“Partnership” constitutes the oldest-known legally-accepted model of business organization involving more than one person. In the crudest (and, indeed, oldest) sense, it reflects “any” sort of association between persons who pool their resources with a view to carrying on business and participating in its profits and/or losses. With growth in human civilization, business organization complicated and, this, in turn, required law to respond, sometimes by mere “recognition” and sometimes by “creation” of of newer business forms. Capitalistic nature of their economies particularly motivated some States to have a responsive regulatory regime in place. A “company”—or, a “corporation” in the American sense—best illustrates this responsiveness. While the most successful, a “company” does not reflect all regulatory innovation in this area. There are several other business forms which are purely the result of such innovation. A “limited liability partnership”—which, simply put, is a form of business organisation in which the liability of the “partners” is limited to the extent of their interest in the partnership, owing to its company-type separate legal personality and yet having the organizational suppleness and tax treatment of a partnership—constitutes the most recent epitomization of such regulatory tendency.

HISTORICAL ACCOUNT AND OBJECTIVES OF LLP

The concept of a limited liability partnership surfaced in response to the great real estate and energy prices crumple in 1980s and the consequent impact it had on the banks and other financial institutions. Since not much could be recovered from these failed financial institutions, attention soon shifted to the lawyers and accountants who had represented the failed financial institutions before their collapse. The plausibility of recovery came across owing to the backing of these professionals by rich and moneyful partnerships and insurers. The saga of the partners—which had not been involved in advising the financial institutions in any capacity or sense but who were proceeded against in respect of their personal assets also, sympathetically attracted the consideration of the legislature.

The United States, which was the epicenter of that financial crunch—as it has been for most other, including the present sub-prime credit crunch—spearheaded the process of legislating the concept of LLPs. The initial hesitation—both in the academic and legislative circles—in disturbing the long-settled principles of “unlimited liability” of the partners of a partnership firm on the grounds of its morallyistically weak foundations and its discriminatory nature, was soon overcome by the commercial expediency of its legislation. Thus, came on the statute book, the first law on LLP with Texas enacting the Texas House Bill 278 on 26 August 1991. The other states of the US soon followed.

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2 Advocate, High Court of Delhi; BSL, LL.B., ILS Law college (High Merit); PGDCL, Asian School of Cyber Laws. The Author may be reached at sachinsachdeva_law@rediffmail.com.
5 For an excellent illustration of the saga, see, Hamilton, “Registered Limited Liability Partnership: Present at the Birth (Nearly)” 66 University of Colorado Law Review 1065, 1066.
The objective of the LLP law, if understood in this milieu, is quite clear. It seeks to achieve the principal benefits of both partnership and company as forms of business organization. Primarily, it aims at freeing the mind of a professional from the fear that his personal assets may be attached for the negligent and other wrongful acts of his copartners, “over whom he has no control.” This, the law does, by providing the “shield of limited liability” by way of a separate legal personality. In other words, it “enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner.” The other objective is to allow to the LLP the same organization litheness and freedom from compliances as are available to a general partnership, thus calling for a new form of corporate governance. Additionally, an LLP is also conferred the same status as a general partnership for tax purposes, by following the “flow-through” system, so that the tax incidence does not act as a disincentive against this form of organization.

DISTINGUISHING AN LLP FROM OTHER SIMILAR BUSINESS FORMS

Before we proceed to visit the provisions of the recently concluded Indian LLP Act and address some of the concerns that the Act seems to have failed to address, we must first distinguish an LLP from certain other forms of business organisation in order to best appreciate the choice of an LLP over other similar forms.

We first distinguish an LLP from its parent concept: a “general partnership.” A general partnership enjoys no legal status or existence separate from the partners who constitute it. An LLP, on the other hand, is a legal entity, separate from its partners. This constitutes the foundational distinction between the two entities; the others, being its derivatives. In terms precisely of the extent of liability, an LLP is different from a general partnership in the following sense: in a general partnership, all partners are “personally” liable for “all” business debts to the extent they exceed the assets of the partnership. Vis-à-vis a third party, the liability is joint and several, i.e. each partner may be sued for the full amount of any claim. The basis for this sort of liability is perhaps the entitlement of each partner to represent as an agent, supervise as a principal, and take decisions for the partnership business as well as other partners. In an LLP, on the other hand, no partner is liable for the actions of any other partner beyond the extent of his share in the LLP.

An LLP is different also from a “Limited Partnership” in that unlike the former, at least one of the partners of the latter is a “general partner” who is in the ordinary control of day to day business of the firm and has unlimited personal liability. Besides the general partner, there is also at least one partner who has limited liability for debts and claims arising out of business decisions and activities. An LLP “has no general partner.”

