ADOPTING A LIMITED LIABILITY PARTNERSHIP FOR THE LEGAL PROFESSION IN THE PARTNERSHIP LAW: A CRITICAL REVIEW FROM INDONESIA'S PERSPECTIVE

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ABSTRACT

Traditionally, cooperation between people working within legal professions has taken the form of a partnership, under which each partner may be personally liable to third parties for any damages caused. There have been efforts to limit the liability of the partners in such a partnership. Several jurisdictions have adopted the Limited Liability Partnership (LLP) form, which is derived from the United States of America for legal professions. Other jurisdictions, such as the Netherlands and Indonesia, continue to use the civil form (or ordinary) partnership and the Maatschap. To date, there is a dearth of scholarship that comprehensively examines the concept of the LLP from the perspective of Indonesian Partnership Law. This article evaluates the idea of incorporating LLP as a new form in the Bill of Business Entities in Indonesia, which can be used for, amongst other matters, legal practice. The assessment offered may be useful for other civil law countries considering adopting the LLP-model. Currently, the ideal legal form for legal professions is being discussed in Indonesia. This paper argues that although it is necessary to revitalize the current regulations around the Indonesian Maatschap, it is not crucial to adopt LLP as a new form of business organization.

Keywords: Business Legal Form, Limited Liability Partnership, Legal Profession, Partnership Law, Maatschap.

INTRODUCTION

There are various types of legal forms for conducting business[1] in Indonesia, including sole proprietorships, partnerships, and corporations. The most common type of business entity in Indonesia is the civil partnership[2] or the Maatschap, which constitutes 99, 92% of the total business units, and contributes to 60% of the country's GDP (News, 2018 SME Business Information, 2019). The legal basis of a civil partnership or a Maatschap can be found in Book 3 Chapter 8 Articles 1618 to 1652 of the Indonesian Civil Code. Commercial partnerships, such as the Vennootschap Onder Firma (FA) and the Commanditaire Vennootschap (CV), are governed by the same provision as the Maatschap and can be found in Book 2 Chapter 1 Articles 16 to 35 of the Indonesian Commercial Code, which has been in force since 1847, through the principle of concordance (Hariyanto, 2009; Soemardi, 1992). Some claim that this form of partnership law no longer accommodates Indonesian society's needs and have called for the introduction of a new legal form of partnership: a Limited Liability Partnership or LLP.

The Head of the Indonesian Advocates Association (or Perhimpunan Advokat Indonesia, PERADI) stated in 2015 that Indonesia should adopt provisions on the establishment of Limited Liability Partnerships for advocates. He argued that since Indonesia has become a member of the ASEAN Economic Community, the movement of legal services across the border would become easier. He believes that the LLP would be a better form of business organization which, he held, would improve the competitiveness and confidence of local advocates (Ricardo, 2015). This idea was revisited when, in October 2017, the Indonesian Government (specifically the Ministry of Law and Human Rights) reopened the discussion on the Bill of Business Entity/Enterprise. One of the ideas was to include the legal form of the LLP as an alternative business association or professional practice, particularly for legal consultants and advocate firms. The Bill of Business Entity is one of three bills prepared by the Indonesian Government of Indonesia to improve the facilitation of businesses in Indonesia (Gatra, 2019), and thus encourage national economic improvement (News, 2019).

The overarching question is whether adopting the concept of the LLP as a new business entity would promote competitiveness for professional practice in Indonesia, particularly in legal services. This article argues that it is unnecessary to adopt the LLP model for the legal profession because it has no bearing on Indonesia's competitiveness among ASEAN member countries. From an international perspective, this article will contribute valuable insights for other civil law countries that may face the same problems of determining whether or not the country ought to adopt this American-LLP model/concept for professional practice. The Indonesian Partnership Law recognizes three forms of partnership: a Civil Partnership or Maatschap, a General Partnership/Firma or Venootschap Onder Firma (VoF), and a Limited Partnership or Commanditaire Vennootschap (Purwosutjipto, 1987). Some countries distinguish between civil and commercial codes. A Maatschap, which does not have a commercial element, is subject to the civil code. Thus, a Maatschap or a civil company is different from a general partnership/Firma because a Maatschap does not have to operate a business or commercial undertaking (bedrijf). Generally, civil partnership (Maatschap) in Germany and France (Fibbe, 2009)[3] are used by those who occupy the category of "*liberal professions*". If a Maatschap is used to undertake a job or as a professional practice, This would fall under the category of "*liberal professions"* (lawyers or advocates, accountants architects, or medical doctors (Lutter, 1998). Yet, Maatschap could also be used as a commercial undertaking. Considering that Indonesia already has the Maatschap that is commonly used in/for professional practice, especially for the legal profession, the idea to adopt the LLP, which is also intended for professional practice, needs to be carefully examined. This article evaluates the idea of incorporating this new business form in the Bill of Business Entity/Enterprise.

The article begins with an elaboration of the concept of the LLP which originated in the USA, in section two. This section explores the history, concept, features, and characteristics of the LLP in the USA. The third section will then compare the LLP with the Maatschap, a concept derived from the Netherlands and commonly used to conduct an activity without commercial character, including professional practice such as the operation of a law firm. The legal form and regulations governing professional practice, particularly the legal services in the Netherlands, will be elaborated since Indonesian Civil and Commercial Laws were originated from the Netherlands. This section will discuss the preliminary draft of the Modernization of Partnership Act that was introduced in early 2019 in the Netherlands. The fourth section will delve into the revision of Indonesian Partnership Law by comparing the American-LLP and the Netherlands'

New Partnership Act. Finally, the conclusion will show that it is not necessary for Indonesia to adopt the LLP for professional services but will nevertheless call for some revitalizations to the Indonesian Maatschap or Partnership rules.

