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A Global Code of Legal Ethics for the Transnational Legal Field

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We are living in a moment of history when we are being invited—forced!—to consider the globalisation of just about everything. Why not a global code of legal ethics? The need, some might say, is obvious: for the first time, we are actually experiencing transnational legal practise on a grand scale. Very large law firms with hundreds of partners and employees in dozens of jurisdictions act for clients involved in complex transactions or disputes which also reach across jurisdictional boundaries.² Surely, the argument runs, we need a code of ethics which has a commensurate transnational reach: which does not depend on regulatory structures of any particular State; which is cosmopolitan in character and not embedded in particularistic legal and/or professional traditions, cultures and organisations; and—ideally—which deals explicitly with issues which are commonly encountered in transnational legal practice. Nothing less would serve the interests of clients who entrust their affairs to these firms, or the interests of the world community which is affected by their professional exertions in international negotiations, agencies and tribunals. This logic may be powerful: but I hope to demonstrate that it is flawed.

Of course, the project of a global code of legal ethics does have some attractions to some lawyers, which is why at least two important attempts have been made to create one: the Code of Ethics of the International Bar Association (IBA) which originated in the immediate post-war era, and the more recent Common Code of Conduct for Lawyers in the European Community developed under the ægis of the *Comité Consultatif des Barreaux Européens* (CCBE).³ It is a project which might interest some scholars as well. Attempts

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² See e.g. J. Flood, "Mega-lawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice" (1996) 3 *International Journal of the Legal Profession* 169, D. Trubek *et al.*, "Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas" (1994) 44 *Case Western Reserve Law Review* 407, H. W. Arthurs and R. Kreklewich, "Law, Legal Institutions and the Legal Profession in the New Economy" (1996) 34 *Osgoode Hall Law Journal* 1.

³ International Bar Association (IBA), *Code of Ethics* (adopted 1956, revised to 1988), and Comité Consultatif des Barreaux Européens (CCBE), *Common Code of Conduct for Lawyers in the European Community* (adopted 1988 with Explanatory Memorandum and Commentary adopted 1989) reproduced in E. Godfrey (ed), *Law without Frontiers* (London, Kluwer Law International and International Bar Association, 1995), Appendices 4 and 11. And see J Toulmin, "A Worldwide Common Code of Professional Ethics?" (1991-2) 15 *Fordham International Law Journal* 673, R. E. Lutz, "Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners" (1992) 16 *Fordham International Law Journal* 53.

to create a global code might stimulate empirical research and theorising about legal professionalism, about the relationship of the legal profession to global capitalism, or about the constitution of transnational legal orders—all subjects of great interest and importance.⁴ However, it is also important to understand what such codes are *not*: an effective means of regulating transnational legal practice. This, I will argue, is because a fundamental ambiguity afflicts the many proposals now circulating for the regulation of global social and economic activity by means of codes of conduct, because incoherence and contradiction—characteristic features of all regimes of professional legal ethics—are likely to be particularly pronounced in the global context; and because legal professions are too closely identified with the particularities of national interest and of professional circumstance and culture to be meaningfully regulated by a universal or global code.

1. *The Current Vogue for Transnational Codes*

Codes of conduct, familiar after a century of use by professional bodies in North America,⁵ are becoming increasingly popular in a host of non-professional and transnational contexts. They are being used, *inter alia*, to regulate employment,⁶ investment⁷ and environmental⁸ practices, bribery and corruption in business,⁹ advertising standards¹⁰ and voyeuristic journalism.¹¹ This new generation of codes has been largely drafted, promulgated and enforced, not by public agencies operating with the force and authority of the State, but by business corporations, professions, sectoral associations or industry standard-setting bodies. Sometimes, it is true, these codes are mandated, promoted, endorsed or adopted

⁴ See e.g. M. Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley, Cal., University of California Press, 1977), E. Friedson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago, Ill., University of Chicago Press, 1986), R. Nelson, D. Trubek, R. Solomon (eds), *Lawyers' Ideals/Lawyers' Practices—Transformations in the American Legal Profession* (Ithaca, Cornell University Press, 1992), M. Cain and C. Harrington (eds), *Lawyers in a Postmodern World—Translation and Transgression* (New York, New York University Press, 1994).

