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Citation: 2 Legal Ethics 29 1999



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Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct

ANDREW BOON¹ & JOHN FLOOD²

1. Introduction

Is a transcendent ethics for a global legal profession feasible? Increasing activity in two areas has given credence to the idea. The first is the participation by lawyers in international deal-making and international commercial dispute resolution. In turn, this may be seen to provide the momentum for the growth of multi-national law firms and multi-disciplinary practices. The second area of activity concerns attempts to establish international codes of ethics by international bodies such as the International Bar Association (IBA) and the Council of the Bars and Law Societies of the European Union (CCBE). These developments may appear to run counter to a trend towards subjecting professions to higher levels of external monitoring and interference. They have occurred at a time when many outside the legal profession, and some within, doubt the legitimacy of self-regulation, particularly given the increasingly fractured nature of professions like law in their domestic sphere.³ We therefore consider a third area, one that contextualises the aspiration to transcend local contexts and conditions. Theorising that has been taking place in the sociology of globalisation and communitarianism, especially in the work of Giddens⁴ and Selznick,⁵ suggests mechanisms for the homogenisation of experience and for identifying the ethical means and ends that professions might pursue. Giddens is concerned with the disembedding force of globalisation, and hence the potential havoc it can wreak. Selznick argues for a communitarian ethic which contains the elements of morality and selfhood, character and civic virtue and reason.

¹ Head of the School of Law, University of Westminster, London, UK.

² Professor of Law and Sociology, University of Westminster, London, UK.

³ It is suggested that the polarised profession identified by Heinz and Lauman (J. Heinz & E. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Chicago, Ill., American Bar Foundation and New York, Russell Sage Foundation, 1982)) has now fully emerged in the UK, with significant implications for professional ethics. Firms serving influential clients and operating in the corporate sector have a strong commercial-entrepreneurial ethos, whereas those firms serving the individual, non-influential clients and markets are seeking to retain a traditional professionalism rooted in the idea of public service—G. Hanlon, "A Profession in Transition? Lawyers, The Market and Significant Others" (1997) 60 *Modern Law Review* 798 at 799, and see also J. Flood, "Megalaw in the UK: Professionalism or Corporatism? A Preliminary Report" (1989) 64 *Indiana Law Journal* 569, C. Stanley, "Enterprising Lawyers: Changes in the Market for Legal Services" (1991) 25 *Law Teacher* 44.

⁴ A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, Polity Press, 1991) and see also B. D. Santos *Towards a New Common Sense: Law Science and Politics in the Paradigmatic Transition* (London, New York: Routledge, 1995).

⁵ P. Selznick, "The Idea of A Communitarian Morality" (1987) 75 *California Law Review* 445.

These possibilities for a new ethical professional order are set in the context of declining faith in the possibility of universal ethical values. Our third area not only addresses this issue but responds to the belief that most discussions of professional ethics have focused on surface or behaviouristic issues of aspects of professional behaviour. Before codes were instituted in the UK, "ascriptive characteristics" were of considerable importance and professional guides to etiquette implicitly relied on them.⁶ While agreeing that behaviouristic issues do need analysis, intensive concentration on them neglects the deeper, more theoretical aspects of ethics. Our approach borrows stylistically from Lukes's discourse on power.⁷ He argues that to perceive of power in purely behaviouristic terms omits broad areas of the operation of power, that is, the explicit act of A influencing B is merely one dimension of power. Other dimensions have to be opened up wherein analysts examine the non-explicit formulations of power such as agenda-setting and constraint-determination. Therefore, while we begin at the behaviouristic level, we attempt to go deeper by engaging with social theory. This step enables us to construct a more elegant theory of the globalisation of professional ethics.

The key question the article considers is, given high levels of scepticism regarding the possibility of achieving "universal ethics", what lies behind the development of international codes? From this a number of other questions arise. Does the momentum come from professional bodies, from lawyers engaged in international commerce and finance or from other interests? Do these initiatives pave the way for collaboration between lawyers and professional bodies concerned about wider spheres of activity, for example in relation to human rights? Can such collaborations truly create the potential for migration of professional norms between jurisdictions and the need to create common understandings about ethical obligations, lawyer to client, lawyer to tribunal and lawyer to lawyer? Key figures in the movement hail the potential for a global harmonisation of codes of professional ethics. John Toulmin QC, who was president of the CCBE in 1993, thus asserted that a worldwide code could be founded on the US Model Rules of Professional Conduct, the Japanese Code and the CCBE Code.⁸ Underlying these questions is another fundamental question that concerns us: what incentive do diverse legal professions have to subscribe to potentially alien norms of conduct?

Our path through the issues is as follows. First, we examine the activity of the CCBE and IBA, the contexts in which they function, and the codes that they have produced, as case studies of the production of international codes of ethics. These two codes are among the more mature attempts in the production of international ethical codes and therefore provide sufficient material for analysis and comparison. Secondly, we compare the codes and examine the three functions of the promulgation of ethical codes that constitute their sociological comprehensiveness: the deontological function, the legitimisation function and the political function, and the extent to which these provide the momentum for globalisation of lawyers' ethics.⁹ We conclude with a discussion of the wider issues raised by exploring the interplay of ethics and globalisation.

⁶ R. Abel, "The Decline of Professionalism" (1986) 49 *Modern Law Review* 1.

⁷ S. Lukes, *Power: A Radical View* (London, Macmillan, 1974).

⁸ J. Toulmin, "A Worldwide Common Code of Professional Ethics?" (1991/2) 15 *Fordham International Law Journal* 673.

⁹ There has been a recent increase in attention to the issue of how codes of ethics might best be analysed and compared (see D. Nicolson, "Mapping Professional Legal Ethics: The Form and Focus of the Codes" [1998]

2. *The Council of the Bars and Law Societies of the European Union (CCBE)*

The CCBE is the liaison body for the legal professions of the countries comprising the European Community (EC).¹⁰ The CCBE studies questions affecting the legal profession of the Member States and formulates “solutions designed to coordinate and harmonize professional practice”. It maintains contacts with other international organisations of lawyers, including the IBA, submits comments prepared by specialist committees to European institutions,¹¹ and maintains permanent delegations to the European Court of Justice, the Court of First Instance of the European Communities and the “European Jurisdictions of Human Rights”.¹² The adoption of the “common code of conduct” in 1988 followed the promulgation of the fundamental principles of professional conduct applicable to EC lawyers in the Declaration of Perugia in 1977 and, following the decision to create a code, six years of discussion between representatives of the different legal traditions of the EC.¹³ The result, the “Code of Conduct for Lawyers in the European Community”, applies to the cross-border activities of lawyers within the EC and has been accepted by most of the EU professional bodies.¹⁴ As discussed below, however, it is intended to have a wider impact than this.

The creation of the CCBE code followed the policy of the European Community towards eliminating internal restrictions on the free movement of goods and services.¹⁵ Part of the CCBE’s early agenda was the application of the directive on lawyers’ services and the preparation of a directive on the exercise by lawyers of rights of establishment.¹⁶ It necessarily brought to the fore issues of conduct, and led directly to the consideration of inconsistencies in etiquette between the European bars. These were most clearly identified, *inter alia*, as problems relating to professional privilege, specialisation and advertising, information relating to fees, the protection of the consumer of legal services and the

Legal Ethics 51 and L. E. De Groot-Van Leeuwen & W. T. De Groot “Studying Codes of Conduct: A Descriptive Framework for Comparative Research” [1998] *Legal Ethics* 155). We have not adopted the structures outlined by these authors but agree broadly that production, audience, focus, communication and function are central. It will be seen that this article deals with these issues pervasively.

¹⁰ The professions originally represented were *Avocat/Advocaat/Rechtsanwalt* (Belgium), *Advokat* (Denmark), *Avocat* (France), *Rechtsanwalt* (Germany), *Dikigoros* (Greece), Barrister or Solicitor (Ireland), *Avvocato* or *Procuratore* (Italy), *Avocat-Avoué/Rechtsanwalt* (Luxembourg), *Advocaat* (Netherlands), *Advogado* (Portugal), *Abogado* (Spain), Advocate, Barrister or Solicitor (United Kingdom). The Bars of Austria, Cyprus, Finland, Norway, Sweden, Switzerland and Czechoslovakia had observer status (CCBE pamphlet, 1992).

¹¹ “. . . on such subjects as competition and intellectual property, company law and lawyers’ pensions” (*id.*).

¹² *Id.*

¹³ See L. S. Terry, “An Introduction to the European Community’s Legal Ethics Code Part I: An Analysis of the CCBE’s Code of Conduct” (1993) 7 *Georgetown Journal of Legal Ethics* 1 for a detailed account of the process of drafting the code, starting with a draft prepared by a Scottish solicitor in 1983, and J. Toulmin, “Ethical Rules and Professional Ideologies”, Paper for the Cornell Law School seminar in Paris, 4–5 July 1997 at p.13.

¹⁴ “CCBE Code of Conduct for Lawyers in the European Community” in N. Taylor (ed), *The Guide to the Professional Conduct of Solicitors* (7th edn., London, Law Society, 1996), p.172 and para. 1.5.

¹⁵ The CCBE Code refers to the “. . . continued integration of the European Community and the increasing frequency of the cross-border activities of lawyers within the community . . .” (Preamble, para. 1.3). The Services Directive (EC Directive of 1977 on Lawyers’ Services) permits the rendering of occasional legal services in the host State rather than establishment. The Diplomas Directive (EC Directive of 1989 on Mutual Recognition of Diplomas) provides for the recognition of legal qualifications gained in one EU State in another EU State subject to either an aptitude test or adaptation period (most States have opted for the latter).

¹⁶ *Supra* n. 10.

education of young lawyers.¹⁷ The aim of harmonisation was to be pursued by each local bar or law society in relation to the cross-border activities of EC lawyers. No date was set for the adoption of a common code by all the member associations, and the extent to which it is a realistic goal is debatable. The CCBE code is, for example, less comprehensive than the rules of conduct promulgated by the Law Society of England and Wales. In most instances, the Law Society would argue, its own rules are more extensive and detailed than the CCBE code can aspire to be. This is itself anomalous, in that the Law Society conspicuously refuses to call its own provisions "a code".¹⁸ Were the CCBE Code to stand alone as a code for European lawyers it would reflect considerable confidence in the ability of lawyers to interpret and observe broad ethical principles, as opposed to detailed rules of conduct.¹⁹ Conversely, a European code more detailed than the national codes would be more effective in stimulating debate in national professional associations. It would also force the pace of harmonisation, if, indeed, that is regarded by the European legal professions as a desirable end.

