textually than others. However, the four major schools of thought, each developed between the 7th and 9th Centuries, regard each other as authentic and correct in their adherence to the Islamic faith.

2. Limitations on Expression

Shar’ia law harshly represses any expression believed to harm Islamic faith, communities, or Muslims generally or particularly. Because the Qu’ran is the primary source of Shar’ia law, it is helpful to study the book for divine references related to free expression.

An early chapter of the Qu’ran seems to suggest debate is a preferred approach over more oppressive techniques in securing societal unity. According to Qu’ranic scholar Muhammad Asad, Surah 2, verses 190-192 lists harassment or oppressive acts against people who voice ideas intended to reform society as a “heinous offense.”

“The verse implies that it is a heinous offence to persecute a person or party by Harassing and oppressive treatment for holding ideas and theories opposed to those in vogue at the time, and it is abominable to [inflict] on people injury and punishment for adhering to and propagating those ideas and theories with a view to reforming the ways of society. Though bloodshed is an evil thing, to oppress and harass others for adhering to their own faith and principles and to force them to give these up and adopt those of the oppressors is [far] worse.

31 Id., at 29.
32 Id., at 32-33.
33 Id.
34 De Seife, at 36.
35 Id., pages 36-37.
Therefore it is lawful and justifiable to use force against such people as a resort to brute force instead of argument.”\footnote{36}

Despite the tolerance suggested by Asad, numerous verses in the Qu’ran indicate Muslims should use any and all efforts to silence anyone viewed as harming Islam.\footnote{37} Additionally, righteous Muslims should never express an independent opinion without first consulting the Qu’ran and the Sunna.\footnote{38}

Defamation law is the most specific limitation on expression discussed in the Qu’ran as a punishable offense.\footnote{39} After separate slander campaigns regarding two of Muhammad’s wives, he penned a chapter of the Qu’ran indicating God would curse anyone who slandered Muhammad, and that it was a heinous sin to slander any Muslim.\footnote{40} Unlike under more liberal models of defamation, language that falls short of causing reputational harm is punishable under Shar’ia law. According to Qu’ranic scholar Sayyid Abul Ala Maududi – Tafhim, the 24\textsuperscript{th} Surah specifically warns Muslims to avoid any forms of expression that would spoil relationships or friendships or erode society.

“Then the Muslims have been exhorted to safeguard against the evils that corrupt collective life and spoil mutual relationships. Mocking and taunting each other, calling others by nicknames, creating suspicions, prying into other people's affairs and back biting are the evils which are not only sins in themselves but they also corrupt society. Allah has mentioned all these evils separately and forbidden them as unlawful.”\footnote{41}

There is little mention regarding information gathering and governmental access in the Qu’ran. However, a running theme in the holy book, as well as decisions expressed in the Sunnah suggest that mannerly and respectful behavior, based upon the teachings of Islam, should always be the goal of Muslims. These teachings have specific regulations for actions related to trespass and harassment, among other crimes related to news-gathering activities.\footnote{42}

\footnote{36} Muhammad Asad, “The Message of the Quran: Translations of Holy Quran, available at \url{http://www.usc.edu/schools/college/crcc/private/cmje/religious_text/The_Message_of_The_Quran__by_Muhammad_Asad.pdf}


\footnote{38} Id., Surah 49, v. 1, footnote 1; cf. Surah 33, v. 36. \textit{See also}, Asad, Muhammad, “The Message of the Quran: Translations of Holy Quran” discussion of Surah 49, v. 2-4, which states “personal opinions and predilections must not be allowed to overrule the clear-cut legal ordinances and/or moral stipulations promulgated by the Prophet.”

\footnote{39} Surah 4, v. 19-21; Surah 24.

\footnote{40} See Maududi – Tafhim, supra, referencing Surah 24, v.11-58. See also, Surah 41.

\footnote{41} See Maududi – Tafhim, supra, commentary to Surah 49, \url{http://www.searchtruth.com/tafsir/tafsir.php?chapter=24}.

\footnote{42} See Surah 24, v. 27 (“do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants”), and Surah 49, v. 12(“And do not spy or backbite each other.”) More enlightening on the issue of mannerly behavior are the Sunnah recorded by Persian Muslim scholar Bukhari, whose interpretations of the Qur’an are among the most highly regarded throughout the Muslim community. See Sahih al-Bukhari, Volume 8, Book 74 and Volume 9, Book 93 for multiple examples of rules prohibiting harassment and unauthorized entry.
The passages of the Qu’ran dealing with apostasy are the most relevant to restrictions on expression used to protect national security and public order. A Muslim commits apostasy when he or she leaves the faith. Additionally, a Muslim commits apostasy when he or she blasphemes or otherwise acts in any way deemed to be against the Muslim community. Apostasy, then, may encompass any number of acts, from blasphemy and hypocrisy toward Islam, to disrespecting Islam and clerical members of government in high positions, to acts equivalent to high treason in the Western world.

International Law Models of Free Expression

1. Summary

There have been numerous attempts by the United Nations and other entities to develop international accords protecting human and fundamental rights. Central to these efforts was recognition of the right to free expression as a key human right. The importance of such efforts lies in the resulting obligation signatory nations supposedly accept to establish domestic rules and policies that protect citizens from human rights abuses. Moreover, freedom of expression exists as a fundamental means of ensuring other human rights are protected and freely exercised.

Two such documents, the International Covenant on Civil and Political Rights (“ICCPR”) and the Cairo Declaration on Human Rights in Islam (“Cairo Declaration”), are particularly important to the establishment of an international law model of free expression due to their different understandings of applying the law.

There are 196 countries in the world, and about 50 of these countries have a Muslim majority population. Fewer than two dozen countries, including just seven countries that have a Muslim-majority population and/or government, are non-signatories to the ICCPR since its adoption in 1966, which means most of the world has agreed to be obligated to the document’s prioritization of the American freedom of expression ideal included in Article 19. Despite this fact, some 57 self-identified Muslim nations attended the Organization of the Islamic Conference (“OIC”) in 1990 and ratified the Cairo Declaration on Human Rights

43 Surah 9, v. 73-74.
44 Surah 5, v. 33.
45 Agnes Callamard, Expert Meeting on the Links between Article 19 and 20 of the ICCPR, available at http://www.article19.org/data/files/pdfs/conferences/iccppr-links-between-articles-19-and-20.pdf 2 (last visited Jan. 2, 2015) “Less well known is the fact that international and national bodies and courts worldwide have insisted and demonstrated also that the right to freedom of expression is central to the international human rights regime and human dignity.”
47 See Callamard, at 3.
48 United Nations, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 2, 2015.) Muslim-majority countries that have neither signed nor ratified the treaty are Brunei, Malaysia, Oman, Qatar, Saudi Arabia, United Arab Emirates and Kosovo (non-UN member).
in Islam ("Cairo Declaration"). The Cairo Declaration recognizes the human right of free expression, but articulates greater limitations on this right under Shar’ia law.

There appears to be a conflict between the ICCPR and the Cairo Declaration, such that contemporary Muslim nation states can adhere to the American ideal espoused in Article 19 of the ICCPR in theory only. A recognition of the conflict was expressed in 2007 by the European Court of Human Rights, which stated principles of democracy -- such as that of the free expression ideal -- have no place under Islamic law. In this section, I will outline the development and parameters of free expression identified as binding international law under these two treaties, then demonstrate how Muslim nations have abrogated the international law model due to the limitations they are mandated to follow under Shar’ia law.

2. Developing binding international law

Freedom of expression was one of four freedoms recognized as goals of the Allied forces in World War II, and it ultimately became a founding principle behind the establishment of the United Nations in 1945. The United Nations first recognized free expression as a “common standard of achievement for all peoples” in the Universal Declaration of Human Rights, which was adopted and ratified as a statement of common objectives by the General Assembly of the United Nations in 1948. The document defined free expression as “the right to freedom of opinion and expression … includ[ing] freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Among the countries ratifying the agreed document were several countries whose governance was based upon Shar’ia law, including Afghanistan, Pakistan, and Iran.

In 1966, the Universal Declaration of Human Rights was the foundation undergirding the ICCPR, and free expression ultimately was elevated from a nonbinding agreement among members of the United Nations to binding international law. The European Court on Human Rights has held that the principles inherent to the American ideal of free expression have been expanded to represent an ideal for all democratic societies. In this manner, the American ideal has expanded its scope and even

---

50 “In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression--everywhere in the world.” Franklin D. Roosevelt, excerpted from the State of the Union Address to the Congress, January 6, 1941.
51 United Nations Charter, preamble and article 56.
52 Preamble, Universal Declaration of Human Rights.
53 Id, Art. 19.
54 Id, Signatures.
55 Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, available at http://www2.ohchr.org/english/law/ccpr.htm. Article 19 (last visited Jan. 2, 2015.) Para. 1 of the ICCPR recognizes the “right to hold opinions without interference”, while Art. 19, para. 2 defines freedom of expression as including “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” The remaining portions of Article 19 permit restrictions of free expression only to protect the rights or reputations of others, or to protect national security or public order, health, or morals.
taken on universal features, as evidenced by international accords such as Article 19 of the ICCPR, a non-self-executing treaty that has been ratified by 164 countries around the world. Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Legal systems in Muslim nation-states, even if not officially theocratic in makeup, derive their legal governance from Shar’ia law. It is significant, then, that approximately 16 Muslim-majority nation-states have signed and ratified the ICCPR, with another 24 nations having signatory status but no ratification. Despite their adoption of the ICCPR as binding law, however, most of the Muslim-majority signatories also signed the Cairo Declaration, which was designed to contextualize the earlier treaty by providing an Islamic perspective on human rights.58

Cairo Declaration signatories sought to qualify their responsibilities under the earlier human rights treaties in order to prioritize Shar’ia law. The declaration indicates some aspects of human rights protections already are embedded in Shar’ia law. However, Article 22 specifically indicates Shar’ia law articulates greater limitations on free expression than are represented in either the American free expression ideal or the ICCPR. Specifically, Article 22 of the Cairo Declaration states:

(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shar’iah.
(b) Everyone shall have the right to advocate what is good, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shar’iah.
(c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt, or harm society or weaken its faith.