⁵ J. F. Backof and C. L. Martin, Jr., "Historical Perspectives: Development of the Codes of Ethics in the Legal, Medical and Accounting Professions" (1991) 10 *Journal of Business Ethics* 99. The first formal "ethical" code for attorneys in North America was adopted by the state bar of Alabama in 1887. It became the template for the American Bar Association's 1908 *Canons of Professional Ethics*. See R. A. Zitrin and Carol M. Langford, *Legal Ethics in The Practice of Law* (Lexis Law Publishing, 1995).

⁶ L. Compa and T. Hinchcliffe-Darricarrère, "Enforcing International Labor Rights through Corporate Codes of Conduct" (1995) 33 *Columbia Journal of Transnational Law* 663.

⁷ See e.g. S. J. Rubin, "Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development" (1994) 10 *American University Journal of International Law & Policy* 1275; OECD, *Draft Corporate Governance Guidelines* at <<http://appli.oecd.org/maillist.nsf/dafgovernance>>. The OECD draft guidelines on corporate governance were released for public comment on 18 Dec. 1998 and will be finally considered by OECD ministers at their meeting in May 1999.

⁸ See R. A. Reiley, "The New Paradigm: ISO 14000 and Its Place in Regulatory Reform" (1997) 22 *Journal of Corporate Law* 535, N. Roht-Arriaza, "Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment" (1995) 22 *Ecology Law Quarterly* 479.

⁹ See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which will enter into force on 15 Feb. 1999 <<http://www.oecd.org/daf/cmisis/bribery/20nov1e.htm>>, Transparency International (The Coalition against Corruption in International Business Transactions), *Standards of Conduct* (Copy in possession of the author).

¹⁰ See British *Code of Advertising Practice* (9th edn., 1995) and *Sales Promotion Code* (6th edn., 1995) <<http://www.asa.org.uk/>>.

¹¹ See the British Press Complaints Commission (PCC), *Code of Practice* (ratified 26 Nov. 1997) <<http://www.pcc.org.uk/about/default.htm>>.

by the State; and occasionally, non-governmental consultative groups or social movements are invited to participate in their adoption or administration.¹² But ultimately they are “voluntary” in the sense that those governed by them have chosen to submit to their strictures.

It is precisely this “voluntary”, non-state character of codes which explains their current popularity. In today’s New Economy, the State’s regulatory power and authority are under attack on many fronts: from neo-conservative ideologues, despairing social democrats and deluded populists; from powerful corporations which have created transnational markets and world-wide manufacturing and sourcing strategies; from communications and transportation technologies which can move ideas, goods, money and people across national boundaries with relative ease and great speed. But while state regulation has been denigrated and diminished, the need for regulation of some kind has become increasingly obvious. Profitable global trade, integrated manufacturing processes, efficient communications and transport and the confidence of investors, customers and clients all depend upon well-understood and effective normative regimes which ensure the orderly and honest operation of capital markets, the protection of intellectual property, predictable outcomes in credit transactions, physical safety and security and compatible technologies. To a significant degree, then, the future of globalisation itself depends upon the extent to which regulation can create a relatively stable social and political environment in which investors and consumers, voters and workers feel that they are beneficiaries of and stakeholders in the new dispensation, rather than its victims.

For all of these reasons, codes of conduct have come into prominence as a strategy to achieve regulation without regulation, to hold out the promise of stability and equity without the taint of state intervention. However, the project of self-regulation is fatally flawed. Individual businesses, occupations and professions, or sectoral groupings of firms, may lay down rules of conduct; occasionally they may monitor compliance; but seldom are they able to deal effectively with violations. Regulatory regimes built around voluntary codes often suffer from debilitating weaknesses (some of which, admittedly, they share with state regimes): defects of design and drafting; perversion of the regulatory process by self-seeking constituencies within the regulatory agency; capture of those processes by the intended targets of regulation; inadequate staffing; passive rather than proactive administration; inaccessible complaints procedures; inadequate inspections; lethargic investigation of complaints; and especially, the absence of an effective sanctioning mechanism.

