Penn State International Law Review

Volume 27
Number 2 *Penn State International Law Review*

Article 10

9-1-2008

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## I. INTRODUCTION

"*Is* law a business or profession?" This is one of the oldest and most familiar questions about the practice of law and the work of lawyers.[1] In fact, law has almost always been an occupation that displays characteristics of *both* business and profession,[2] with changes in emphasis over time.[3]

Why is the business/profession dichotomy still discussed today[4] if it is just a "rhetorical fight" between "bottom-line profits and professional virtue?"[5] One reason might be that the normative question "*should* law be a business or profession?" has been the subject of heated debates in

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1. JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? xiii (1916).

2. *See generally* Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*, *in* LIVING THE LAW (1987); Mark J. Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (reviewing LAWYERS IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1989)).

3. In both the United States and England, there were periods in history when virtually anyone could practice law, free from the usual restrictions typically associated with "professional practice." *See generally* Robert W. Gordon, *The American Legal Profession 1870-2000*, *in* CAMBRIDGE HISTORY OF LAW IN AMERICA (2008); B. ABEL-SMITH & R. STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965 (1967); Richard L. Abel, *The Decline of Professionalism*, 49 MOD. L. REV. 1 (1986).

4. *See* Samuel L. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005).

5. Yves Dezalay & Bryant Garth, *The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests of Professional Credibility*, 29 LAW & SOC. INQUIRY 615, 616 (2004).

many countries, reflecting ongoing tensions between professionalism and commercialism in the practice of law.[6]

This article focuses on global law firms: those mainly U.S. and U.K. law firms that practice in the globalized legal services market. This market has grown exponentially in the last twenty-five years.[7] By the twenty-first century, global law firms were present in 105 cities worldwide; most global lawyering takes place within and between these cities.[8] London and New York are the prime centres of global legal services.[9]

The growth of large law firms illustrates a shift from profession to business.[10] Large law firms "were and are considerably more commercially oriented and entrepreneurial"[11] than law firms in the past, with less of a focus on traditional professional virtues.[12] Global law firms, in particular, have to be managed along "proper business lines" to ensure client satisfaction.[13] If global law practice is, in fact, a business, is there any reason to treat it as a profession?

At the heart of the tensions between commercialism and professionalism lie two key questions: who should regulate the legal profession and why? Answers to these tend to reflect two distinct and contrasting conceptions—or visions—of the nature of legal work. One envisages an important public interest dimension to the practice of law, even at a global level. The other recognizes the fact that most lawyers are private practitioners offering services in a predominantly commercial context. Nowhere is this more likely to be true than in the global market.

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6. *See* Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067, 1075 (2007).

7. James R. Faulconbridge, Jonathan V. Beaverstock, Daniel Muzio & Peter J. Taylor, *Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 456 (2008).

8. *Id.* at 460.

9. *Id.*

10. *See* Robert G. Lee, *From Profession to Business: The Rise and Rise of the City Law Firm*, 19 J.L. & SOC'Y 31, 31 (1992); Marc Galanter & Thomas Palay, *Large Law Firms and Professional Responsibility*, *in* LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 189, 189-93 (Ross Cranston ed., 1995); Daniel Muzio & Stephen Ackroyd, *On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process*, 32 J.L. SOC'Y 615 (2005).

11. ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 39 (Hart Publishing 2d ed. 2008).

12. *See generally,* MARC GALANTER & THOMAS M. PALAY, TOURNAMENT OF LAWYERS: TRANSFORMATION OF THE BIG LAW FIRM (1991); MILTON C. REGAN, EAT WHAT YOU KILL (2005).

13. Laurence Etherington & Robert Lee, *Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm*, 14 IND. J. GLOBAL LEGAL STUD. 95, 101 (2007).

In Section II, I outline the contrasting "professional" and "business" visions of legal practice and the lawyer's role in society. In Section III, I set out the regulatory "maze"—or mess—that had developed in the U.K. prior to 2007, reflecting the unresolved business/profession dichotomy. In 2007, radical and revolutionary reforms were introduced in the Legal Services Act. The practice of law is now to be regulated externally from and independently of the legal profession itself; law firms can operate as "Legal Disciplinary Practices" ("LDPs") or in "Alternative Business Structures" ("ABSs"). In Section IV, I set out this transformation in U.K. policy over the last thirty years, from a professional to a business vision and in Section V, I review the reforms.

The reforms appear to envision a future where the practice of law should be treated predominantly as a business. In Section VI, however, I argue that a closer analysis of the new regulatory framework in the U.K. actually suggests that there is a "third way," or new vision, of legal practice that has been created specifically—and paradoxically—with global law practice (amongst other things) in mind. This adds a new gloss to the normative business/profession dichotomy. I draw some conclusions in Section VII.

## II. VISIONS OF LAW: PROFESSION OR BUSINESS?

### *A. Profession*

Lawyers and professional bodies, not surprisingly, usually have no doubt about how legal practice should be regulated. In Europe, for example, one of the core principles common to the whole European legal profession is said to be the self-regulation of the profession.[14] In the United States, the ABA agrees: "The legal profession is largely self-governing."[15]

A "measure of self-regulation" is, of course, one of the defining characteristics of a profession,[16] and there are several self-regulating professions. However, the legal profession claims to be unique "because

14. *See* The Council of the Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession, Principle (j) (2006) [hereinafter CCBE].

15. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 10 (2006).