Limited Liability Partnership (LLP) in the USA

Background of LLP Incorporation

The legal form of the LLP was developed more than a decade ago and covers legal and accounting firms (Miller, 2007). Some Asian countries such as Japan, India, and Singapore have adopted this LLP construction in their systems. The introduction of the concept of the LLP is a direct consequence of the collapse of the real estate sector and the crash in oil prices in the 1980s, which resulted in the failure of the banking sector and credit institutions in Texas. Eventually, it led to a national banking crisis (Hamilton, 1996). After the banking crisis, several lawsuits were filed by shareholders, members of Boards of Directors, and chairmen of the corresponding financial institutions. However, the amount of compensation successfully obtained was very little compared to the total amount of losses suffered by the people. The people's attention was then diverted to the lawyers, legal consultants, and accountants who represented these financial institutions and questioned their roles in that collapsed institutions.

The notion of filing a lawsuit against an advocate, a legal consultant, or an accountant on the grounds of malpractice and/or breach of duty began to develop. One famous example was the Dallas Law Firm. Dallas Law Firm is known as one of the most reputable law firms in the state of Texas and was a general partnership firm since its establishment in 1980. Laurence Vineyard and four other partners represented three associations of financial institutions. Company records showed that Vineyard had been conducting various important jobs for Vernon and represented parties in the Brownfield acquisition. In 1983, Vineyard seceded and established his law firm together with several partners, and this law firm continued to conduct jobs for the aforementioned three financial institutions. Besides providing legal services, Vineyard also occupied a position as one of the directors in a financial institution and had been reaping financial benefits from other financial institutions. The three institutions were companies that did not abide by the principle of sound financial management and gave excessive benefits and loans without collateral to the owners of the institutions they financed. The losses resulting from the collapse of the three companies reached more than one billion dollars. The vineyard was eventually sentenced to 2-5 years in prison, was fired, and his license to practice law was revoked. Vineyard's wealth was not enough to cover the losses suffered by the financial institutions that he represented. As a result, the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation diverted their attention towards malpractice in insurance companies and all partners in Dallas Law Firm who represented the three companies. Among those hit by lawsuits for compensation were partners who had retired, partners who had resigned and worked in other law offices, associates who had become partners, those who worked as "*of counsel*" in Dallas Law Firm, and almost 40 partners who did not in any way represent or were involved with those various financial institutions. The legal process surrounding the case of Dallas Law Firm attracted the lawyers' and legal consultants' attention and eventually; this lawsuit was settled by securing insurance money for malpractice from Dallas Law Firm.

For the first time, in 1991, the discourse to limit the personal liability of innocent partners in Texas law firms was embodied in Bill 302 supported by a senator from Lubbock, Texas. The bill regulated limited liability on malpractice lawsuits specifically concerning certain professions, which included: lawyers/legal consultants, accountants, medical doctors, engineers, architects, and real estate brokers. The draft was supported and approved by all lawyers holding positions as senators. However, in the next round, opinions disapproving of the bill, which was also proposed by litigation lawyers, appeared. A tough debate took place at that time but after important amendments were made to the initial text, the legal provisions of LLP were attached to an omnibus bill (Gunter, 2012), which became the legal basis of the LLP establishment in Texas. It also resulted in important amendments to the Corporation Statute and the Partnership Statute. On 26 August 1991, the House of Representatives of the State of Texas officially enacted Bill 278 into legislation.

Aside from the banking and financial institutions crisis, malpractice claims are not uncommon. There are many cases in which legal and accounting firms have settled malpractice claims for much higher amounts than those provided through insurance coverage. One such case is that of the New York firm Kaye, Scholer, Fierman, Hayes, and Hadler, which settled for 275 million USD in a claim, but which was only covered by insurance for 41 million USD (Fortney, 1995). The increasing number of malpractice litigations against professional firms has prompted many professionals to seek out limited liability as a defense against these types of settlements (Naylor, 1999). Within one year of the enactment of Bill 278 nearly 1200 law offices in Texas, including several big state-owned enterprises chose the LLP construction (Hamilton, 1996). Based on statistical data from the Texas Secretary of State, since 1996, approximately 1600 partnerships have changed their status to the LLP based on the legislation of the state of Texas. Most of these registrations have been conducted by law offices. Besides, after the LLP Statute was enacted, three big accounting firms in the United States of America, including Coopers & Lybrand, Ernst & Young, and Price Waterhouse (now PricewaterhouseCoopers), simultaneously decided to change their legal form of business to the LLP based on the Delaware LLP Statute that adopts narrow non-liability. Three large accounting firms, including Arthur Anderson & Company, Deloitte & Touche, and KPMG Peat Marwick, simultaneously considered changing their legal form of business into an LLP. These six accounting firms often referred to as the "*The Big Six*", were the largest partnership in the world consisting of hundreds or thousands of general partners. Before the LLP statute, accounting firms, as well as law firms were obligated by state law to establish a general partnership. The liability provision in general partnership states that each partner in "*The Big Six*", which are in a general partnership, is in principle personally liable for all obligations and company liability without looking at the mistake or involvement of each partner. As a result, every partner may be liable for negligence conducted by other partners in other cities or countries that are not known to him. It may even be the case that the name of the partner accused of the wrong-doing(s) is not mentioned in a lawsuit by a third party. The liability of a partner was in effect in the case involving the seventh-largest accounting firm in the United States of America, Laventhol & Horwarth, which was liquidated in 1990 and the wealth of the firm proved to be insufficient to cover its obligations. This resulted in each partner (including the retired partner) being obligated to cover the deficit from their personal wealth (Macey & Kennedy, 1995).