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9 Maurice, “A New Personal Limited Liability Shield for General Partners: But Not All Partners are Treated the Same” 43 Gongaza Law Review 369.
12 See, the concepts of agency and supervision in the context of law firms, Richmond, “Law Firm Partners as Their Brothers' Keepers” 96 Kentucky Law Journal 231, 263-273
13 See, Maurice, “A New Personal Limited Liability Shield for General Partners: But Not All Partners are Treated the Same” 43 Gongaza Law Review 369.
It may, at this point, also be appropriate to distinguish an LLP from a “Limited Liability Company.” (for short “LLC”). The precise distinction between the two concepts is not very well defined. The reason, perhaps, is that since “LLC” is a peculiarly US concept, where the legislative competence, in this regard, is vested in the provincial states and due to the differences in the needs of different states, the regime providing for the formation of LLCs is different from state to state. However, some broad generalizations may be made:

<table>
<thead>
<tr>
<th><strong>LLC</strong></th>
<th><strong>LLP</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>There can be a single-member LLC, though in most cases, the states in the US require them to have a minimum of two members.</td>
<td>An LLP being a “partnership” has to have at least two persons</td>
</tr>
<tr>
<td>An LLC may carry on any sort of business or trade</td>
<td>The scope of an LLP is generally much restricted. For instance, in California, an LLP may be engaged only in the practice of public accountancy, the practice of law or the practice of architecture. But see, the District of Columbia Bar permits organization into either an LLP or LLC.</td>
</tr>
<tr>
<td>An LLC is afforded a corporate-like regulatory regime for most purposes including the protection against personal liability. It is, however, usually treated as a non-corporate business organization for tax purposes. In short, it is a company for most purposes other than tax, for which purposes it is treated as a partnership.</td>
<td>Though treated as corporate entity, an LLP is afforded a partnership-type regulatory regime for most purposes including tax. For limited purposes, it is treated as a company. This is particularly so in case of the extent of the liability of the persons constituting an LLP.</td>
</tr>
</tbody>
</table>

Because of the peculiar nature of certain professions, an LLP is seen as a preferred form of business organization. This is particularly so for lawyers and chartered accountants, who render their services on a “contract for service” basis. An LLP is thus a business form that enables a (professional) partner to escape personal liability for another (professional) partner’s activities, including, for instance, professional impropriety and negligence. Because of these features, the acceptance of “LLP” as a model of business organisation came quickly outside the US also with LLP laws (and related and/or derivative concepts) being passed in the United Kingdom, Singapore, Hong Kong etc. India is not lagging far behind.

After discussions and deliberations stretching over two years, we have an LLP law on the statute book in India. We may now proceed to consider how the legislative process has ensued so far.

**CURRENT STATUS OF THE LLP LAW IN INDIA**

Pursuant to the recommendations of the J.J. Irani Committee and the Naresh Chandra Committee-II and the feedback received on the Ministry of Company Affairs Concept Paper on LLP, a draft LLP Bill was prepared. The news about the drafting of the LLP Bill first became official around the mid of September 2008.

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18 For an excellent comparative account the law of partnership in the UK and the US, see, Bradley, “Twenty First Century Anglo-American Partnership Law” 30 Commonwealth Law World Review 330; and the literature cited there.
2006. The first version of the Bill was approved by the Cabinet on December 7, 2006 and was introduced in the Rajya Sabha on December 15, 2006. Subsequently, the Bill was referred to the Department Related Parliamentary Standing Committee on Finance. The Committee submitted its Report to both the Houses of Parliament on November 27, 2007, recommending some changes in the draft LLP Bill, 2006. The Standing Committee (Finance and Corporate Affairs) then submitted the final version of the Limited Liability Partnership Bill to the Ministry for Corporate Affairs.

The Cabinet on 1 May 2008 approved the introduction of a Limited Liability Partnership (LLP) Bill, 2008 in Parliament by replacing the Limited Partnership Bill, 2006. On 21 October 2008, the Bill was introduced in the Rajya Sabha. This Bill was introduced first in the Rajya Sabha since the Union Minister of Corporate Affairs, Shri Prem Chand Gupta, is a member of the Rajya Sabha. After being passed in the Rajya Sabha on 24 October 2008, the Bill was tabled in the Lok Sabha, which also passed the Bill without any changes. The Bill received the assent of the President of India on 7th January, 2009. “The Limited Liability Partnership Act, 2008” was thereafter notified in the Official Gazette of India dated 9th January 2009.