3. *The International Bar Association's International Code of Ethics and General Principles*

The International Bar Association was founded in 1947 in New York.²⁰ Notionally, it brings together lawyers and bar associations from around the world but, in reality, it primarily represents elite lawyers. Its strength lies in its section and committee structure; each section reflects a broad area of work and contains a raft of committees devoted to substantive and procedural issues.²¹ Despite its lack of representative status it has influence. For example, it played a signal role in promoting the establishment of a permanent international criminal court. Similarly, although the IBA has no official status in the regulation of lawyers, its effort to create an international code of ethics for lawyers reflects a strong aspiration to represent the global legal profession. There are two main components in the IBA's initiative; the Code of Ethics and the General Principles of Ethics. The IBA International Code of Ethics, which has been adopted by the Law Society (of England and Wales),²² "applies to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction".²³ The General Principles of Ethics do not presume directly to affect practitioners (see Appendix). Rather, they serve as a yardstick against which members can judge the rules of their own national associations "without prejudice to the direct application of any such Code of Ethics which Member Organizations may currently have in house".²⁴

Both the code and the general principles tread familiar ethical ground covering obligations of loyalty to clients, candour in general and, particularly, as part of a duty to the court. The IBA Code is an even shorter document than the CCBE Code, comprising 21

¹⁷ *Id.*

¹⁸ Hence the "Guide", *supra* n.14.

¹⁹ Terry, *supra* n. 13, and "An Introduction to the European Community's Legal Ethics Code Part II" (1993) 7 *Georgetown Journal of Legal Ethics* 348.

²⁰ See the IBA Website at <http://www.ibanet.org>.

²¹ For example, Committee J of the Section on Business Law has been central to the adoption of international practices relating to cross-border insolvency.

²² "International Code of Ethics of the International Bar Association" (see *The Guide, supra* n.14, p.159).

²³ *Id.*, "Preamble".

²⁴ *International Bar News*, Summer 1995, p. 47.

brief paragraphs, and, like the CCBE Code, it contains nothing remarkable in terms of the ethical principles espoused. Its prohibitions are often subject to national codes, for example, in relation to advertising and soliciting and the delegation of work to non-qualified personnel.²⁵ In the next section we compare the salient features of the two codes.

4. Comparison of the Codes

4.1 Aims and Scope

The CCBE code has two broad aims. The first is to “mitigate the difficulties which result from the application of double deontology . . .” in the European Community.²⁶ The concept of deontology is in professional ethical discourse synonymous with codes of conduct.²⁷ In the context of the code it refers to lawyers subject to the codes of their national association (the “home member State”), and of the jurisdiction where they work (the “host member State”).²⁸ The second aim is that EC member states consider the code “in all revisions of national rules . . . or professional practice with a view to their progressive harmonization”.²⁹ The IBA has less clear objectives in publishing its code. The nearest the Code itself comes to a rationale is a statement that it represents “a guide to what the IBA considers to be a desirable course of conduct by all lawyers engaged in the international practice of law”.³⁰ As to scope, the CCBE Code applies to “professional contacts with lawyers of member states other than his own” and professional activities conducted by such lawyers in such States.³¹ The IBA code, as noted above, purports to govern all lawyers engaged in the international practice of law. It might, therefore, aspire to govern the interaction between a lawyer from the United States and the European Union.³²

4.2 Virtues

Apart from virtues integral to other obligations, particularly in dealings with clients and the courts (see below) the CCBE Code focuses on independence, freedom from all influence including personal interest, as its primary virtue.³³ The IBA Code also emphasises independence in general,³⁴ and cites the specific example of a right to refuse cases unless assigned by a competent body.³⁵ There is a focus in both codes on relations between lawyers. The emphasis on collegiality is reflected in obligations to treat colleagues

²⁵ *Supra* n. 22, paras. 8 and 20 (hereafter “IBA Code”).

²⁶ *Supra* n. 14, para. 1.3.1 of the Preamble (hereafter “CCBE Code”).

²⁷ Deontology, the study of duty, suggests a system of ethics with a “given” moral content, an internal logic and a mode of evaluation where the morality of actions are considered independently of consequences (J. Pearsall & B. Trumble (eds), *The Oxford English Reference Dictionary* (Oxford & New York, Oxford University Press, 1995), and see D. Luban, “Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to Lawyers and Justice” (1988) 49 *Maryland Law Review* 424 at 428).

²⁸ CCBE Code, para. 1.6

²⁹ *Id.*

³⁰ IBA Code, “Preamble”.

³¹ CCBE Code, para. 1.5

³² US lawyers are not covered by the CCBE Code which governs relations between lawyers from the different European Union states (*id.*, paras.1.3 and 1.5).

³³ CCBE Code, para. 5.8.

³⁴ IBA Code, Rule 3.

³⁵ *Id.*, Rule 10.

with courtesy and fairness,³⁶ or to achieve trust and co-operation in the interest of clients.³⁷

4.3 Clients and Third Parties, Including Wider Public Duties and Duties Owed to the Court

In common with all codes of lawyers' ethics there are a collection of statements in both codes about the duties owed to clients. The IBA Code states that the interests of clients are the primary concern of lawyers.³⁸ It emphasises the need to defend the client "without fear",³⁹ give candid advice and avoid conflicts of interest. The CCBE Code stresses that the relationship between lawyer and client is based on honour, trust and integrity,⁴⁰ rooted in the obligation of confidentiality,⁴¹ loyalty, specifically manifest in a duty to avoid conflicts of interest,⁴² and the need to advise promptly, conscientiously and diligently.⁴³ Interestingly, the CCBE adopts the Law Society's formulation, that the lawyer's obligation is always to act in the client's best interests,⁴⁴ but qualifies this in stating that the lawyer should not compromise his professional standards to please his client.⁴⁵ The CCBE Code allows a lawyer to withdraw from a case if this will not cause the client prejudice,⁴⁶ but, unlike the IBA Code, does not require that there be a good cause for withdrawing.⁴⁷ The CCBE Code also requires a lawyer to use his best endeavours to ensure that insurance cover enjoyed in the home State is extended to clients in the host State. If this is not possible, the lawyer is enjoined to insure on the same basis as required in the host State and to inform clients of this.⁴⁸

In common with other codes of ethics for lawyers, the duties owed to third parties under both codes are considerably fewer than those owed to clients. The most obvious manifestation of any such responsibility in both codes is the duty not to communicate directly with represented individuals.⁴⁹ Apart from this the only obligations in the IBA Code which touch on third party interests are the duty not to stir up litigation and to endeavour to reach settlements, albeit in the client's interests.⁵⁰ There is little in the way of public duties expressed in either code. One exception to this is the plea to lawyers in the CCBE Code to recognise, in the interests of European integration, the need to train lawyers from other Member States.⁵¹ Another is the duty to the court. This is drawn in some detail in both codes.

³⁶ *Id.*, Rule 4.

³⁷ CCBE Code, para. 5.1.

³⁸ IBA Code, Rule 17.

³⁹ *Id.*, Rule 6.

⁴⁰ CCBE Code, para. 2.2.

⁴¹ *Id.*, paras 2.3.1. and 2.3.2.

⁴² *Id.*, para 3.2

⁴³ *Id.*, para. 3.1.2.

⁴⁴ *Id.*, para. 2.7.

⁴⁵ *Id.*, para. 2.1.1.

⁴⁶ *Id.*, para. 3.14.

⁴⁷ IBA Code, Rule 10.

⁴⁸ CCBE Code, para. 3.9.

⁴⁹ IBA Code, Rule 7, CCBE Code, para. 5.5.

⁵⁰ IBA Code, Rule 11.

⁵¹ CCBE Code, para. 5.8.

The IBA Code lays down general obligations of respect and candour to the court,⁵² but, confusingly when it comes to the detail, states that lawyers must “never knowingly give to the court incorrect information or advice which is to their knowledge contrary to the law”.⁵³ Similarly, the CCBE Code imposes obligations to comply with the rules of the tribunal, to display respect and courtesy and to have due regard for the fair conduct of proceedings.⁵⁴ More emphatically, the CCBE Code states that, “[a] lawyer shall never knowingly give false or misleading information to the court”.⁵⁵ On the face of it, this goes beyond the professions’ codes in the United Kingdom or the United States which are more closely circumscribed in relation to a lawyer’s responsibility to the court.⁵⁶ However, it may be that the CCBE intends a more limited obligation, i.e., to observe the law which, in most cases, is as might be expected.

4.4 Conflicts of Interest and Confidentiality

Conflicts of interest are dealt with briefly in both codes and reveal substantial differences. The IBA Code states that conflicts of interest must be avoided in litigation but are acceptable, following full disclosure, in other matters.⁵⁷ The CCBE Code bans a lawyer from acting if there is a significant risk of a conflict of interests between clients in any matter.⁵⁸ The only exception is where the circumstances suggest to the lawyer that it might be appropriate for him, with the parties’ consent, to act as a mediator between the parties to resolve the difference between them.⁵⁹

More substantial difficulties arise in relation to confidentiality. Both codes uphold the sanctity of information divulged by clients or received by clients.⁶⁰ The situation is considerably more complex in relation to information received from other lawyers. The IBA Code states that:

“Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers shall in principle be accorded a confidential character as far as the court is concerned, unless certain promises or acknowledgements are made therein on behalf of the client.”⁶¹

This position skates over the difficulties arising in this area as the situation addressed by the CCBE Code illustrates. In Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain written or oral communications between lawyers are regarded as confidential. In the UK and Ireland communications made with the intention of settling a dispute are protected from production in court. In Denmark the duty to keep clients informed is more extensive, but oral communications between lawyers with a view to settlement are usually

⁵² IBA Code, Rules 6 and 10.

⁵³ *Id.*, Rule 6.

⁵⁴ CCBE Code, para. 4.

⁵⁵ *Id.*, para.4.4.

⁵⁶ See for example *The Code of Conduct for the Bar of England and Wales* (London, Bar Council, 1990), as amended, which imposes a duty only to inform the court of “relevant decisions and legislative provisions” and “procedural irregularities” (para. 6.10.) and discussion by Terry, *supra* n.13 at pp.36–7.

⁵⁷ IBA Code, Rule 13.

⁵⁸ CCBE Code, para. 3.2.

⁵⁹ CCBE Code, commentary on Section 3.

⁶⁰ IBA Code, Rule 14, and CCBE Code, para. 2.3.