These characteristic weaknesses are compounded and intensified by the profound ambiguity of the circumstances which so often lead to the adoption of corporate and sectoral codes designed to regulate aspects of the global economy. A typical sequence of events frequently precedes the adoption of such codes. Egregious misconduct by a transnational corporation is revealed—the exploitation of children, environmental depredation, a bribing scandal—usually in a developing country; sympathetic social movements, trade unions or journalists in the advanced economies publicise the revelations; this publicity conjures up the threat of consumer boycotts to banish the offending product or producer from the market until the offensive conduct is remedied or—worse yet—of government legislation

¹² See e.g. the Workplace Code of Conduct adopted by the Apparel Industry Partnership of major clothing retailers and manufacturers, endorsed by consumer, labour and human rights groups, and endorsed by President Clinton, *New York Times* (14 Apr. 1997) Sec. A, p. 17.

to ban all goods from that corporation, country or economic sector. Corporations, in turn, routinely deny the allegations; when they can deny no longer, they attempt to discount the seriousness of any harm done; when their protestations are no longer credible, they apologise; and when consumer and political pressures seem likely to produce consequences in the marketplace or in parliament, they finally respond by offering symbolic reassurance of their good intentions in the form of a “voluntary” code of conduct. Needless to say, the provisions of such codes are likely to be relatively innocuous or, if nocuous, are unlikely to be vigorously enforced.

But why does this response usually succeed, at least for a time, in pacifying critics and activists, governments and relevant publics? The reason is that many States lack—or believe they lack—the financial means, juridical powers or political will to intervene in the global economy. Still, they have to appear to be doing something, and by placing their *imprimatur* on a scheme of self-regulation, States hope they can placate their citizens, at least in the short term.¹³ But why should the public—and critics and activists—acquiesce in these ineffectual measures? Because advocacy groups seeking effective regulatory intervention have learned through bitter experience that in the global economy half a loaf may indeed be the most that is on offer. Indeed, for this same reason they may even allow themselves to be co-opted as stakeholders in the voluntary regime, and reconcile themselves to its imperfections by telling themselves that if self-regulation fails, the case for enforceable state legislation will become unanswerable. But they are wrong: legislation is not likely to be enacted for all the reasons it was not enacted in the first place.

Thus, within the context of the global economy, corporations, states and social movements tend to converge on a common approach to self-regulation and voluntary codes with different—often conflicting, deceptive, even self-delusory—expectations. However, in the specific case of a global code of legal ethics, this fundamental weakness is exacerbated by contradictions already immanent in the domestic version of such codes.

2. *The Structures, Processes and Outcomes of Legal-professional Codes*

All normative systems ultimately are what they do: they are not mere collocations of words on paper; they are operational regimes lodged in regulatory structures whose imperfect processes and uncertain outcomes ultimately give meaning and effect to normative language. In particular, as I have argued elsewhere, an “ethical economy” shapes the regimes which regulate the legal profession.¹⁴ Since regulatory bodies—whether public or professional—typically have at their disposal limited staff resources, constituency support and public credibility, they cannot possibly enforce all aspects of their Codes with equal vigour. To the extent possible, they therefore concentrate on enforcing provisions which

¹³ Canadian governments, for example, have been actively dismantling and weakening their regulatory structures at the same time as they have begun to promote Codes quite aggressively: see H. W. Arthurs, “‘Mechanical Arts and Merchandise’: Canadian Public Administration in the New Economy” (1997) 42 *McGill Law Journal* 29; and see D. Cohen and K. Webb (eds), *Exploring Voluntary Codes in the Marketplace* (Ottawa, Government of Canada, 1998) and Industry Canada, *Standards Systems: A Guide for Canadian Regulators and Voluntary Codes: A Guide for Their Development and Use* (Ottawa, Government of Canada, 1998).

¹⁴ H. W. Arthurs, “Legal Ethics: Ideology, Interest and Implementation of a Professional Ethical Code” in C. D. MacNiven (ed), *Moral Expertise: Studies in Practical and Professional Ethics* (New York, Routledge 1990) at 93; “Climbing Kilimanjaro: Ethics for Postmodern Professionals” (1993) 6 *Westminster Affairs* 3; “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995) *University of Alberta Law Review* 800.

address issues of serious public concern, but which are unlikely to provoke the resistance of significant professional constituencies or require a large commitment of organisational resources.