In terms of Section 1(2) of the Act, the Act was to come into force on a date appointed by the Central Government by notification in the Official Gazette. Vide Notification No. S.O. 891(E), dated 31.03.2009, the Central Government has appointed the 31st day of March, 2009 as the date on which the majority of the provisions of the Act have been brought into force. Similarly, the Central Government has also notified the LLP Rules which are effective from 1 April 2009.

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26 Any Act, other than a money Act, may be introduced in either House of Parliament. See, Article 107(1) read with Article 109(1) and Article 110(1) of the Constitution. In view of the definition of “Money Act”, the LLP Act is not a money Act.

27 The notification is available at http://www.llp.gov.in/tolink/ActNotification.pdf, last accessed on 14.04.2009. The following Sections have been brought into force:

1. Section 1
2. Section 2 except clauses (c) and (u) of its sub-section (1)
3. Sections 3 to 30
4. Section 31 except to the extent of its application in context of the ‘Tribunal’
5. Sections 32 to 50
6. Sections 52 to 54
7. Sections 59 to 62
8. Sections 66 to 71
OVERVIEW OF THE LLP ACT

The LLP Act\(^{29}\) provides “for the formation and regulation of limited liability partnerships and matters connected therewith and incidental thereto.”\(^{30}\) The Act describes an LLP as a “body corporate formed and incorporated under [Chapter III of] the Act\(^{31}\) and confers upon an LLP the status of a “separate legal entity”\(^{32}\) and all its incidents, including “perpetual succession”\(^{33}\) and the capacity and power of “suing and being sued”, dealing with “property, both movable and immovable”, “having a common seal” and, “doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.”\(^{34}\) An LLP must necessarily maintain a minimum of two partners\(^{35}\)—whether individuals or bodies corporate.\(^{36}\) An LLP must also designate at least two partners as “designated partners.”\(^{37}\) at least one of whom shall be an Indian individual. A change in the partners however has no effect on the existence, rights or liabilities of the LLP.\(^{38}\)

The relationship between the partners, including any admission to\(^{39}\) and cessation from\(^{40}\) the LLP, is primarily governed by the limited liability partnership agreement\(^{41}\) (“LLP Agreement”) entered into between the partners and filed with the Registrar;\(^{42}\) and in default, by the rules contained in the First Schedule to the Act.\(^{43}\) Cessation of partnership interest can also be brought about by death or by dissolution of the LLP.\(^{44}\) The grounds for “winding up”\(^{45}\) are more analogous to the winding up of a company and may be either voluntary or by an order of the Tribunal.\(^{46}\) Besides the obvious grounds of financial insolvency\(^{47}\) and security of India,\(^{48}\) the broad ground that “it is just and equitable”\(^{49}\) to wind up is

9. Sections 74 to 80
10. Section 81 except clause (b) to the extent of its application to sections 51, 63 and 64 and clause (c)
11. First schedule

The LLP Rules may be accessed at [http://www.llp.gov.in/tolink/LLPRulesasnotified.doc](http://www.llp.gov.in/tolink/LLPRulesasnotified.doc)

28 The Ministry of Corporate Affairs, Government of India has floated the following new website for the limited liability partnerships in India: [http://www.llp.gov.in/](http://www.llp.gov.in/)

29 Preamble, The Limited Liability Partnership Act, 2008 (“The LLP Act”)

30 Sections 3(1), The LLP Act
31 Section 3(1), The LLP Act
32 Section 3(2), The LLP Act
33 Section 14, The LLP Act
34 Section 6(1), The LLP Act
35 Section 5(1), The LLP Act
36 Section 7(1), The LLP Act
37 Section 3(3), The LLP Act
38 Section 22, The LLP Act
39 Section 24, The LLP Act
40 Sections 22 and 23, The LLP Act
41 Section 23(2), The LLP Act
42 Section 23(4), The LLP Act
43 Section 24(2), The LLP Act
44 Chapter XIII, The LLP Act
45 Section 59, The LLP Act
46 Section 60(c), The LLP Act
reserved with Tribunal. Besides this, wide rule-making powers and discretion are vested with the Central Government, including for extension of application of provisions of the Companies Act, foreign LLPs, compromise or arrangement of LLPs and for certain other purposes provided for under the Act.

Much desired though, unlike the UK LLP Act, 2000, there is no specific provision in the Act clarifying the special tax status of an LLP, though the government opines that “since tax matters of all entities in India are addressed in the Income Tax Act, 1961, the taxation of LLPs shall be addressed in that Act.” Presently, there are as many as four approaches are proposed to tax an LLP and this is likely to cause some confusion and may in fact act as a hindrance in quick adoption of the concept. However, by far, the most important change that the Act proposes to bring about is the change in the extent of liability of the partners of an LLP. This merits some space and time.