⁶¹ IBA Code, Rule 5.

confidential. In the Netherlands there is a presumption that communications between lawyers are confidential. In Germany there is no confidentiality in relation to such communications and they may be admitted in court.⁶² For these reasons the CCBE Code is understandably diffident. It suggests that, if lawyers dealing with lawyers in other Member States wish a document to be treated as confidential, they should mark it as such. The obligation on the lawyer recipient who is unable to accept this is, according to the Code, to return it to the sender without revealing its contents to anyone else.⁶³

4.5 Self-interest: Fees and Advertising

Exhortations, such as those in the IBA Code, to uphold the honour and dignity of the legal profession⁶⁴ are ambiguous. They are often seen as self-interest writ large,⁶⁵ but can be regarded as signalling an expectation of high standards. In other respects the IBA's Code is more explicitly protectionist than that of the CCBE, cautioning lawyers against allowing non-lawyers to pass themselves off as qualified.⁶⁶ The IBA Code is, however, more restrained in relation to advertising, another area where self-interest could be said to operate, imposing an obligation to observe the rules on advertising of both their home and host States.⁶⁷ Restricting advertising in this way is a classic example of the enlightened self-interest necessary in order to keep commercialism at bay. Self-interest is more marked in the IBA's *laissez faire* stance on restricting liability.⁶⁸ The CCBE Code contains a similar provision to the IBA Code on advertising.⁶⁹ The focus of its restrictive practice provisions is the prevention of lawyers from other EU countries engaging in occupations that are regarded as "incompatible" in the host State.⁷⁰ The level of self-interest might also be tested by provisions on fees and the handling of money. Apart from common prohibitions on co-mingling office and client account monies,⁷¹ both codes adopt modern and liberal approaches to fees. The IBA Code provides that a deposit for costs must reflect a true estimate of charges,⁷² but should not be demanded at a time when a client would be unable to find other assistance. It also states that fees should be proportionate to the sum involved.⁷³ Similarly, the CCBE Code provides that the fees charged shall be reasonable and fully disclosed, that deposits shall not exceed a reasonable estimate of fees and disbursements⁷⁴ and that detailed information on costs shall be provided on request by the client.⁷⁵

The most significant difference between the two Codes is in relation to contingency fees. The IBA Code merely provides that, where they are permitted, they should be

⁶² CCBE Code, commentary on para. 5.3.

⁶³ *Id.*, paras. 5.3.1 and 5.3.2.

⁶⁴ IBA Code, Rule 2.

⁶⁵ Nicolson, *supra* n.9.

⁶⁶ IBA Code, Rule 20.

⁶⁷ *Id.*, Rule 8.

⁶⁸ *Id.*, Rule 21.

⁶⁹ CCBE Code, para. 2.6.

⁷⁰ *Id.*, para. 2.5.

⁷¹ CCBE Code, para. 3.8, IBA Code, Rule 15.

⁷² IBA Code, Rule 16.

⁷³ *Id.*, Rule 17.

⁷⁴ CCBE Code, para. 3.5.

⁷⁵ *Id.*, para. 3.8.

reasonable.⁷⁶ The CCBE Code, however, provides that a lawyer may not enter a *pactum de quota litis*, an agreement whereby the client agrees to pay the lawyer a share of the result, whether that result is money or other benefit secured.⁷⁷ This would appear to catch conditional fee agreements. Lawyers in the UK are, however, saved from embarrassment. Agreements “that fees be charged in proportion to the value of a matter” are excluded from the general prohibition provided the charging arrangement is part of a recognised fee scale or controlled by a competent authority with jurisdiction over the lawyer.⁷⁸ Both codes reflect ambivalence and confusion about speculative fee arrangements. The CCBE Code suggests that the *pactum de quota litis* is objectionable because it encourages “speculative litigation and is likely to be abused”, precisely the criticisms levelled at conditional fee agreements.⁷⁹ The IBA Code provides, with no apparent sense of irony, that lawyers should not acquire a financial interest in the subject matter of a case.⁸⁰

4.6 Regulation

The IBA Code has no significant regulatory implications. Despite the claim that its provisions have the status of rules, it expects lawyers to observe the ethical standards of the jurisdiction in which they were admitted and those of the country in which they are working.⁸¹ The IBA is reduced to warning that it “may bring incidents of alleged violations to the attention of relevant organizations”.⁸² The CCBE Code is only slightly more intrusive on domestic regulatory arrangements, invoking instead the “corporate spirit” of lawyers.⁸³ The approach to disputes between lawyers from different jurisdictions is indicative. The Code provides that where a lawyer has a dispute over professional conduct with a lawyer from another State, he should first raise the matter with the other, try to settle in a “friendly way”, and, finally, ask the home professional associations to mediate before commencing any proceedings.⁸⁴

5. *The Functions of International Codes*

Here we identify three functions, deontology, legitimacy and politics, which capture the potential motivational forces in the production of ethical codes. We also try to excavate deeper into the problematics of ethical codes before we move onto the theorising involved.

5.1 The Deontological Function

The IBA’s *General Principles of Ethics* is most clearly directed to ensuring that, worldwide, the codes of lawyers, and particularly the professions of Europe and North America, are brought into line. Its International Code of Ethics moves only slightly beyond the expression of broad principles, to specific instances, for example, the setting of fees, the

⁷⁶ IBA Code, Rule 18.

⁷⁷ CCBE Code, paras. 3.3.1 and 3.3.2.

⁷⁸ *Id.*, para. 3.3.3.

⁷⁹ P. Abrams, A. Boon & D. O’Brien, “Access to Justice: The Collision of Funding and Ethics” (1998) 3 *Contemporary Issues in Law* 59.

⁸⁰ IBA Code, Rule 12.

⁸¹ IBA Code, Rule 1.

⁸² *Id.*, “Preamble”.

⁸³ CCBE Code, para. 5.1.1.

⁸⁴ *Id.*, para. 5.9.

seeking of deposits and the terms on which retainers are terminated.⁸⁵ This is not only ambitious, because the IBA has little or no regulatory muscle, it also runs counter to the attempt of the CCBE code to harmonise the ethics of European lawyers. Were lawyers working in Europe to take the IBA code seriously there would, in some small but significant areas, be a risk of “triple deontology”: the home code, the CCBE code and the IBA code could all claim jurisdiction.⁸⁶ Nevertheless, the similarity between these documents is so great, and their contents so general, that this risk is negligible. To assess their validity as a framework for a universal code of ethics for lawyers, it is necessary to explore the scale of the problem of “double deontology”, that is, multiple allegiances to national codes. Next we examine some sites where the double deontology problem lurks.

5.1.1 Transnational Trade

International trade is the driving force behind the globalising process and trade and markets have become a kind of global language. Yet, to suggest that global trade may carry the ethics of individual legal professions in its wake may imply a level of global economic integration that has yet to materialise. Indeed, it is the international financial and capital markets that are the focus of international economic activity. These markets are confined to three main regions, North America, Europe and the Pacific Rim, and revolve around micro-markets. Activity within these markets imposes considerable pressures on those elements of legal professions that serve corporate finance and commerce. For, with the nation State giving way to that of the super-region, professions potentially active in these markets must transcend their traditional geographical boundaries or risk being marginalised in national and international markets.⁸⁷ And here we discover another motive for moving the ethics of legal professions to an international stage. Barriers to the success of the super-regional firms are institutionalised in domestic codes of conduct. This is because, in the history of professional evolution, professions avoided turf wars in their national spheres of operation by reaching “settlements” with other professions.⁸⁸

The division of advocacy and conveyancing between English barristers and solicitors is a classic example of a settlement enshrined in professional ethics. Traditions of etiquette, such as the prohibition on barristers accepting instructions from professionals other than solicitors, evolved to protect the settlement governing advocacy. The etiquette governing intra-professional relations, which are part of the fabric of professional ethics, potentially impede competitiveness in the international market for legal services. Not only do professionals serving the corporate and financial sector have strong incentives to overthrow such traditions, they are inexorably driven towards an ideal competitive form which is the antithesis of anti-competitive regulation. The market determines the structure of the competitive unit. Therefore, national and international firms offering multinational practices or multi-disciplinary “one stop shops” may, because of their in-house expertise and convenience for clients, be the dominant organisational form for handling transnational

⁸⁵ IBA Code, Rules 17–18, 16 and 10.

⁸⁶ A mischievous suggestion, but one with some substance in that the drive towards convergence/harmonisation is in fact driving lawyers to divergence in following codes (see Terry, *supra* n.19).

⁸⁷ J. Flood, “The Cultures of Globalization: Professional Restructuring for the International Market” in Y. Dezalay & D. Sugarman (eds), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (London, Routledge, 1995) at p140.

⁸⁸ A. Abbott, *The System of Professions: An Essay on the Expert Division of Labor* (Chicago, Ill., University of Chicago Press, 1988).

transactions and transnational disputes. This prospect suggests that the ethics of local, disciplinary based professions may transmute into an ethic reflecting a multi-professional ethical consensus or, in cases of extreme specialisation, an adoption of the ethos and perspectives of the commercial sector served.

5.1.2 Transnational Dispute Resolution

Trade involving corporations from different legal jurisdictions carries in its wake the need for transnational dispute resolution. This represents an opportunity for considerable invisible earnings for nations and for legal and other professionals. It also presents considerable opportunity for legal professional activity. Several areas of dispute resolution are relevant in the commercial sphere. We find in commercial contracts clauses providing for *forum conveniens*, and for the resolution of disputes by arbitration or mediation, usually in one of the major centres for international commercial dispute resolution. Finally, there are new horizons in transnational dispute resolution. In the commercial sphere there is collaboration between lawyers to assemble portfolios of relevant law when a legal dispute transcends national borders but no provision has been made for jurisdictions or mechanisms for dealing with that dispute.

(a) National Jurisdictions as *Forum Conveniens*

Some countries have become established as centres of international commercial dispute resolution. In the UK, for example, 75 per cent of the Commercial Court's case load involved non-British disputants,⁸⁹ generating a significant volume of trade by the home legal professions.⁹⁰ Since the disputants tend, however, to be represented by lawyers from the *forum conveniens*, there is little need for interaction between lawyers of different jurisdictions.

(b) International Alternative Dispute Resolution

The growth of international arbitration and mediation provides one of the most obvious opportunities to engage in international dispute resolution.⁹¹ Lawyers from different jurisdictions are sometimes impelled to work together in order to resolve disputes. In private dispute resolution across international borders there are increasing opportunities to customise arbitration and mediation, there are circumstances where the parties and their representatives must assimilate and accommodate ethical norms from other jurisdictions. An example of this arose in the French case concerning the Kuwait Foreign Trading Contracting and Investment Co.⁹² It was held that the fact that the chairman of an arbitration panel was an English Queen's Counsel, when one of the parties was represented by a barrister from the same chambers, did not create "common interests or any economic or intellectual interdependence" so as to raise a presumption of bias. The acceptance by an overseas court of an ethical norm of the English legal profession, that the sharing of chambers is not a material connection, demonstrates the portability of ethical understandings between jurisdictions.

⁸⁹ K. Dillon, "Out of the Robes and into the Ring" *Legal Business*, May 1993 at p 46.

⁹⁰ In 1988 British law firms generated £300 million in overseas earnings (*Law Society Gazette*, Lawyers' foreign earnings up 259: v. 86, p. 2. 1989).

⁹¹ Y. Dezalay & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of an International Legal Order* (Chicago, Ill., University of Chicago Press, 1996).