It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.\textsuperscript{59}

The Cairo Declaration appears to state that freedom of expression is permissible so long as the expression cannot be deemed a negative representation or criticism of Islam. If this is true, then those Muslim nations that ratified the ICCPR appear to be paying lip-service only to that accord.

3. Free Expression in Reality

Examples abound of the incompatibility of the international law free expression ideal and the Shar‘ia law governance standard that Muslim nation-states adhere to, but the vast majority of incidents revolve around apostasy, blasphemy and political criticism. Increasingly, issues that might once have only been recognized on a local scale are placed in an international spotlight because of punishments that expand beyond national boundaries. In an well-known modern example, British Indian Salman Rushdie, an Islamic fiction writer and self-described “antagonist to the state,”\textsuperscript{60} received a death sentence for apostasy after publication in 1988 of his fourth novel, Satanic Verses. The sentence, or fatwa, was issued by Ayatollah Ruhollah Khomeini, then Supreme Leader of Iran, because the book was deemed a blasphemy against Islam, the prophet Muhammad, and the Qu’ran, and it led to the interruption of political ties between the United Kingdom and Iran for nearly a decade before the fatwa was withdrawn by a subsequent Iranian leader.\textsuperscript{61}

In 1993 Egyptian professor Nasr Abu Zeid and his wife, Ibtihal Younis, also a professor, were ordered to divorce after the husband, an Arabic linguist, was branded a nonbeliever due to writings which deviated from orthodox interpretations of the Qu’ran.\textsuperscript{62} In October 2007 Afghan journalist Sayed Pervez Kambakhsh handed out copies of an Internet article written by atheist Arash Bikhoda that questioned interpretations of the role of women in Islam. Three months later, Kambaksh was sentenced to death defaming the Islamic faith, but his sentence was commuted upon appeal to a 20-year prison sentence. After an intense, year-long campaign by multiple governments and individuals, Kambaksh was granted amnesty and permitted to leave Afghanistan in August 2009.\textsuperscript{63}

Restrictions based upon religious commentary are not the only abrogations of the free expression ideal under Islamic governance. In another incident, a delegation of Iranian students participated in a conference in Berlin in April 2000 to discuss the Reformists’ victory at the parliamentary elections. Most of the delegation were prosecuted upon their return and either exiled or imprisoned in early 2001 for remarks that were deemed critical of

\textsuperscript{59} Organization of Islamic Cooperation, at Article 22.
\textsuperscript{60} Salman Rushdie, Jaguar Smile 50 (1987).
\textsuperscript{61} On This Day February 14, 1989: Ayatollah sentences author to death, BBC, \textit{available at} http://news.bbc.co.uk/onthisday/hi/dates/stories/february/14/newsid_2541000/2541149.stm.
\textsuperscript{62} Thomas M. Franck, Is Personal Freedom a Western Value?, 91 Am.J.Int'l L. 593, 600 (October 1997) (discussing examples of Islamic intolerance).
the government. One member of the delegation, student leader Ali Reza Afshari, was more harshly dealt with and received a longer prison sentence due to his separate comments critical of the Iranian government during a student rally in 2001.

In December 2014 the Bahranian government handed down prison sentences related to their expressive activities and political criticism to the daughters of Abdulhadi al-Khawaja, the former president of the Bahrain Centre for Human Rights who has himself been in detention since 2011.

The small sampling of incidents in this section represent a fraction of the cases involving violations of ICCPR Article 19 that would demonstrate compliance with the Cairo Declaration’s Islamic perspective on free expression. In every case, free expression is recognized as an important human right only so long as no real or perceived criticism or denigration of Islamic symbols or political leadership occurs.

Conclusions

1. Summary

The American model of free expression encourages the free flow of debate and opinion with interruption or punishment permissible only when narrowly defined for a compelling governmental interest. This model has been recognized as espousing a fundamental human right by many nations and has been formally adopted under multiple sources of international law recognized by nation-states that are governed or influenced by Shar’ia law. Despite these facts, those nation-states find themselves unable to honor the expansive protections granted under the American ideal while remaining faithful to the religious edicts of Shar’ia law. In this section, I will provide a realistic determination of whether the amount of convergence between these two interpretations of free expression will permit development of an operable international law model.

2. Common Ground

Neither the U.S. Constitution nor the ICCPR recognize the freedoms of speech or the press as unalienable rights. In fact, Article 19(3) of the ICCPR expressly states a legal that is applicable for determining whether a restriction on expression is permissible:

The exercise of the rights provided for in paragraph 2 of this article carries with it

---


special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.67

In other words, the ICCPR prioritizes free and open debate in most situations but conceives situations when government-mandated and/or endorsed restrictions on expression are necessary to protect other overriding concerns. Interestingly, a similar inherent respect for debate and rational thought exists within the collective sources of Shar’ia law, albeit the fact these are tempered by strictures forbidding any perceived discrediting of canonized writings or teachings. Ultimately, it would seem common ground does permit the adoption of some type of legal framework prioritizing free expression in a practicable manner.

A changed interpretation of Shar’ia law could assist in this regard. Former Pakistani Prime Minister and human rights activist Benazir Bhutto argued Shar’ia law was never intended to be a static doctrine, and that its restrictiveness is an invention of authoritarian governments the law was originally created to protect the people from.68 In her book Reconciliation: Islam, Democracy, and the West, Bhutto wrote:

“Islam is committed not only to tolerance and equality but to the principles of democracy. The Quran says that Islamic society is contingent on “mutual advice through mutual discussions on an equal footing.” …It is a religion built upon the democratic principles of consultation (shura); building consensus (ijima); finally leading to independent judgment (ijtihad). These are also the elements and processes of democratic institutions and democratic governance.”69

Bhutto notes the fundamentals of democratic governance are part of the Islamic value system, and a religion that encourages communication and religious pluralism is inherently open to free expression.70

Similarly, legal scholar Ali Khan also believes Islamic governance and notions of democratization are compatible because there are certain values that are not culture specific, but rather, are held dear to all people.71 In presenting his case for a theory of universal democracy, Khan indicates community values, which are specific to a locale and protected through a legal system, differ from universal values, which are inherent to the global society and “emerge through a process of consultation and consensus among communities of the

67 International Covenant on Civil and Political Rights, supra Article 19 para 3.
70 Id., at 18, 33-34.
world.” As an example, Khan cites the International Bill of Rights, which includes the ICCPR, as espousing universal values.

“It is not required that every nation must ratify a covenant before it lawfully becomes the source of universal values. For example, even the International Bill of Rights has not been ratified by all nation-states of the world. Nonetheless, its universal character cannot be denied given its broad ratification across cultures, religions and legal traditions. As a general principle, the more the consensus among the peoples of the world, the more universal the value is. Sometimes, a value is constantly reaffirmed in global, regional and local international covenants. This extensive reaffirmation of a specific value at different levels may be a good basis to state that the value has attained universal acceptance.”

With this viewpoint it mind, it may be beneficial to consider models of free expression in Muslim-majority countries that have developed into either secular or religious democracies. For example, modern Turkey has embraced secularism and westernization in its political, economic and social orders, despite having an overwhelming Islamic presence. The nation’s notions of equality and individual rights, including an increasingly expansive version of free expression, have been documented from the country’s first constitution in 1876 to recent developments regarding expression in the new millennium. Another more restrictive model to consider is the religious democracy of Malaysia, where Islam is the state religion but the constitution expressly guarantees free speech, assembly and association. Unlike the U.S. Constitution and subsequent judicial interpretatin, Article 10 of the Malaysian constitution includes a number of permissible restrictions on free speech and expression in order to protect broadly interpreted “friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.”

Finally, creation of a more workable international law framework could occur if definitions for hate speech in general and blasphemy in particular could be agreed upon. Any definition should accommodate a variety of defenses regardless of context to protect truthful messages and those delivered by the press. Such was the joint recommendation of the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (“OSCE”) Representative on Freedom of the Media, and the Organization of American States (“OAS”) Special Rapporteur on Freedom of Expression in a 2001 statement on racism and the Media which presented a list of principles to guide hate

72 Id., at 65-66.
73 Id., at 73. See also footnote 36, where Khan specifically references the ICCPR’s articles relating to freedoms of expression and association, and the right of political participation.
74 Pew Research Center, An Uncertain Road: Muslims and the Future of Europe, 12-13 (October 2005)
75 Meliha Benli Altunisk, Turkish Model for Democratization in the Middle East, 27 Arab Studies Quarterly 1&2, 45, 51-54 (2005). Altunisk notes restrictions on free expression were relaxed at the adoption of the Turkish constitution in 1876 and a series of “harmonization laws” and constitutional amendments adopted between 2002-2004 led to an expansion of protections for fundamental liberties including freedom of assembly, association and expression, as well as relaxations on broadcast media restrictions.
speech regulations. The leaders indicated overbroad rules in this area stymied societal progression but removing safe opportunities to promote tolerance in order to limit “offensive speech:”

“Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient ‘hate speech’ legislation. In many countries, overbroad rules in this area are abused by the powerful to limit nontraditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.”

Whether the arguments regarding permissible limitations on freedom of expression are crafted under the American or Shar’ia law standards, it’s clear that the debate is perpetual and largely contextual. Current international law leans toward the more expansive American ideal, and although a number of Muslim nation-states have agreed in principle to the value of free expression, the adoption of this ideal in practice has not been widely accepted. No one is arguing for absolutism, which means all agree that line-drawing is appropriate and necessary. This brief discussion regarding does not end the discussion, but it does outline the arguments of both extremes in order to demonstrate the common ground that exists as we move toward a practicable international standard for free expression.

77 Callamard, supra, at 12-13.
78 Tamara Zellars Buck is an Assistant Professor of Mass Media at Southeast Missouri State University. She can be contacted at Southeast Missouri State University, One University Plaza MS2775, Cape Girardeau, Missouri, 63703. Email: tbuck@semo.edu.
WHAT SHOULD BE THE FATE OF THE CURRENT PROVISIONS GOVERNING JOINT VENTURE IN THE FORTHCOMING REVISED COMMERCIAL CODE OF ETHIOPIA? RETENTION OR EXCLUSION?