**EXTENT OF LIABILITY OF THE LLP AND ITS PARTNERS**

The Act at the outset, besides conferring the separate legal personality, clarifies that “every partner … is the agent of the LLP, but not of the other partners.” This marks a clear shift from the present “general” partnership law where the agency relationship, which is the rule, extends much farther. This also has clear implications for the liability of the partners for the acts of other partners.

Broadly, there are two models of limiting the partners’ liability adopted by the legislatures worldwide. The first is the Texas Model. This model seeks to limit the liability of the partners only in respect of “wrongful acts” but not “ordinary business acts.” The other model, commonly referred to as the Minnesota Model, imposes no “personal liability for anything chargeable to the partnership … or other debts or obligations” on partners of an LLP “merely on account of this status.” The second model is followed more explicitly in New York state. There is also a third approach, which is a rather mid-way solution, which is followed in the UK. The UK law imposes upon the members the “liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act.”

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48 Section 60(d), The LLP Act
49 Section 60(f), The LLP Act
50 Section 63(1), The LLP Act
51 Section 57, The LLP Act
52 Section 58, The LLP Act
53 Section 72(1), The LLP Act
57 Section 26, The LLP Act
58 See, Sections 18 r/w 25 and 26, The Partnership Act, 1932.
The second model is susceptible to severe criticism in that it may provide a strong disincentive for the partners to act with full devotion as a single unit. Further, there is empirical evidence that most firms collapse for reasons such as insufficiency of business to meet overheads, irresolvable personal disagreements and incentives to open their own or join a different firm and not necessarily for reasons of liability. ⁶⁴

Despite the possible criticism, the Indian LLP Act seems to follow the second model in that Section 28(1) seeks to exclude the personal liability of a partner “directly or indirectly for an obligation referred to in [Section 27(3)] solely by reason of being a partner of the limited liability partnership.” Section 27(3) in turn provides that “[a]n obligation of the limited liability partnership whether arising out of contract or otherwise, is solely the obligation of the [LLP].” Nothing in the Act qualifies Section 27(3) as a reference solely to “non-business” liabilities.

This gives an Indian LLP, the same status as a “company” within the meaning of Section 3 of the Companies Act so far the extent of personal liability of its partners is concerned. Whatever the nature of acts giving rise to the obligation in question, a partner (other than the partner who committed a wrongful act) of an LLP cannot be made personally liable. The following table summarizes the extent of liability exposure of each of the LLP, the concerned partner and the other partners:

<table>
<thead>
<tr>
<th>PARTICULARS</th>
<th>LLP</th>
<th>CONCERNED PARTNER</th>
<th>OTHER PARTNERS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>To the Extent of HIS SHARE in the LLP</td>
<td>Personal Assets</td>
<td>To the Extent of Their Share in the LLP</td>
</tr>
<tr>
<td>1. Lawful acts carried out in the normal course of business</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2. Wrongful acts in the NORMAL COURSE of business</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>3. Wrongful acts done WITH AUTHORITY</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>3. Acts done WITHOUT AUTHORITY</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**SOME ENGLISH PRECEDENTS ON LLPs**

An overview of some of the decisions rendered by the English courts on the nature of an LLP may be useful to be examined. This is for two reasons: a) the Indian LLP Act, 2008 draws heavily upon the English LLP Act, 2000; and, b) traditionally, the Indian judges have relied on the wisdom of their English counterparts.

At the outset, it may be useful to visit the general rules for imposing liability for the tort of negligence may be expedient to fully appreciate their (non)-extension to LLPs by the English court. The principle for imposing the liability for negligence under the English law is the principle of “assumption of responsibility.” Although in principle the courts there have laid down a three-prong test of reasonably foreseeable loss, proximity of defendant’s act with the injury suffered and a general enquiry into whether it is “just, fair and

reasonable” to impose a duty of care, the courts have been lately using the “assumption of responsibility” justification at least after the House of Lords decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. This seems like a sufficient test. The liability in tort may exist in addition to the liability under contract.

We would now consider how the liability of the firm and partners for negligence of a co-partner has undergone substantial change after the enactment of LLP Act, 2000 in the UK.

**Dubai Aluminium Co Ltd v Salaam and Others [2002] UKHL 48**

In that case, one of the partners of a law firm (not an LLP) drew up agreements that were used for a fraud of sham contracts. The other two partners of the firm were personally innocent of any wrongdoing. In answering a claim by the defrauded plaintiff, the co-partners of the defrauding partner paid up part of the compensation to the plaintiff. During the contribution proceedings, the co-partners sought to recover the compensation paid by them. The House of Lords disallowed the relief to the co-partners.