Thus, legal-professional bodies tend to enforce most vigorously ethical norms which prohibit behaviour which is also illegal under general law—varieties of fraud and misappropriation are a prime example—because disbarment of offenders is relatively straightforward, is unlikely adversely to affect the interests of any interest group within the profession and will reassure the public concerning the honesty of lawyers. For similar reasons—as I have shown by reference to the experience in Ontario—professional bodies are prepared to punish conduct by lawyers which constitutes blatant disrespect for their own regulatory authority.¹⁵ However, by contrast, legal-professional bodies are very reluctant to prosecute even fairly egregious cases of incompetence: charges are hard to prove because of the non-falsifiable character of legal knowledge; vigorous prosecution of incompetents might be threatening to some groups of practitioners who would have to revalidate their credentials or purchase expensive malpractice insurance; and dissatisfied clients would be incited to make large numbers of “unreasonable” claims which—for the first two reasons—could never be resolved. Similarly, provisions of the professional code which oblige lawyers to represent unpopular clients, make legal services available to those who cannot afford them or promote the cause of law reform are virtually never enforced.

As numerous studies also show, the skewing effects of this “ethical economy” are experienced not only by the public, which is denied the full range of protection promised by the profession’s ethical code, but also by vulnerable elements within the profession—solo practitioners and lawyers in small firms. Various hypotheses have been suggested to explain why these lawyers are the most frequent targets of professional disciplinary sanctions. Since they act for unsophisticated clients, especially in real estate transactions, they are more likely to have the opportunity to commit fraud or theft; since they do not earn as much as other lawyers, they are more likely to experience and to yield to temptation; since they work with few or no immediate professional colleagues, they are not exposed to informal constraints and socialisation processes which might inhibit improper practices; and, since in most jurisdictions they are under-represented on professional governance bodies, they are unlikely to be able to influence patterns of enforcement. Whatever the explanation, however, there is little doubt that solo practitioners and those in small firms do in fact bear the brunt of professional discipline.¹⁶ Finally, this skewed pattern of ethical enforcement interacts with the distorted demography of the profession.¹⁷ Because of persisting discriminatory patterns of recruitment in elite firms, as well as other factors, the ranks of solo and small-firm practice are likely to be populated disproportionately by members of disadvantaged groups and other socially marginal individuals.¹⁸ The consequence

¹⁵ H. W. Arthurs, “Why Canadian Law Schools Do Not Teach Legal Ethics” in K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998) at p. 105.

¹⁶ J. Brockman and C. McEwen, “Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?” (1990) 5 *Can. Journal of Law & Society* 1; B. Arnold and J. Hagan, “Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers” [1992] *American Sociological Review* 771.

¹⁷ See e.g. J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Chicago, American Bar Foundation, 1994).

¹⁸ See e.g. J. Hagan, M. Huxter, P. Parker, “Class Structure and Legal Practice: Inequality and Mobility Among Toronto Lawyers” (1988) 22 *Law & Society Review* 9; J. Hagan and F. Kay, *Gender in Practice: A Study of Lawyers’ Lives* (New York, Oxford University Press, 1995).

is that a disproportionate number of ethical offenders are likely to be members of disadvantaged and marginal groups.¹⁹ As a corollary, members of large, prestigious firms—the very firms which virtually monopolise transnational legal practice—are almost never disciplined. This is not because they are a more virtuous breed but—I hypothesise—for three different reasons: first, professional bodies tend not to prosecute the kinds of anti-social conduct in which elite lawyers are most likely to engage; secondly, dishonesty and other conduct likely to attract professional censure tends to be forestalled by intra-firm controls; and thirdly the economically-privileged and professionally-prestigious situation of elite lawyers tends to insulate them from many of the temptations and pressures felt by lawyers on the periphery of the profession.

To sum up: the “ethical economy” which shapes domestic regimes of legal ethics operates within the profession’s demographic and socio-cultural structures, and through its political processes. Consequently, while domestic codes of legal ethics may be more or less effective in protecting the public from certain kinds of misconduct, which kinds of misconduct and which offenders are punished is largely determined by power relations between the profession and the public and within and amongst professional constituencies.