⁹² Paris, Court of Appeal 1991 [1993] ADRLJ 167.

(c) *Ad Hoc* Dispute Resolution

In some cases no framework for resolving a dispute is appropriate to the presenting legal problem. Traditional conflict of laws may be inadequate to resolve the jurisdiction issue. A classic example was the Maxwell insolvency in which a UK business held almost all of its assets in the USA. Following the general collapse of the Maxwell financial empire, the UK business found itself simultaneously under a UK administration order and in the US Chapter 11 insolvency regime. The reconciliation of incommensurable insolvency rules, and the creation of a private legal system by American and English lawyers, was accepted by the courts in both countries as the only approach that would avoid expensive litigation. This was clearly an exceptional case in terms of both complexity and expense, but the complexity of international business could see such privately negotiated legal regimes becoming more common. Clearly, a high level of common understanding is the only basis on which this level of dispute resolution can progress.⁹³

(d) International Jurisdictions

A relatively new mechanism in this field is the international trade arbitration tribunal created by the World Trade Organisation. It is a binding jurisdiction over the 130 States, comprising the vast majority of the world's major trading nations, which is accessible to private companies. Since 1996 over 87 disputes have been presented for resolution. The rate of litigation is predicted to increase as private companies find that states can be made to comply with the General Agreement on Tariffs and Trade and Trade in Services.⁹⁴ Outside the commercial sphere there is the possibility for further expansion of the machinery of international jurisdictions. Examples include the hearing of appeals from national courts to supra-national legal bodies such as the European Court of Human Rights or the proposed International Criminal Court.

5.1.3 Transnational Legal Practice

The growth of substantial transnational legal practice dates from the 1980s,⁹⁵ and is concentrated in the international centres of finance, London, New York and Tokyo, of arbitration, London and Paris, and of government, Brussels, Luxembourg and Strasbourg.⁹⁶ Limitations on the scope of lawyers qualified overseas are often imposed by the host country⁹⁷ rather than the home country.⁹⁸ The main markets are, however, highly structured. Not only are they difficult to penetrate but a presence in them may be difficult to sustain unless work is based on links with the home jurisdiction or lawyers from the overseas jurisdiction are recruited.⁹⁹ It was, and continues to be, the case that multi-national practice was the preserve of American and, latterly, English firms. It is no coincidence that these are the countries that provided conditions for the growth of large firms; there is a strong

⁹³ J. Flood & E. Skordaki, "Normative Bricolage: Informal Rulemaking Among Lawyers and Accountants" in G. Teubner (ed), *Global Law Without a State* (Aldershot, Ashgate/Dartmouth, 1997).

⁹⁴ P. Rutley, "The WTO's Dispute Settlement Mechanism" (1997) 2 *Amicus Curiae* 4.

⁹⁵ R. Abel, "Transnational Legal Practice" (1993-5) 44 *Case Western Reserve Law Review* 737.

⁹⁶ *Id.*, at p.743.

⁹⁷ So, for example, solicitors are permitted to be in partnership with registered foreign lawyers in England and Wales, provided such lawyers do not conduct litigation or advocacy (*The Guide*, *supra* n. 14, Principle 8.01, pp.140-1).

⁹⁸ See, for example, *id.*, para. 8.01, note 5.

⁹⁹ G. Choudhuri, "Denton Hall Pulls Out of the U.S.", *The Lawyer*, 1 March 1999, p.1.

correlation between the size of firms and their activity in international legal markets. Nevertheless, the number of firms, and the number of lawyers from the home State deployed in overseas jurisdictions is at a low level. This is even true of firms from the UK and USA relative to the numbers in their home professions.¹⁰⁰

The presence of international firms in London exemplifies this dimension of transnational legal practice. There are approximately 70 law firms from the United States represented in London and a similar number from other jurisdictions, mainly Europe, but including a few from South America and the Caribbean and the old Commonwealth, Australia, South Africa and Canada.¹⁰¹ With the exception of Salans Hertzfeld and Heilbronn, a French firm with 60 fee earners, of whom 56 were initially qualified in the United Kingdom, most of the non-US firms have fewer than five fee earners in the UK and employ few, if any, UK lawyers. In contrast, 11 of the US firms have more than 30 fee earners in the United Kingdom and, on average in these firms, approximately half the fee earners were initially qualified in the UK.¹⁰² These patterns are explained by the fact that US and UK firms are in direct competition for a specific type of legal work, namely, capital markets work. Such work is dominated by either New York State law or English law and so these jurisdictions' law firms reap the benefits.¹⁰³ Non-US firms, however, are not involved in these markets to the same extent, hence their use of smaller numbers of overseas lawyers.

5.1.4 Reflections on the Issue of Double Deontology

The argument that the problem of double deontology justifies the efforts of international bodies of lawyers in promoting a universal ethic is difficult to evaluate. Abel's analysis of transnational legal practice apart,¹⁰⁴ there are scant quantitative data and no qualitative analysis of how significant the alleged problem is in reality. It seems likely that the interaction of lawyers on the international stage is most intense in the area of commercial deal-making. It does not follow that an extension of the mechanisms of domestic professional regulation to this sphere is a necessary means of controlling lawyers' conduct. In fact, Abel argues that the regulation of lawyers on the international stage is unnecessary. This proposition is based on the contention that professional ethical rules are designed to protect clients, and particularly those clients who are not in any position to evaluate professional services. Clients need protection because, in the professional relationship, there are more significant information asymmetries than in other transactions between the supplier and consumer of services. The relationship is therefore underpinned by a substantial degree of trust in the profession of which the individual professional is a member. The risk of default is therefore underwritten by the professional body. Since home professions are underwriting the risk that overseas lawyers default, this essential backdrop is missing in the case of the international codes.

¹⁰⁰ Abel suggests that law firms from the USA, the most heavily represented overseas, have fewer than 2,000 lawyers in foreign branches and many of these are local lawyers (*supra* n. 91 at p.738).

¹⁰¹ R. Tyler, "When in London . . .", *The Lawyer*, 30 June 1998, pp.18-19.

¹⁰² R. Tyler, "Over Here—in Partnership", *The Lawyer*, 30 June 1998, pp. 22-23.

¹⁰³ J. Flood, "Megalawyring in the Global Legal Order: The Cultural, Social and Economic Transformation of Global Legal Practice" (1996) 3 *International Journal of the Legal Profession* 169.

¹⁰⁴ *Supra* n.95.

Between international legal businesses and their lawyers, there are fewer information asymmetries than afflict the relationship between lawyers and "one-shot" personal plight clients. Corporate clients are usually in a good position to evaluate the services they receive. They are served by in-house legal departments which can dictate how work is performed by private firms, can monitor the performance and assess the value of that work. If the professional firm supplying the services does not meet the standards required the corporate client moves on. If the professional firm does not observe the highest standards of probity there is an increased risk that the failing would be exposed, and future business and reputation lost. For lawyers operating in this sphere not to observe confidentiality would be professional suicide; confidentiality is one of the strongest market advantages legal professionals possess. In the international market for commercial legal services, patronage supplants professionalism as the dominant means of controlling service providers.¹⁰⁵ In fact, the professional ethics intended to protect ill-informed personal plight clients have unethical uses in the war of international commerce.

A classic example of the unintended use of conduct rules by lawyers involves conflict of interests. Such rules are primarily intended to ensure that lawyers do not have to divide their loyalties between clients. The problem concerns mega-transactions and disputes where only relatively few lawyers have the necessary expertise or resources to handle the matter. These lawyers are in high demand and it is generally thought that the best of them can significantly affect the outcome of a case. The relatively small number of megaplayers makes technical breaches of conflict rules almost inevitable. Conflict of interest rules can be activated because lawyers have previously acted for another corporation, or one of its many subsidiaries. The motive behind invoking these rules, however, is not concern that a party will be disadvantaged by the potential conflict. It is to deprive opponents of the services of the small field of experts capable of acting competently in the matter or, if not, significantly to delay the resolution of the main dispute.¹⁰⁶

Finally, the assertion that the rules of each bar and law society are based on the same values and in most "cases demonstrate a common foundation",¹⁰⁷ the accommodation of the different perspectives of the European bars is only possible at the high level of generality at which the codes are expressed. Indeed, the CCBE introduces its own note of caution regarding the detail of the different codes of its members.¹⁰⁸ There is considerable work to be done before it can be said that the European bars and law societies are working from the same ethical script. In the meantime the guidance given to lawyers for reconciling the double deontology problem is confusing and contradictory. Principle 9.03

¹⁰⁵ See generally T. J. Johnson, *Professions and Power* (London, Macmillan, 1972). Abel (*supra* n. 95, at p.762) argues that powerful jurisdictions, with major international business, should negotiate the lowering of foreign barriers. He does however, propose that each jurisdiction should establish a register of foreign lawyers practising in that jurisdiction, identify areas of reserved practice and disciplinary proceedings and facilitate the requalification of foreign lawyers. He suggests that foreign jurisdictions should not try to regulate the fees of overseas lawyers and that contingency fee arrangements should be permitted and home disciplinary proceedings should apply at the instance of clients.

¹⁰⁶ Flood, *supra* n. 103.

¹⁰⁷ CCBE Code, para. 1.2.

¹⁰⁸ ". . . it is neither possible nor desirable that [the rules of each bar] should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application" (*id.*, para. 1.2.2).

of *The Guide to the Professional Conduct of Solicitors*,¹⁰⁹ for example, states that solicitors engaged in overseas practice must comply with local rules of conduct if there is a specific local obligation to do so but, if there is not, that they should “observe the standards of conduct applicable to local lawyers so far as possible without breaching solicitors’ conduct rules or hindering the proper exercise of his or her profession”.¹¹⁰ Despite some attempts by local associations to publicise the CCBE Code in particular, it appears to have had relatively little impact.¹¹¹ The lack of means for determining the conduct of lawyers engaged in international practice forces us to explore other reasons for the promulgation of international codes.

5.2 The Legitimation Function

Analysts hold very different views on the role of ethics in the evolution of legal professions. Early sociological analysis regarded the development of rules of conduct and disciplinary procedures as a prerequisite for the end state of professionalism and a necessary response to the increasing heterogeneity of the professional group. Professionalism, the control of producers of professional services by their peers, was a benign force operating in the public interest. Recent emphasis in the sociology of the legal profession is on the manipulation of markets in the self-interest of professionals.¹¹² Within this tradition, professional claims to ethical practice, including codes of conduct and the other paraphernalia of self-regulation, are conceived of as means to securing and retaining legal jurisdiction over preferred areas of work.¹¹³ Their principal mode of operation is through claims of legitimacy articulated by means of a professional ideology that emphasises the responsibility for defending the rule of law and individual rights against the intrusions of the State. Self-delusion is endemic in the concept of ideology.¹¹⁴ It is not surprising that the ideology on which claims to professional privilege rest is central to the rhetoric of elite European lawyers. Thus, a report of a speech by a leading continental commercial lawyer claimed:

“We often forget that law is also a culture with its own values, languages and practices. Which values? Those which make up a state of law. A hierarchy of standards, the recognition of fundamental human rights and of civil liberties, the legal guarantee of these rights, in particular by the monitoring of the constitutionality of the laws, the independence of judges and respect of the principles of a fair trial: these are the foundations of the legal culture of our modern societies.”¹¹⁵

The ideology of public service is deeply embedded in the emergent international codes. Despite the fact that lawyers ostensibly affected by the CCBE Code tend to be commercial lawyers, the Code itself claims a broad ethical foundation, one deeply embedded in

¹⁰⁹ *Supra* n. 14.