Characteristics and Types of LLPs

In the majority of American states, an LLP has been preferred by various types of firms, most common law and accounting firms, because of the various benefits they offer professional partnerships. While an LLP is found largely by a general partnership, it has special characteristics that a corporation has. These characteristics are as follows:

1. Unlike a general or limited partnership, an LLP has a separate legal personality and thus may own property under its name. Another effect of the separate legal personality is that it is not easily dissolved when there are changes in partners. However, despite it being a legal entity, no tax is imposed on the entity level (pass-through taxation; Naylor, 1999). There is no double taxation as taxes are only imposed on partners.
2. Limited liability. While partners in a general partnership are jointly and equally liable for any debts, obligations, or claims by third parties, those in an LLP are provided with limited liability having two types of protection: narrow and broad non-liability statutes.

In general, to establish or form an LLP, a general partnership has to file a registration statement to the state office and submit a name to be used for the LLP. Furthermore, in the majority of the states, the partnership must also own wealth or cash assets in a certain amount, or cover malpractice insurance in a certain amount, or be able to provide security to a third party that the company is capable of executing its obligations, as stipulated in the relevant LLP Statute. During the process of registration, the founder is charged a fee, the amount of which depends on the number of partners. Registration of LLPs and an annual fee has become a source of income for several states (Hamilton, 1996). The essence of LLPs is the protection given to partners who are not personally liable for the wrong-doing(s) of other partners in the firm and usually refers to what is understood as the "*shield of limited liability*". In other words, as has been mentioned above, the background of the LLP establishment is to limit a partner's personal liability against certain obligations in a partnership. LLPs in the United States of America fall under one of two types: narrow non-liability statutes and broad non-liability statutes.

Narrow Non-liability Statutes

The concept of not being personally liable in a narrow sense is the original version of LLP development, and this concept is adopted in the state law of several states, including Texas and Delaware. The concept of not being personally liable in a narrow sense protects the "*innocent*" partners from liability that arise due to errors, omissions, negligence, incompetence, or malpractice conducted by other partners or by employees who are under the supervision of that other partner. In such a case, the innocent partner is not liable; the partner who committed wrongdoing and the partnership itself carries full liability. In other words, all partners in the LLP have the same rights, obligations, and legal liability which is similar to partners in a general partnership. The protection given by this type of LLP is often depicted as offering "*peace of mind*" assurance to innocent partners because this protection is created to avoid a partner's concern that his wealth (assets) will diminish due to the negligence or malpractice conducted by a partner not under his/her control or supervision, or even by someone that he/she may not even know. On the other hand, the partner who conducts the malpractice or fails to supervise their employee conducting malpractice is personally liable for all obligations of the partnership based on Section 15-306 (c) and (d) of Chapter 15, Delaware Revised Uniform Partnership Act.

Therefore, the LLP statute is a modification of the general partnership statute that stipulates every partner is personally liable for all obligations of the partnership if the obligation is larger than the partnership's assets.

Broad Non-Liability Statutes

The second type of LLP is based on the "*concept of not being personally liable in broad definition*" which was first adopted by the state of Minnesota in 1994. Broad non-liability statutes also concern liability due to mal-practice; however, this version provides additional protection to all partners against the majority of the other personal liability. The party liable is the partnership itself and thus the creditor of the partnership can only claim for wealth/assets owned by the partnership. Meanwhile, the client who was harmed because of the malpractice can claim for the wealth of the partnership or of the specific partner who conducted the malpractice. This type of LLP protects the same form of liability as that found in a limited liability company (LLC), however, the difference is that an LLP does not have the continuity nature that an LLC is known to have. If changes in narrow non-liability statutes (partial shield) are deemed as something important concerning the principle or general conception of partnership law, then the changes in broad non-liability statutes (full shield) can be deemed as revolutionary (Rhodes-Martin et al., 2014). The American Bar Association's version of the LLP Statute and several amendment provisions on Uniform Partnership Act (UPA) 1994 approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1996, both follow and adopt the concept of broad non-liability statutes. The enactment of the Revised Uniform Partnership Act (RUPA) in 1994, which is the first comprehensive revision by NCCUSL, substantiates various amendments of partnership law in general. The success of LLPs has led to the stipulation of LLP provisions in RUPA in 1997 (McCahery, 2001).

Legal Forms for Professional Practice in the Netherlands: The Modernization of Partnership Law

Current Law of the Netherlands Partnership

The Netherlands recognizes three types of legal forms for business, including a sole proprietorship, a partnership, and a company/corporation. The difference between the three legal forms pertains to the status of having a legal personality, which is something usually granted only to corporations (Meinema, 2002). The Dutch Law on Partnerships is regulated by Book 7a of the Burgerlijk Wetboek (The Dutch Civil Code) and the Wetboek van Koophandel. There are four types of partnerships recognized under the Civil Code. Firstly, there is a silent partnership in which a business or professionals act together, but not under a single name of a partnership. Secondly, there is a general partnership, in which a business acts under a separate partnership name. Thirdly, there is a limited partnership which has a common partnership name but contains two types of partners, the general partner who is personally liable towards the partnership and has managerial tasks, and the silent partner, who is not personally liable, and does not partake in any managerial position within the partnership. Lastly, there is the type of partnership commonly used by professionals, such as lawyers, doctors, dentists, architects, and accountants, which is called a Maatschap or a "*Professional Partnership*". In a Maatschap for professionals, the

partners join together to conduct a common profession to make a profit under a common partnership name.