16. THE ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, Cmnd. 7648, vol. 1, at 28, 30 (1979). According to Stephen Pepper, one of the characteristics that define the concept of a profession is that it is "largely self-regulated in determining and administering the qualifications for membership and in policing professional activities." Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, AM. B. FOUND. RES. J. 613, 615 (1986).

of the close relationship between the profession and the processes of government and law enforcement."[17] The ABA asserts that

> [t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.[18]

Thus, lawyers make the claim that they "play a vital role in the preservation of society."[19] The Council of the Bars and Law Societies of Europe[20] ("CCBE") goes even further. It claims that there is an interdependence and a correlation between—on the one hand—the role of the lawyer in society and—on the other—the nature of the society itself: "In a society founded on respect for the rule of law the lawyer fulfils a special role. . . . Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society."[21]

The CCBE states that, "It is one of the hallmarks of unfree societies that the state, either overtly or covertly, controls the legal profession and the activities of lawyers."[22] Therefore, the CCBE is "convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfill their professional and legal role."[23]

The CCBE vision has been endorsed by the Court of Justice of the European Communities. The Court has recognized that "independence, absence of conflict of interest and professional secrecy/confidentiality are core values of the legal profession that qualify as public-interest considerations; regulations to protect core values are necessary for the proper practice of the legal profession, despite the inherent restrictive effects on competition that may result from this."[24]

As a result, the Court upheld Member State restrictions on competition—a Dutch ban on multi-disciplinary partnerships, for

17. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 10 (2006).
18. *Id.* ¶ 11.
19. *Id.* ¶ 13.
20. The CCBE represents over 700,000 lawyers from the European Union and the European Economic Area, through their member Bars and Law Societies. *See* CCBE, Introduction, http://www.ccbe.org/index.php?id=2&L=0 (last visited Sept. 28, 2008).
21. CCBE CODE OF CONDUCT FOR EUROPEAN LAWYERS pmbl., art. 1.1 (2006).
22. *Id.*
23. *Id.*
24. European Parliament Resolution on the Legal Professions and the General Interest in the Functioning of Legal Systems, EUR. PARL. DOC. B6-0203 (2006).

example—on the grounds that the rules were justified to ensure the proper practice of the legal profession, especially with regard to conflicts of interests and secrecy.[25]

The European Parliament has also observed that "any reform of the legal professions has far-reaching consequences going beyond competition law into the field of freedom, security and justice and, more broadly, into the protection of the rule of law in the European Union."[26] Thus, core values "are particularly endangered when [legal professionals] are authorised to exercise their profession in an organisation which allows non-legal professionals to exercise or share control over the affairs of the organisation by means of capital investment or otherwise, or in the case of multidisciplinary partnerships with professionals who are not bound by equivalent professional obligations."[27] As a result of these and other factors, it "recognize[d] fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice."[28]

In short, despite the emphasis placed on market values, including competition, as the foundation of policy, the European Union ("EU") views law predominantly as a profession, thereby justifying exceptional protection. Whether or not this vision emerged for political reasons, it appears that this "rule of law" rhetoric in Europe is relatively new. In the EU, the rhetoric emerged after the fall of the Berlin Wall in 1989.[29] The criteria for accession to the EU included, with an eye on the former Soviet Union, respect for the rule of law.[30] The Treaty on European Union proclaimed that the EU "respected" fundamental human rights.[31] Later that was amended to state that the EU was "founded" on the rule of

25. *See* Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577. Note that the rationale of the Dutch Bar Association was that MDPs between lawyers and accountants threatened obligations of professional conduct because the accountants had obligations to audit and report to third parties. *Id.* In this context, the professional obligations clashed.

26. EUR. PARL. DOC. B6-0203 (2006).

27. *Id.*

28. *Id.*

29. European Commission, International Economic Issues: Enlargement, http://ec.europa.eu/economy_finance/int_economic_issues/int_economic_issues99_en.htm (last visited Sept. 29, 2008).

30. The so-called Copenhagen criteria, set out in 1993 by the European Council, www.europa.eu.int/comm/enlargement/intro/criteria.htm#Accessioncriteria (last visited July 15, 2008).

31. Treaty on European Union art. F, July 24, 2002, 2002 O.J. (C 191).

law.[32] Rule of law rhetoric is associated with human rights discourse as well as with globalization in general.

### *B. Business*

However, globalization is itself a reflection of another view which poses a growing challenge in modern times to the professional ideology. This view states that the regulation of legal services and lawyers is best left to the market and market forces. It is heavily informed by economic analysis and it is this analysis which has been sought repeatedly by U.K. governments in recent years. According to this view, "There is nothing unique about lawyers and legal services."[33] The analysis suggests that the special features of the job, and the Code of Conduct that goes with it, are "typical of many professions,"[34] including doctors and medical services.

The view that law is distinguished by the unique ethical obligations of lawyers and by the critical importance of legal services to society has also been rejected: "legal services are not unique in their social importance or in their conflicts between short-term commercial gain, quality, and ethics."[35] Conflicts of interest arise in almost every part of the economy. For example, lives may be at risk when doctors, who provide services on a fixed fee basis (the National Health Service in the U.K., or an HMO in the U.S.), are put under commercial pressure to choose low-cost treatment. Doctors may face commercial pressures to over-provide too. Similar conflicts arise in other sectors, for example where the cost of safety is a significant commercial factor.

These contrasting visions of legal practice—and the fact that law has typically displayed characteristics of both—are reflected in the way a regulatory "maze" in the legal services market developed in the U.K.

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32. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 6, Oct. 2, 1997, 1997 O.J. (C 340) [hereinafter Treaty of Amsterdam].

33. PAUL A. GROUT, THE CLEMENTI REPORT: POTENTIAL RISKS OF EXTERNAL OWNERSHIP AND REGULATORY RESPONSES, A REPORT TO THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS 4 (2005). The quote comes from a Report commissioned by the UK Department for Constitutional Affairs (DCA), looking at the potential risks arising from the introduction of outside ownership of law firms. The author is a Professor of Political Economy at the University of Bristol.

34. *Id.* at 4.

35. JAMES DOW & CARLOS LAPUERTA, THE BENEFITS OF MULTIPLE OWNERSHIP MODELS IN LAW SERVICES 5 (2005), *available at* http://www.dca.gov.uk/legalsys/dow-lapuerta.pdf. The quote comes from an assessment of the potential benefits and costs of permitting legal service providers to fund practices with outside equity. The authors, James Dow and Carlos Lapuerta, are Professors of Finance at the London Business School and independent consultants with an international consulting firm (Brabble).

