

# Some Thoughts on the Organization of legal Practice in Ethiopia

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## Abstract

The art of arguing cases evolved in Ethiopia as elsewhere as a personal skill and to this day, legal service in Ethiopia is a sole practice that has not been able to organize itself into a law firm<sup>1</sup>. Lawyers have not been able to take advantage of *partnership* models under the Ethiopian Commercial Code of 1960 as in other countries, either because of concocted legal mysticism or because of the laxity of legal service in the country that did not call for robust or specialized and organized law firms. The history of law firms in other countries indicates that the evolution proceeded through the General Partnership to Limited Partnership (LP) and finally culminating on the Limited Liability Partnership (LLP) which started in the USA and spread out to the rest of the world in the 1990s. It is now time to think in terms of organizing law firms in Ethiopia, and the Committee entrusted with a duty to revamp the Commercial Code of Ethiopia must see to it that the section on Business Organizations included the LLP to accommodate professional business associations including the legal practice.<sup>2</sup>

## Key terms

Legal practice, limited liability partnership, non-commercial professional partnership, Commercial Code, Ethiopia

## 1. Background: Lawyering in Ethiopia, 1940s Onward

As elsewhere lawyering started as a personal skill fit for sole practice and continued as such in Ethiopia long after the basis for its legal recognition was

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<sup>1</sup> Tameru Wondim Agegnehu: 'Evolution of legal practice in Ethiopia (Amh.)', *ELA 50<sup>th</sup> Anniversary Gold Jubilee Journal*, June, 2015, pp.3-8.

<sup>2</sup> I obtained a copy of the draft on Sept. 20/16 for the first time, and noticed that the LLP is included in the new draft with some characteristics of an ordinary partnership, which is left out in the draft.

laid down in 1942 under Art 20 of Proclamation 2 of 1942.<sup>3</sup> In the 1960s winds of change began to blow impacting the organization of legal practice. This change was accentuated by three important concurrent factors which included:

- the enactment of modern laws,<sup>4</sup>
- the appearance of trained practicing lawyers<sup>5</sup>
- the influence of foreign practicing lawyers<sup>6</sup> in Ethiopia and foreign judges sitting in the High and Supreme Courts of Ethiopia<sup>7</sup> and, added to these, was the flow of business into the country which was then on the rise.

The above factors gave impetus to practicing lawyers to start thinking in terms of getting organized not only to assemble sufficient skilled work force for the new challenge, but also to enable them to address the rising quest for focused legal services commensurate with the new development. Quite a few lawyers were inspired towards the attainment of this goal and late in the 1960s they started to organize their practice into *de facto* law firms based on principles of partnership. Some called their office ‘law firm’ even though they were refused registration by the authorities. Such *de facto* set ups included:

- *Scot & Scot* ran by American Lawyers which also co-opted the services of the famous Asefa Dula, who was killed in a shoot out (in a fit that looked like a duel);
- *Vosikis* Law office ran by an Italian Lawyer where the late Alemayehu Eshete was also associated;
- *Hamawi* Law office ran by a Lebanese lawyer- where the late Atnafu Tsehai was a prominent associate;
- *Teferi & Bekele* Law offices ran by two Ethiopian foreign trained lawyers where the late Girma Tadesse was a prominent associate;
- A Law Office Organized by the association of Selamu Bekele, Tadesse Dilnessahu, Ken’ a Guma, and Daniel Zeleke;
- *Gilla Michael Bahita* Law office, Where lawyers like Kebede Fiseha served as associates;
- *Getahun Hunegnaw Law offices*; and
- *Fiseha & Tadesse* Law firm.

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<sup>3</sup> The first Administration of Justice proclamation that laid down the blue print for modern judicial system in Ethiopia.

<sup>4</sup> A flurry of modern codes came out in 1960. See Tameru Wondm Agegnehu: ‘The Future of Law and Legal Institutions in Ethiopia’, *Law and Development and Legal Pluralism*, JLSRI Publications, pp 89-110.