Law practitioners in the Netherlands in many cases use the legal form of a Maatschap. However, other forms such as the B.V. and N.V. are also sometimes used by legal practitioners, though these forms are less common than the Maatschap. Each form comes with its own different benefits and disadvantages. Upon contacting the Netherlands Business Contact Centre, it was confirmed that professionals are indeed not obliged to undertake the Maatschap form. Article 7A:1655 of the Dutch Civil Code states that a Maatschap may be for professional and business practice, but there is also no regulation obliging professional practices to be regulated exclusively under the Maatschap. A partnership, including a Maatschap, is formed by concluding a partnership agreement. However, there is no obligation for the contract to be in written form. Nevertheless, a written contract would certainly be more practical. A general written professional partnership agreement would include specifying the names of the partners along with their respective contributions towards the partnership, how profits will be shared between the partners (if there is no specification regarding the sharing of profits, it would be done based on the contribution of each partner), and the provision of specific tasks or authorizations between the partners. The main differentiating aspect between a Maatschap and an LLP is the liability of its partners.

The provisions regarding the liability of partners in a Maatschap are contained in Section 7A: 1679-1682of the Dutch Civil Code and such provisions apply to professional partnerships. The provision regarding liability states that a partner may not be individually liable for the entire debts of the partnership. The recognition of liability and the amount to be procured by a creditor for the wrongdoing of a partner is extended to all other acting partners who have provided a power of attorney or mandate. If the other acting partners have not provided a power of attorney or mandate, then they will be shielded from liability and damages. These provisions, therefore, provide a degree of protection towards partners in the case that one partner conducts an irresponsible juridical act that results in losses. Such a measure, requiring additional steps to attaining an attorney or mandate power, allows each partner to be informed about potential acts affecting the partnership and reduces the risk of acts being conducted without consultation and input from each partner. This aspect of liability in the Maatschap, in which each partner is equally liable for juridical acts on behalf of the partnership, may be considered as a disadvantage of the Maatschap in comparison to the LLP where partners who have not wronged will not be held liable. However, as was mentioned above, the requirement to obtain a power of attorney from each partner in the case that one partner is to act on behalf of the partnership can be regarded as a preventive measure that would reduce arbitrary juridical acts. The equal liability in the Maatschap is also an advantage over the Dutch general partnership, in which partners share liability. If the Maatschap's juridical act does indeed result in losses, it would still not be possible for a single partner to bear the entire burden of the loss (es), unless determined otherwise within the partnership's agreement.

If this aspect of liability were to be an issue when a Dutch legal practitioner was to start their practice, they may also resort to another legal form, called the Besloten Venootschap (BV) or Private Limited Liability Company which, to a certain extent, contains similarities with the common law LLP. Despite there also being a clear fundamental difference with the LLP, as the nature of the BV is as a company whereas an LLP is a partnership, it is not uncommon for Dutch law firms to be incorporated under the BV form. The reason for this is because of the limited

liability nature, in which the shareholders are not held personally liable. This reduces risks that would normally be borne by a partner's personal assets in a Maatschap. Another reason behind the use of the BV to form a business partnership is the recent relaxation of the BV regulations. The now flexible requirements have made it substantially easier to form a BV, with requirements that are not very different from the requirements to form a Maatschap. This Act on the simplification of law applicable to private companies with limited liability, which took effect on October 1st, 2012, allowed for several changes. One such change is that there is no longer any minimum capital required, which incentivizes small partnerships to shift to the BV form (Goedvolk, 2012).

When it comes to the dissolution of a Maatschap, such an event would occur when it has reached the expiration date as pre-determined in the agreement. Another reason for dissolution would be if a partner were to leave the partnership or die. However, it is also possible to prevent the partnership from directly dissolving in such an event if a "*survivorship*" or takeover clause is included in the forming agreement. Such a clause would entail the possibility for the remaining partners to continue the partnership. It is also possible for a partner to file for the termination of the partnership in court if there are specific reasons behind such a request for dissolution. Despite recent changes to regulations regarding the BV, there remain substantial differences between the BV and the Maatschap, particularly about taxes. One of the reasons why Maatschap remains the most popular form for legal practitioners is because the tax terms are more lucrative. Taxation will not be applied to the partnership. The partners in a Maatschap are to be regarded as "entrepreneurs", and therefore taxation is imposed individually upon the partners. Having the status of an entrepreneur also allows the partners to be subject to certain tax benefits and different taxation requirements from practitioners working under a BV, who may be required to pay corporate income tax instead and are not subject to tax benefits. The tax is lower for partners under the status of entrepreneurship. For entrepreneurs, the Value Added Tax (VAT) may either be 6 or 21% depending on the type of product or service provided. However, for the Maatschap, a tax benefit through the "*small-size entrepreneurs*" regulation may apply. Through this regulation, a Maatschap would be subject to even less VAT than the previously mentioned percentages, and possibly at all, depending on the amount of income. To maintain such a taxation benefit, the entrepreneur must however fulfil several VAT requirements. If legal practitioners were to form a BV instead, higher tax rates would apply. For corporations, the tax rate may either be 20% or 25% of the corporation's annual profit including deductible losses. If the profit were to be less than €200,000, then 20% would apply. If the corporation's profit exceeded €200,000, a 25% tax rate would apply instead. This tax rate would be imposed on the corporation's income, and not the incomes of individuals working under the BV. An additional personal income tax would then apply depending on the size of the individual's income.