¹¹⁰ *Id.*, Principle 9.03, note 3, at p.145.

¹¹¹ Terry, *supra* n.19 at 378, notes that it has been cited in a few French cases and US disciplinary tribunals.

¹¹² M. S. Larson, *The Rise of Professionalism, A Sociological Analysis* (Berkeley, Los Angeles, Cal., University of California Press, 1977), R. Abel, *The Legal Profession in England and Wales* (Oxford, Blackwell, 1988).

¹¹³ In Abbot’s analysis (*supra* n. 88) professions are territorial: they protect their sphere of work against rival occupations using specialist knowledge. Their objectives are both economic and social; power, material and social capital. See also T. C. Halliday & L. Karpik (eds), *Lawyers and the Rise of Western Political Liberalism* (Oxford, Clarendon Press, 1997).

¹¹⁴ R. Cotterell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford, Clarendon Press, 1995).

¹¹⁵ R. Badinter, “Role of the International Lawyer” (1995) 23 *International Business Lawyer* 505.

the Anglo-American legal professions.¹¹⁶ It is prefaced by a statement delineating “the function of the lawyer in society”. This begins with the statement that “in a society founded on respect for the rule of law the lawyer fulfils a special role . . . a lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend”.¹¹⁷ In addition to those obligations owed to clients, courts and the legal profession the code notes an obligation to “the public for whom the existence of a free and independent profession, bound together by respect for rules made the profession itself, is an essential means of safeguarding human rights in the face of the power of the state and other interests in society”.¹¹⁸

The development of international codes of ethics by international lawyers may therefore be seen as an ideological claim reflecting the strategies of dominance used by the commercial clients that they serve. This reflects the increasing dominance of an internationalist ruling class whose ideology is founded on corporate liberalism and Atlantic unity, characterised by the international replication of institutions and corporate forms.¹¹⁹ So powerful is this economic elite that anti-trust and competition law is inadequate at the national level, let alone in the international sphere. One of the recent strategies of the elite for addressing the perception that regulatory mechanisms are inadequate is its promotion of “international economic soft law”, such as codes of conduct for international business. In general these codes can be seen as largely symbolic, “a reaction to and an attempt to contain the growing criticisms of and actions against transnational corporations from the 1960s onwards”.¹²⁰

The development of lawyers’ international codes of ethics can be seen as part of a similar process of emulation. Like international businesses, international lawyers are suspicious of, even fearful of, an effective system of regulation of their activities. They produce codes to create the impression that professionalism is an adequate mechanism of control. Yet, the justification of double deontology is dubious. The confidentiality of correspondence between lawyers apart, problems do not arise in the spheres of activity, or in relation to the client groups, that are used as means of legitimating the codes. They react to the perceived absence of regulation of international lawyers but they articulate an ideology that furthers the political objectives of legal professions.

5.3 The Political Function

The legitimation of professional structures and professional action is not an end in itself. It is deployed in pursuit of political goals. In broader terms, the agenda of the legal profession could be seen as the furtherance of the goal of professional autonomy, and the restriction of the role of the State.¹²¹ At a micro-political level legitimacy protects pro-

¹¹⁶ G. C. Hazard, “The Future of Legal Ethics” (1991) 100 *Yale Law Journal* 1239.

¹¹⁷ CCBE Code, para. 1.1.

¹¹⁸ *Id.*

¹¹⁹ S. Picciotto, “The Control of Transnational Capital and the Democratisation of the International State” (1998) 15 *Journal of Law and Society* 58 at p.64.

¹²⁰ *Id.*, at pp. 70–1.

¹²¹ In most jurisdictions, professional ethics reflect the desire of professionals to be independent, particularly from state control, and the demand for autonomy in the way work is conducted. This trend is probably less pronounced in civil law countries and reversed in the communist countries during the cold war. In Eastern Europe the lawyer was not bound solely by client loyalty but by loyalty to the State. Lawyers were formerly under a duty to persuade clients to avoid proceedings which conflicted with the interests of the community or society,

fessions from incursions into their work and autonomy. The relationship between legal professions and the state can be seen as one in a condition of permanent tension. Historically, strong legal professions were influential in the broader political sphere and achieved privileges such as self-regulation because of the relative weakness of the state bureaucracy.¹²²

With the growth of state machinery, reliance on professional knowledge and government has been weakened. The excessive cost of state funding of private practitioners providing legal services has damaged confidence in the profession's ability to resist economic incentives to overwork and overcharge. Thus, over the past 25 years, attacks on legal professional privileges by the State, the erosion of long-standing monopolies, the undermining of self-regulation and the gradual increase in external regulation, have been a worldwide phenomenon.¹²³ These attacks have transformed the relationship between legal professions and the State and the confidence of legal professions in the beneficence of the state towards them. In the UK the profession's need for more effective collective action and public relations has underlined the fact that a new relationship with the State is being forged; professions are no longer regarded as part of the fabric of the State but as barriers to achieving policy objectives.¹²⁴

What are the connections between professional aspirations and state activity? Professions such as the French and English bars, which were both well organised and founded on a prestigious medieval past had played a significant role in the evolution of the democratic liberal State.¹²⁵ Professional activities mirrored state aspirations. Thus, under imperial rule, professions co-opted local elites to the goals, standards and interests of the metropolitan centres, laying potential foundations for a global legal culture. In the new global market, governments and lawyers again share the aspiration of and opportunity for global domination. Liberal States may have eschewed overt imperial domination but, with the agglomeration of corporate power in business, and its virtual eclipse by supra-national companies, corporate imperialism now rides on the back of liberal democracy. World political movements towards democracy, in Latin America and Eastern Europe, provide ample opportunities for liberal democracy, corporatism and lawyers. Market theories of professions have moved from the national to the international sphere.¹²⁶ While in domestic markets the relationship between the State and publicly funded private lawyers is under considerable strain, in the international sphere lawyers and their national governments march in step.

an orientation which will change as lawyers in the former Soviet bloc now redefine their basic affiliations (M. Bohlander, M. Blacksell & K. M. Born "The Legal Profession In East Germany—Past, Present And Future" (1996) 3:3 *International Journal of the Legal Profession* 255), hence the interest of lawyers from these States in issues of professionalism.

¹²² D. Sugarman, "Bourgeois Collectivism, Professional Power and the Boundaries of the State: The Private and Public Life of the Law Society, 1825–1914" (1996) 3 *International Journal of the Legal Profession* 81.

¹²³ V. Olgiati, "Self-Regulation of Legal Professions in Contemporary Italy" (1997) 4 *International Journal of the Legal Profession* 89.

¹²⁴ That is, lawyers in these different countries have located themselves in different relationships to the state so that in England, for example, professional self-government is seen as a pillar of civil society and a bulwark of liberal political society (Abel, *supra* n. 112 at p.8).

¹²⁵ *Id.*, p.353.

¹²⁶ *Id.*, p.349.

The beat to which liberal democracy and Western legal professions march is provided by the rule of law.¹²⁷ It is used by both in pursuit of political goals. The supra-national State seeks stable, predictable and legitimate dispute resolution in its partners and uses financial institutions in promoting government according to the rule of law. So, for example, the European Bank of Reconstruction and Development lends money only to countries committed to promoting the rule of law. The spread of Western law is an inevitable consequence of the spread of capitalism and political liberalism. The narratives of legal liberalism and globalisation “share a conception of the world—markets, science and liberal law—as the cumulative outcome of individual will and agency”.¹²⁸ But as a means of claiming legitimacy, they have a profound weakness. They do not perceive a gap between the “ideal, abstract formal equality, and the reality, substantive and experiential inequality”.¹²⁹ Similarly, lawyers involved in the international commercial sphere see law as “a factor of economic progress, in particular because it ensures greater security for its participants”, and international business law as a “factor of peace and stability [as] one of the essential, even if rarely perceived, elements in the development of a more harmonious and peaceful world order”.¹³⁰

Images of the beneficence of law are part of a myth of globalisation that Silbey calls the story of the enlightenment. Science and technology facilitate increasingly rational forms of social organisation, “in the end overcoming ignorance, superstition, myth, religion, and scarcity to create relative abundance, human freedom and worldwide mobility”.¹³¹ But one of the narratives of globalisation is the spectre of the increasing domination of the social and the political by economics.¹³² The State itself is forced to shrink as private property is recognised as paramount: “[b]y subordinating reason and law to desire, the market narrative is a parable about lowering expectations about what collectives can or should do”.¹³³ Governments are increasingly impatient of the attempts of law to mediate the operation of markets.

But the need for some form of political mediation becomes increasingly necessary as globalising forces produce casualties among those who cannot adapt to the demands of globalisation. The legal profession could be one such casualty and is therefore, perhaps, in a weak position to play a mediating role. There are, however, opportunities for the professions to fill a niche in the neo-liberal State and the new supra-national state systems. As in the nineteenth century, the bureaucratic machinery of the nation state, and the supra-national state system, is relatively weak in relation to the massive tasks of integration it assumes. This provides scope for professional influence, both national and transnational, particularly for the normative professions, like law, whose authority transcends

¹²⁷ Halliday and Karpik suggest that lawyers have participated in the rise of modern political liberalism through the creation of rights which protect citizens and confine States. Lawyers impede or facilitate that political transformations involved through the courts, buttressed by bar self-governance. Independent legal professions are therefore structurally linked to the rule of law, separation of powers and independence of the judiciary (*supra* n.113 at p.21).

¹²⁸ S. S. Silbey, “‘Let Them Eat Cake’: Globalization, Postmodern Colonialism, and the Possibilities of Justice” [1997] *Law & Society Review* 207 at p.230.

¹²⁹ *Id.*

¹³⁰ Badinter, *supra* n. 115.

¹³¹ *Supra* n.128 at p.212.