## III. A REGULATORY MAZE

Traditionally, in the U.K., there have been very few restrictions on offering legal advice and assistance. Most legal services can be offered by anyone for free or for a fee. Some important legal services are "reserved" in the sense that only authorised practitioners may offer them.[36] However, the list is relatively short: conveyancing (real property transfer), probate, preparation for litigation, advocacy and notary work.[37] By contrast, the number of authorised practitioners who may offer these services is relatively large and includes not only lawyers but also, depending on the work, licensed conveyancers, legal executives, patent agents, banks and insurance companies.[38]

Even the definition of lawyer is problematic in the U.K. Many foreign observers of the English legal profession know that it is divided into barristers and solicitors. Few, however, would be aware that regular providers of legal services also include accountants, notaries, licensed conveyancers, trademark attorneys, members of the Institute of Legal Executives, will writers, claims managers (intermediaries), claims assessors, financial advisers, online/email service providers,[39] employment advisers and patent agents. Indeed, in the EU, well over thirty occupations collectively qualify for the definition of lawyer.

Not surprisingly, therefore, the machinery for regulating legal services providers in the U.K. had developed into an enormously complicated "regulatory maze."[40] For some legal services, such as litigation, advocacy and general advice, there were no less than twelve different regulators; for others, where legal advice was provided by a layperson, there was none. While some persons performing legal work—barristers and solicitors—enjoyed professional privilege, others—for example, accountants—did not. Parts of the legal services sector were regulated on the basis of the service provided; others on the basis of the professional status of the provider. There were difficulties of interface and cooperation between the various regulators.

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36. Legal Services Act, 2007, § 12, sched. 2 (Eng.) [hereinafter LSA]; Courts and Legal Services Act, 1990, (Eng.), as amended by the Access to Justice Act, 1999, (Eng.); Solicitors Act, 1974, §§ 22-23 (Eng.). [Ed. Note: for purposes of clarity, subsequent citations to these and other statutes will include the name of the statute and a *supra* cross-reference.]

37. LSA, *supra* note 36, sched. 4.

38. *See, e.g., id.*

39. *See, e.g.*, Freelawyer, www.freelawyer.co.uk (last visited Sept. 29, 2008).

40. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET, 2003, at 14, *available at* http://www.dca.gov.uk/consult/general/oftreptconc.htm (stating the government's conclusions following its consultation report titled IN THE PUBLIC INTEREST, 2002, *available at* http://www.dca.gov.uk/consult/general/oftrept.htm).

The regulatory maze was complicated further by several other factors. For example, some regulators focused on standards and rules, while others focused on handling complaints. Some regulators were involved in enforcement activity including discipline, others in policy-making. Many regulators also played a role representing members' interests. The globalization of legal work added a further layer of regulation. Lawyers practising abroad often have to deal with international rules, "super-regulators," such as the EU and the World Trade Organization, and "double deontology," a concept which encompasses the problems lawyers encounter when they face different rules in more than one legal profession or legal system.[41]

. In short, the regulation of the legal services market in the U.K. was incredibly confused, fragmented and full of anomalies. The regulatory maze had evolved into a regulatory mess, in which the nature of law—business or profession—and, in particular, the role to be played by professional values, was confused and contested. The time was ripe for review and reform.

## IV. TRANSFORMATION: PROFESSION TO BUSINESS

In 1979, a major review of the provision of legal services in the U.K. was published.[42] The Royal Commission on Legal Services enquired into changes to the structure, organization, training, regulation and entry into the legal profession that were desirable in the public interest. In general, it endorsed the professional vision of legal practice, that the preservation of the status quo, including self-regulation, was still in the public interest.[43]

In the same year, however, the Conservative Party, led by Prime Minister Margaret Thatcher, came to power, a position the Party would maintain for eighteen years. At first, the view of the Royal Commission was not challenged by the new government but, later, the foundations were laid for a redefinition of the public interest based upon a business vision of law.

The "Thatcher revolution" began in 1985 with the abolition of the solicitors' conveyancing monopoly.[44] Licensed conveyancers could now also undertake work that had yielded fifty percent of the collective

41. *See* Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. LEGAL ETHICS 521 (2005).

42. *See* THE ROYAL COMMISSION ON LEGAL SERVICES, *supra* note 16.

43. *See generally id.*

44. Administration of Justice Act, 1985, pt. 2 (Eng.). The conveyancing monopoly meant that only solicitors could draft the deed required to transfer ownership in land.

income of the solicitors' branch of the legal profession.[45] Increased competition, lower prices and the relaxation of professional rules restricting advertising immediately followed.[46] Soon after, the whole profession—both barristers and solicitors—came under increased pressure to justify other restrictions on the practice of law.[47] As a result, an intra-professional turf war between the two branches broke out. It was clearly "A Time for Change."[48]

Slowly but surely, the traditional vision of legal practice as a profession was transformed.[49] By 1989, the government stated its belief that "free competition between the providers of legal services will through the discipline of the market ensure that the public is provided with the most effective network of legal services at the most economic price."[50]

In 1990, the Courts and Legal Services Act created the Lord Chancellor's Advisory Committee for Education and Conduct ("ACLEC"). This committee, comprised of both lawyers and laypeople, had, as part of its remit, the task of scrutinizing changes to professional rules proposed by the Law Society.[51] The Law Society continued to set the rules for solicitors, and the Act specifically permitted the Law Society to retain restrictions on multi-disciplinary partnerships ("MDPs"),[52] endorsing the view of the Royal Commission that MDPs were not in the public interest.[53] However, the Law Society had lost its autonomous power to self-regulate.

Prior to the Courts and Legal Services Act, the Law Society had drafted and approved all the rules, subject only to the approval of a

45. RICHARD O'DAIR, LEGAL ETHICS TEXT AND MATERIALS 66 (2001).

46. *Id.*

47. *See* LORD CHANCELLOR'S DEPARTMENT, THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION, 1989, Cm. 570; LORD CHANCELLOR'S DEPARTMENT, CONVEYANCING BY AUTHORIZED PRACTITIONERS, 1989, Cm. 572; LORD CHANCELLOR'S DEPARTMENT, CONTINGENCY FEES, 1989, Cm. 571. These documents are collectively known as the Government Green Papers.