<sup>5</sup> This included foreigners and Ethiopians mostly working conjointly.

<sup>6</sup> Legal practice was solely reserved for Ethiopian nationals by Art. 3/2 of Pro. 199/2000

<sup>7</sup> Administration of Justice Proclamation 1/1/1942 Art. 4.

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## 2. Rainy Times for Legal Practice and Its Resurgence

The move towards starting law firms was eclipsed by the adoption of the socialist system of government in 1974 that was contemptuous for the concept of private property. This led to the dispersal of foreign lawyers from Ethiopia, and the weakening of the legal practice as a result of the slowdown of business and economic activities that set in following the sweeping nationalization. From then on legal practice ceased to be a promising calling for lawyers, and the judiciary was occupied with routine matters that seldom involved hard issues relating to business or property or human rights.

As a result, legal practice lost its luster, becoming less attractive for lawyers, with no incentive to specialize or organize. In effect, the few lawyers in the practice spread themselves thin over a vast area of the law, lacking any mastery on a specific field of law. Specialization (to use a phrase from Konrad Lorenz) is the art of *knowing more and more about less and less*, and it failed to attract lawyers as it did not guarantee success to make the venture gainful. On the other hand inconsistencies in judicial decisions created a legal situation where one can speak only in terms of *legal but not judicial certainty*. Unlike neighboring countries the system became too secluded lacking cross-border interactions between judges and lawyers, making lawyers and judges by and large inward looking with very little to learn from outside. Added to that is a subdued and lately highly scattered and weak Bar Associations which continues to exist under the administrative authority of the Minister of Justice, currently, the Attorney General at the center and the respective Justice Bureaus in the regions. As a result, we have not been able to emulate the models for organizing law firms or the Bar even from countries that are across our borders.

The adoption of more liberalized economic system following the down fall of the Military Regime at the beginning of 1990s came with some hope for the resurgence of liberal legal practice in Ethiopia. It, indeed, succeeded in making legal practice more attractive than the judiciary, and helped to significantly raise the number of practicing lawyers<sup>8</sup> at the expense of the Judiciary. Once more again there arose a need for more organized, efficient and specialized legal service. Lawyers including Abebe Worke, Alemu Deneke, the late Commander Hailu Mekonnen and Daniel Bekele spearheaded the movement and applied to the Ministry of Trade to register a Law Firm as Limited Partnership under the Commercial Code.

The Ministry of Trade gave green light for the registration but when the Ministry of Justice was approached for clearance things went absolutely wrong for the astute lawyers. Clearance was outrightly denied by the Ministry of

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<sup>8</sup> A new trend resulting in a movement from the 'Bench to the Bar' set in, thus undermining careerism and stability in the judiciary.

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justice and the lawyers were put under temporary suspension immediately. Three months later, they were served with a stiff reprimand with a threat to debarment for attempting to defile the sanctity<sup>9</sup> of the legal profession by applying to register it as a business organization.<sup>10</sup> That threat seems to have sent a loud message for all enterprising lawyers to stay put until the *fullness of time*. One may note in passing that whereas request for registration of law firm as partnership was simply greeted with mere refusal by the Ministry of Justice in the 1960s, similar request by lawyers thirty years later entailed threat for debarment on top of refusal.<sup>11</sup>

All the above events conspired against thinking in terms of creating a ‘shell’ entity for organizing legal practice in Ethiopia. But that said, the law was not devoid of an entity that could have been used by lawyers for this purpose. To that end the Commercial Code of 1960 provided different kinds of partnership entities including ordinary partnership,<sup>12</sup> general partnership<sup>13</sup> and limited partnership in its section on business organizations.<sup>14</sup> These were the very organizations that were used to create law firms in other countries with minor amendments. Lawyers in Ethiopia have not been able to do that not only for lack of foresight or drive but also because the administration of the Commercial Code and the legal practice fell under two separate jurisdictions, Ministry of Trade, and Ministry of Justice, and that many in the Ministry of Justice thought the legal practice was out and beyond the ambits of the Commercial Code. Such

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<sup>9</sup> This rests on the objective of the partnership. Under the Commercial code the term business organization includes all partnerships and corporate entities (Art. 210/1). But Art. 213/1 provides that ‘Any business organization other than ordinary partnership may be a commercial business organization ...’ This means that ordinary partnership falls under the classification known as ‘civil partnership’ under French law. The ordinary partnership is too loose an Association largely left to the agreement of the parties to serve as a vehicle for the formation of a viable law firm. See for instance, Arts., 227,233,235,254.