The *Dubai Aluminium* case demonstrates the extent of liability of a general partnership and that of its partners for the acts done by other partners. It was reiterated in this case by the House of Lords that acts, though not authorized by his co-partners, could nevertheless be said to be done “in the ordinary course of the business of the firm” if, for the purpose of the firm’s liability to third parties, it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm’s business; such that such acts would be capable of attracting personal liability for the other partners also and vicarious liability for the firm.

**Re, Rogers [2006] EWHC 753 (Ch)**

In this case, a testatrix executed a will under which she appointed the “partners in the firm of … [a named law firm]” as its executors and trustees. Subsequently, this named law firm merged with another law firm. The merged entity was constituted and incorporated as an LLP. All the partners of the merged firm became “members” of the LLP. The question before the court therefore was whether this change in the legal status into an LLP and its members, was sufficient to render the words of the will incapable of being carried out.

Even though the court finally gave a “common sense” solution based on the reasoning that the document executed by a commoner who is not expected to precisely understand the difference between a “partnership” and an “LLP,” the court observed:

“12 There are two hurdles … The first is that a limited liability partnership is a corporate body with a legal personality separate from that of its members: it is not a firm in the sense of a partnership. The second is that its members (whether or not profit sharing) are not partners: see section 1 of the Limited Liability Partnerships Act 2000.”

**In the Matter of Magi Capital Partners LLP [2003] EWHC 2790 (Ch)**

The case stands for the proposition that in matters of dissolution, an LLP is more akin to a company than a partnership since this involves the winding up of a separate legal entity, incorporated under a statute.

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68 Ibid.

Being so, an LLP cannot be wound up by an arbitrator. However, for the purpose of fact finding, including bad faith of the members, the matter may be referred to arbitration.

The Court observed:

“10. It seems to me probable that if this had been an ordinary partnership and not a limited liability partnership, the Applicant, Mr. Banerjee, would have had an absolute right under the Arbitration Act to have the present winding up petition or the issues in it resolved by arbitration and that the arbitrator would probably have had jurisdiction conferred on him by agreement between the parties under section 35 of the Partnership Act 1890 to wind up the partnership. But that is not the present case. This is not an ordinary partnership. It is a limited liability partnership. It is accepted that that creates a different entity, which is a creature of statute, and that it is not possible to exclude the statutory right to apply to have the statutory entity wound up by the court.”

Hailes v Hood & Others [2007] EWHC 1616 (Ch)
While discussing the nature of an LLP and the “interest” of a partner in it, the Chancery Division of the High Court of England & Wales observed:

“The legislation proceeds on the basis that a member of an LLP has a ‘share’ and ‘interests’ in the LLP; and it contemplates that the share, or an interest, of a member is (potentially) transferable. There is, however, no definition of a ‘share’ or ‘interest’; nor is there any explicit guidance given as to what a share or interest comprises. Broadly speaking, a member of an LLP will have financial rights and obligations (for instance, a right to share in the profits, and an obligation to contribute capital), and governance rights and obligations (for instance, the right to vote on various LLP business and administrative affairs, and the obligation to comply with certain contractual and statutory duties). Put another way, a member will have an economic interest and a management interest in the LLP. The nature and extent of these rights and interests for any one member may well vary, depending on the point in time at which, and the context in which, they are being considered. The authors suggest, however, that the ‘share’ of a member is the totality of the contractual or statutory rights and obligations of that member which attach to his membership; and that an ‘interest’ of a member is one or more of the components of his share.”

BFI Optilas v Blyth & Others [2002] EWHC 2693 (QB)
In that case, defendants 1 and 2 were employees of the claimant. They had entered into agreements in restraint of trade with the claimant whereby the defendants 1 and 2, operational until 12 months of the termination of the employment. The defendants 1 & 2 left the job and constituted an LLP (Defendant No. 3) along with another person to render services of the nature they had been employed for with the claimant.

In a petition seeking temporary injunction against each of the defendants, the question before the Queen’s Bench Division in this case was whether any restrictions undertaken by and enforceable against any set of persons under a contract may be extended to and enforced against an LLP, where such persons subsequently constitute themselves into an LLP. The Court, while refusing to grant injunction against the LLP even though the Court granted temporary injunction against Defendants 1 & 2, held:

“38. The application is also made in respect of the third defendant, a limited liability partnership, created under the Act of 2000. Reliance is placed upon Section 6(1) and 6(4) …

39. Although this provides for vicarious liability in the event of a wrongful act or omission of a member of the partnership, I cannot accept that this potential liability can form the basis for preventing the third defendant from having dealings with the Companies covered by the first defendant’s restrictions.