48. COMMITTEE ON THE FUTURE OF THE LEGAL PROFESSION, A TIME FOR CHANGE, 1988, at 1. The committee, known as "the Marre Committee," had been organized by the two branches to resolve a dispute between them about rights of audience for advocates.

49. *See generally* RICHARD ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE (2003); GERARD HANLON, LAWYERS, THE STATE, AND THE MARKET: PROFESSIONALISM REVISITED (1999).

50. LORD CHANCELLOR'S DEPARTMENT, THE WORK AND ORGANISATION OF THE LEGAL PROFESSION, *supra* note 47, ¶ 1.2.

51. Courts and Legal Services Act, *supra* note 36, § 19(1).

52. *Id.* § 66(2).

53. THE ROYAL COMMISSION ON LEGAL SERVICES, *supra* note 16, at 401.

senior judge.[54] Following the passage of the Act, proposed changes to rules ultimately had to be approved by the Lord Chancellor.[55] On the face of it, this was only a minor inroad into the status quo, but, as the Law Society put it, it was a "dangerous accumulation of power in the hands of a government minister."[56] By the end of the 1990s, government oversight was further enhanced: ACLEC was taken out of the picture, and the Lord Chancellor alone had the final decision.[57]

In 1994, the Law Society held a Research Conference titled, "Profession, business, or trade: Do the professions have a future?"[58] In 2000, the Office of Fair Trading ("OFT"), the competition (antitrust) authority, decided to review competition in the professions.[59] The review identified professional rules, practices and customs which had anti-competitive effects.[60] In 2001, it issued a report advocating more competition between the professions and the removal of restrictions on practice,[61] including the restrictions on MDPs. The OFT also suggested that there should be an extension of professional privilege to accountants providing tax advice. In the same year, professional rules were relaxed enabling law firms to incorporate and to practice as limited liability partnerships or as limited companies.[62]

In 2003, the Department for Constitutional Affairs published a report that looked at competition and regulation in the legal services market.[63] This report concluded that the regulatory framework was "outdated, inflexible, over-complex and insufficiently accountable or transparent."[64] The government then appointed Sir David Clementi to carry out an independent review of the regulatory framework for legal services. He reported in 2004.[65]

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54. The "Master of the Rolls" is the most senior judge of the Court of Appeal. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS, 2003, at 99, *available at* http://www.dca.gov.uk/publications/annual_reports/2003/judstat03_ch09.pdf.

55. Courts and Legal Services Act, *supra* note 36, § 19(1).

56. THE LAW SOCIETY, STRIKING THE BALANCE: THE FINAL RESPONSE OF THE COUNCIL OF THE LAW SOCIETY ON THE GREEN PAPERS ¶ 1.4 (1989).

57. *See generally* LORD CHANCELLOR'S DEPARTMENT, RIGHTS OF AUDIENCE AND RIGHTS TO CONDUCT LITIGATION: THE WAY AHEAD, 1998; Access to Justice Act, *supra* note 36.

58. O'DAIR, *supra* note 45, at 65.

59. *See* OFFICE OF FAIR TRADING, COMPETITION IN THE PROFESSIONS, 2001.

60. *See id.*

61. *Id.*

62. SOLICITORS' CODE OF CONDUCT R. 14 (2007); *see also* Limited Liability Partnerships Act, 2000 (Eng.).

63. *See* DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *supra* note 40.

64. *Id.* ¶ 70.

65. *See* DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES-FINAL REPORT (2004).

The Clementi Report was blunt: if lawyers reject the notion that they are in business, complaints against them would continue until they were indeed out of business.[66] The report advocated the establishment of a single regulatory authority that would take over the regulatory functions of the professional bodies, leaving those bodies to act solely as representatives of their members.[67] Quite clearly by now, policy-makers were being guided predominantly by market assumptions and economic analysis. The emphasis was no longer on "clients" but on "Putting Consumers First."[68] Even the review of legal aid funding was framed in an economic context, as can be seen from the title of the 2006 report: "Legal Aid—A Market-Based Approach to Reform."[69] This report proposed that a market system be introduced with lawyers bidding for contracts for legal aid work. In the same year, the government published a radical and revolutionary Legal Services Bill,[70] the majority of which was enacted in October 2007.[71]

## V. THE UK LEGAL SERVICE REFORMS

The Legal Services Act sets the scene in the U.K. for what is "arguably going to be the most fundamental change ever in the structure of the provision of legal services."[72] The Act has three main objectives: to create a new regulatory regime based on a set of regulatory objectives; to strengthen the machinery for dealing with complaints; and to facilitate the creation of new structures of legal practice.

One of the most striking features of the reforms is the extent to which regulators are now independent of the legal profession. In other words, self-regulation has largely been replaced by independent, external regulation and regulators. At the heart of the reforms are three themes:

66. *See generally id.*

67. *See generally id.*

68. *See generally* DEPARTMENT OF CONSTITUTIONAL AFFAIRS, THE FUTURE OF LEGAL SERVICES—PUTTING CONSUMERS FIRST, 2005, Cm. 6679. A White Paper is a Consultation Paper. This one was published following the Clementi Report.

69. LORD CARTER OF COLES, LEGAL AID: A MARKET-BASED APPROACH TO REFORM, 2006.

70. Legal Services Bill [HL], HL Bill 9, Session 2006-07 (2006), *available at* http://www.publications.parliament.uk/pa/ld200607/ldbills/009/07009.i-v.html.

71. *See generally* LSA, *supra* note 36.