<sup>10</sup> From discussion with Ato Alemu Deneke, who was one of the four lawyers.

<sup>11</sup> Surprisingly unlike those in the 1960s, the two most senior officials at the time at the Ministry of Justice were both graduates of the law school of HSIU.

<sup>12</sup> An ordinary partnership is among the six business organizations recognized by the code (Art. 212), but it is not a commercial business organization (Art. 213/1), and where it deviates from an ordinary partnership it shall be deemed to be a general partnership. (Art.,213/2), commercial code. The expose de motif edited by Winship, refers to the nature of partnership as ‘commercial and civil’ and quotes Escara who states that his present thought is devoted to each of the five forms of business organizations which excludes the ‘ordinary partnership. Peter Winship: Background Documents of the Ethiopian Commercial Code of 1960. P.57 Faculty of Law, (HSIU) 1974. AA.

<sup>13</sup> See Assefa Ali, Mamo Esmelealem, and Thomas G/Ab: *General Partnership: A comparative Analysis* (unpublished), a term paper for the LLM class, Law School, AAU, 2002.

<sup>14</sup> Commercial Code, 1960. Book II Tittles 2&3.

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views are given legal impetus by Arts. 5, 10, and 213 of the Commercial Code, among others.

These were primarily the grounds for which lawyers were refused to organize themselves into partnerships. Based on the tenets of the above provisions, a law firm should not be allowed to organize itself into a partnership falling under the category of business organization. Under the Code all business organizations other than ordinary partnership may be commercial business organizations. Hence, unlike the other business organizations in the Code the nature of ordinary partnership is 'civil' rather than 'commercial'. But ordinary partnership is too loose an entity to serve as a vehicle for the formation of law firm. To begin with it rests by and large on the agreements of the parties rather than legal provisions. The default provisions of the Code confine important matters to the agreement of the parties.<sup>15</sup>

A prominent scholar has highlighted the problem of civil partnership under French law as follows: '... a civil partnership ... is still very close to being no more than a contract, since the wishes of the participants, as expressed either in the contract constituting the association or in the course of managing its affairs, are nearly always the determining factor.'<sup>16</sup> The same author had in 1972 foreseen that 'it is probable in the near future [that] the status of civil partnerships will be modified and brought closer to that of general partnerships'.<sup>17</sup> This shortfall in ordinary partnership seems to have prompted a new law in Ethiopia in March 9<sup>th</sup> 2000,<sup>18</sup> to enable two or more lawyers to form a law firm that shall be a 'non business organization'<sup>19</sup> in nature.

On its face the new entity under the proclamation is not any different from the ordinary partnership under the Commercial Code except that the entity under the Proclamation is described as a 'non business organization' unlike ordinary partnership which is a business organization even though not a commercial one. Apart from that there is no indication in the new law that relates it to any one of the business organizations under the Commercial Code. It therefore goes without saying that ordinary partnership is not inherently fit to serve as a shell entity for the formation of law firm. But the directive envisaged under the Proclamation<sup>20</sup> regarding licensing law firms has not been issued to date. As a

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<sup>15</sup> See, for instance, Art. 229, 233, 234, 235.

<sup>16</sup> General editor: Robert R. Pennington, LLD; French Company Law, OYEZ Publishers London, 1974, p. 8.

<sup>17</sup> *Id.*, p. 9. Accordingly a bill was presented to parliament in France to modify the nature of civil partnership as far back as 1972, according to the same author.