MELESE WONDMAGEGNEHU BELETE∗

Abstract

A joint venture is one arrangement that business persons/investors can use to compete and grow in a dynamic business environment. Joint venture is a means to pool property, services, and skill together without forming an actual partnership. For its flexibility in formation, anti-double taxation benefits, possibility in technology transfer, and good opportunity to pool diversified resources together joint venture, nowadays, turn out to be the best and a growing type of business organization.

Business organizations are affected by the legal environment in which they operate. The 1960 Commercial Code of Ethiopia is the available legal framework to regulate business organizations in general, joint venture in particular, in Ethiopia. The pertinent provisions of the 1960 Com. C. governing joint venture continue to be the area of contentions. On the one hand, some argue for the exclusion of the existing provisions in the forthcoming revised commercial code of Ethiopia while others argue for their retention. This paper tries to explore the arguments, the practical existence of joint ventures in Ethiopia, the applicability of the pertinent provisions of the 1960 commercial code and suggest for the retention of the provisions in the forthcoming revised commercial code of Ethiopia.

Key Words: Joint Venture; Ethiopian Commercial Code; Draft Commercial Code of Ethiopia

List of Acronyms

AACCSA                  The Addis Ababa Chamber of Commerce and Sectorial Associations
Art.                              Article
Com. C.                       Commercial Code
OHADA                      Organization for the Harmonization of Business Law in Africa
UAE                            United Arab Emirates
WTO                           World Trade Organization

∗ Assistant Lecturer of Law at Debre Berhan University, Ethiopia
Introduction

‘There is no room for jealousy in business. If someone is doing a better job than you are, either find a way to improve yourself or join forces with that person.’

Tom Joyner

Commercial activities are held mainly in either of the two forms- sole proprietorship or business organization. In the contemporary world, with the advent of globalization, conducting commerce as a sole trader becomes troublesome mainly for short of capital, time constraint, and lack of experience or expertise. As a result individuals come together in order to pool resources and succeed to maximize their profit. This association of individuals establishes a business organization.

Business organizations are vehicles to the economic activities of a country and facilitate investment and flow of capital. Based on different considerations, like simplicity of formalities, flexibility, taxation liability, and limitation of liability etc, business persons will select among the different types of business organizations that may serve the purpose for which they stand together.

Joint Venture is among the six business organizations that are recognized under the 1960 Ethiopian Commercial Code (‘Com. C.’ herein after). A joint venture is one arrangement that business persons/investors can use to compete and grow in a dynamic business environment. The legal framework governing joint venture (under the Com. C.) has been in place for decades without changes to adapt itself to the contemporary developments. Of course, there are some proclamations that were devised to govern such kind of arrangement; i.e. Joint venture Establishment Proc. No. 235/1983, the Investment Proclamation No.769/2012, and the Public Enterprises Privatization Proclamation no. 146/1998. However, these legal frameworks are devised to govern different types of joint ventures.

Unlike Ethiopia, there are jurisdictions, like England and France, which revised their commercial laws so many times.1 Years have passed since we heard about an encouraging effort made by the Ministry Of Justice to amend the Commercial Code. The Ministry has showed up with the Draft Revised Version of the Commercial Code of Ethiopia and made it open for suggestions and recommendations on a request by the Addis Ababa Chamber of Commerce and Sectorial Associations (AACCSCA). The Addis Ababa Chamber of Commerce and Sectorial Associations, representing the Ethiopian business community, aimed at reconsidering the draft provisions of the Commercial Code which may affect the interest of its community.2 Provisions governing Joint Venture are among the subject matters that are considered and on which suggestions are forwarded by the team of national experts.

---

The purpose of this term paper is to explore arguments for and against the retention of the current legal framework, under the 1960 Com. C., which govern joint venture in the forthcoming revised commercial code. To achieve such purpose, it is a must to start by defining joint venture and tracing its historical background. In order to avoid confusions between joint ventures and the other partnerships, some part is dedicated to discuss on the similarities and distinguishing features of these business arrangements. An effort is also made to explore the driving force behind the decision of business persons to choose joint venture than other forms of business organizations and an analysis will be made on some relevant court cases. Finally a thorough discussion on arguments for and against the retention of the current provisions of the Com. C. governing joint venture in the forthcoming commercial code will be in place.

1. General

1.1. Definition of Joint Venture

There is no universally accepted definition of the term ‘joint venture’ or as to what constitutes a ‘joint venture’. The existence of different models in different jurisdictions is the reason for not to have a single legal definition of a ‘joint venture’. Some jurisdictions adopt a contractual joint venture governed by a written agreement and the partners’ contract with the outside world in their own name, not under the name given to the joint venture.3 Others recognize a joint venture company where the partners form a separate limited liability company and then take shares in the company.4

It is worthwhile to consider some of the definitions given by different literatures and legal instruments in order to appreciate why we do not have a single definition of ‘joint venture’. Al Tamimi & Company, the largest independent law firm in the Gulf, defines ‘joint venture’ as:

...nothing more than an economic cooperation or business combination of two or more people, companies or associations with a common economic goal. A sharing of risks and profits in a specific proportion coupled with a contribution of expertise and assets to the venture, whether those assets be human capital or monetary capital. 5

Vinod Kothari and Nidhi Ladha describe that “The idea of a joint venture signifies doing a venture – a business, a transaction, a deal, with combined resources, with the understanding that this coming together of resources is limited to the venture in hand.”6 On the other hand Black’s Law Dictionary defines ‘joint venture’ as “a business undertaking by two or more persons engaged in a single defined project”.7 Similarly a ‘joint venture’ may be defined as “a contractual agreement or a business relationship between two or more people for the purpose of executing a particular business undertaking”.8

Unlike the above definitions, the Indian legal regime defines ‘joint venture’ based on its forms. From legal and organizational standpoint, joint ventures can be of two different forms i.e.

4 Id.
6 Vinod K. and Nidhi L., Think before you marry: The fluid law of Joint Ventures, ( ), Vinod Kothari Consultants Pvt Ltd., P. 2
8 Kamil Sayeed, Law of Joint Ventures in India, ( ), Vinod Kothari & Company, P. 2
equity joint ventures and contractual joint ventures. In equity joint ventures, “two or more partners participate to create a new corporate entity wherein each one of them owns a given share of the equity capital”. In this respect the joint venture is a legal entity so any contracts entered into by the joint venture will be with it, not with the joint venture partner. That means that the joint venture partners have the benefit of limited liability protection. However, such a thing is absent in contractual joint ventures “wherein the only internal legal relations between the parties as well those the parties, on one hand, and third parties on the other are structured and regulated on a contractual basis”.

Part four of the U.A.E. Commercial Companies Law Federal Law No. (8) of 1984, as amended, is dedicated to regulate a ‘joint venture company’ carrying on business in the UAE. Article 56 defines a joint venture to mean “a company concluded between two or more partners for the sharing of profits or the losses of one or more commercial businesses by one of the partners in his own name”. The 1960 Ethiopian Com. C defines ‘joint venture’ as “an agreement between partners on terms mutually agreed and is subject to the general principles of law relating to partnerships”. The draft revised commercial code of Ethiopia (‘draft revised code’ herein after) adopts a definition verbatim copy of the Com. C. A similar definition is adopted by Organization for the Harmonization of Business Law in Africa (OHADA) as it states “a joint venture shall be an entity whose partners agree not to register it in the Trade and Personal Property Credit Register and not to give it a corporate personality...”. Regardless of the differences in the abovementioned definitions, it is quite possible to point out some common elements and reached at agreeable conceptions of the term ‘Joint venture’. All the definitions have certain elements to share in common. These elements include; the association of two or more persons, based on agreement, pooling resources together, and consensus to share losses and profits.

1.2. Historical background of ‘Joint Venture’

The term ‘joint venture’ derives from early commercial relationships made in the 18th and 19th centuries in England where the parties were associated for a particular transaction. Two important changes have taken place since the early 1980s in terms of business cooperation:
- The extent of cooperation has increased very much resulting in big numbers of national and international partnerships;
- The organizational structure of cooperation has changed dramatically, reflecting the increasing importance of organizational flexibility. Non-equity (similar to contractual joint venture) partnerships are currently dominating the landscape.

9 Id.
10 Id.
11 Id., P. 3
12 Supra n. 5
15 Secretariat of the Organization for the Harmonization of Business Law in Africa, Uniform act relating to commercial companies and economic interest groups (OHADA), (1998), P. 11
16 Nicholas S. Vonortas, Strategic business partnerships, (2009), The George Washington University, P. 9
17 Id., P. 10
While no identified reason of why or how joint ventures developed, American courts began to recognize joint ventures and distinguish them from partnerships as early as 1890. It was then that courts began to gradually acknowledge that parties could combine their property and services without forming an actual partnership. Courts have generally stated that joint venture relationships are established when parties undertake a specific business project with a profit motive. Additionally, the parties involved must have an equal voice regarding the control and management of the venture.

In its rudimentary form, the existence of trade through business organizations had been recognized in Ethiopia as early as the 15th C. However, the history of commerce through company, in formal way, in Ethiopia cannot be traced beyond the late 19th Century. It was during Emperor Menilik II that different business organizations were introduced. Among those, Franco-Ethiopia railway Company (1897), Bank of Abyssinia (1905), Agricultural and Commercial Development Company of Ethiopia (1909) are worth noting.

However, it was in 1933 when the first company law was enacted that the concept of joint venture was introduced to our legal system. The Company Law of 1933 provides for various forms of business organizations, namely, share companies, joint stock companies, private limited companies, ordinary partnerships, and limited partnerships. It also contains several provisions pertaining to the formation, operation, and dissolution of companies.

Three provisions of the Company law of 12th July, 1933, Arts. 131-133, were dedicated to deal with joint venture. Article 131 of this proclamation provides that “a Participating Association can be concluded for a determined business, for series of operations or for the performance of a commerce.” According to Articles 4 and 132 of this proclamation, Participating Association has no legal personality as against third parties.