72. Simon Young, *A Class Act,* 158 NEW L.J. 10, 10 (2008). The Law Society called it "the biggest reform of the regulation of legal services in England and Wales for a generation." Briefing from The Law Society on The Legal Services Act 2007 (Nov. 29, 2007), at 3, http://www.lawsociety.org.uk/documents/downloads/dynamic/lsa_briefing.pdf.

consumer focus, independence, increased competitiveness and increased choice for consumers.[73]

### *A. New Regulatory Regime*

The Legal Services Act creates the Legal Services Board ("LSB").[74] Under the Act, the LSB, which will become fully operational in early 2010,[75] will be responsible for the oversight of all the legal front-line ("approved") regulators including the Solicitors Regulation Authority ("SRA") and the Bar Standards Board.[76] The LSB, whose chairman and majority of members must be laypeople,[77] has been given real power in order to deliver "consumer confidence."[78]

The LSB's powers and duties include authorising bodies to be approved regulators of legal services; authorising bodies to license alternative business structures, approving professional rules, and directing changes to them if this proves necessary and justifiable; directing approved regulators to take a particular action, and applying sanctions if they do not; and recommending to the Lord Chancellor which services should be reserved services and therefore compulsorily regulated.[79]

The Legal Services Act changes the way professional rules are approved. Rules must meet the regulatory objectives set out in section 1(1) of the Act. These are:

(a) protecting and promoting the public interest;
(b) supporting the constitutional principle of the rule of law;
(c) improving access to justice;
(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services;
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen's legal rights and duties; and
(h) promoting and maintaining adherence to professional principles.[80]

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73. LEGAL SERVICES COMPLAINTS COMMISSIONER, CYCLE OF CHANGE: ANNUAL REPORT AND ACCOUNTS, 2006-7, H.C. 676, at 17, *available at* http://www.olscc.gov.uk/docs/annual-report-06-07-full.pdf.
74. LSA, *supra* note 36, § 2(1).
75. Ministry of Justice, Jack Straw appoints first chair of Legal Services Board, Apr. 23, 2008, www.justice.gov.uk/news/newsrelease230408a.htm.
76. LSA, *supra* note 36, pt. 4.
77. *Id.*, sched. 1, ¶¶ 2(1)-(2).
78. LEGAL SERVICES COMPLAINTS COMMISSIONER, *supra* note 73, at 8.
79. Briefing from The Law Society, *supra* note 72, at 4.
80. LSA, *supra* note 36, § 1(1).

The professional principles are independence, integrity, maintaining proper standards of work, acting in the best interests of clients, confidentiality and, for those exercising rights of audience or who conduct litigation, to comply with their duty to the court to act with independence and in the interests of justice.[81] The LSB must act in accordance with these objectives so far as is reasonably practicable. It will, however, be responsible to Parliament, not the professions.

### *B. Machinery for Dealing with Complaints*

The Legal Services Act also creates the Office for Legal Complaints ("OLC").[82] The OLC is an independent body set up to administer an ombudsman scheme that will deal with all consumer complaints against lawyers or about legal services.[83] When it becomes fully operational, probably by late 2010, it will become the single point of entry for all consumer complaints about lawyers and legal services. It will replace and reinforce the current machinery which was developed during the 1990s to tackle perceived shortcomings in the professional responses to consumer complaints. This machinery will be briefly reviewed here.

The Legal Services Ombudsman ("LSO"), appointed by the Lord Chancellor, reviews the way professional bodies handle consumer complaints about solicitors, barristers, legal executives, licensed conveyancers and patent agents. The LSO, who cannot be a qualified lawyer, is completely independent of the legal profession.[84]

There is also a Legal Services Complaints Commissioner ("LSCC"). If it appears to the Secretary of State that complaints about members of any professional body are not being handled efficiently, he may require the LSCC to consider exercising her authority under section 52(2) of the Access to Justice Act of 1999.[85] This authority includes the power to require the professional body to provide information or make reports to the LSCC about the handling of complaints about its members; to investigate the handling of complaints about the members of a professional body; to set targets in relation to the handling of complaints; and to require a professional body to submit to the LSCC a plan for the handling of complaints about its members.[86]

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81. *Id.* § 1(3).
82. *Id.* § 114(1).
83. *Id.* pt. 6. Professional disciplinary matters remain the responsibility of the approved regulators. *Id.*
84. Courts and Legal Services Act, *supra* note 36, § 21; Administration of Justice Act, 1990, §§ 51-52 (Eng.).
85. Access to Justice Act, *supra* note 36, § 52(2).
86. *Id.*

Where a plan is required but the professional body fails to submit one that the LSCC considers adequate for securing that such complaints are handled effectively and efficiently, or if a professional body submits a plan but fails to act in accordance with it, the LSCC may require the body to pay a penalty.[87] Before requiring the body to pay a penalty, the LSCC must afford it a reasonable opportunity to appear and make representations.[88] The Secretary of State must specify the maximum amount of the penalty which is the lesser of £1m or one percent of the body's income.[89]

In determining the penalty, the LSCC must have regard to all the circumstances of the case including, in particular, the total number of complaints about members of the body and, where the penalty is imposed for a failure to handle complaints in accordance with a plan, the number of complaints not so handled, as well as the assets of the body and the number of its members.[90] The penalty is paid to the Commissioner who pays it to the Secretary of State.[91] A Legal Services Consumer Board has been set up to advise the LSCC on consumer issues, and assist in identifying what the consumer expects from complaints handling in legal service provision.[92]

The Legal Complaints Service ("LCS") and SRA Improvement Plan 2006-07 were declared inadequate by the LSCC on April 3, 2006. The LSCC found that the Plan did not include all the targets she had set, nor did it aim to deliver sufficient improvements in complaints handling which consumers and the profession "expect and deserve."[93] The LSCC provided the LCS and the SRA with an opportunity to make representations as to whether she should impose a penalty, which they did, orally and in writing.[94] Taking all these into account, she notified the Law Society on May 17, 2006 that she was levying a penalty of £250,000.[95] In July 2006, the LCS and the SRA submitted a new Improvement Plan.[96] On 28 July, she considered this to be adequate.[97] She adjusted the penalty to £220,000 in recognition of the co-operation

87. *Id.* § 52(3)(a),(b).
88. *Id.* § 52(5).
89. *Id.*
90. Access to Justice Act, *supra* note 36, § 52(6).
91. *Id.* § 52(7).
92. LEGAL SERVICES COMPLAINTS COMMISSIONER, *supra* note 73, at 67.
93. *Id.* at 12.
94. *Id.*
95. *Id.*
96. *Id.*
97. LEGAL SERVICES COMPLAINTS COMMISSIONER, *supra* note 73, at 12.