¹³² *Id.*

¹³³ *Id.*, at p.217.

its disciplinary boundaries.¹³⁴ This creates the conditions in which Johnson's view, that world-wide alliances of professional associations could provide important checks on the accumulation of state power in the interests of trade and the service of corporations, could be realised. Professions could "provide an important channel of communications with the intellectual leaders of other countries, thereby helping to maintain world order".¹³⁵

Given the generally apolitical stance of the English legal professions,¹³⁶ there are barriers to the legal professions making political capital of the shared aspirations of the State and elite lawyers. One of these barriers is the apparently fragile foundation of common interest among sections of legal professions. On one level international commercial lawyers have little in common with the bulk of their domestic professions, save for a common past and a common title. They apparently have little to lose by severing the links with their brethren. But if, as their rhetoric suggests, they retain the notion of a common professional ideal, the international stage has much to offer. An immediate agenda is to resist the efforts of national governments, driven by the need to create conditions for competitive trade, to control the cost of legal services by deprofessionalising legal practice. A platform for limiting state action must, of necessity, be a degree of independence from the State and the opportunity for significant collective action.¹³⁷ But the effectiveness of collective action critically depends on solidarity based on a common perception of the lawyers' social role and hence a common purpose and identity.

The perspective is articulated, but only as a sub-text, in Toulmin's writing. He is concerned that, contrary to the globalisation thesis, there may be significant differences in the way in which the work of lawyers in different jurisdictions develops. Toulmin cites the important example, in both jurisdictional and ethical terms, of the provision of wider access to justice, the rock on which relations between the State and legal professions have begun to founder. Article 3 of the Maastricht Treaty provided that Member States should inform and consult one another with a view to co-ordinating action on providing access to justice. Toulmin, in common with others, argues that the issue is assuming greater significance and that "unless the lawyers take the lead . . . procedures will be introduced for the resolution of disputes which will by-pass them. Computers will be harnessed to set out the law to be interpreted by lay people. Lawyers will be excluded from representing clients in a range of civil cases".¹³⁸ The concern here is that, if the work of legal professions diverges rather than converges, it will become more difficult to establish the validity of a single, coherent ethic.¹³⁹ Lawyers would be less effective as a global political force.

¹³⁴ See T. C. Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (Chicago, Ill., University of Chicago Press, 1987), Halliday and Karpik, *supra* n.113, and Johnson *supra* n.105.

¹³⁵ *Ibid.*, at p.14 quoting K. Lynn, "The Professions" [1963] *Daedalus* 653.

¹³⁶ See M. Burrage, "Mrs. Thatcher Against the "Little Republics": Ideology, Precedents, and Reactions" in Halliday and Karpik, *supra* n.113, p.125.

¹³⁷ Larson, *supra* n. 112.

¹³⁸ Toulmin, *supra* n. 13 at p.13.

¹³⁹ Take access to justice as an example. Because civil law procedures are less confrontational and less expensive than such procedures in the common law countries. there may less need for the addition of alternative methods of dispute resolution to supplement court procedures in civil law countries than in common law countries (*id.*, at p.8).

6. *Towards a Theory of the Globalisation of Ethics*

It is, of course, possible that codes of conduct exist to serve all of these purposes we have identified and more. But, motive aside, is the idea of a global ethic for legal professions realistic? Supporters of the idea acknowledge differences in the ethical codes of legal professions in the United States and Western Europe, but, as in the case of Toulmin, feel that "they are like two trains on the same track with the US train in the lead".¹⁴⁰ Incompatibility in key areas, including secrecy and confidentiality, advertising, conflicts of interest and contingency fees, are, he suggests, "greater in theory than they are in practice".¹⁴¹ Expressed at the level of the international codes this may be so. For example, the traditional Anglo-American values of loyalty to clients, confidentiality and candour to the court, harmonising the legal profession's affiliations to clients and the judiciary, are similar elsewhere.¹⁴² But stating these duties is one thing; their manifestation in practice differs significantly, even in relation to the most fundamental obligations.

The differences in relation to the control of information relevant to the client's case are an example, not just of different rules, but of different cultural perceptions that bear on the manifestation of independence, autonomy and confidentiality. The Anglo-American tradition, as we have seen, that the right to information is vested in the client¹⁴³ contrasts with the expectation in much of Europe that lawyer communications are confidential.¹⁴⁴ In some professional legal cultures, autonomy and independence from clients, and the desire to foster collegial relations between lawyers, takes precedence over client autonomy in decision-making. This kind of issue, on which the international codes, and most national codes, are silent, is among the most fundamental issues confronting professional ethics. Even between the legal professions of the United States and the UK, common law countries sharing similar traditions and a close interest in each other's ethical development, there are differences in the attention paid to this issue.

The USA has a strong tradition of "zealous advocacy" on behalf of clients. Over a period of years it has been argued that this creates for lawyers a partisan role, and a distinctive role morality, that, in certain operations, negotiation for example, justifies the pursuit of client desires irrespective of their validity or conduct implications.¹⁴⁵ Similarly, there have been debates about the role of lawyers in the empowerment of clients through collaborative decision making. In the UK, in contrast, these debates are more muted, if they exist at all.¹⁴⁶ Practice Rule 1, the cornerstone of the solicitors' code, talks of a duty to act in the client's best interests, there are specific provisions in the code against pur-

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at p.16.

¹⁴² Hazard, *supra* n 116 at p.1246.

¹⁴³ *Lillicrap v. Naldel & Co.* [1993] 1 All ER 724.

¹⁴⁴ Although lawyers can have a duty of partisanship in an inquisitorial system (M. Taruffo, "The Lawyer's Role and the Models of Civil Process" (1981) 16 *Israel Law Review* 5, and J. Leubsdorf "The Independence of the Bar in France: Learning from Comparative Legal Ethics" paper at the symposium "Lawyers' Practice and Ideals: A Comparative View", Paris, July 1997).

¹⁴⁵ G. Condlin, "Bargaining in the Dark: The Normative Incoherence of the Lawyer Dispute bargaining Role" 51 *Maryland Law Review* 1 at pp.68-78.

¹⁴⁶ A. Boon, "Client Decision Making in Personal Injury Schemes" (1995) 23 *International Journal of the Sociology of Law* 253.

suing certain client goals¹⁴⁷ and, recently, a clear indication that the public interest is the key to interpreting conflicting principles of conduct.¹⁴⁸ The fact that the American Bar Association has softened the obligation of “zeal”, and that streams of academics have opposed the more extreme claims made for role-morality,¹⁴⁹ cannot disguise the deep roots of partisanship in the United States. We must confront a number of possibilities here. Do lawyers in the United Kingdom have a more paternalistic attitude towards clients? Is the identity of European lawyers less likely to be collapsed into that of their clients than in the USA? Or are the processes of lawyer/client interaction in the USA and Europe substantially different even though the results for clients are the same? Each possibility suggests significant differences in the ethical stance of lawyers in Europe and the United States. It is likely however, that these and other differences are found amongst the European countries.

It is not credible to imagine that the practice cultures that underlie the codes of lawyers can be changed by diktat. The ethics of the legal professions of different countries are deeply rooted, reflecting different conceptions of the judicial process and its purpose, different theories and ideologies about procedure and substantive justice and different ideologies relating to the role of judges and legal professionals. The ethics of any particular legal profession will be pitched at a point along a continuum marked by obligations to protect client interests to the exclusion of other interests,¹⁵⁰ and wider obligations to administer and to facilitate the operation of law.¹⁵¹

In the western democracies, we surmise, the ethical orientation of different legal professions varies greatly, producing different responses to standard hypotheticals applying the same rules. If this is not sufficiently problematic for the prospect of a “universal ethic”, the fact that the three main legal cultures of the world, Common Law, Civil Law and Islamic Law, produce legal professions with profoundly different traditions surely is. Even in some of the advanced capitalist countries cultural differences in legal professionalism are profound. The Japanese profession for example, cited by Toulmin as potentially providing one of the strands of a fused global code, is structurally, and therefore culturally, highly distinctive. Although there is a literature on the cultural distinctiveness of the Japanese profession it is not yet clear how far the fairly recent development of international practice in Japan can or will lead to professional adaptations.¹⁵² The interjection of

¹⁴⁷ The *Guide* obliges a solicitor to “refuse to take action which he or she believes is solely intended to gratify a client’s malice or vindictiveness” (para.12.01 note 6).

¹⁴⁸ The latest edition of the *Guide* explicitly states that “where two or more of the principles in practice rule 1 come into conflict, the determining factor in deciding which principle should take precedence must be the public interest and especially the public interest in the administration of justice” (para. 1.02, note 6, “Basic principles—additional guidance” p.2: note the examples given in the *Guide* under para. 7 of situations where a solicitor may find a conflict between rule 1(c) (client’s best interests) and 1(b) choice of solicitor where “the public interest demands that the latter takes precedence . . .”).

¹⁴⁹ Hazard, *supra* n.116, and see J. Noonan, “The Purposes of Advocacy and the Limits of Confidentiality” (1966) 64 *Michigan Law Review* 1485.

¹⁵⁰ J. Weinstein, “On the Teaching of Legal Ethics” (1972) 72 *Columbia Law Review* 452, and J. F. Sutton & J. S. Dzienkowski, *Cases and Materials on the Professional Responsibility of Lawyers* (St. Paul, Minn, West Publishing Co, 1989) at p.3.

¹⁵¹ T. W. Giegerich, “The Lawyer’s Moral Paradox” (1979) 6 *Duke Law Journal* 1335.

¹⁵² Lawyers in Japan may appear to be at a relatively low level of professionalisation generally. The State exercises a high degree of control over entry to the profession (E. I Chen, “The Legal Training and Research Institute of Japan” [1991] *Toledo Law Review* 975), recognises only litigators as lawyers and subjects non-contentious work to competition from non-legal professions. This has a significant cultural impact, arguably

culture represents a significant constraint on the evolution of a universal ethic for legal professions.¹⁵³

7. Culture

Greenwood postulated that ethics and culture are two of the five common attributes of professions.¹⁵⁴ Culture, he proposed, consists of values, norms and symbols. Ethics he associated with a regulative code which was more explicit, systematic and binding than those governing other occupational groups and with an altruistic and public service focus. The distinction is difficult to sustain. A profession's ethics are the embodiment of norms and values that flow naturally from service to the defining "good" that a profession offers to society.¹⁵⁵ Its organic development occurs in interaction with the institutions concerned with the administration of that good. So, for example, in common law countries the ethic of the legal profession reflects an ideological position; that the good of justice is delivered through the adversary system.¹⁵⁶ In this way codes of conduct merely reflect the culture of practice out of which ethical positions emerge.¹⁵⁷ If professional ethics are meaningful, they are, necessarily, deeply embedded in professional values, norms and symbols. While codes of conduct may be criticised for their focus on issues of etiquette rather than ethics,¹⁵⁸ the interactions that shape the nature of practice also shape ethical norms.