After the return of Emperor Haile Selassie I from exile, particularly in 1956-1963, companies began to play a great role in facilitating trade and investment in Ethiopia. Subsequently, the 1960 Commercial Code has replaced and amended the 1933 Company Proclamation and in this Code also joint venture has been recognized as one of the six business organizations in Ethiopia. The Commercial Code has provided a little bit detailed provisions compared to its predecessor, but it still has only nine provisions and maintains the basic features of such organization, i.e. no legal formalities for its formation and no legal personality.

---

19 Id.
20 Id.
23 Id., P.113
24 Alemayehu F. & Kefene G., Law of Traders and Business Organizations, Teaching material, (2009), Justice and Legal System Research Institute, P.2
25 Peter Winship, Background Documents of the Ethiopian Commercial Code of 1960, (Edited & Translated), (1974), Faculty of Law, HSIU, Artistic Printers, A.A., Ethiopia, P.55
26 Id.
27 Id.
28 Fekadu, Supra n. 1, P. 19
1.3. Joint Venture and partnerships

A question quite often arises – is a joint venture nothing but an ad-hoc or temporal partnership? This question assumes huge significance because most countries have legislations defining rights/obligations of partners in a partnership; however, not specific laws dealing with joint ventures. The issue may also be pertinent to the Ethiopian context because a cursory look at Arts. 271 and 272/4 of the Com. C. cast light that joint venture is closer to partnerships.

In the United States joint venture is closer to partnership and covered by Partnership law. However, it is treated as a separate concept and there are clear differences from partnership. According to Chetwin:

There was a prohibition of corporate partnership in the United States as it was considered that the officers and directors of a corporate partnership may not be able to carry out their responsibilities and that the corporate assets may be jeopardized in an ultra vires manner.

The 1960 Ethiopian Commercial Code defines ‘joint venture’ under Art. 271 as “…an agreement between partners on terms mutually agreed and is subject to the general principles of law relating to partnerships.” From the definition given, it is noteworthy that joint venture under Ethiopian law is not only a mere agreement, but it is also a partnership between the joint partners/venturers. Moreover, the cumulative reading of Article 212 and Article 210(1) signifies that joint venture is not a mere contractual relationship.

However, joint venture and partnership are not one and the same. In the eyes of the commercial world, a partnership is seen as a continuing business relationship and it is common for partners to distinguish themselves from the partnership. Hence, it is common for partners to give loans to the partnership, charge interest on the loans, draw remuneration from the partnership, and so on. If partnership was the same as the partners, the question of any remuneration, loans or interest would not arise. In case of joint ventures, the separation of personality, even in commercial sense, does not exist – hence, in case of a joint venture, the joint venture partners are not entitled to any remuneration for the service provided unless specifically provided by the joint venture agreement.

1.3.1 Unique features of JV

The parties to a joint venture simply organize their cooperation on a contractual basis. In some jurisdictions (Australia, Sweden, Germany, England, India etc…) this type of cooperation is described as a ‘contractual joint venture’. Whereas, the 1960 Ethiopian Commercial Code considered this type of arrangement as a unique type of partnership. That is, an agreement between the partners to a joint venture is a partnership agreement that establish a business

---

29 Maree Chetwin, The Broad Concept Of Joint Venture: Should It Have A Fixed Legal Meaning?, (2007), University of Canterbury, New Zealand, P.2
30 Id.
31 Vinod K.. and Nidhi L., Supra n. 6, P. 5
32 Id.
33 Id.
35 Arts. 210/2 Cum. 271 of the Ethiopian Com. C.
organization which has special features.³⁶ Though the literal reading of Art. 271 of the Com. C. seems to adopt a contractual type of joint venture, however, a thorough consideration of the relevant provisions of the Com. C. is worthwhile.

Joint venture is best explained by the existence of certain characteristics, understandings and arrangements. It is generally characterized by the following salient features: ³⁷

A. **Legal Personality:** A joint venture does not have legal personality. Thus, it is not going to be considered as a legal entity. That is to say, a joint venture may not have a firm-name; may not enjoy ownership right over the capital; may not incur liabilities; may not have a head office; cannot sue or be sued in its firm-name; cannot be declared bankrupt.

B. **Confidentiality:** A joint venture is not made known to third parties. This makes a joint venture to be clandestine in nature. Third parties do not have knowledge about the existence of the joint venture. Since every partner deal with third parties in his own name and only the manager is known to third parties³⁸, the latter may logically assume as entering in to contract with a sole trader.

C. **Ease of Formation and Absence of Formalities:** In most jurisdictions, there is no form required for the agreement, no registration, no publicity or reporting requirements for a joint venture.

D. **Contribution:** Venturers contribute money, property or skill to the joint venture, but their contributions are not necessarily equal. Joint ventures are typically formed because the combination of skills or resources offered by each participant makes it possible to pursue a business opportunity that would not have been available to any one of the participants acting alone. The joint venture very often involves the contribution by the participants of different and complimentary resources which may include: technological expertise, marketing and distribution networks, trained personnel, capital or the ability to raise capital, licenses or permits, contacts or “good will”.

E. **Venturers hold the property of the joint venture in common:** Unless otherwise provided, every member retains ownership of the property which he contributes to the joint venture. Since the organization has neither legal personality nor capital, the contribution of the members cannot become the property of the joint venture. The members merely place certain goods or assets at the disposal of the manager.

Although most joint ventures are limited in scope -limited to the expertise of the joint venture partners, it may also be established for a number of transactions.³⁹ It is also quite common for a joint venture to have some form of time limitation such as a preliminary phase with a prescribed time limit within which the venture must accomplish minimum goals.⁴⁰ If those targets are met, then the joint venture automatically proceeds to another phase or a permanent phase subject to early termination under certain defined circumstances.⁴¹

2. **Why business persons choose JVs?**

³⁶ Arts. 271 Cum. 212/1/b, 210/1/2 & 211 of the Ethiopian Com. C.
³⁸ Look at Arts.276 (1) and (5) of the Ethiopian Com. C
³⁹ Peter Winship, Supra n. 25
⁴⁰ Supra n. 5
⁴¹ Id.
Joint venture is a vehicle for the development of a business opportunity by two or more persons acting together. These days, pre-existing entities are forming joint venture, even across frontiers. With the dramatic increase in the globalization of the economy in all market sectors since the late 20th C., the 'joint venture' has become the business relationship of choice to expand into new businesses and new markets for a variety of reasons. First and foremost a company can minimize or soften its financial risk by sharing the risk of expansion into a new geographical, product or service market by seeking a partner with similar expertise or special expertise in the target market to share the risk. Even if capital risk is not a concern, many large enterprises worldwide will choose a joint venture arrangement for the purpose of spinning off a business not part of its 'core' business operations, as opposed to selling the non-essential business, and assume a passive or limited role in the joint venture.

Others choose joint venture simply to access new markets or new technology that might improve an existing successful product. Although it is possible to access a new market through a distributorship arrangement or a licensing arrangement, concerns over limited or short term gains, loss of control over the technology and confidentiality issues dictate other market entry methods.

Recently, joint ventures have a big success on the markets, and that is so because they allow the participants to do things which they would not be able to do on their own, giving contractors a chance to try something new and to diversify their skills. Both partners bring their experience, technology and knowledge, also dividing the risks by founding a joint venture. Thereby, “contractors can gain access to new geographic markets without overexposing the company (usually one chooses a partner who knows the market, has experience in the field and has already a good position on the market)”.

2.1. Advantages and disadvantages of Joint Venture

Joint ventures are the most effective way to increase the sales and profits. Joint ventures have inherent advantages for well-matched partners. Partners may share obligations and risks, allowing each to undertake the new venture where neither would be willing or able to do so alone. In addition, if the risks and obligations each partner bears are well matched to its particular talents and contributions, the overall burden of a particular risk or obligation will diminish.

One of the reasons for selecting a joint venture structure rather than the other business organization structures relates to avoidance of double taxation. The difference between incorporated and contractual joint ventures with regard to double taxation is that, incorporation creates a new legal entity that will normally be taxed separately, tax being imposed on an entity basis. An incorporated joint venture thus creates the conditions for double taxation; first on the corporate profits of the joint venture company, and second on the dividends transferred to the joint venture parties.
In the context of a contractual joint venture, no new corporation is created. Profits and losses of the joint venture arise directly with the parties, and are taxed there. In practice, “matters are of course more complex and the parties are well advised to consult a tax specialist before choosing the legal form for their joint venture and determining its structure”. 49

Another advantage of this form of business arrangement is that it offers a great flexibility. In most legal systems, contract law allows considerable freedom for the parties to regulate contractual relationships, including contractual joint venture relationships, which are not governed by the more stringent company law regulations.50 That is, the parties may amend or modify their agreement by mutual consent at any point of time. Contractual joint ventures can thus be structured and adapted to the particular needs of the parties.

Joint venture is without the detailed regulation applicable to corporations and partnerships, giving its participants a great deal of flexibility in structuring their arrangements and determining their contractual rights and obligations.51 Compared with other forms of partnerships, a joint venture might be easier, quicker and cheaper to arrange, and permit a more flexible, hence efficient joining of forces.52 It could also be less commercially risky and easier to undo than a full-fledged partnership. 53

Moreover, with other resources, joint venture partners may share technology thereby paves the way for the development of new innovative technologies.54 In a joint venture, firms also pool their financial resources, potentially eliminating the need to borrow funds or seek outside investors. Taken together, the benefits suggest an improved competitive position for a joint venture, and each of the partners.55

Potential disadvantages and risks of joint venture include:

- Risk that joint venture would be deemed to be Partnership - Increased Liability Exposure: Courts have held that the onus of proof in establishing that a partnership exists, rather than a joint venture or other form of business vehicle, lies with the person alleging that a partnership has been formed.56 Courts have also held that in determining what type of business organization has been formed, regard will be made to the intention of the parties.57 For this reason, it is common for the participants to a business enterprise to make a written statement indicating the kind of association they intend to form, often by including an express statement in the joint venture agreement that they intend to form a joint venture and not a partnership.