Background of the Modernization of Partnerships Law

The law regulating partnership in the Netherlands, like in Indonesia, is the Civil Code. The Civil Code dates back to 1838 and do not always reflect the current social views. For example, the view that civil and commercial law requires separate regulation has been abandoned. Yet, the business entity's popularity remains: there are approximately 231,000 partnerships in the Netherlands. As a consequence, there is a need to modernize the laws to provide trade security and offer creditors sufficient protection, thus contributing to the

attractiveness and competitiveness of the Dutch economy (McCahery et al., 2004). There have been two attempts to modernize the Partnerships Law, which primarily aimed at abolishing the distinction between civil and commercial partnerships, but ultimately failed. The last draft was withdrawn by the Minister of Justice in 2011.

Characteristics of the New Partnership for Professions

The preliminary draft brings together a Maatschap and a VoF (firm), creating two new forms of partnership. These include a partnership (vennootschap) and a limited partnership (commanditaire vennootschap). Either type may be used for professional and business activities. There is no need for a notarial deed or starting capital to establish a partnership, providing easy entry, and thus making it an attractive legal form for entrepreneurs and professionals. Partners must be registered in the trade register, and this is how a partnership obtains legal personality. This preliminary draft also says that all partnerships will acquire legal personality. As a result, assets can be registered in the name of the partnership. This also means that the withdrawal of a partner does not lead to the dissolution of the partnership. In contrast, the current regulations accommodate partnerships with no legal personality, and as a result, the partnership dissolves when a partner enters or leaves.

Furthermore, if the legal personality is granted, then in the event of a change of partner, the transfer of assets will be settled financially without having to liquidate the assets first and thus creating more costs. Another feature in the draft is that the partnership can be dissolved through court at the request of the interested party or the public prosecution. About liability, partners jointly share liability for the debts of the partnership, if the other party can prove that the partnership cannot fulfil its obligations. As a result, the other party will have to first seek liability from the partnership itself, i.e. from the partnership's assets. In addition, when the other party has assigned obligations to a specific partner, the partner will fully be liable for failure in the performance of the agreement. Third parties are also able to claim from both the partnership and the partners insofar as it can be proven that the partnership will not pay the debt. This bears similarities to the American-LLP type of broad liability statute.

Revising the Indonesian Partnership Law

Existing Rules on Indonesian Maatschap

As has been previously mentioned, there have been demands in Indonesia to establish American-style LLP as a new business entity, with the expectation that it will encourage the competitiveness of the legal services. Thus, before addressing the question of whether Indonesia should or should not adopt the American-LLP, it is important to first elaborate on the legal form commonly used or chosen for professional practice, especially for legal practice in Indonesia. In contrast to the emergence of the LLP in the United States of America which tends to govern certain professions, the LLP is not recognized in Indonesia. In Indonesia, the most common legal form for professional conduct, such as lawyers, legal consultants, accountants, and medical doctors, is the Maatschap (civil company/partnership). This is subject to Article 1623 of the Indonesian Civil Code that governs the special Maatschap, a partnership that is limited in nature to the provision of certain goods or activities/projects, and certain professions and occupations.

However, in practice, there are also law offices, legal consultants, and accounting firms that have adopted the form of partnership with firms (vennootschap onder firma, general partnership) as regulated under the Indonesian Commercial Code. This was found in studies conducted to collect deeds of establishment and articles of association. Never before had a study been conducted on the reasons for the law offices to choose the legal form of a "*Firma*" instead of a Maatschap. However, the research suggests that there maybe be at least two reasons for this practice. First, Article 1623 of the Indonesian Civil Code which regulates a special partnership and is the legal basis for carrying out the profession may have been misunderstood. Second, there may be a misunderstanding in the language, where the word firm, which is commonly referred to in the context of law firms in English, has been directly translated into "*firma*" in Indonesia. This creates the mistaken view that the law office is in the form of a "*Firm*" in the meaning of "*Firma or VoF*".

According to Article 16 of the Indonesian Commercial Code, a Firma is a partnership in which two or more persons enter for trading under a common name. As a consequence, other than the differences which will be explained further, provisions and explanations regarding the Maatschap also apply to the Firma. The significant differences between a Maatschap and a Firma are the provisions about external affairs, i.e. liability. While a partner in a Maatschap is liable for actions that s/he committed without the authorization of the other partners, in a Firma, each partner, unless they are specifically excluded from doing so, is entitled to act and engage with third parties in the name of the partnership. If there is a claim from a third party with regards to a certain act committed by a partner, each partner will be held individually responsible for the whole, that is, they are jointly and severally liable. This means that once one of the partners has paid for compensation, the obligations of other partners to pay will disappear.