Professions tend to approach the issue of their ethics as if codes determine professional behaviour. Empirical evidence, for example of the difficulty the Law Society experienced in persuading firms to implement its client care regime, suggests that this is not the case. Therefore, the task of bringing the codes of legal professions into line, although difficult enough, is not the fundamental problem. Cultural difference is the issue. The problem is not that lawyers from different jurisdictions do not respect obligations of confidentiality

positive, on the work and cultural values including public esteem (G. Dal Pont, "The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis" (1994-5) *University of Detroit Mercy Law Review* 291). Japan has a more significant in-house sector than legal professions in the West, and this has stronger affinities with the corporation than the profession. (K. Rokumoto, "The Present of Japanese Practising Attorneys: On the Way to Full Professionalization?" in R. L. Abel & P. S. C. Lewis (eds), *Lawyers in Society: The Civil Law World* (Berkeley, Cal., University of California Press, 1988), A. B. Levine, "Professionalization of the Japanese Attorney and the Role of Foreign Lawyers in Japan" (1986-7) *New York Journal of International Law and Politics* 1061, J. M. Ramsayer, "Lawyers, Foreign Lawyers and Lawyer Substitutes: The Market for Regulation in Japan" 27 *Harvard International Law Journal* 499, Kitahama Law Office, The Legal Profession in Japan <http://compuserve.com/homepages/Kitahama/Legproj.htm>). It should be noted that overseas lawyers have been accepted in Japan since 1985. In 1993 approximately 75 practised there, 66 per cent from the USA and 23 per cent from the UK (S. Ota and K. Rokumoto, "Issues of the Lawyer Population: Japan" (1993) *Case Western Reserve Journal of International Law* 315 at 330).

¹⁵³ Flood, *supra* n.103

¹⁵⁴ E. Greenwood, "Attributes of a Profession" [1957] *Social Work* 45. See also T. Parsons, "Professions" in D. Sills (ed), *International Encyclopedia of the Social Sciences* (New York, Macmillan and The Free Press, 1968), pp.536-47.

¹⁵⁵ Abbott, *supra* n. 88.

¹⁵⁶ O. Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073.

¹⁵⁷ This view of the complex relationship between ethics and culture is consistent with Bourdieu's argument that the juridical field is a "structured socially patterned activity or practice, . . . disciplinarily and professionally defined", which is "strongly patterned by tradition, education, and the daily experience of legal custom and professional usage": R. Terdiman, "Translator's Introduction to P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field'" (1987) 38 *Hastings Law Journal* 805.

¹⁵⁸ Nicolson, *supra* n. 9.

or do not understand that they must not lie to courts. It is that their procedures, and hence their cultures, comprised of norms, values and symbols, are different. This gives rise to misunderstandings in interaction, for example when European lawyers criticise US lawyers as too “pushy”.¹⁵⁹ It is cultural difference, which codes merely reflect, that codes are also inadequate to resolve. Professor Pierre Lalive, an eminent international arbitrator, reinforced this perspective when he wrote, “[i]f I had to sum up, in a few words, the most significant lesson I have learnt in several decades of practical experience as counsel or arbitrator, my choice would unhesitatingly be the extreme importance of the cultural dimension”.¹⁶⁰

The issue of culture is one of the neglected aspects of the literature on the globalisation of the legal profession. Culture is, however, fundamental to our discussion because of the relationship between ethical norms and cultural norms. Some versions of the globalisation thesis have much to say about culture. Giddens describes globalisation in terms of general mechanisms of change, fuelled by technology, which create new mechanisms of social adaptation. One of the main consequences of globalisation is the reorganisation of time and space. Events occurring on the other side of the world are presented not only quickly but, often, in a way which is immediately relevant to peoples the world over. Rapid access to information provides “mediated experience” and “globalises” the traits of modernity in order to transform the nature of social life. Despite the continued existence of the nation State the world has a “standardized past and universally applicable ‘future’”.¹⁶¹

Ideas of disembodied understanding suggest that the possibility of a global professional ethic is not pure illusion. The essential mechanism in the process of cultural globalisation is reflexivity, which hinges on “the susceptibility of most aspects of social activity, and material relations with nature, to chronic revision in the light of new information or knowledge”.¹⁶² This brings the individual, the moral agent, to the fore and raises the relationship between ethics and self-identity. Giddens proposes “self-identity is not a trait, or even a collection of traits, possessed by an individual. It is the self as reflexively understood by the person in terms of her or his biography”.¹⁶³ It is important to our theme for two reasons. First, the process of reflexivity suggests the possibility that cultural understanding, for example regarding the role of law and lawyers, could be universal. Secondly, to the extent that the deontological assumptions of professions were ever justified, they are undermined by the implications of globalisation for individual behaviour and individual ethics. In Giddens’s analysis shame has replaced guilt, anxiety over the breaking of moral rules, as the primary motivation for individual action.¹⁶⁴ The individualisation of the self means that people take more responsibility for their own behaviour and provide explanations for their conduct. Thus, reflexivity is a process triggered by reasons for action rather than by guilt.

¹⁵⁹ Flood, *supra* n. 3.

¹⁶⁰ J. Flood, “Globalisation: The Context: The Globalizing World” (1995) 23 *International Business Lawyer* 509 at p.512.

¹⁶¹ A. Giddens, *supra* n. 2 at p.17.

¹⁶² *Id.*, at p.20.

¹⁶³ *Id.*, at p.53.

¹⁶⁴ Shame bears on self-identity because shame represents anxiety about the adequacy of the biographical narrative and the feeling that “it cannot withstand engulfing pressures on its coherence or social acceptability” (*id.*, at p.65).

Giddens' analysis suggests ways of addressing those features of the contemporary legal profession that undermine its ethical coherence. Criticisms of the attempt to control by code are, even at national level, significant. It is said that legal professions are too large, and its modes of organisation and types of practice too diverse, for codes to be effective. The arrival of the fractured and stratified legal profession leads to arguments that ethical principles can only be meaningful in specific contexts,¹⁶⁵ that they should distinguish between different kinds of clients,¹⁶⁶ and the different tasks which lawyers perform, before specifying too closely how they should behave. The analysis of Giddens, and other sociologists and moral philosophers, supports the argument that professions should promote "moral agency", the capacity for independent reasoning using moral premises, rather than regulation.¹⁶⁷ While this may appear to support moral relativism¹⁶⁸ "moral agency" is not the freedom to act without restraint. Indeed, it implies that more attention, rather than less, would be paid to ethical issues in legal practice.

Some of the more visionary exponents of alternatives to codes see small communities of practitioners within professions as the most effective way of developing and transmitting professional norms relevant to different fields of practice.¹⁶⁹ This is a distinctly communitarian theme, as developed by Selznick who sees the three strands of a communitarian ethic as morality and selfhood, character and civic virtue and reason.¹⁷⁰ The theme offers the possibility of combining notions of rationality, autonomy and self-interest, within the pursuit of a greater social good.¹⁷¹ The first of these, morality and selfhood, recognises that the deepest obligations an individual owes flow from the nature of the community, rather than from contract or consent, and that such obligations are necessarily indistinct. The second, character and civic virtue, are obligations which flow from belonging to a community, from the role the individual fulfils in that community and from the circumstances in which she finds herself. To be effective, the community must have a clear picture of the kind of person an individual should become and demand that individuals become better than they are. The third theme, the community of reason, requires that shared beliefs are taken seriously and reflected upon. This inevitably means that beliefs

¹⁶⁵ M. Davis & F. Elliston (eds), *Ethics and the Legal Profession—An Educational Text* (New York, Prometheus Books, 1986).

¹⁶⁶ It has been suggested that there are four categories of client, each of which category poses different ethical problems: (i) adults, i.e. competent self-sufficient adults, (ii) the aberrant, i.e. the minor, the incompetent, the ignorant or poor, (iii) the artificial client, i.e. the business entity, (iv) the accused (L. R. Patterson, "On Analyzing the Law of Legal Ethics: An American Perspective" (1981) 16 *Israel Law Review* 28 at 35).

¹⁶⁷ See I. Kant, *The Critique of Practical Reason* (1788), and S. J. Kupfer, "Authentic Legal Practices" (1996) 10 *Georgetown Journal of Legal Ethics* 33.

¹⁶⁸ Lawyers, for example, could be given more discretion in deciding, for example, who they will act for and how they will act (*supra* n. 167 at p.88).

¹⁶⁹ This is consistent with Foucault's view that discipline, the enforcement of normalising judgements, in society, just as in closed communities, such as armies or prisons, is fostered by hierarchised, continuous and functional surveillance—P. Rabinow, *The Foucault Reader* (Harmondsworth, Penguin, 1991) p.192.

¹⁷⁰ Selznick's example of the large corporation is apposite. He asks whether the corporation, in reality, owes obligations only to shareholders in considering a hostile takeover. What of the interests of employees or the nation? A communitarian morality considers all of these interests as open ended, not a neatly prescribed set of obligations (*supra* n.5).

¹⁷¹ "Community" is not a special purpose organisation but a framework for life; "community" implies integration, shared symbolic experience and self regulating activities groups and institutions (*Id.*, at 449).

must be subject to review in the search for better standards.¹⁷² The goal of the reflexive process is a higher degree of congruence between personally held values and the actions of the practitioner in her work.¹⁷³

Ideas of a communitarian ethic are in harmony with the socio-political context of the liberal state as sketched by Giddens. For him, modernity has stimulated ideas of human emancipation from exploitation, inequality and oppression. It has led to the emergence of "life politics" which are institutionalised in political commitments to emancipatory politics and the primary imperatives of justice, equality and participation.¹⁷⁴ The aim of emancipatory politics is the organisation of collective life in such a way that people are autonomous, i.e., capable of independent action and responsibility. One goal of life politics, therefore, is the creation of morally justifiable forms of life that will promote self-actualisation in the context of global interdependence. The tendency to equate globalisation with multi-national practice or with the international connections of elite law firms is, therefore, potentially misleading.¹⁷⁵ It does not explain how the growth of technology affects the way people, including lawyers, live or how and why they observe group norms.

The more expansive notion of globalisation, as a process giving rise to fundamental changes in the systems and goals of the modern State, provides a set of values which can be integrated with professional ethics. To some extent this process has begun formally, with both the Bar and the Law Society paying attention to issues of access to justice and access by minority groups to the legal profession and reflecting these in their codes and in their contribution to public debate. This could be said to reflect a high degree of isomorphism between the State and professional institutions. Yet the policies of professional bodies may not be reflected in the activities of their members. Therefore, to pursue the idea of a global ethic for legal professions these issues, regulation, local etiquette and local culture, would need to be separated from issues of ethics. As part of their preparation for practice, for example, lawyers would consider the professional obligations of fairness or public service rather than their dubious manifestations in the rules. In this way the global profession might struggle towards a common conception of how, for example, lawyers care for clients without causing unnecessary harm to others or how they serve society. The role of codes in this process would inevitably be contested. Purists tend to argue that codes cease to be definitive, or regulatory, and operate merely as an influence in moral choice.¹⁷⁶ Others would see codes, perhaps suitably amended, as performing a more valuable role than they currently do. Even as they stand they can be seen to reflect consensus on critical issues of role performance, send important messages to the members of the profession

¹⁷² The attempt to map a postmodern ethic is therefore built on the notions of reflexivity, the recognition and accommodation of difference (i.e. reciprocity). In this way it attempts to deal with the main problems presented by postmodern analysis; the revival of pragmatism and the failure of foundational beliefs, the incommensurability of values and the fragmentation of self (see Kupfer, *supra* n.167 at pp.62-7).