<sup>18</sup> Art. 18/2 Pro. No. 199/2000.

<sup>19</sup> Bekele Nigussie 'Art. 18/2 of Pro. No. 199/2000', Term paper submitted to Faculty of law, LLM class, (unpublished), July, 2002.

<sup>20</sup> Art. 18(4)/

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result the provision has remained a dead letter with no way to apply it. The non business nature ascribed to the envisaged firm by the latest law as well as the unlimited liabilities to which members are exposed contractually and extra-contractually under it are some of the features that are cited against it to serve as a vehicle for a law firm.<sup>21</sup> The new law is devoid of details in terms of licensing of law firms and it mainly focuses on the licensing of lawyers.<sup>22</sup> Nothing has changed in that regard in the latest establishing proclamation of the office of Federal Attorney General, which is entrusted with the duty of ‘administering and supervising’ advocates at the Federal level.<sup>23</sup>

### 3. Evolution Law firms and the Era of the LLPs

Developments in other countries have taught us that lawyers imitated general partnership as a model or shell entity for their firms and adopted the limited partnership format and ended up as Limited Liability partnerships.<sup>24</sup> We have no reason not to emulate this phenomenon and adopt the LLP model to enable lawyers, and other professional entities to give them the options to organize into firms.

So one may ask ‘what is a limited liability Partnership?’ The shortest possible answer would appear to be ‘it is a hybrid of corporate model with some partnership overtones’.<sup>25</sup> A prominent member of British Parliament described it as an entity ‘which falls under company law as far as possible and ... falls under partnership law as little as possible’.<sup>26</sup> In essence, therefore, an LLP is a body corporate where its members, are not personally liable for its debts beyond their financial interest in the LLP.<sup>27</sup> On the face of it, it has many similarities with companies, but it has no shareholders or share capital, nor directors, nor statutory requirements as to meetings or resolutions.<sup>28</sup> The members are agents of the LLP for the purposes of carrying on its business, making the LLP vicariously liable for their acts. But unlike partners, they are not as such agents for each other, so that a member is not vicariously liable for the acts of another.

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<sup>21</sup> Bekele Nigussie, *supra* note 17, p. 4.

<sup>22</sup> The same is true on preceding proclamations regulating the legal practice

<sup>23</sup> Pro. No. 943/16 Art.6/11 Neg. Gaz 22<sup>nd</sup> Year No. 62.

<sup>24</sup> Lewis D. Solomon *et al*, ‘Corporations and Alternative Business Vehicles’ pp 1.44 Casenotes Publishing, 2002.

<sup>25</sup> Geoffrey Morse (2011), *Palmer’s Limited Liability Partnership Law* 2<sup>nd</sup> ed. Sweet & Maxwell, p 4

<sup>26</sup> Solomon *et al*, *supra* note 24.

<sup>27</sup> Members and the LLP are invariably required to obtain professional liability insurance (pli) also known as professional indemnity insurance (pii) more commonly known, in the USA, as Errors & Omissions (E&O)

<sup>28</sup> *Id.*, p.7

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Liability will, therefore, rest primarily on the member and shared by the LLP. Members may also owe fiduciary duties and a duty of care to the LLP.<sup>29</sup>

The concept of general partnership is said to have evolved in France and to have arrived in New York in the 1880s. In 1916 American lawyers proposed to reform the general partnership to accommodate those who have capital and the ones who possessed management skills. While the former play no management role this task would be entrusted to those who contributed their skill, and who thus will become the general partners. This business entity came to be known as 'Limited Partnership'.<sup>30</sup> This entity helped to cement the business alliance between *passive* investors and active managers and was widely used in the USA until the 1970s. In the 1960s lawyers in the USA discovered in limited partnerships a utility never envisioned by the framers of the partnership law.<sup>31</sup>

For years, partnerships including limited partnerships, had, a 'nonassociation' status in the tax code. Unlike Corporations, partnerships were not distinct taxpaying entities.<sup>32</sup> Instead, both business profits and losses were 'passed through' to the individual partners who bore tax consequences on their individual returns. This 'nonassociation' status and the 'pass through' tax scheme of Limited Liability partnership are the main features that attracted lawyers to choose it as a vehicle for their firms.