Plainly, in my view, the third defendant, as a separate legal entity, would not be prevented by any contractual restriction imposed by the claimant from having dealings with such Companies through, for example, the agency of Mr Yeo. In my judgment the claimant is only entitled to
restrict the activity of its former employees to the extent that it has enforceable covenants against them. In the event that they were found liable to the claimant, or in breach of such covenants, the claimant could then seek redress against the third defendant, but until such has been proved I can see no basis for any relief being granted against the third defendant, and accordingly that application is also dismissed.”

These cases clearly demonstrate that an LLP is a complex legal entity, whose status and nature cannot be determined on the basis either of the principles of company law or of partnerships. Undoubtedly, there is great potential in this entity: potential both for business as well as litigation.

SOME CONCERNS FOR LAWYERS

Cap of “Twenty” Partners

One of the motivations for enacting the LLP law in India is stated to be to bypass the hindrance to growth of partnerships in India owing to a cap of “twenty” persons who may associate themselves as partners in a partnership firm. Surprisingly, the restriction is not laid down by the Partnership Act; rather it is the Companies Act, 1956 that imposes the restriction of a maximum of twenty partners. Though widely believed, perhaps also by the Ministry of Company Affairs, that the LLP Act, by not prescribing the limit of 20 partners, admits of any number of partners, this conclusion does not seem to have much legal basis.

Section 11 of the [Indian] Companies Act, 1956 provides

11. Prohibition of Associations and Partnerships Exceeding Certain Number.—

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.

Even though contained in the Companies Act, Section 11 seems to be directed at any form of business organization, not being a company. The embargo there is not restricted to partnerships. The purpose of the provision was to prevent mischief arising from the anonymity of the members of a large trading undertaking which is not a company. By the same token, the objective also seems to be the promotion of “company” as a form of business organization. In this sense, the existence of the prohibition in the Companies Act and not the Partnership Act is justified.

Having said that, we must now analyze the nature of the prohibition under Section 11, Companies Act. Section 11 does not per se prohibit organization of more than 20 persons to carry on any business for the acquisition of gains. What it does is that it requires such organization to be registered as a company. Thus, though couched in negative language, the actual meaning of the provision may more precisely be understood to be


72 A. Rammiiya, Guide to the Companies Act Part I (Nagpur: Wadhwa & Co. 16th Ed. 2006) 336, citing Smith v. Anderson (1880) 15 Ch. D. 247, 273: “The Section was intended to prevent mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that the persons dealing with them did not know with whom they were contracting and so might be out to great difficulty and expense. This was a public mischief to be redressed.”
"Every company, association or partnership consisting of more than twenty persons shall be [...] registered as a company under this Act, or is formed in pursuance of some other Indian law."

Undoubtedly, the consequence is the same. Nevertheless, the difference does have a legal connotation in that the Indian law requires the use of "company" and not a "partnership" as the appropriate tool for such business organization.

Secondly, that the requirement of "registration as a company" is contained in the Companies Act and not in the Partnership Act, has a further consequence vis-à-vis the proposed Limited Liability Act since the Act seeks to exclude the application of the Partnership Act alone but not the Companies Act. An exclusion of the Partnership Act by Section 4 thus would NOT by itself be sufficient to allow an LLP to have more than 20 partners inasmuch as Section 4 would not have the effect of creating an exception to the Companies Act Section 11.

Thus, if one of the objectives of enacting the LLP law is to address the cap of 20 partners under the present state of law, an express exclusion of the application of Companies Act Section 11 is necessary.

Without such an exclusion, the combined effect of:
   a) not prescribing the maximum number of partners; and,
   b) expressly excluding the application of only the Partnership Act,
would not serve the desired purpose.

There are then two ways of reaching the desired result:
1. That the LLP Act make a specific provision excluding Section 11 of the Companies Act
2. That the LLP Act confer the status of a "company" within the meaning of Section 3 of the Companies Act so that an LLP fulfils the requirements of Section 11, Companies Act.

Solution (2) can be attained in one of the two ways:
   a) By relying on the definition of "body corporate" under Section 2(c) of the LLP Act; or,
   b) By relying on the second part of Section 11 of the Companies Act.

   a) Reliance on Section 2(c), LLP Act
   Section 2(c) of the LLP Act defines the expression "body corporate" in the following words:
   "body corporate" means a company as defined in Section 3 of the Companies Act, 1956 and includes,—
   (i) a limited liability partnership registered under this Act;
   (ii) ... …" 
   While this definition clearly is a definition of "body corporate" and not that of "company", by defining a "body corporate" to "mean" a "company" and then further proceeding to define that a "body corporate" includes an LLP. One may argue that the definition of "company" for the purposes of Section 11 of the Companies Act has been extended to include an LLP also.