While the grammar and rhetoric of a global ethics code might well mimic those of domestic codes, its actual application and effects are likely to be shaped by the special features of the global ethical economy within which it operates. Thus, a global code would almost certainly be written so as to send subtle, reassuring signals to a very specific “public”—essentially transnational corporations and other important actors in the global economy—and covertly to advance the interests of the great transnational law firms (mostly US- and UK-based) which serve that “public”.²⁰ Conversely, whatever its formal language,²¹ a global code would not likely do much to protect the interests of lawyers and clients outside the transnational legal field: they are essentially non-actors in the global economy, though they may be acted upon by it. Key provisions of such a code might therefore be drafted and administered so as to legitimate arrangements which the relevant law firms and clients find expedient, such as cross-boundary practices, inter-firm alliances and multi-jurisdictional credentials.²² Or they might be written with a view to reassuring clients about risks, such as conflicts of interest, which have become notoriously trouble-

¹⁹ See e.g. S. Arthurs, “Discipline in the Legal Profession in Ontario” (1970) *Osgoode Hall Law Journal* 235.

²⁰ The IBA—“the world’s foremost international association of lawyers”—has some 18,000 individual members and 173 affiliated law societies and associations, organised into three sections: Business Law, Energy and Natural Resources Law, and General Practice. While the great majority of committees organised under these three sections are focused on business-related issues, the IBA does have committees as well on access to justice, human rights law, discrimination and gender equality, environmental law and indigenous people’s law. See E. Godfrey, *supra* n. 3 at p. xi and the IBA website at <<http://www.ibanet.org>>.

²¹ For example, the CCBE Code in its preamble says that the lawyer “must serve the interests of justice” and that “his [sic] function . . . lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards . . . the public for whom the existence of a free and independent profession . . . is an essential means of safeguarding human rights in the face of the power of the state and other interests in society”. Not a single operational provision of the CCBE Code reinforces these noble sentiments: there is no obligation to represent the indigent or unpopular; not even hortatory language concerning support for law reform or the advancement of public understanding of the law. The IBA Code, which lacks an inspirational preamble, does stipulate that lawyers should defend their clients “without fear . . . and without regard to unpleasant consequences to themselves” (s. 6) and should “put first not their right to compensation for their services, but the interests of their clients . . . and the exigencies of the administration of justice” (s. 17).

²² Indeed, both the CCBE and IBA Codes apply only to “cross-border practice”: CCBE s. 1.5, IBA Preamble.

some in transnational legal practice.²³ Or they might define the terms of trade in transnational professional relations, such as rules governing referral fees, indemnity insurance, confidential communications and demarcation of fields of expertise.²⁴

On the other hand, a global code is by no means indispensable for the regulation of transnational legal practice. Provisions in national codes might just as easily be used to regulate distinctive aspects of transnational practice such as the role of lawyers who work in transnational corporations,²⁵ offer advice to clients abroad,²⁶ or have extensive relations with foreign lawyers.²⁷ Consequently, one might suspect that the real purpose of a global code of legal ethics is not in fact to provide redress for clients or to establish the modalities of cross-border practice. Rather, like its domestic counterparts, it seems to be a useful way to structure the global market for legal services. This seems to involve three distinct strategies.

The first is the articulation of an ideology of transnational legal professionalism. Not surprisingly, global codes contain allusions to the contribution of lawyers to the great project of economic integration²⁸ and to the special needs of clients confronting the "internationalization of the business world".²⁹ A sensible corollary—were the IBA or CCBE more imaginative and less self-regarding—might be language admonishing lawyers to protect the rights and interests of citizens and communities confronted with the negative consequences of globalisation. For example, transnational lawyers might be enjoined to be sensitive to environmental concerns, respectful of national cultures and scrupulous in their dealings with public officials in countries where their clients do business. However, no such language is found in the transnational codes which have been adopted to date.