In Indonesia, the recognition of a Maatschap is specifically designated as a profession governed by Article 1623 of the Indonesian Civil Code (Subekti & Tjitrosudibio, 2007). . Maatschap is often translated as "*civil union/company*" or "*civil partnership*" (persekutuan perdata), however their definitions differ. In the scope of commercial law, a "*civil partnership*" refers to an association of people whose interests are alike on a certain enterprise, and the "*partners*" refers to the members of an enterprise. Therefore, a partnership is an association of people who are members of a certain enterprise. If the business entity does not run an enterprise, it is not a partnership, but a "*civil union/company*", while the people managing the business entity are called "*members*", and not "*partners*". A Maatschap is considered as an enterprise if it fulfills the following elements: (1) the business form is either operated by a natural person or a legal person; (2) there is a consistent continuation of activities; and (3) the purpose is generating profit. The definition of a civil partnership is slightly different from a civil company/union (perserikatan perdata). The definition of a Maatschap as stipulated in Article 1618 in conjunction with Article 1619 paragraph (2) of the Indonesian Civil Code, emphasizes "*agreement*". Comprehensively, a *Maatschap* is: "*agreements by which two or more individuals bind themselves to contribute money, other goods or skills into the partnership, with the intent of sharing the proceeds therefrom among one another*."

A civil partnership is a civil company/union running enterprise as regulated under Article 1618 in conjunction with Article 1623 of the Indonesian Civil Code. A civil company/union does not run an enterprise (Purwosutjipto, 1987). Thus, based on Article 1623 of the Indonesian Civil Code, a "*civil union/company*" may transform into a "*civil partnership*" if it runs an enterprise, a special Maatschap (civil partnership). In other words, a "*civil union/company*" does not run an

enterprise, while a "*civil partnership*" does run an enterprise. Hence, a "*civil union/company*" is a business entity included in the scope of general civil/private law, while a "*civil partnership*" is a business entity included in the scope of commercial law because it runs an enterprise (Purwosutjipto, 2007).

Meanwhile, as has previously been mentioned, a Firma is a partnership into which two or more persons enter for trading under a common name. This means that a Firma is essentially a *Maatschap* used for commercial purposes only. According to its history, the *Maatschap*, Firma, and CV must own what is called "*affectio societatis*" which is the intention of parties to cooperate as partners. Furthermore, it must also possess "*intuitu personae*" which is a personal closeness between the partners and fraternity (Huizink, 2009). This becomes the basis on which the *Maatschap* has a "*personal*" nature which points to the closeness between each of the partners. This nature distinguishes the *Maatschap*, Firma, and CV from the Perseroan Terbatas (Limited Liability Company/Corporation). In a partnership, the association of the partners is the main priority whereas, in a Limited Liability Company, the association of the capital is the main priority. As a result, partnership often refers to a partnership or association of people whereas a Limited Liability Company refers to a partnership or association of capital (Purwosutjipto, 1991). *Maatschap* partnerships are governed by Book III Chapter 8 of the Indonesian Civil Code, while Firma partnerships are governed by Book I Chapter 3 of the Indonesian Commercial Code.

Maatschap between members of certain professions is governed by provisions in the Indonesian Civil Code beginning from Article 1618 to Article 1652. In France, a Maatschap is established to conduct profession as regulated by law or articles of association, for instance, notary, advocate, bailiff, medical doctor, accountant, architect, and others. Meanwhile in the United States of America, since the difference between civil law and commercial law is not recognized, an association of members of a profession is subject to regulations on the partnership, which is a business entity or business organization.

The establishment of a Maatschap does not require being in writing, bearing in mind that Article 1624 of the Indonesian Civil Code stipulates that a Maatschap is established once consent or agreement on its establishment is achieved. In other words, it is sufficient to establish a Maatschap with verbal agreement or consent so long as it meets the requirements for a valid agreement as stipulated under Article 1320 of the Indonesian Civil Code (Soekardono, 1983). However, with the development of the business sphere, it is uncommon to establish a Maatschap without a deed of establishment/partnership agreement. If the legal form is a Firma, then the establishment procedure may be governed by Articles 22-28 of the Indonesian Commercial Code. The main difference here is the function of the deed of establishment or the partnership agreement of a Firma that will be used as evidence by a third party in comparison to the function of the deed of partnership in a Maatschap. This is because, in Firma, the partners have the right to deviate from default provisions as regulated both in the Civil and Commercial Codes. Indonesia does not recognize the legal personality of partnerships (Adenas & Wooldridge, 2009). This is derived from an aggregate theory of partnership which states: *"a partnership does not have a separate legal existence (as does a corporation), but rather is only the totality of the partners who make it up (Gardner, 2001)."* In other words, a partnership is considered as an agreement (aggregate theory). A partnership involves ties of cooperation created by those who are involved through a joint action that establishes an enterprise. As a result, all legal relationships arising from the enterprise are considered as consequences of the partnership's agreement (establishment).

Due to the influence of aggregate theory, which provides that a partnership is not a legal entity, all partners are joint owners of the partnership that is not a separate entity from its partners (Hager, 1989). This has led to the creation of common interests over a partnership's properties, called a "*tenancy of partnership*". This means that every partner has joint ownership over the partnership's properties. This "*tenancy of partnership*" is also known as "*free co-ownership*" ("*mede-eigendom*") which means that one or more persons have the right over a joint property. In the case of a partnership, this form of co-ownership is called "*gebonden mede-eigendom*", or "*bound co-ownership*" (Erp, 2006; Kleijn, 2006). The properties or assets (vermogen) in a *Maatschap* are joint properties of the partners and are regulated by provisions on joint ownership (joint ownership right) and thus one does not necessarily personally own property (Kleijn, 2006). Properties that are required to perform partnership activities are owned jointly by the partners. The properties or assets of a civil company (persekutuan perdata) are not solely derived from the contribution of the partners and the properties obtained by the partnership, but also include losses incurred from properties or assets of the partnership, for instance, insurance or compensation. According to Article 1619 paragraph (2) of the Civil Code, the contribution of partners in a partnership can be in the form of money, property/good, rights, or labor/skill.