   Clearly, this cannot be the desirable solution in that if an LLP is conferred the status of a "registered ... company", it shall be required to comply with all the necessary disclosures and compliances under the Companies Act.

   b) Reliance on Section 11
   It may be argued that the cap of 20 partners does not apply to the LLP Act in that the restrictions imposed by Section 11 are met even by a "... partnership ... [which] is formed in pursuance of some other Indian law."

   The LLP [Act] when legislated would answer the description of "some other Indian law." The only difficulty here would be whether the words "in pursuance of" would be interpreted by the Court to mean "under" or "as a result of the permission provided by" the other Indian law. The argument
against the obviousness of the second of the possible interpretations is that the “Partnership Act, 1932” would also meet the criterion of “other Indian law”. Section 11 further does not qualify “other Indian law” with the requirement in the nature of the words, “promulgated or enacted after the coming into force of the Companies Act.”

Therefore, in order to ensure that the cap of twenty partners does not apply to the LLP [Act], it may be suggested that the Act must carry an express provision excluding the application of Section 11 of the Companies Act, 1956, rather than a “sensible” judicial interpretation, which in any case is likely to give rise to the Dhawwadkar-Nirmala Industries-Ramulu-type confusion.73

**A Law Firm of Advocates and CAs**

Rule 2 of Chapter III of Part VI of the Rules expressly prohibits an advocate from entering into a partnership with a non-advocate. Rule 2 reads as under:

**Rule 2**: An advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate.

This clearly constitutes a bar on the advocates from entering into a “partnership” for sharing remuneration with any non-advocate. Even if the word “partnership” is understood only in the sense of Section 4 of the Indian Partnership Act, 1932, an LLP under the LLP Act is still likely to be covered within the words “any other arrangement” under Rule 2. Therefore, the problem would stay. In order to permit an association between advocates and any other professional(s), necessary changes are needed to be brought to the Bar Council of India Rules. The recent limited relaxation of the rule prohibiting advocates from advertising seems to be reflecting the current mood of the Council. One may hope that the prohibition against association with other professionals may also be adequately relaxed.

**A “Company” of Advocates (and CAs)**

Before one may seek to address this concern, some misconceptions need to be done away with. Firstly, the commonly held notion that a “law firm” or “partnership” is prescribed to be the lawful form of organization by the Advocates Act ("the Act") or the Bar Council of India Rules (the Rules”), does not seem to have strong basis. There is no express provision either in the Act or in the Rules specifically providing for “partnership” as the correct form of business organization. Similarly, there is also no express provision bar on the advocates forming a company in either the Act or the Rules.

Secondly, the Companies Act also does not debar advocates from incorporating a company. There is nothing in the Companies Act barring an advocate from being either a shareholder or a director. There is similarly no provision in the Advocates Act or the Bar Council Rules imposing such a bar. However, at the same time, it can be inferred from the Bar Council Rules74 that the right to practice is a right capable of being conferred upon and exercised by only natural person. A company, with a separate legal personality, cannot “practice” law. In that case, it will have to consider an alternative nomenclature such as “management consultancy”, “risk management” etc to provide legal services. Interestingly, this problem would arise even when the LLP Act is passed since LLP would also have a distinct legal personality.

There is however a plausible legal basis to argue for the legitimacy of the claim that a law firm is an appropriate tool for organization of advocates. The relevant provision of the Bar Council Rules leads to such an inference. Rule 2 of Chapter III of Part VI of the Rules expressly prohibits an advocate from entering into a partnership with a non-advocate. Rule 2 reads as under:

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73 See, for a matrix of confusion in the context of the interpretation of the limitation period under O.21, R. 89, CPC and Article 127, Limitation Act, 1963 before reaching a result that was “intended by the Legislature”, the cases of Basavanatappa v. Gangadhar Dharwadkar AIR 1987 SC 53 (Two-Judge Bench); P. K. Unni v. Nirmala Industries AIR 1990 SC 993 (Three-Judge Bench: overruled Dharwadkar); and, Dadi Jagadnadh v. Jammulu Ramulu AIR 2001 SC 2699 (Five-Judge Bench: overruled Nirmala Industries). Even if that is the “intended result” one may notice that it took the Court a decade and a half to reach there.