The second strategy is to facilitate and legitimate the activities of transnational law firms through the elimination of "artificial" barriers to market access. This is accomplished, on the one hand, by securing the repeal of provisions in national codes of legal ethics which are designed to preserve domestic practice monopolies, and on the other by promoting harmonisation of divergent professional regulatory standards whose inconsistent and idiosyncratic requirements may unintentionally impede cross-border practice.³⁰ To the extent that these efforts succeed, transnational codes will have the effect of bolstering the market position of transnational law firms *vis-à-vis* local legal practitioners not bound by a *global* code (and, for that matter, lawyers working in multidisciplinary firms not bound by a code of *legal* ethics.)

²³ CCBE s.3.2, IBA s. 13. For a fuller discussion see M. Daley and R. Goebel (eds), *Rights, Liability and Ethics in International Law Practice* (Irvington-on-Hudson, Transnational Juris Publications/Kluwer, 1995).

²⁴ CCBE ss. 3.9, 5.2, 5.3, 5.4 etc.; IBA ss. 4, 5, 19.

²⁵ M. C. Daly, "The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel" (1997) 46 *Emory Law Journal* 1057.

²⁶ M. Majumdar, "Ethics in the International Arena: The Need for Clarification" (1995) 8 *Georgetown Journal of Legal Ethics* 439.

²⁷ R. E. Lutz, "Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners" (1992) 53 *Fordham International Law Journal* 53.

²⁸ CCBE s. 1.3.1.

²⁹ Godfrey, *supra* n. 3 at p. 2.

³⁰ CCBE s. 1.3.2 purports to be "the expression of a consensus of all the bars and law societies of the EC", contemplates its formal adoption "in accordance with national or Community procedures" and notes that, following adoption, lawyers engaged in cross-border practice "will remain bound to observe the rules of the bar or law society to which he belongs to the extent that they are consistent with the rules in this code" (emphasis added).

Thirdly, global codes mediate between the interests of influential national professional bodies and their numerically large memberships, on the one hand, and the much smaller cohorts of transnational practitioners on the other. This is accomplished by genuflecting in the direction of national bars and law societies, by identifying them as the authors of the global code,³¹ by co-opting them as its implementers and enforcers,³² and by acknowledging their continuing importance as the primary locus of professional authority.³³

But however successful it may be in making the world safe for transnational law firms and legal practice, however reassuring for clients, governments, the public or traditional professional bodies, a global code of legal ethics is not likely to do much to enhance the honesty, diligence or civic-mindedness of lawyers in the transnational legal field. To be effective, such a code, after all, must ultimately constrain the activities and challenge the interests of the powerful law firms which dominate that field. However, these same firms also dominate the IBA and, to a lesser extent, the CCBA; they can draft a global code in their own interests; and they can administer it in any way they find convenient.³⁴ If they were really interested in an effective regulatory regime, these firms might have exhibited more diligence in using their national codes to enhance professional standards in the transnational field, in seeking sanctions against lawyers for conduct outside their home jurisdiction, or in accepting vicarious responsibility for the unethical acts of firm members stationed abroad. That the leading transnational firms have made only modest efforts in this regard augurs poorly for the success of any global code sponsored or administered by them.

Furthermore, in one crucial respect a global code of legal ethics is bound to differ from codes of domestic provenance: the supposed beneficiaries of a global code, the clients, have little need of one. By and large, transnational corporations and other powerful actors in the global economy are not in the same position *vis-à-vis* their professional advisors as typical domestic clients. These *emptors* are uncommonly capable of constructing their own *caveats*. They are sophisticated, repeat consumers of legal services; they often have their own in-house legal staff; they can seek second opinions from lawyers in other countries; they have the economic power to punish their misbehaving lawyers by firing them or suing them; and transnational companies are at least as likely as their lawyers to be sinners rather than sinned against.

Finally a global code of legal ethics is likely to prove ineffective in a symbolic sense as well as a practical one. Professional codes are often described as Janus-headed: they are meant both to reassure the public and to guide the profession. However, "hydra-headed" would better describe a code which is intended to operate in the transnational legal field.

³¹ As of 1995, 164 bar associations and law societies were affiliated with the IBA, while their counterparts in all European Community Member States and several candidate States are affiliated with the CCBE. E. Godfrey, *supra* n. 3 at p. xi.