- Decision-making and dispute resolution processes can be lengthy and costly, depending upon what mechanisms are agreed in the joint venture agreement and what practices have evolved during the life of the joint venture in this respect. 58

49 Id.
50 Joint Ventures, ENERGY AND RESOURCES LAW, Lexis Nexis, P. 103
51 International Trade Centre, Supra n. 34
53 Id.
54 Siri Terjesen, Joint Ventures: Synergies and Benefits (Executive summary), available at www.qfinance.com
55 Id.
56 Joint Ventures, (MAY 2012), Alberta Law Reform Institute (ALRI), Edmonton, P. 5- 7 available at www.alri.ualberta.ca.
57 Id.
58 Siri Terjesen, Supra n. 54
• Lack of trust between the parties can limit cooperation; since business through joint venture is mainly based on a mutual trust, antagonism will arise once the mistrust between the venturers is failed.  

There is the possibility of being ripped off by unscrupulous joint venture partners and hurting your reputation or disappoint the customers. All this can occur only by associating with wrong people, even unknowingly. Whatever the reason for establishing a joint venture, the venture partners must carefully plan all aspects. A joint venture may be the appropriate investment arrangement in the particular circumstances, and, like any investment arrangement, the potential downsides and risks can be managed through careful diligence, thoughtful planning and appropriate documentation.

Thus, formation negotiations should be approached with planning, flexibility, and willingness to compromise. Prospective co-venturers must be carefully identified based on shared business goals, and time must be allowed to build a relationship before the actual joint venture negotiations can begin. Time invested in this initial step will pay off later in smoother dealings between the parties.

2.2. Significance of JV

Probably the most significant aspect of a joint venture is the admissibility of corporations to membership. A joint venture can bring together the strengths and resources of two or more business entities to create a team that is stronger and more competent than any of its individual members. Developing nations can benefit from participating in joint ventures with large corporations through a company's access to capital, experts in management and operations, established market access, and often through information and technology that would not otherwise be available to them. In a community with low current capacity, a joint venture can bring many needed resources to the table. The big projects that typically result from joint ventures with large corporations require funding on a scale that is not possible for developing nations acting on their own.

The importance of trade in development is well established. Nowadays, trade is a prime vehicle of economic growth. According to (DFID) (2005), trade contributes to economic growth and poverty reduction. China achieved 8% growth for 25 years and lifted over 200 million people out of poverty largely because of expansion of trade. Ethiopia also recognized the importance of trade more than four decades ago when it introduced the Commercial Code in 1960. This Code is among the legal frameworks that are governing the existing Ethiopia’s trade and commerce. In its preface, the Com. C. states:

60 Id.
61 Id.
62 Id.
64 Supra n. 56
67 Id.
“…In the modern world, no nation can hope to expand its commercial and
economic life unless there exists a firm legal basis which will assure the
necessary elements of stability and security in business transactions while at
the same time providing a sufficiently articulated yet flexible framework
within which trade and commerce may flourish and grow ….”

The Com. C. has devised joint venture as one important structure to enhance commercial
activity and avail the outcome. Joint ventures can be an important part of the sustainable
development plan for a developing nation like Ethiopia. By choosing joint ventures, “a
developing nation is able to influence the direction of its growth and may choose to work with
partners who look forward to the future”. Employment in joint ventures could provide income
and contribute to individual, family, and community prospers.

2.3. **Practical existence of Joint Ventures in Ethiopia**

No exclusive test is used to establish a joint venture. Whether a joint venture exists
depends upon the facts and circumstances of each case, as no rule can be applied to every case.
In joint venture relationships, a single factor is not determinative. Instead, the facts of each case
are examined as a whole. However, courts in foreign jurisdictions have determined a number of
elements that generally establish a joint venture.

Elements that were used by the Minnesota Supreme Court will be worth mentioning
here. The court provided four elements that it found necessary to establish a joint venture
relationship: (1) contribution; (2) joint proprietorship and control; (3) sharing of profits, but not
necessarily losses; and (4) a contract. The court also held that a business enterprise must be
limited in scope and duration in order to be considered as a joint venture.

In the same fashion, the North Dakota Supreme Court stated that joint venture
relationships are similar to partnerships, but are more limited in scope and duration. The court
also acknowledged that the laws of partnerships apply to joint ventures. The court laid out the
four elements needed to show that a joint venture exists: (1) contribution; (2) proprietary interest
and the right of mutual control; (3) an express or implied agreement for sharing of profits, but
not necessarily losses; and (4) an express or implied contract showing the formation of a joint
venture. However, the court also stated that there is no set of method to determine the existence
of a joint venture, as each case is dependent on the facts.

The Ethiopian courts have take into account different elements in their effort to determine
the existence of joint venture established by the concerned parties. A case between Ato Worku
W/tsadik v. W/ro Wude Mierabush et al. (the heirs of Ato Tesfaye W/selasi) is worthy of
discussion here. The case was initiated at the Federal First Instance court claiming for the
existence of partnership between Ato Worku (initially plaintiff and now applicant) and Ato
Tesfaye (the deceased). The court has rejected the claim deciding against the existence of any

---

68 Look at the Preface of the Com. C.
69 Sarah Jane Fraser, Supra n. 65, P. 40
70 Rehnberg v. Minnesota Homes, as cited in Kelly E. Olson, Supra n. 18, P. 481.
71 Id.
72 Id.
73 Kelly E. Olson, Supra n. 18, P. 482.
74 Id.
75 Id.
76 Worku W/tsadik v. Wude Mierabush et al., The Federal Supreme Court, Cassation F.N. 76394, 18 /03/2005 E.C.

---

81
kind of partnership based on the provisions of the Com. C., i.e. Arts. 214 and 219. The Federal High Court, in its appellate jurisdiction, dismissed the appeal confirming the decision of the lower court. However, the Federal Supreme Court Cassation Bench reversed the decision of the lower courts criticizing their failure to examine the partnership agreement of the parties in light with the relevant provisions of the Com. C. The Cassation Bench has employed relevant elements in order to establish the existence of joint venture among the parties. The elements were absence of legal personality, agreement not necessarily in written form, subjected to no registration and publicity requirements, and clandestine (dealings by the partners are made in their own name).

The case between W/ro Birhan Tsegaye v. Mikael Fiseha et al.\(^77\) emphasizes the existence of joint venture in Ethiopia and cast light on how courts determine the existence thereof. The Federal First Instance Court has rejected the claim arguing that the agreement of the parties was a partnership agreement that did not have the effect of establishing joint venture. This was also confirmed by the Federal High Court to which case was appealed. In its cassation jurisdiction the Federal Supreme Court has criticized and reversed the decision of the lower courts. The lower courts were not wise in appreciating Art. 211 together with Art. 212 of the Com. C., which may help them to determine the type of partnership that parties intend to establish. Thus, For the Cassation Bench, the requirement of registration under Art. 219/2/c was irrelevant for the partnership agreement which the parties have concluded to establish a joint venture.

At this juncture, the writer of this paper is interested to draw your attention on one sideline issue. Based on the above cases, have you noticed the level of our courts’ prudence as well as their commitment to comply with their obligation to follow the interpretation of a law by the Supreme Court rendered by the Cassation Division?\(^78\) The Federal First Instance and the Federal High Court has entertained the case Ato Worku W/tsadik v. W/ro Wude Mierabush et al. after a binding interpretation was given by the Cassation Division on the case between W/ro Birhan Tsegaye v. Mikael Fiseha et al.\(^79\) There are many other scenarios that vindicate the imprudent and negligent practices of our courts which will be beyond the ambit of this paper to discuss further. In the writer’s view, it is time for our courts to escape out from the depression where they are in.

Though establishing the existence of joint ventures in Ethiopia is a tough task, many commercial transactions were and are still carried out by such types of business organizations. As aforementioned, joint ventures are flexible, i.e. no strict formation requirements like written agreement, registration, and publicity are required. The absence of these requirements for the formation of joint venture emphasizes their clandestine nature. For these reasons one may not easily able to find any official statistics of such kinds of business structures\(^80\) and to know their actual existence and their practical experiences in Ethiopia.

Nevertheless, this does not warrant someone to conclude as joint ventures are absent in Ethiopia. Samuel’s wordings emphasize this point as:

\(^{77}\) Birhan Tsegaye v. Mikael Fiseha et al., The Federal Supreme Court, Cassation F.N. 46358, 25/06/2002 E.C.
\(^{78}\) Art. 2/1 of , Federal Courts Proclamation Re-amendment Proc. No. 454/2005...provides for lower courts to be bound by the interpretation of the cassation division
\(^{79}\) The Federal first instance court has decided the case between Ato Worku W/tsadik v. W/ro Wude Mierabush et al. on 08/03/2004 E.C. and the Federal High Court on 9/05/2004 after an interpretation was rendered by the Cassation Division on a case between W/ro Birhan Tsegaye v. Mikael Fiseha et al. at 25/06/2002 E.C.
\(^{80}\) Look at on Booz Allen Hamilton, Ethiopia Commercial Law & Institutional Reform And Trade Diagnostic, (January 2007), United States Agency for International Development (USAID), P. 19
“…This fact makes it very difficult even to assertively conclude that among the various types of business organizations joint venture is the most unfrequented one because joint venture business being undertaken underground or in the shadow might be numerous to defeat such assertion. So, the maximum that can be said about joint venture in the general business community is that it is an unknown zone to explore…”81 (Emphasis added)

The research conducted some 45 years ago revealed the fact that business transactions were carried out, by the Gurage people, predominantly through arrangements that are alike to joint venture.82 The researcher Paul McCarthy considered those business arrangements as “De facto” partnerships, i.e. which actually exist but not recognized by law. However, though the Gurages’ customary business institutions do have elements that conform to elements provided under Arts. 210/1 and 211 of the Com. C., they have failed to complement with elements under Arts. 214 and 219 of the Com. C.83 The absence of written agreement and registration requirement assimilates these customary business institutions to joint venture than to partnerships. These business arrangements are still prevalent in Ethiopia, though predominantly, not only in Gurages’ but also between all the nations.