#### 4. Why LLP?

By mid 1980, there arose in the USA a proliferation of law suits against law firms, accounting firms and other professional partnerships for malpractice and for other tort liability.<sup>33</sup> In many cases large judgments were assessed against all of the persons who were general partners in a defendant firm at the time of the partner's malpractice or other misconduct.

Each partner in general partnership can be held personally liable vicariously or on grounds of agency for the obligations and liabilities created by his/her

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<sup>29</sup> This duty is encapsulated in one of the most quoted opinions of Cardozo, which partly reads as follows: 'Co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties.' *Meinhard v. Salmon*, 249 N.Y. 458, 463, 164 N.E. 545, 546 (1928). However, under English law it appears the internal affairs of the LLP, including the extent of fiduciary duties among members are left to the agreement as between the members. *Morse*, *supra* note 25, p.5.

Art. 1732 of the civil code is, the corner stone for laying the principle of good faith in any contractual relations in Ethiopia. *See* also Art. of the Commercial Code.

<sup>30</sup> Solomon, *supra* note 24, pp. 1-30 to 1-31.

<sup>31</sup> *Id.*, p.1-31

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, p.1-43

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partners if the assets of the partnership are insufficient to satisfy those liabilities. Upon dissolution of the partnerships each partner may also be required to contribute personal assets to discharge creditor claims that have not been covered out of the partnership assets.

In response to the plight of professional associations resulting from the dramatic expansion of vicarious liability, more than thirty states in the USA (beginning with Texas in 1991) enacted laws authorizing the creation of limited liability partnerships (LLP).<sup>34</sup> The LLP was intended to provide what is termed as ‘narrow’<sup>35</sup> or ‘broad’<sup>36</sup> shield to other partners (associated for carrying on lawful business with a view of profit) for the malpractice or misconduct of their fellow partners. The concept was incorporated into the English legal system at the end of 2000, and by June 2011, the number on the register stood at 47,000.<sup>37</sup> The concept is adopted in many jurisdictions including the UK, Canada, China, Germany, Greece, Japan, India, and others with some variation.

## 5. The Need for and Salient Features of LLP

The need for LLP arose mainly due to limitations of sole proprietorship concerns, as well as conventional Limited Partnership. The following are some of the salient features of the LLP:

- LLP is a body corporate and has legal personality separate from its partners.
- LLP has perpetual succession.
- Any change in relation to the partners of an LLP will not affect the existence, rights or liabilities of the LLP.
- LLP has unlimited capacity and is capable of suing and being sued, acquiring, owning, holding or disposing of property.
- LLP may do and suffer such other acts and things as bodies corporate may lawfully do and suffer
- For tax purposes the LLP is a ‘nonassociation’ not subject to tax *per se*, or at any rate not exposing members to double taxation on income derived from the firm.
- While a minimum of two partners are required for the formation of LLP, there is no limit for the maximum number of partners.

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<sup>34</sup> Ibid.

<sup>35</sup> ‘Narrow shield’ statutes provide that a partner in an LLP is not personally liable, either directly or indirectly, for obligations or liabilities arising out of the negligence, malpractice of her partners. She remains jointly and severally liable for all other partnership liabilities. Solomon et al *supra* note 24, p. 1-45

<sup>36</sup> ‘Broad shield’ statutes protect each partner in an LLP from direct or indirect personal liability for all liabilities or obligations created by the acts of other partners, whether arising in contract or tort or under any other body of law. Ibid.

<sup>37</sup> Morse, *supra* note 25, p.4

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- There is broad or narrow shield protection against vicarious liability for malpractice or conduct of fellow members of the firm.
- Two tier decision-making organs (i.e., the Shareholders and Board of Directors), are not required for an LLP.
- The business for which the LLP is established must be lawful and carried on with a view to profit,
- The parties in the LLP are not, technically speaking, 'partners' in the sense the term is used in partnership but are 'members' of the LLP.