³² The IBA "may bring incidents of alleged violations to the attention of relevant organizations" (IBA Preamble); CCBE members are asked to ensure that "national rules of deontology or professional practice [are] interpreted and applied whenever possible in a way consistent with . . . [the CCBE] code" and national bodies are to be involved in the event of complaints arising out of cross-border professional relations (CCBE s. 5.9).

³³ CCBE ss. 1.5, 2.4, IBA s. 1.

³⁴ This is a not unfamiliar story. In the analogous field of international standard setting, dominant firms purporting to speak as representatives of their home States, operate a virtual "secret government" (my phrase). See e.g. L. Salter, "The Housework of Capitalism: Standardization in the Communications and Information Technology Sectors" (1993-4) 23 *International Journal of Political Economy* 105.

Such a code must address the interests, not of a single “public”, but of a plethora of publics with differing and often opposing interests. As I have already suggested, not all of these publics are equally protected by domestic codes of legal ethics. Nor will they all be equally protected by global codes; *au contraire*: in the global sphere, there will be more publics, and very likely less protection. Likewise, in the global context, “profession” must be used in the plural, not the singular. It is not just that a global code seeks to regulate the activities of lawyers who physically reside in different countries, operate within different national legal systems, are immersed in different national legal cultures, and are presently regulated by different national legal-professional and state bodies. It is that national legal professions are deeply divided within themselves along fault lines of professional knowledge and functions, clientele, economic interest, ideology and demography.³⁵ Consequently, the relationship of professional constituencies to national professional structures, cultures and values and to the objectives, modalities and outcomes of professional regulation will vary profoundly.³⁶ And, as with publics, variances and conflicts amongst professional constituencies will grow exponentially across national boundaries.

Globalisation, moreover, has neither harmonised the interests of all States nor achieved convergence amongst legal professions within the transnational legal field.³⁷ As Santos reminds us, “globalized localisms”—the projection of the interests and institutions of the great economic powers, principally the United States—exist in tension with “localized globalisms”—the many different adjustments made by States to accommodate themselves to the new dispensation of global communications services, capital markets, disseminated manufacturing processes etc.³⁸ However, different States, regions, economic sectors, social classes and cultures experience these phenomena in proportions which are neither universal nor randomly distributed. This is axiomatic not only if we approach globalisation from a critical perspective with an emphasis on power relations, but also if we accept the theory of comparative advantage. After all, trade theory claims only that all trading countries are better off in the aggregate; it accepts that particular producers and providers may be winners or losers. Thus, from quite opposite perspectives similar conclusions flow: States, clienteles, legal professions and elements within each of them experience globalisation in ways which may range from very positive to very negative. Hence their fundamental perspectives on lawyers and legal professionalism will differ and diverge as well.

A few examples may help. A given country’s political situation and its location within the global economy may determine, for example, whether its government regards the local bar as a pillar of civil society and defender of national interests, deserving maximum protection, or as a rent-seeking monopoly whose destabilisation by foreign competitors would benefit consumers. Countries whose prosperity is based on their role as global providers

³⁵ H. W. Arthurs, “A Lot of Knowledge is a Dangerous Thing: Can the Legal Profession Survive the Knowledge Explosion?” (1995) 18 *Dalhousie Law Journal* 295.

³⁶ V. Gessner, “Global Legal Interaction and Legal Cultures” (1994) 7 *Ratio Juris* 132, V. Oligati, “Process and Policy of Legal Professionalization in Europe: The Deconstruction of a Normative Order” in Y. Dezalay and D. Sugarman (eds), *Profession Competition and Professional Power* (London/New York, Routledge, 1995). For a different perspective, see L. Friedman, “Is There a Modern Legal Culture?” (1994) 7 *Ratio Juris* 117.

³⁷ B. Garth, “Transnational Legal Practice and Professional Ideology” (1985) 7 *Michigan Yearbook of International Legal Studies* 3.

³⁸ B. De Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995) at pp. 250 ff.

of producer services such as banking and insurance may need one kind of legal profession; those which function primarily as suppliers of primary products or cheap labour may need quite another. Countries which have continued to provide reasonable levels of social assistance, including legal aid, may be much less concerned about enforcing the bar's obligation to represent poor people than those where *pro bono* representation is the only form of legal services the poor are likely to receive.