It is the road construction sector, among others, where the existence of joint venture may be officially witnessed in Ethiopia.84 This sector becomes apparent because of the directive issued from the Ministry of Works and Urban Development to Ethiopian Roads Authority in 2008 which requires 85 such joint venture agreement be in a writing and to be authenticated by the concerned documents authentication and registration office. Samuel further makes a note that “though the fact that such arrangement being disclosed to Ethiopian Roads Authority (ERA) makes the joint venture to be a partnership to ERA purpose, we can however observe that the arrangement is still joint venture for the general public and for other third parties purpose.”86

The joint venture between the three banks (United Bank S.C, Awash International Bank S.C, and NIB International Bank S.C.) is another scenario to be mentioned for the point under consideration. They have formed a special company as Premier Switch Solutions Share Company (PSS) in order to establish a common electronic card payment system and the three banks have joined their capitals and resources and established the share company as an independent entity with all having equal equity shares.87

The practice by the aforementioned banks is common in other jurisdictions where entities are recognized as members to a joint venture. It is however important to note that formation of corporate ‘joint venture’ in its broader sense of the term is not totally precluded from being a possibility under Ethiopian Commercial Code. This is to say that two or more persons can still form a corporate ‘joint venture’ by choosing any of the other legal forms such as partnership, private limited company, or share company.

82 Paul McCarty, Supra n. 21, P. 106
83 Id., p. 108-109
84 Samuel Asfaw, Supra n. 81, P. 49
85 Id.
86 Id.
87 Id., P. 45
3. The fate of the current provisions applicable to Joint Venture in the forthcoming Ethiopian Commercial Code: Retention or Exclusion?

The pertinent provisions of the Com. C. governing joint venture continue to be the area of contenions with the advent of globalization. In the contemporary world where free market becomes popular with the motto ‘survival of the fittest’, business organizations appeared to be the best way of doing business. For its flexibility in formation, anti-double taxation benefits, possibility in technology transfer, and good opportunity to pool diversified resources together joint venture, nowadays, turn out to be the best and a growing type of business organization.

As mentioned many times, the provisions of the Com. C. applicable to joint venture remained in force for the last 53 years without any change, except the recent attempt to amend it by the Ministry Of Justice. Hoping that the amendment of the commercial code will be actualized soon, different arguments are forwarded with regard to the fate of the prevalent Com. C. provisions of joint venture in the forthcoming Com. C. Herein under a discussion addressing the two lines of arguments is in place.

3.1. The legal framework of JV in other Jurisdictions

Many countries in the world are committed to keep their commercial law up to date. The Commercial Code of France, which was a source for the 1960 Ethiopian commercial code, is among the many which undergone through a process of changes many times after the adoption of the Ethiopian Commercial Code.

Notably, the 1807 Commercial Code of France was amended in 1967 with a major shift in philosophy which sought to provide protection to creditors by assisting the company with its reorganization. The law of March 1, 1984 has also introduced changes in the French Commercial Code regarding the amicable settlement of company difficulties. It was in 1994 that significant changes were introduced in French company law. The Societe par Actions Simplifiee (SAS) was introduced with the particular view of promoting joint ventures.

At least seven types of business organizations and unique economic groups known as Groupement D’Interet Economique (GIE) are adopted by the existing commercial code of France (2006). More importantly, the French Commercial Code has incorporated a business organization alike to joint venture. According to Samuel:

88 Of course, different proclamations (Joint Venture Establishment Proclamation No.235/1983, Public Enterprises Privatization Proclamation no. 146/1998, Investment Proclamation No.769/2012) were enacted and introduced additional legal frame work for joint venture. However these legal frameworks are in place to govern specific types of joint ventures.


90 Id.


“...Societe en participation is also called ‘silent partnership’ and this type of business organization in French law does not have legal personality, and it is said that it is purely private arrangement between the partners. The French law provides that its existence and membership must not be disclosed to third parties by the partners. This type of business organization in France has almost identical rules and legal provisions with the provisions of joint venture under Ethiopian Commercial Code.”  

The US and Germany are among the jurisdictions which do not have any specific law governing joint venture as a distinct form of business organization; i.e. “joint venture can take any of the available legal forms for partnership or for limited companies”. Despite the absence of pertinent law regulating joint ventures in Germany, there are other legal regimes like the European Antitrust Law, merger control as well as the prohibition on cartels, that are applicable to joint ventures.  

In Swiss law the term ‘joint venture’ is generally understood as “a short-term or long-term cooperative relationship between two or more parties with regard to a specific purpose”. Two types of joint venture, i.e. equity and Contractual joint ventures are recognized under the Swiss law. Alike the German and US law, there is no specific legal framework which regulate joint venture in Swiss. The formation and operation of a joint venture under Swiss law is, therefore, governed by the general rules concerning contracts and companies which are contained in the Swiss Code of Obligations.  

At this juncture, it would be worthwhile to consider the position of the OHADA’s instrument on joint venture. According to the OHADA’s Uniform Act Relating to General Commercial Law, ‘joint venture’ shall not have legal personality, no requirement of registration and publicity. This Joint Venture in the OHADA instrument is almost identical to the Ethiopian joint venture in its most aspects.  

3.2. Joint Venture under the draft revised Commercial Code of Ethiopia  

The draft revised commercial code did not made any substantial change on the arrangement of the existing Com. C. Accordingly, rules governing business organizations are arranged under Book II of the draft revised version of the code. This is also an important part of the code where the drafters thoroughly considered and introduced changes. Ordinary partnership is omitted as it is deemed to be non-commercial organization which must be treated by other legal regimes.  

The provisions under Title III of the draft revised code are the verbatim copy of the existing articles governing joint venture. However, the team of experts has forwarded some comments and recommendations thereon. The first recommendation is on Art. 274/1 which prohibits against the issuance of negotiable securities by a joint venture. The concern of the team here is on the possible confusion which may be created by the a contrario reading of this article with respect to the other types of business organizations, i.e. General partnership, limited

93 Samuel Asfaw, Supra n. 81, P. 32  
94 Id.  
95 Id.  
96 Peter C Schaufelberger & Richard W Allemann, Joint Ventures in Switzerland, P. 111, available at www.iflr.com  
97 Id.  
98 Id.  
99 OHADA, Supra n. 15, P. 11
partnership, or even a private limited company. The team has recommended, to avoid the confusion, for a similar provision to be provided in the draft for those business organizations mentioned herein before too.

The other comment and recommendation of the team relates to the contradictory provisions of the draft revised code. On the one hand, Art. 272/2 of the draft code gives freedom to the prospective venturers to enter into agreement in any form they opt. On the other hand, Art. 278/1 (a), (i) and (2) of the draft code reveal the legislature’s intention to make memorandum of association as a requirement for joint venture formation. The team of experts recommended for memorandum of association to be mandatory for two reasons. First, it will solve the problem of evidence in solving disputes concerning joint venture. Second, it will avoid the existing contradiction between Arts. 272/2 and 278/1 (a), (i) and (2) of the draft code.

Of course, the team has considered the potential danger that would be casted on the confidential nature of joint venture if agreement thereof is mandatorily required to be in writing. However, the team has suggested how this requirement will not peril the very nature of joint venture saying “…but does not cause it to be so much public as it would be, were it to be registered as required by Article 219 of the Code”.

3.3. Arguments on the retention of the current JV provisions in the forthcoming Com. C.

From the draft version of the forthcoming revised commercial code of Ethiopia it can be noticed that changes are introduced. Among other things, the legal framework governing business organizations in general, joint venture in particular, is the subject of the revision by the draft commercial code. The types of business organizations are reduced into five with the exclusion of Ordinary Partnership. The latter is excluded for its non-commercial nature and is intended to restrict the scope of the Code on commercial business organizations.

Regardless of the inclusion of joint venture provisions in the draft commercial code, this paper aimed at drawing attention over the contesting positions concerning the retention of the present provisions governing joint venture. It happens to be difficult to find out sufficient literatures on Ethiopian joint venture legal regime. This may appeals to lack of adequate information on the ground because of their clandestine nature. However, this does not warrant someone to conclude that joint ventures in Ethiopia are non-existent and to judge the practical insignificance of the current provisions thereof. On the other round, it is also difficult and awkward to favor the significance of the provisions of the Com. C. governing joint venture.

Hence, in the following sections an endeavour is made to explore arguments for and against the retention of the existing provisions of the Com. C. governing joint venture in the forthcoming Com. C. based on some practical experiences, available court cases, available literatures, and more importantly on the analysis made hereinbefore.

100 AACCSA, Supra n. 2, P. 19
101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id., P.18
3.3.1. Arguments for the retention of the provisions

Though it is not possible to quantify the existence of joint ventures for their confidential nature, it is a fact of experience that many commercial activities are carried out through such type of business arrangements. It is also a general consensus that at this epoch of free market, where competition is stiff, sole-proprietorship is not an effective and efficient way of doing business. Thus commercial business organizations, including joint venture, are important structures in facilitating commerce which in turn enhances the national economic growth.

It can be inferred from the preface of the 1960 Ethiopian Commercial Code that one of the motivations to come up with a legal framework governing commerce in Ethiopia was the expansion of commercial activities and an increased number of company formation. It states:

…The commercial life of Ethiopia has expanded, increasing numbers of Ethiopian and foreign companies have been formed and registered, and more complex methods of transacting business have been developed in recent years. 107

The importance of a legal framework to regulate business organizations in general, joint venture in particular, is also emphasized by the following statements;

Recognizing the impetus which a modern Code regulating the constitution and activities of all business organizations could give to the further growth of trade and commerce, we directed the Codification Commission created by US to prepare a modern Commercial Code….. 108 (Emphasis added)

This is to say that the prevalent Com. C. provisions governing joint venture came in to picture to regulate the practically existed as well as the forthcoming business organizations, i.e. joint ventures. This is accentuated by Prof. Escarra in his preliminary report on the preparation of the Com. C. He states that “…the first task in the preparation of the future commercial code is to make an economic and legal inventory…a commercial code rests essentially on the economic life of the country…..”109 In order to accomplish his task, he inquired to obtain more complete information on issues like “…do Ethiopian traders (or any of Ethiopian or foreign commercial communities) use certain forms of commercial business organizations?…”110 More importantly, in his Exposé des motifs 111, Prof. Escarra states that “although in practice the joint venture is frequently used for a single business transaction…..”112 (Emphasis added)

One can infer from all the above discussions that the introduction of the legal framework for joint venture was necessitated by the desire to regulate the practically existed forms of business organizations. If commercial transactions were carried out using joint venture at that initial stage, for stronger reason, we can safely argue that doing business through joint venture is increasing in Ethiopia.