shown by the LCS and the SRA, and the fact that they submitted an adequate Plan.[98] The Law Society paid this sum in August 2006.[99]

In 2006-2007, the LSC Commissioner moved to a "more co-operative process for agreeing" the Law Society's LCS and SRA Improvement Plan for 2007-2008.[100] She encouraged the Boards to include aspects of their Improvement Agendas in their final Plan that she could independently measure and monitor.[101] In other words, the Commissioner sought a "change of culture and ethos in their organisations to truly deliver a better service for consumers and the profession."[102]

The LCS and SRA complaint-handling performance in 2006-2007 was "a very mixed picture."[103] While encouraging results had been achieved on how quickly cases had been handled, this had not been matched by achievement of all the quality targets: "Getting to grips with their own processes and embedding them into their culture still appears to pose a significant challenge to the Law Society's LCS and SRA."[104] In her Improvement Plan 2006-2007, the Commissioner set thirteen targets for the LCS and SRA in three strategic areas: timeliness, the quality of decisions, and the implementation of the Plan.[105]

The Legal Services Act abolishes the offices of the LSCC and the LSO.[106] When the OLC becomes operational, it will appoint a Chief Ombudsman,[107] who must be a layperson,[108] and, possibly, other assistant ombudsmen. The OLC will administer the ombudsman scheme, which is far more elaborate and detailed than the prior scheme.[109]

Even though the OLC chairman and a majority of members must be laypeople,[110] the OLC must still get the consent of the LSB in making the ombudsman scheme rules.[111] The LSB may also give guidance to the OLC on any matter it likes.[112] Thus, the overall effect of the Legal

98. *Id.* at 12-13.
99. *Id.* at 30.
100. *Id.* at 7.
101. *Id.*
102. LEGAL SERVICES COMPLAINTS COMMISSIONER, *supra* note 73, at 7.
103. *Id.* at 8.
104. *Id.*
105. *Id.* at 12 (explaining that 9 out of 13 are related to timeliness and quality while the remaining four are related to internal management issues).
106. LSA, *supra* note 36, § 159(1).
107. *Id.* § 122(1).
108. *Id.* § 122(2).
109. *See generally id.* pt. 6.
110. *Id.* sched. 15, paras. 2(1)-(2).
111. LSA, *supra* note 36, § 155(1)(a).
112. *Id.* § 162.

Services Act is to reinforce even further the independence of regulators from the professions they regulate.

In 2006, in anticipation of the Act and "seeing which way the wind was blowing,"[113] the professions changed their governance structures.[114] The regulatory functions of the Bar Council were taken over by the Bar Standards Board in 2006. More significantly, the Law Society formally separated into three distinct bodies: the Law Society—the representative body for solicitors; the Solicitors Regulation Authority ("SRA")—which conducts the regulation of solicitors and deals with some consumer complaints where misconduct of a solicitor is alleged; and the Legal Complaints Service ("LCS") (formerly, until January 2007, the Consumer Complaints Service), which handles consumer complaints about service by solicitors.[115]

Each of these bodies has its own Chief Executive and, in the case of the LCS and the SRA, their own Board.[116] The Law Society has its own Council and Corporate Governance Board.[117] The LSCC welcomed "the relative independence that the SRA and LCS Boards have from those that represent solicitors."[118]

The Solicitors Disciplinary Tribunal ("SDT"), which is the statutory tribunal whose primary function is to consider and adjudicate upon allegations of professional misconduct or breaches of professional rules by solicitors and solicitors' employees, is also constitutionally independent of the Law Society, although its administration is funded by the Society.[119] The SDT may order the striking off the Roll, suspension, or the payment of a penalty.[120]

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113. BOON & LEVIN, *supra* note 11, at 138.

114. *Id.*

115. Although the SRA and LCS operate as different entities, the governance arrangements remain the same and the Law Society Council approves the budget of all three, and is responsible to the Commissioner for its Improvement Plan and how complaints are handled in accordance with this Plan. Although the Commissioner's powers relate to the Law Society, as the professional body, the LCS and the SRA have been delegated the responsibility for submitting an Improvement Plan to the Commissioner. The statutory responsibility remains with the Law Society. There is an overlap between the LCS and the SRA with regards to complaints handling and they submit a joint Plan. However, the overwhelming majority of the improvement plan relates to LCS and the remainder to SRA. LEGAL SERVICES COMPLAINTS COMMISSIONER *supra* note 73, at 11.

116. *Id.* at 10.

117. *Id.*

118. *Id.* at 7.

119. Solicitors Disciplinary Tribunal, Welcome, www.solicitorstribunal.org.uk (last visited Oct. 3, 2008).

120. *Id.*

### C. *New Structures of Legal Practice*

Another striking feature of the Legal Services Act is its removal of certain restrictions on the practice of law and its potential sources of funding. For example, the introduction of so-called Legal Disciplinary Practices allows firms to be owned and managed by lawyers and non-lawyers.

There will be restrictions: at least seventy-five percent of the number of managers must be legally qualified. There can be up to twenty-five percent individual non-lawyer managers if approved by the SRA. Non-lawyer ownership is also restricted to twenty-five percent of the overall ownership, but no external ownership of the LDP is permitted.[121] In other words, non-lawyer owners must also be managers. The LDP will be approved to offer only solicitor or other relevant legal services; it will not be a multi-disciplinary practice.[122] However, the Act envisages legal services being offered to the public by all types of legal practitioners,[123] together for the first time. The Ministry of Justice is currently working with the various legal regulators, such as the SRA, to enable these structures to emerge.[124] In July 2008, the SRA Board published a draft amendment to the Solicitors' Code of Conduct to provide for LDPs.[125] If approved, the new rules are expected to come in to force in March 2009.[126]

An ABS—or "licensed body"[127]—will go much further than the LDP. An ABS will allow the creation of multidisciplinary practices. Not only will lawyers be able to share the management and control of the firm with non-lawyers, an ABS will also be able to provide any type of legal services, both reserved and unreserved, as well as other related services such as insurance, surveying and so on.[128] In other words, an

121. Managers are partners in a partnership, members in a limited liability partnership or directors of a limited company.