¹⁷³ *Id.*

¹⁷⁴ Giddens, *supra* n.4 at 212.

¹⁷⁵ W. J. L. Calkoen, "Globalization of the Legal Profession" (1995) 23 *International Business Lawyer* 502.

¹⁷⁶ See W. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass., Harvard University Press, 1998) who proposes that, rather than pursuing an orientation towards "the dominant view" (or client-centred orientation) or a public interest view, the extent to which lawyers should follow rules depends on the context in which the ethical problem arises (and see Kupfer, *supra* n.167).

regarding expectations and aspirations and avoid the spectre of ethical relativism and confusion that stalks discretionary approaches to ethics.¹⁷⁷

Codes, or some other form of guidance on conduct, are likely to survive the onslaught of post modern critique. Precisely because of the brevity of the international codes, they are a promising starting point for a debate about how to reconstruct a code of lawyers' ethics. Unconcerned with enforcement issues, they stand in stark contrast to the more voluminous domestic versions, as represented by the current *Guide to the Professional Conduct of Solicitors*, with its intermingling of ethics, regulation, conduct and etiquette. Because they operate at the level of principle they are more consistent with a view of ethics as matters of character and of moral agency. As the CCBE Code perceptively notes, "relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations".¹⁷⁸ Yet in Selznick's terms these codes cannot fulfil this paradigm; the practice of law is truly international in a restricted sphere. Legal professionalism, for the most part, makes sense only in parochial contexts. We return to the issue of whether organisational and institutional forms that exist at the national level can be replicated on a grander global scale, and whether or not this is necessary before a global ethic of legal professions can be claimed to exist.

We have argued that, by laying claim to the ideological force of the rule of law, the global legal profession, although currently based on international and elite practice, must continue to present itself as a unity. In practical terms, whole legal professions must move towards universal norms, and for convenience the norms of the most powerful professions. One of the central difficulties in the notion of a globalised ethic of legal professions, however, is that Americanisation and Anglicisation occur only at the apex of the profession. Whatever the global currents, local legal practice continues relatively unaffected. Is it out of habit that corporate legal professionalism co-opts the rhetoric of the rule of law? If it is, is such co-optation necessary or sustainable? It may be necessary for, as McBarnet notes, the rhetoric of the rule of law is a difficult one for corporate lawyers, in particular, to support. Lawyers in general, and corporate lawyers in particular, often work against the spirit of law in the sphere of deal making and advising; "far from being means to the implementation of rights . . . lawyers create the devices which obviate them and render them ineffective".¹⁷⁹

Can the norms of the most powerful influence and change those legal professions dragged along in the wake of global currents? Such a thesis is contingent. First, there must be a high level of awareness of alternative ethical models, and this requires ready exchange of information and, arguably, some common educative component. Secondly, however, the adoption of alternative norms of behaviour might require a high level of acceptance by recipient professional institutions of these new norms.¹⁸⁰ How are such high

¹⁷⁷ See T.D. Campbell, "Moral Autonomy for Lawyers: A Review of William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics*" [1998] *Legal Ethics* 201; L. Sheinman, "Looking for Legal Ethics" (1997) 4 *International Journal of the Legal Profession* 139, and Nicolson, *supra* n. 9.

¹⁷⁸ CCBE Code, para. 2.2.

¹⁷⁹ D. McBarnet, "Law, Policy and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?" (1998) 15 *Journal of Law and Society* 113 at pp.118–19. But cf. R. W. Gordon, "The Independence of Lawyers" (1988) 68 *Boston Law Review* 1.

¹⁸⁰ Halliday and Karpik, *supra* n.113 at p. 361.

levels of transmission and acceptance to be achieved? Clearly, the theory of cultural globalisation does not rule out the possibility of the assimilation of norms on a global scale. The spread of liberal democracy, and with it principles of participation and equality under the rule of law, carries values, positive and negative, that could become “global”. It seems likely, however, that the process will not occur automatically; the codification of global professional legal norms would require substantially more effort than has been expended to date.

There are substantial practical obstacles to the formulation of a global ethic for legal professions that would command common consent and loyalty. Advocates of closer ties, like Toulmin, recognise that large firms in New York or Chicago have more in common with similar firms in London or Brussels than with the single practitioner in their own jurisdictions.¹⁸¹ That international codes often reflect the aspirations and values of dominant groups marginalises pressure groups outside the elite group. Divided by language and geography, they may find it difficult to affect the content and operation of the international codes.¹⁸² This presents the possibility of a process whereby strata of the legal professions form international links and develop ethics that reflect the interests of, and demands on, those strata. International lawyers may be followed by criminal defence or personal plight lawyers in seeking common ideals for their work. Without these lawyers the legitimacy of international lawyers is diminished. The problem is exacerbated by substantial problems of integration for lawyers and firms working in an overseas jurisdiction. Bans on conducting litigation or advocacy restrict overseas lawyers to transactions and deny them public service roles, e.g., performing *pro bono* work.¹⁸³ Friction in national associations between elite and non-elite lawyers suggests the greater possibility of fragmentation than cohesion. If existing groups calling themselves “lawyers” remain in unified associations the gap between the ethos and ethics of entrepreneurial corporate-sector lawyers and traditional or collegial models of lawyer organisation will continue to grow.¹⁸⁴

At a time when there is great potential for the spread of the rule of law there is also increasing dissimilarity, if not conflict, between the interests of different groups of lawyers within national professions. The ability to carry forward a liberal political agenda in the globalisation of ethics depends on the ability of the international bar to resolve the tensions of economic and political globalisation. There remains a serious issue whether the professional elites seeking a global order can carry their own professions. The alternative is that globalisation precipitates “internal political struggles over the goals,¹⁸⁵ identity and control of the profession . . . between segments of professions differentially exposed to the force of transnational developments”.¹⁸⁶ We could say as the world becomes globalised (with instantaneous communicative facilities) the values that emerge are, at worst, those of the marketplace, which we can characterize as the “race to the bottom”. Alternatively, emerging values could represent the best case and incorporate Giddens’ ideas of emancipation

¹⁸¹ *Id.*, at p.2.

¹⁸² Picciotto, *supra* n. 119.

¹⁸³ Abel, *supra* n. 95 at pp. 743 and 749.

¹⁸⁴ Hanlon, *supra* n. 1.

¹⁸⁵ See Halliday and Karpik, *supra* n. 113 at p.361.

¹⁸⁶ H. W. Arthurs, “Lawyering in Canada in the 21st Century” (1996) 15 *Windsor Yearbook of Access to Justice* 202 at p.209.

and thereby engage communities in integrative discourses across and within societies and sectors inside them.

8. *Conclusion*

We have approached the theme of the globalisation of ethics through the codes of ethics promulgated by international bodies of lawyers. Addressing the issue of why such codes have been produced, we conclude that political rather than deontological issues are at the fore. Such materialist conclusions are reflected in discussions of globalisation by lawyers. In writing on legal practice and legal professions, for example, globalisation has tended to be associated with the movement of goods and services across national borders, with the harmonisation of the legal regimes of trading partners and with the growth in the international dimension of legal practice to service the global economy.¹⁸⁷ While these areas are undoubtedly worthy of study they tend to scratch the surface of deeper processes. In the context of ethics, globalisation has wider and deeper implications which require a different kind of theorising. The movement towards a universal global culture, precipitated by the increasing interdependence of global economies, technologies and political systems, implies the declining significance of national systems of governance and the increasing harmonisation of culture, political ideologies and values. A key feature of the globalisation thesis is its inexorable progress. Lawyers and legal professions are, like all of us, inevitably caught up in the globalising process. Whether the world, or its legal professions, can ever be truly in step is, however, doubtful. That legal professions might be in step for some purposes seems more plausible.

The codes considered here as case studies illustrate one way in which lawyers have engaged in the globalisation process. We have argued that the codes, though reflecting a naïve faith in their own power, offer some interesting possibilities for pursuit by legal professions interested of an ethical agenda. We have proposed that ethics are deeply embedded in culture and that professional aspirations, for example to independence and autonomy, are built on the foundations of culture. Some theories of globalisation are potentially illuminating in relation to the processes that might degrade the cultural foundations of ethics. In particular, cultural and political globalisation suggest ways in which ethics may become universal rather than situated in uneasy truce with individual self-identity. But, as we caution, the implied values of a global ethic could be materialistic, positivistic, the lowest common denominator. In this article, we have attempted to broaden the notion of globalisation typically articulated in legal professional discourse. In terms of the international codes, we identify the relative absence of discourse as the barrier to the opportunity for the globalisation of professional ethics presented by the growing practice of international law. This is reflected in the absence of mechanisms to legitimate ethical norms through consulting groups marginal to their formation, and the absence of any attempt to universalise such norms through educational activity. We speculate that, at present, the international codes operate at a symbolic and ideological level. If they are to become more, legal professions must seek new ways to articulate, legitimate and transmit their ethical vision.

¹⁸⁷ *International Bar News*, Summer 1995, p.23.

Appendix: The International Bar Association General Principles

These General Principles were drafted by the Professional Ethics Standing Committee of the IBA and were endorsed by a number of IBA member organizations. The principles state that:

1. Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.
2. Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.
3. Lawyers shall honour any undertaking given in the course of their practice, until the undertaking is performed, released or excused.
4. Lawyers shall not place themselves in a position in which their clients' interests conflict with those of themselves, their partners or another client.
5. Lawyers shall at all times maintain confidentiality regarding the affairs of their present or former clients, unless otherwise required by law.
6. Lawyers shall respect the freedom of clients to be represented by the lawyer of their choice.
7. Lawyers shall account faithfully for any of their clients' money which comes into their possession, and shall keep it separate from their own money.
8. Lawyers shall maintain sufficient independence to allow them to give their clients unbiased advice.
9. Lawyers shall give their clients unbiased opinion as to the likelihood of success of their case and shall not generate unnecessary work.
10. Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.
11. Lawyers are entitled to a reasonable fee for their work. A demand for fees should not be a condition of the lawyer carrying out the necessary work if made at an unreasonable time or in an unreasonable manner.
12. Lawyers shall always behave towards their colleagues with integrity, fairness and respect.