Even, the contemporary trend in the world ascertains the growing significance of joint venture as a main form of business organization. Since adapting the current developments in the commercial sphere is among the motivations for the revision of the 1960 Com. C., retaining the existing provisions of the Com. C. governing joint venture will be a genuine decision.

107 Look at the Preface of the Com. C.
108 Id.
109 Peter Winship, Supra n. 25, P. 1
110 Id., P. 2
111 It is a document by which the drafter of the Com. C. has explained the purpose intended to be achieved by the Com. C.
112 Id., P. 55
The World Bank’s Ease of Doing Business report 2012 reveals that Ethiopia ranks 111th out of 183 countries. If this rank has to be improved and if we aspire to achieve sustainable development, the availability of alternative ways of doing business in Ethiopia is worthwhile. The retention of the current provisions of the Com. C. in the forthcoming Com. C. enables to provide an alternative form of business organization for business persons who may opt joint venture for different reasons. Prof. Escarra describes the possibility of the formation of joint venture for a short period. Accordingly, for business persons who are not interested to engage in an ongoing business relationship, joint venture is the best alternative.

Projects which are for a short term and which require huge capital usually carried out through joint ventures. Moreover, joint venture is the preferred form of business organization in terms of its advantage with regard to ease of formation, tax liability, confidentiality, legal personality etc... Hence, the forthcoming Com. C. shall retain the provisions governing joint venture and provide an optional business structure for those who are interested to do business in Ethiopia.

These days, many jurisdictions are adhering towards the incorporation of provisions, in their commercial law, to govern joint venture business organizations. For instance, the French commercial code of 1994 has introduced provisions to regulate joint ventures. There are many cases in different jurisdictions involving joint ventures and it is thus a growing area of the law. The English, Canadian and New Zealand courts have moved in the direction of recognizing joint ventures as constituting a distinct area of the law.

The Organization for the Harmonization of Business Law in Africa (OHADA) has also recognized the existence of rules governing joint venture in the commercial codes of the member states. Membership to OHADA is open any Member State of the African Union (AU). Hence, Ethiopia as a member state of AU may join the organization of OHADA to avail the benefits thereof. For such reasons, advocating for the inclusion of the existing joint venture rules of the Com. C. in the forthcoming Com. C. is tenable.

As aforementioned, fourteen National experts team, under the auspices of the Private Sector Development (PSD) Hub, were in charge of reviewing the draft revised commercial code. The task of reviewing the draft revised commercial code was initiated by Addis Ababa Chamber of Commerce and Sectorial Associations (AACCSA) in order to make sure that the revision of the code has addressed the interests and concerns of the business community. Thus the outputs by the team of experts reflect the position of the business community on the revision of the Commercial Code of Ethiopia. The team of experts has favored the retention of the existing

---

114 Peter Winship, Supra n. 25
115 Id., Prof. Escarra describes joint venture as a form of business organization to undertake project businesses.
116 Look at Supra n. 29
117 Id.
118 Alhoussinei Mouloul, Understanding The Organization For The Harmonization Of Business Laws In Africa (O.H.A.D.A.) (2nd Ed.), (June 2009), P. 9, The rationales behind the creation of OHADA are mainly two fold-achieving economic & legal integration among the African states and create the opportunity for the African continent to enter into the channels of international trade.
119 Id., P. 24
120 Id.
121 AACCSA, Supra n. 2, P. 5
122 Id., The document is entitled as ‘Position of the Business Community on the Revision of the Commercial Code of Ethiopia’ and the editors’ note in the introduction (P. 6) asserted that “…the comments and observations, as edited
provisions applicable to joint venture in the draft revised Com. C. This reveals the fact that the business community is enjoying the legal framework governing joint venture as an alternative to the other frameworks of business organizations.

The experts have forwarded in-depth comments and recommendations particularly on Book Two of the Commercial Code and the revised draft version of the code, which deals with different forms of business organizations. The study questions the significance of the classification of business organizations in to commercial and non-commercial. According to the report;

“....The general consensus of the business community is to exclude non-commercial business organizations from the Commercial Code as it is not the purpose of a commercial code to treat non-commercial entities.”

The study was presented at Hilton Hotel to participants from the business community to reflect and debate for the first time on the two-year-old study. No objection by the participants on the retention of the provisions governing joint venture is reported. This signifies the importance of preserving the current provisions of joint venture in the forthcoming commercial code.

Ethiopia applied for WTO membership on 2003. It is argued that Ethiopia’s accession to WTO will be a catalyst for change and will strengthen the role of the private sector in the economy. However, the accession process is appeared to be a sluggish and costly. On the other hand, the negotiation process itself provides a clear signal to the private sector to organize itself and shape its own future. In the words of Elias:

….Nevertheless, the years of processing Ethiopia’s accession can be used as the timeframe for putting our house in order so that we can be prepared for the competence towards survival and development…. This is to mean that an enhanced competitiveness of the private sector is vital under the WTO regime. Business organizations are the best business structures to enhance competitiveness than sole proprietorship. Hence, business persons in Ethiopia shall move away from ‘Kiosk business thinking’ (to use the words of Prof. Zekarias Kenea in his class lectures) and develop a culture of doing business together, i.e. through business organizations.

Notably, joint venture is among the business organizations that are preferred for their flexibility, ease of formation, technology and skill transfer etc.... The retention of the legal framework governing joint venture in the forthcoming commercial code, in a way, provides an alternative structure for business persons to build their competence and equipped enough for the battle under the coming WTO regime.

hereof, to reflect the position of the larger team and eventually that of the AACCSEA and the broader business community of the nation…” (Emphasis added)

123 Id., P. 19
124 Reporter Magazine (Reported By Birhanu Fekade), Business community pushes for revision of commercial code, Oct. 16,2010 Available also at www.ethiopianreporter.com
125 Id.
126 Id.
127 Look at Ejigayehu Tadesse v. Megersa Gudeta, The Federal Supreme Court, Cassation F.N. 33470 ,2/02/2001 E.C. The case corroborates the importance of the existing rules of joint venture.
128 Reporter Magazine (Reported By Birhanu Fekade), Ethiopia far from WTO membership, Dec. 24, 2011 Available also at www.ethiopianreporter.com
129 Id.
130 Elias N. Stebek, WTO Accession In The Ethiopian Context: A Bittersweet Paradox, (June,2007), MIZAN LAW REVIEW, Vol. 1 No.1, P.29
3.3.2. Arguments against the retention of the provisions

As mentioned under 3.1 above, there are jurisdictions which recognize joint venture as one type of business organizations but without any particular legal framework that govern it distinctively. For instance, in India, Germany, US, and China joint venture companies become the popular forms of corporate investment, without any specific law governing joint venture as a distinct form of business organization; “…i.e. joint venture can take any of the available legal forms for partnership or for limited companies.” The Swiss law also does not provide for specific rules regulating joint ventures, rather, it is governed by the general rules concerning contracts and companies which are contained in the Swiss Code of Obligations.

A thorough reading of the different provisions governing joint venture reveals that it is closer to partnerships. The recommendation of the team of experts on Art. 274 concerning the issuance of negotiable securities is another indicative of the superfluous inclusion of the specific provisions for joint venture. Furthermore, Prof. Escarra states that Art. 278 of the Com. C. is a provision intended to govern all forms of business organizations and admitted misplacement of the provision under Title III as “a problem of legislative technique”. Accordingly, the retention of the specific rules governing joint venture in the forthcoming commercial code is not quite important and complementary with the contemporary trend.

A study report by United States Agency for International Development (USAID) did not include the number of joint ventures in the overall Ethiopian company-form profile. Surprisingly, the study has mentioned only four types of business organizations (General Partnership, Limited Partnership, Share Company, and Private Limited Company) as types of companies provided by the current company law of Ethiopia and “….as also to be expected in the forthcoming new company law”. The study has also revealed that “…the overwhelming majority of companies are PLCs, which is the best form for a company with only a few owners. Most of the smallest Ethiopian businesses are not organized as companies but as sole proprietorships…”

The logical argument that can be deduced from this study report is that, though the Com. C. provides joint venture as one type of company, this form of business organization appeared to be practically non-existent or insignificant. Allen’s (Booz Allen Hamilton is the person who conduct the study) position on the types of companies in the forthcoming commercial code is also to the exclusion of joint venture. Hence, this is in line with the argument against the retention of the current provisions governing joint venture in the forthcoming Com. C.

More importantly, since joint venture in Ethiopia is not required to be registered and considered as confidential, it has no legal personality. In other words, joint venture does not have corporate existence in Ethiopia. Consequently, it is not subjected to corporate taxation on its profits. Tax is a source of revenue for the government and as a back bone for the sustainable

---

131 Samuel, Supra n. 81, P. 29-32
132 Dr. Peter & Dr. Richard, Supra n. 96
133 Arts. 271, 272/4, 275 of the Com. C.
134 AACCSA, supra n.2, P. 19
135 Peter Winship, Supra n. 25, P. 58, One may appreciate from the reading of Expos des motifs of Prof. Escarra (p. 58, No.9 in peter winship) that the organization of Book II, Title II of the Com. C. was intended to begin with the rules governing joint venture.
136 Booz A. Hamilton, Supra n. 80
137 Id., p. 18
138 Id., P. 19. From year 2000 through mid-2006 registered PLCs were 3778 and Sole proprietors 33,079.
development of a country. Payment of tax is generally considered as a contribution to the development and macro-economy of a country. From this perspective, the significance of joint ventures established pursuant to the current legal framework is negligible. Thus the retention of the prevalent provisions applicable to joint venture in the forthcoming commercial code is trivial.