122. LSA, *supra* note 36, sched. 16, para. 82 (inserting § 9A to the Administration of Justice Act 1985, *supra* note 44).

123. These include, but are not limited to, licensed conveyancers, barristers, notaries public, legal executives, patent and trademark agents and law costs draftsmen.

124. MINISTRY OF JUSTICE, LEGAL SERVICES REFORM FACT SHEET—ALTERNATIVE BUSINESS STRUCTURES, 2008, at 2, *available at* http://www.justice.gov.uk/docs/abs-fact-sheet.pdf.

125. Solicitors Regulation Authority, Legal Services Act—new rules and regulations, http://www.sra.org.uk/sra/legal-services-act/lsa-new-rules.page (last visited Oct. 7, 2008).

126. SOLICITORS REGULATION AUTHORITY, LEGAL SERVICES ACT: NEW FORMS OF PRACTICE AND REGULATION, 2008, at 4, *available at* http://www.sra.org.uk/securedownload/file/478.

127. LSA, *supra* note 36, § 71(2).

128. *Id.* pt. 5.

ABS will be a "one-stop shop" for prospective consumers of legal services.

ABSs will also be able to raise capital by listing on the stock exchange, to float their shares, and to be publicly traded.[129] An ABS can consist of the same legal practitioners as in an LDP, and may contain no lawyers. So, it is entirely possible for non-lawyers, including commercial organizations, to own firms that provide legal services.[130]

The Legal Services Act thus envisages law as a business, though there are some safeguards. Regulators will be able to apply to the LSB to become the licensing authority ("LA") to regulate ABSs.[131] Firms will then apply to the LA for ABS status.[132] If a non-lawyer owns greater than ten percent of the firm, they have to meet a "fitness to own" test.[133] External investors are also subject to this test, which covers honesty, integrity and reputation, competence, capability and financial soundness.[134] Consumers will benefit from greater competition in terms of choice, price quality and access. Producers will benefit from greater access to finance, greater flexibility and choice.[135]

It is anticipated that the first LDP will be licensed in March 2009;[136] the first ABS in 2011 or 2012.[137] So, what impact will the reforms have on global firms?

## VI. THE PARADOX OF PROFESSIONALISM—A NEW VISION?

When the reforms were proposed, it was clear that the business vision of legal practice was being embraced in the UK. The removal of self-regulation and the introduction of LDPs and ABSs confirmed the view that the public interest was to be protected by the market and market forces rather than by professional self-regulation. Conduct, or

129. *Id.* By contrast, ABA Model Rule 5.4 prohibits lawyers from sharing fees, practicing in partnership with non-lawyers, or letting non-lawyers own interests in law firms. Lawyers can obtain outside capital for a separate company that rents buildings and equipment to the firm. *See* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1721 (1998).

130. SOLICITORS REGULATION AUTHORITY, LEGAL SERVICES ACT: NEW FORMS OF PRACTICE AND REGULATION, 2007, at 2, *available at* http://www.sra.org.uk/securedownload/file/350.

131. *Id.* at 3.

132. *Id.* at 4.

133. LSA, *supra* note 36, pt. 5, sched. 13. The test is whether their ownership is compatible with the statutory regulatory objectives and whether they are fit and proper to own the interest. *Id.*

134. *Id.*

135. CLEMENTI, *supra* note 65, at 5.

136. Solicitors Regulation Authority, Legal Services Act—update on our work, www.sra.org.uk/sra/legal-services-act/lsa-update.page (last visited Oct. 7, 2008).

137. Solicitors Regulation Authority, Consultations, http://www.sra.org.uk/securedownload/file/350 (last visited Oct. 7, 2008).

misconduct, would still be regulated, but lawyers would not be given any special, or exclusive, professional status. Thus, if certain legal services were to be regarded as special in some way (for example, because of the nature of the advice given), then all providers of such advice, not just lawyers, would be subject to special regulation.

In the new legal services market, lawyers will have to compete with others, especially accountants, on a level playing field. And indeed, several banks have set up legal service departments ready to take advantage of the Legal Services Act provisions once they come into force.[138] Other organizations, such as the Royal Automobile Club, are expanding their legal service departments in anticipation.[139] But what about global law firms? How will the reforms affect them?

In this section I review the opportunity and the threat posed by the reform proposals for global law firms. First, I argue that the "business" aspects of the reforms may well have little, or no, impact on global law firms, especially if they decide not to take up the ABS option. Secondly, I will show that the proposed shift of vision, away from profession to business, actually posed a threat rather than an opportunity for global law firms. In fact, late amendments to the legislation were made in order to restore certain professional core values to alleviate this threat. Given the reforms' emphasis on business, why was this done? Was it a belated acceptance of the profession's own view, as expressed by the CCBE, the ABA and other professional associations, that self-regulation is a core principle? Did the government acknowledge the view that lawyers are, in fact, unique or, at least, that the lawyer's professional function is an essential condition for the rule of law and democracy in society?

My argument is that the late changes were actually in harmony with the business/market ideology of the reformers. Indeed, it appears that the commercial position of English global law firms will be not merely protected but positively reinforced by a "professional" vision. In this sense, there is no longer any business/profession dichotomy.

### *A. Opportunity*

It was argued by some that the reforms would be good for U.K.-based global law firms. Liberalisation of ownership structures in the U.K., it was said, would "enable more effective competition and expansion into [international legal services] markets further into the future."[140] The introduction of ABSs and outside equity could give the

138. BOON & LEVIN, *supra* note 11, at 34 (referring to the Co-operative and Halifax banks (Co-Operative Legal Services and Halifax Legal Solutions)).

139. *Id.* The Automobile Association has also entered the legal services market.