Article 1646 of the Indonesian Civil Code uses the word "*Maatschap eindigt*" which means "*termination of partnership*" instead of the word "*dissolve*". The word terminate is not always clear because there needs to be a liquidation before a partnership can end. The use of the word "*terminated*" suggests that no further legal action is required to end a partnership. The dissolution or end of a partnership means that the agreement that established the partnership can no longer be implemented. However, debts, accounts receivable, enterprise affairs (immovable goods, movable goods, and non-goods, which as a whole are within the area of the enterprise) continue to exist and must be settled before the Maatschap can be fully terminated. In other words, a dissolved Maatschap must be followed by the legal action of "*liquidation*", an action to determine assets (accounts receivable) and losses (obligations) of the partnership. Therefore, the order is the dissolution of a *Maatschap*, followed by "*liquidation*", which leads to the termination of the *Maatschap (Purwosutjipto, 1991)*. There are several reasons which may lead to a *Maatschap* being dissolved, including:

1. Expiration of the period for which the partnership was established;
2. Destruction of assets or the accomplishment of the object for which the partnership was established;
3. According to the intent of one or several of the partners;
4. The death of a partner, a partner's detention, or the declaration of bankruptcy or insolvency of a partner.

In principle, the death of a partner leads to the dissolution of a *Maatschap*, except when stipulated otherwise by the deed of establishment. If the *Maatschap* is not dissolved upon the death of the partner, it does not necessarily follow that the successor of the deceased automatically acquires the status of partner.

Based on the basic principle which holds that in a *Maatschap*, no partner has the authority to act in the name of another partner or the partnership as a whole, the partner who acts without authority will be held liable for the acts he/she committed. The form of the partner's liability in a *Maatschap* reaches the partner's assets or property. However, if the said obligation is conducted by two or more partners and everyone has given the mandate to one of the partners, the liability for the said legal action will become that of the partner who creates the obligation as well as the

partner(s) who gave the mandate. In this case, there is a joint liability among the partners, whether equally or proportionally. There are at least three forms of liability: first, the partners are jointly and severally liable; second, the partners are liable up to their own proportion in the partnership; and third, partners are liable for the debt of the partnership equally. Indonesia and the Netherlands have adopted the second concept in which partners are liable according to their proportion in the partnership. In the Netherlands, "*Proportional Liability*" is defined according to the number of partners. However, in the draft of the recent Dutch BW, it was proposed that all partners would be jointly and severally liable if the debt cannot be shared. In the Bill of Indonesian Business Entity without Legal Personality (Badan Usaha Bukan Badan Hukum), provisions on the liability of partners in a Maatschap stay the same as is governed by the Indonesian Civil Code, and likewise, the liability of the partners in a Firma under Indonesian Commercial Code remains.

Comparing the American-LLP to Maatschap

Now, we turn to examine and compare the American-LLP with the Maatschap. From the explanation of both the LLP and the Maatschap above, a Table 1 of comparison could be made.

Table 1
COMPARISON OF LLP AND THE *MAATSCHAP*

Criteria	LLP	Maatschap
Legal nature	An LLP is a hybrid form of business entity: it is neither a partnership nor a company. Like a company, it has a separate legal personality and thus is its own legal entity. But like a partnership, the relationship is governed by a private agreement.	A Maatschap is a civil partnership and thus is not a legal entity by itself. Article 1618 of the Indonesian Civil Code stipulates that it is an agreement by which two or more persons cooperate for a shared profit.
Partner's liability	All partners have limited liability. This can be seen in Section 306 (c) of RUPA which states: A debt, obligation, or other liability of partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely because of being or acting as a partner.	Based on Article 1644 of the Indonesian Civil Code, a partner who acts on account of the partnership without authorization or mandate from others will be liable for that act alone, excluding other parties. This will reach the partner's assets, thus partners have personal liability.
Property of LLP/Maatschap	Considering that this business entity is its own legal person, it has its own assets separated from the partners' assets.	All partners are considered joint owners of the assets.

As has been previously elaborated, one important feature of a Maatschap is the fact that it

is established by an agreement under the law of obligations of the Indonesian Civil Code. The establishment of a contract is based on the principle of freedom of contract, in which as long as parties agree to the terms and fulfil the requirements, it will become law to them. As a consequence, partners are flexible in determining how the partnership should run, including liability. There is a law firm in Indonesia in the form of a Maatschap which includes the characteristics of the LLP in its Article of Association. Although the partners do not have limited liability in the sense that their liability reaches to their personal assets, it follows the characteristics of an LLP in the sense that in case of malpractice, only the partner who is responsible for it shall be liable, not other partners. This is the main idea behind the establishment of an LLP too. Article 1644 of the Indonesian Civil Code has provided similar consequences. If a partner acts alone without the consent of other partners and is not authorized to do so, s/he will be personally liable for the loss (es) caused by the act.

In addition, based on Article 22 of the Indonesian Commercial Code, every Firma has to be established with an authentic deed. The absence of the authentic deed cannot be used to harm third parties. Once an authentic deed is created, it has to be registered. The registration provides details such as the identities of the partners, the name and nature of the firm, and the beginning and ending period of the partnership. Upon registration, the partners are also obligated to provide an announcement and the deed to be published in the State Gazette. The consequence of following these procedures of the authentic deed, registration, and announcement, is that the partnership now has the power to bind external third parties. However, if it is not registered and announced, then it will be the same as an establishment without a deed, and as a result, does not bind third parties.