4. Conclusions and Recommendations

4.1. Conclusions

Business organizations are affected by the legal environment in which they operate. The 1960 Com. C. of Ethiopia is the available legal scheme to regulate business organizations. It is quite important to note the two aspects of the Com. C. in relation to business organizations. First, the law facilitates various combinations of labor, capital and management. Certain business or economic goals may be better served by one organizational form than another. The second noteworthy feature of the Com. C. is that various legal formalities are required for the valid formation of each form of business organizations. Furthermore, the business partners’ relationship may have different legal consequences, depending on which organizational form the have selected.

These days, partnerships are quickly getting replaced by joint ventures. For their remarkable advantages joint ventures are winning popularity among the business persons. It is common and a wide practice, in Ethiopia, to engage in business finding people whom they trust each other and who are not interested to go through such stringent establishment requirements. However, disputes are part of life; they are bound to occur no matter how business relationships were based on trust. This fact of life, thus, calls for the need of legal framework that may govern the relationship.

It seems, the day is coming when the 53 years old Com. C. will be revised and up to date changes be introduced to regulate the contemporary commerce in Ethiopia. The provisions governing joint venture are among the subjects of changes in the forthcoming revised Com. C. There are two lines of arguments on the retention of the existing provisions of the Com. C. regulating joint ventures in the forthcoming commercial code.

The argument in favor of the retention of the provisions is basically based on firstly, the practical existence of joint ventures in Ethiopia. The reality is nearer to our day to day life and it is apparent that many business transactions, like garage and construction, are carried out through joint ventures than the other types of business organizations. Secondly, the international trend signifies the growing importance of joint ventures. Ethiopia, as part of the globalization process, cannot escape the rising trend of doing business in joint ventures. Thirdly, many jurisdictions in the world, which have revised their commercial laws after the adoption of the Ethiopian Com. C., opt to incorporate provisions governing joint venture than excluding. Fourthly, the recommendation by the team of experts witnessed that the business community in Ethiopia is feeling comfortable with the provisions regulating joint ventures; except regarding some lacunas that can be potentially improved by the forthcoming revised code. Last but not the least argument in favor of the retention of the provisions pertains to the inevitable membership of Ethiopia to WTO. Among the home works that are yet to be done by the government is laying a fertile ground to improve the competitiveness of local business actors. Though corporatization is the highly recommended weapon in the WTO battlefield, the significance of joint ventures should not be overlooked for the Ethiopian context.
The arguments against the retention of the provisions of the Com. C. governing joint venture in the forthcoming revised Com. C. should also be noticed critically. The first argument to disfavor the retention of the provisions based on the experience of other jurisdictions. There are many jurisdictions which do not have specific legal framework for joint ventures but regulate through other provisions; like partnership provisions. Since most of the existing provisions for joint venture in the Com. C. are similar to the provisions for the other partnerships, the retention of the existing joint venture provisions will not be a prudent decision. Secondly, the USAID study is a well established evidence to lean on in order to ascertain the practical insignificance/ inexistence of joint ventures in Ethiopia. The study could not come up with any reliable data which can prove the existence of these business structures in accordance with the governing provisions. Moreover, for the absence of joint venture’s corporate existence, no significant contribution is made to the government treasure. In other words, joint venture’s contribution to the macro-economy is insignificant. Hence, the retention of the existing provisions in the forthcoming revised Com. C. is appeared to be superfluous.

4.2. Recommendations

Based on the above conclusions and with a view to compromise the aforementioned contentious arguments, the writer of this paper finally recommends the following positions to be adopted concerning the fate of the existing joint venture provisions of the Com. C. in the forthcoming revised Com. C.:-

1. The practical existence of joint ventures as the preferred way of doing business is a fact of life in Ethiopia. It is their unique features that attract, in one or another way and consciously or not, business persons to engage in joint ventures than the other types of partnerships. The Cassation Division cases that are mentioned in this paper substantiate the significance of the provisions governing joint venture. If we insist to exclude the provisions from the forthcoming revised code, joint venture’s de facto existence will be inevitable. Thus, it will be plausible to retain the provisions in the prospective revised code.

2. It has been years since Ethiopia claims for membership to WTO. Though its realization is appeared to be ‘castle in the sky’ we have to get ready for the war called ‘competition’. According to Teshome “...It is true that membership to the WTO may create more access to foreign markets. But the main problem with Ethiopia’s export is not lack of market access but capacity to produce export products in quantity and quality.” In other words, it is to mean that we need to have business actors whose capacity to compete is enhanced through different ways. Among other things, the availability of various types of business organizations, including joint venture, in which business persons may be able to pool their resources together (capital in cash or in kind, skill, technology, ‘goodwill’,

---

139 Some provisions like Art. 271 and 272/4 of the Com. C. cross refer to provisions governing partnerships
140 This is because the process to be member takes long time and it may also take in the future. Cambodia became the WTO’s 148th member, almost 10 years after it had first applied and just over a year after its membership package was approved at the Cancún Ministerial Conference. Look at Prof. Simon J. Evenett & Carlos A. Primo Braga, WTO Accession: Lessons From Experience, (World Bank).
market network etc…) is crucial. Thus, it is timely to retain the provisions of the Com. C. applicable to joint venture in the expected revised code.

3. Let alone business organizations, even sole traders have something to contribute to the wealth of the nation. Changes shall be introduced in the provisions governing joint venture in order to maximize their role in the growth of the macro-economy and in the process of achieving a sustainable development. If a written form and registration requirements could be introduced, some gaps in relation to taxation and evidence might be addressed well. However, the necessary caution shall be done not to compromise the confidential nature of joint venture. To this effect, the team of experts recommends that “The fact that the joint venture agreement is in writing …does not cause it to be so much public as it would be, were it to be registered as required by Article 219 of the Code”.142 Moreover, though the fact that the registration being disclosed to Ethiopian Revenue and Customs Authority makes a joint venture to be a partnership to tax purpose, it is possible however to maintain the arrangement still as joint venture for the general public and for other third parties purpose.

142 AACCSA, supra n.2, P. 22
NEW STYLE SHEET FOR 2015 FOR MUSTANG JOURNALS

Marty Ludlum *
University of Central Oklahoma

Tommy Thompson
Arcada University, Helsinki, Finland

David Davidson
Chien Hsin University, Jhongli, Taiwan

ABSTRACT

This research details the preferred style sheet for submissions to Mustang Journals in the business disciplines and the social sciences. (Legal papers use the same title information but use Harvard Blue Book format for footnotes). The first thing to note is an abstract of 150 words or less is indented. The methods discussed will benefit those who are writing their papers for any of the Mustang Journals. The abstract should be in italics.

INTRODUCTION

This paper conveys the style sheet elements in an example. All papers should be submitted in MS-Word format. All text should be in Times New Roman with a 12 point font. Do not use any special formatting other than the space bar. All paragraphs should be indented via the tab button.

First, you should note that the title is in all capital letters and bold. After the title, skip two lines. Put in the first author’s name in bold, but not in all capital letters. Underneath the name, write the author’s school affiliation in italics. If more than one author, indicate with an * which author is the corresponding author and put the contact information for the authors at the end of the paper. After the last author’s information, skip three spaces and put in the heading for the abstract.

For references in the body of the paper, we use the following format. The current population of Finland is 5,401,267 at the end of 2011 (Statistics Finland, 2012), comparable in size with Oklahoma in the United States. If a direct quote is used, “the page number is added at the end” (Ludlum, Moskalionov, and Ramachandran, 2010 at 17). Headings for the paper should be centered and in all capital letters and bold.

METHOD FOR BUSINESS AND SOCIAL SCIENCE PAPERS

Terms should be defined and references given. If there is one reference for a statement, use this format (Arcada, 2012). If a statement has multiple references, use this format as a guide. Females tend to be more ethical than males (Ludlum and Smith, 2011; Ludlum, 2010; and Ludlum, 2004). The references are separated by a semicolon. If you are using references, you should NOT use any footnotes. Include that information in the text of the paper.

Statistics, if used, should be explained. The statistical information can be reported as this example. A strong majority of students agreed (69% agreed, 11% disagreed).
found that students who were employed \((x^2=13.976, \text{df}=8, p=.082)\) and younger students \((x^2=75.717, \text{df}=44, p=.002)\) supported more individualized views of ethics.

The statistical information can also be included in a chart or graph. Please insert the graph(s) or chart(s) into the paper where they belong. Remember, the papers will be printed in black and white only. Therefore, you should experiment with any graph that requires multiple shades to be understood or read.

**IMPLICATIONS FOR FURTHER RESEARCH & CONCLUSION**

Do NOT use any header, footer, or page numbering system. These are tedious to correct and edit for the final journal proof. Following a conclusion, you should put all of your references. Main headings should be in all capital letters, centered, and bold type. Secondary headings (if used) should be in all capital letters and centered. The references should not be numbered. Instead, put the references in alphabetical order by the author’s last name.

Be cautious about using links to find your references, since the links change so often, they are useless a year after the paper is published! After the end of the body of the paper, skip three spaces, then put in the heading for references. Skip another space then include the references. Single space all references. Keep all references in 10 point font. Notice that Mustang Journals uses *italics* rather than underlining. Italics are much easier to read and duplicate. After the references, put the information for contacting the author(s) with school affiliation and email address.

**REFERENCES**


**AUTHORS**

*Marty Ludlum is an Associate Professor of Legal Studies at the University of Central Oklahoma. He can be contacted at the University of Central Oklahoma, 100 North University, Edmond, Oklahoma 73034. Email: mludlum@uco.edu (corresponding author).*

Tommy Thompson is an Assistant Professor of Make Believe at Arcada University. He can be contacted at Arcada University, 100 North Main, Helsinki, Finland. Email: tthompson@yahoo.com.

David Davidson is a Professor of Other Stuff at Chien Hsin University. He can be reached at CHU, 100 North Main, Jhongli, Taiwan. Email: ddavidson@nothere.com.