## **6. Limitations, Target Groups and Prospects regarding Procedures**

The limitations against LLP relate to fact that any of the partners (without the other partner) may bind the LLP, and the LLP cannot raise money from the public. In many countries the LLP could be formed by any business group including corporate entities, to carry on lawful business with a view to making profit. In some countries, including the UK and India, all LLPs are required to have designated members.<sup>38</sup> A similar notion seems to have been incorporated into our regulation of Advocates Code of Conduct which was enacted close to two decades ago.<sup>39</sup> The main target groups include the following:

- Professionals (Lawyers, Accountants, Company Secretaries)
- Small and medium sized businesses
- Joint ventures
- Venture capitals.

The LLP is incorporated at registration by the authorized body and it is required to submit Memorandum of Association, with the option to adopt Articles of Association at will for its internal governance. The law creating the LLP must be extensive enough to include default provisions that can address deficiencies or *lacunae* in private statutes. The format followed for registration has similarity to that provided for limited partnership under Art. 297 of the Commercial Code of Ethiopia with minor adjustments.

## **7. Concluding Remarks: Prospects for the Adoption of LLP under Ethiopian law**

LLP is a post-Commercial Code phenomenon not duly recognized under Ethiopian law. The nearest that looks like it is, the limited partnership (LP) with two group of partners with distinct roles and liabilities. That old style characterization of the entity makes it unfit to stand as a substitute for the LLP. Above all, vicarious responsibility for the liabilities of fellow partners envisaged

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<sup>38</sup> Id., p.74.

<sup>39</sup> Reg. No. 57/99 Art. 52/3 Neg. Gaz. 6<sup>th</sup> Year, No.1.

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in the section of partnership of the Code is a point of departure which makes the Code provisions unfit or outdated for the purpose. Moreover, the location of the LLP must be clearly fixed. In all fairness, it appears that the Commercial Code is the ideal place for it, and professionals including lawyers must be allowed to register their firms under it. It may be added that the registration may be assigned to a specially designated body for LLPs organized by professionals.

There is the need to streamline the law in line with the concept of the LLP. The entire section of the Code on business organization needs revamping. It appears that the provisions on Limited Partnership could be maintained with some modifications, but as for ordinary partnership<sup>40</sup> which has suffered the misfortune of lapsing into desuetude at inception and remained idle for the last five decades, the future looks slim unless some changes are made on the scope or extent of its application. Art. 5<sup>41</sup> and Art 10 must be reviewed, and the narrow concept that mystifies the legal practice as a calling that shuns profit<sup>42</sup> must be abandoned.

However, it is to be noted that professional service should not be reduced to commercial activity. The LLP is nurtured and developed in the common law system as an entity to be used by professionals to organize themselves into business organization but not commercial business organizations. Secondly, the code of conduct which replicates the one drafted by the American Bar Association lays down standards to be observed by lawyers. Lastly comparison with rules governing French law firms may help to shade away the cloud of confusion or distortion. ■

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<sup>40</sup> The most salient feature of partnership law is that it is a the default business vehicle that governs any enterprise conducted with the energies of more than one person and failing to qualify for other status, such as general partnership, LLP, LLC., PLC., Share Co.. most of which are creatures of Statutes. Solomon *et al supra* note 24, p. 1-2

<sup>41</sup> See Assefa Ali, Bayisa Besie, Shibru Belete, *Who are Traders: The subjective and objective approach* , A paper prepared for the LLM class of the Law School, AAU, July, 2002 (unpublished).

<sup>42</sup> The LLP is relatively a new phenomenon with some variations in different countries. One peculiar feature common to many countries is that it is a partnership falling under the category of business organization, without being a commercial business organization. So in many countries, including the USA, UK, India, the business for which the LLP is established must be lawful and be carried on for profit. It follows that income derived from a law firm organized as an LLP could be characterized as profit.

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