Revision or Modernization of the Indonesian Maatschap

As has been alluded to above, the Indonesian Partnership Law, which originates from the Dutch Civil Code, is outdated, and thus might not accommodate society's current needs. This is also the main reason behind the attempts and introduction of the Dutch Preliminary Draft to modernize its partnership law. After the successful revision of the BV law in the Netherlands, which focused on making the legal form more flexible and deleting unnecessary and obstructive regulations rather than on introducing a new legal form, the Netherlands has adopted the same approach with partnerships. Rather than adding another type of partnership, such as the LLP, the Netherlands intended to reform the legal nature of the already currently existing types of partnership, by adding that partnerships have legal personality and by making their establishment and dissolution easier. However as to the liability, according to the proposal, all partners are fully liable. The limited liability for the partners is only applicable to partners who have been entrusted with the performance of a task on behalf of the partnership and does not extend to other partners who are not involved. Considering the background of the establishment of LLPs in the USA, which is appealing for the limited liability of the partners, the inclusion of the LLP form to the currently existing types of partnership in the Dutch context is not necessary.

Likewise, in the current debate in Indonesia, one could consider that it is not necessary to add the LLP as a new type of partnership. The current types of partnership are flexible enough to accommodate liability for the partners, thus able to adopt the limited liability feature of LLP, without requiring adopting LLP as a new form of partnership altogether. With that said the partnership law in Indonesia does need revitalization which could entail the modernization of

familiar forms of partnership. The Indonesian Maatschap and the American-LLP originate from and operate in two different legal systems, namely civil and common law. Replacing a Maatschap with an LLP for the legal profession does not reflect the comparative development of the Maatschap in civil law countries, including the Netherlands. The current law on Maatschap itself has provided flexibility in regulating limited liability, and thus requires mere revitalization, like what the Netherlands has proposed. Replacing a law with another which originates from a completely different legal system is not only costly but is also less strategic in a plural society such as Indonesia. The Maatschap has been in place for more than a hundred years and has become part of the Indonesian legal system and not easily replaceable (Gautama, 2006). Thus, it is advisable to amend the Indonesian Civil Code on partnerships by enacting a new law on the partnership to accommodate society's needs, i.e. by adopting the special characteristics of the American-LLP into the current ones, rather than trying to establish a completely new form of business organization. The revised partnership law should address the following issues:

The Definition

The Indonesian Civil Code defines a Maatschap as a profit-driven business entity. Lawyers form a Maatschap despite being fee-earners and not profit-makers. The revised partnership law should define a Maatschap based on its rationale, namely its common objective or commerce. Law partnerships have a common objective, specifically a shared profession, and not profits. While one could argue that there are lawyers who work for profit (Barney, 2004), profit is not the main objective of the provision of legal services.

The Scope

The new partnership law shall establish its scope. The scope includes the type of professions that qualify as a Maatschap. This includes law and accounting firms. The elucidation shall provide examples with or without limitation to the scope.

The Legal Personality

A Maatschap will have a similar status to other types of legal entities. The objective remains different from those of companies, foundations, and associations. This status differentiates the personal assets of the partner and the partnership assets. However, unlike the Netherlands where all partnerships are legal entities, Indonesia should continue to make choices specifically for civil partnerships to be able to opt for not having a legal personality status.

The Limited Liability

Although the limited liability feature may be accommodated in Article 1644 of the Indonesian Civil Code, it only extends to tortious claims. The Netherlands' proposal on limited liability can also apply to debts. This feature can also be added to the existing forms of partnership. As a result, the partnership will have special characteristics similar to that of the LLP of a broad non-liability statute, approximating the protection given to a limited liability company.

CONCLUSION

Globalization in business has put existing legal forms of businesses under pressure, including that of the partnership (Maatschap), which is the form currently used for the legal profession in Indonesia. As I have shown, this law is, in many ways, inadequate for the way that it allocates personal liability for each partner. As an emerging market, Indonesia has to adapt to the ever-growing business demands and expansions by providing laws that address the needs of society, facilitate entrepreneurship, provide legal certainty related to business transactions, and provide legal protection for parties in their legal relationships. To achieve such goals, the state does not always have to enact or implement new concepts but can better focus on revitalizing the current law so that it will be able to respond to the market demands. Therefore, Indonesia does not have to adopt the concept of the American-LLP as a new form of business entity, particularly in legal services, for several reasons. First, the legal form that is often used or chosen by the professional offices is the Maatschap or partnership with the firm (vennootschap onder firma). Indonesian law firms remain competitive without an LLP form. The Indonesian Civil Code and the Commercial Code on partnership are complementary because a partnership is an agreement and contracting parties have freedom of contract. As a result, partners have the freedom to determine "*rules of the game*" in the partnership so long it is agreed upon in the partnership agreement. Second, considering what the Netherlands has done in focusing on modernizing and improving current regulations upon partnerships, for Indonesia it would be more effective to focus on how to improve its competitiveness. In the Netherlands, most professionals conduct business through a Maatschap, rather than a BV or an NV, because it is subject to a transparent tax which will be taxed when the partner receives income. Finally, the legal personality status embedded in the LLP may also be granted to a Maatschap or a Firma. This feature could be created by granting a legal personality status to the Maatschap, separating the assets of the partners from the assets of the partnership.

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