But, to reiterate, the contradictions inherent in the project of a global code of legal ethics are attributable ultimately not to the absence of a homogeneous professional community, a common legal vocabulary or common legal-cultural referents, but rather to the presence of divergences of experiences and conflicts of interests amongst national and sectoral interests.

What, then, is the point of the exercise?

3. *The Transnational Regulation of the Legal Profession: The Particular and the Universal*

The point of the exercise, of creating a transnational code of legal ethics, I suggest, is to advance the general project of globalisation, including its special variant, "globalization of the mind".³⁹

Globalisation of the legal profession is not in fact a process of cross-pollination and synthesis which gradually weaves the world's legal systems, cultures and professions together into a universal, cosmopolitan ethical regime. Rather, it is an example of "globalized localism", specifically the projection into other economies and polities of "Cravathism",⁴⁰ an Anglo-American model of corporate legal practice, professionalism and private governance and, ultimately, of capitalism.⁴¹

Seen in this context, the project of a global code of legal ethics is part of a broader tendency towards "globalization of the mind": the desire amongst knowledge workers, professionals and scholars in the policy disciplines to participate in a transnational discourse, shaped by the structures of global capitalism.

In the mainstream variant—in disciplines such as economics and management and law, for example—globalisation of the mind involves the embrace and reinforcement of the underlying intellectual assumptions, values and institutions of free markets. In the emancipatory variant—in the feminist, environmentalist and human rights movements, for example—the focus is on legal empowerment through the articulation of rights and freedoms and the formulation of legal strategies to give effect to them. In both variants, however, there is an urge to universalise the experience of the liberal democracies, especially that of the most powerful such country, the United States.⁴²

This tendency to universalise is, it seems to me, at once the most salient and attractive and also the most problematic characteristic of proposals for a global code of legal ethics.

³⁹ H. W. Arthurs, "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1998) 12 *Can. Journal of Law & Society* 219.

⁴⁰ Arthurs and Kreklewich, *supra* n. 2 and notes in that article.

⁴¹ See e.g. W. Hutton, *The State We're In* (London, Jonathan Cape, 1995); B. Stallings and W. Streek, "Capitalisms in Conflict? The United States, Europe and Japan in the Post-Cold War World" in B. Stallings (ed), *Global Change, Regional Response* (Cambridge, Cambridge University Press, 1995).

⁴² See e.g. B. Ackerman, *The Rise of World Constitutionalism* (New Haven, Conn., Yale Law School Occasional Papers, Second series, No. 3, 1997).

It expresses genuine good intentions—whether realistic or not is another matter—and a willingness to engage with others with no preconceptions or preconditions. But it is a naïve universalism.⁴³ It ignores the historic specificity of all legal cultures and the divergent interests of countries and economic sectors, not to mention the many constituencies within each national legal profession.

More importantly, given the complexity and volatility of the transnational legal field, proposals for a global code of legal ethics also ignore the fundamental insights of legal pluralism: that normative systems are not simply projected from a powerful central source into a void; that they originate in every social field; that they interact with other normative systems with unpredictable results, and that they often persist in mutant forms long after they are supposed to have disappeared. A global ethics code is almost certain to collide with the myriad of normative systems within law firms, professional networks, local communities, state bureaucracies and business organizations which will exert powerful influences on actors within their respective “social fields”.

For all these reasons, a global code of legal ethics is likely to be no more effective in regulating the conduct of lawyers in the field of transnational business and law than national codes are in regulating such conduct in the many domestic fields in which lawyers practise.

⁴³ A good example of this tendency is J. Barker, “The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services” (1996) 19 *Houston Journal of International Law* 95 at pp. 140–1: “On the transnational level, the actual content of the common code of ethics is a less troublesome issue than the manner in which the common code will be enforced. This is because internationally, many of the general principles of legal behaviour are based on the philosophy of morality and the rules of logic. . . . Therefore, it seems somewhat realistic that a common code of professional responsibility could be developed among the NAFTA member countries. . .”