74 See, Sections 24, 29, and 33 of Advocates Act, 1961: For instance, the requirements of “citizenship of India” and “twenty-one years of age” are conditions that a non-natural person is not capable of meeting.
“Rule 2: An advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate.”

From the words of Rule 2, one may therefore plausibly infer that the provision impliedly permits sharing of remuneration at least by “enter[ing] into a partnership” with “any person ... who is [ ] an advocate”. This interpretation would be supported by the well-recognized rules of statutory interpretation of casus omissus, expression unius est exclusion alterius and expressum facit cessate tacitum. Apart from this, one may also rely on the general principle of law that what is not expressly prohibited is deemed to be permitted. Thus, advocates can incorporate a company.

Besides this legal argument, there are also several commercial factors that motivate a preference for a partnership firm to a company, including disclosure requirements, compliances and tax benefits, both income tax and service tax. Under the Income Tax Act, the tax liability is as follows: In respect of a partnership, the flow-through approach is followed under which the tax is leviable only on the income in the hands of the partnership and there is no tax liability when the profits are distributed to the partners. Taxability in case of companies constitutes tax on income in the hands of the company as well as an additional and independent dividend tax when the dividend is declared, distributed or paid. Secondly, advocates are not taxed for the “legal services” they render since “legal services” are exempt from service tax. However, if it is a company that is rendering legal services under a different name (since it cannot render legal services itself under the Bar Council of India Rules) that would be susceptible to service tax.

Thus, in short, there is nothing in the Indian law, either under the Companies Act, the Advocates Act or the Bar Council of India Rules that prohibits advocates from incorporating a company. What is however barred is that such a company is formed by advocates along with members of any other fraternity, including CAs; and that such a company renders legal services. The situation therefore remains much the same even if it is the “company” or and “LLP” that is sought to be constituted.

**LLP with Foreign Partners**

Another interesting question that arises is in the context of LLPs with foreign partners. Though some believe that India is still not ready to open its legal services sector, there is nothing in the LLP Act to debar an LLP from admitting foreign partners. Quite the contrary, the possibility of such admission is one of the objectives of the LLP law. Similarly there is nothing in the Act to permit admission of partners only from those countries that have enacted a limited liability in their own jurisdictions. And, since there are States that still do not have such legislation, the precise extent of their exposure to liability on account of “wrongful” acts cannot be clearly predicted. One may however say that an Indian court would perhaps decline to enforce any claim against the personal assets of the foreign partner. The question however is how would the court in the concerned foreign country react to this factual scenario. Such an issue can potentially arise before an India court at least till the LLP law is enacted in respect of an Indian partner admitted to, a let’s say, UK LLP.

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75 See generally, Fitzgerald, Salmond on Jurisprudence (Bombay: NM Tripathi 1999) 131-141 and the literature and cases cited therein.


77 See, Colquhoun v. Brooks (1888) 21 QBD 52.

78 Section 10(2A), The Income Tax Act, 1961.


The issues raised in this paper are those that have bearing on the profession of law. Understandably, these are only some of the many issues that the Act must address before we can really have the model legislation.

CONCLUSION

In this paper, I have argued that the while the concept of “limited liability partnership” is a salutary means for better organization of business, particularly the actors in the services sector. The near-inevitability of the lifting of the reservation under the WTO GATS with respect to certain services, including advocates, provides good reason, motivation and impetus for encouraging the local actors to grow in size so that they may compete at the global plain,\textsuperscript{81} whenever the reservation is pulled off.\textsuperscript{82} The manner in which the Doha Round of trade negotiations has proceeded so far gives an indication that India does \textit{not} have an awful lot of time before she will have to open the legal services sector. In this sense, the sensitivity of the Indian legislature to the need for encouraging the indigenous actors is commendable.

Be that as it may, the LLP Act however does not go a long way in addressing several key concerns. It seems more like a framework legislation, the effective attainment of the objective of which is contingent on amending a host of other laws. Some much-needed clarifications—including the removal of the cap of twenty persons, tax treatment and liability of foreign partners at least in respect of assets in India—have not been made in the Act. In respect of the legal services, the continued dogmatism of the Bar Council of India remains an area of major concern. Any meaningful chase of indigenous service providers requires much change. It is hoped that this paper would attract attention of the concerned authorities to some of such desired changes.

\textsuperscript{81} For a brief account of the empirical evidence to support the conclusion that the Indian law firms are not competitive at the global scale, see, Suri, “Comparing Law Firms in the United States and India: An Indian Lawyer’s Perspective”, available at \url{http://www.lawyersworldwide.com/content/newsletters}, last visited on 24 September 2008.