140. DOW & LAPUERTA, *supra* note 35, at 12.

U.K. an "unprecedented global competitive advantage in the legal marketplace."[141] For example, a law firm specializing in the project finance of international energy projects would benefit from having engineers working alongside lawyers. Giving the engineers stock in the firm—or even making them partners—might be important as a means of rewarding them.[142]

The ABSs will not in fact have the major impact that some have predicted unless law firms decide to opt for this structure. No doubt many law firms will do so, but it is entirely predictable that global law firms will not, preferring instead to retain, in the medium and long-term, their partnership status. There are several reasons for this.

First, global law firms are not capital-intensive. When profits are high and debt financing is readily available, they have little need of outside equity. Clients of global firms are "expert buyers of legal services" and, as such, "go to the best practices, wherever they are."[143] They can shop around and have no particular need for "one-stop shopping." A series of interviews with partners and clients in the U.K., conducted between November 2007 and January 2008, found that "[v]ery few saw law firms rushing to incorporate."[144] The Legal Services Act was not expected to change the structure or style of legal partnerships.[145]

Secondly, economic analysis suggests that "[w]ithin the legal profession, partnerships might be more efficient than corporations in the provision of those services that are most difficult to value, and less efficient for those services that are relatively straightforward."[146] There is some empirical support for this analysis. For example, in 1970 Booz Allen Hamilton, a large management consulting firm, dissolved its partnership and went public, only to buy back its shares and become a private partnership six years later. According to *Business Week*, "when Booz Allen went public, it appeared it might be a trend-setter among consulting firms. But before long, earnings and the market began to erode, and service companies lost their allure among investors."[147]

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141. Tommy Sangchompuphen, *U.K. Bill Predicted to Cause Shake-Up of Global Legal Services*, LAW.COM, June 12, 2006, http://www.law.com/jsp/article.jsp?id=1149843927137.

142. DOW & LAPUERTA, *supra* note 35, at 8.

143. Alexia Garamfalvi, *England Poised to Reform Legal Market*, LAW. COM, Oct. 10, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1155114327477 (quoting Brian McDonnell, an associate with the London office of Hunton & Williams, who specializes in financial services and regulatory law).

144. EVERSHEDS, LAW FIRM OF THE 21ST CENTURY—AN EVERSHEDS REPORT 7 (2008), *available at* www.eversheds.com/21stcenturylawfirm.

145. *Id.*

146. DOW & LAPUERTA, *supra* note 35, at 6.

147. *Id.* at 7 n.5.

By contrast, in the United States, financial service companies have shifted from partnership status to corporations because information technology increased the efficiency of their services.[148] In other words, different firms may adopt different strategies depending on the type of service they offer clients. Many tax services are amenable to information technology, and ". . . in the U.S. in 1997 'measured by revenue, 67% of tax preparation work was done by corporations, while only 4% was done by partnerships (almost all of the remainder is done by sole proprietorships).'"[149] Corporate structures are predominant amongst those firms that are allowed to handle certain specialized legal or paralegal services like title handling.[150] By contrast, "[p]artnerships still dominate certain aspects of banking and accounting services, but focus on those areas that involve less information technology and more personal skill."[151]

It remains to be seen which side of the line particular law firms in the U.K. will fall.[152] The first ever law firm in the world to go public was an Australian class action law firm in 2007.[153] Whether this firm repeats the experience of Booz Allen Hamilton remains to be seen. It should be noted that the giant consulting firm, McKinsey, has no outside equity.

### *B. Threat*

Global law firms have already experienced competition, consumer sovereignty and fundamental commercial values. The global legal services market is already very sophisticated with well-informed clients, often supported by in-house legal teams and vast human and other resources. Clients shop around for legal services. Enron, for example,

148. *Id.* at 9.

149. *Id.* (quoting Jonathan Levin & Steven Tadelis, *A Theory of Partnerships*, Q.J. ECON., Feb. 2005, at 155.)

150. *Id.* at 10.

151. DOW & LAPUERTA, *supra* note 35, at 9.

152. There are about 85,000 solicitors in private practice in England and Wales. *See* Stephen Mayson, *Referral Repercussions,* COUNSEL, July 2008. Just less than half that number practice in the 9,500 firms of 10 partners or less. *See id.* The other half practice in firms of more than 10 partners. *See id.* What is significant is that there are only around 500 such firms, yet they generate about two-thirds of total fee income. *See id.* There is a significant gulf between the hemispheres of legal practice. *See id.*

153. Steve Hoare, *Aussie Law Firm Listed Today; 8m Shares Traded*, THELAWYER.COM, May 21, 2007, http://www.thelawyer.com/cgi-bin/item.cgi?id=125897. The law firm was Slater & Gordon. The firm's website, www.slatergordon.com.au, has a section entitled "Investors." In 2008, PricewaterhouseCoopers Australia integrated its legal business, operated by its associated firm, PwCLegal into the broader PricewaterhouseCoopers partnership under a multidisciplinary partnership structure. In so doing, it claimed to have created the largest MDP in Australia: www.pwclegal.au.

not atypically for large corporations, used hundreds of outside law firms.[154]

On the face of it, therefore, the intrusion of the marketplace and business values into legal practice envisaged by the U.K. reforms should not have constituted a threat to global law firms. Yet, as one senior lawyer put it, "The loss of professional values generally within the market will make it harder for us to operate."[155] This comment highlights a paradox that lies at the heart of the U.K. reforms. If the market is deemed to be the most appropriate regulator, why should legal professional values be retained?

The problem for global law firms is that the market vision is not universally embraced. Indeed, as we have seen, even the EU itself, although founded on market values, including competition, has endorsed the professional vision of law. As a result, in the EU there has been no attempt to create a "level playing field" between Member States by harmonizing the regulation of the legal services market. Each Member State is free to regulate its legal profession in its own territory, according to its own vision of legal practice.[156] Consequently, professional rules and regulations differ from state to state. This means too that there could be a conflict between the visions of the nature of legal services in different countries. Thus, while some Member State rules, such as in the Dutch case, protect the market for lawyers, others, such as those in the U.K., expose lawyers to free competition in the market for legal services.

This diversity of vision within Europe—and beyond—means that English global law firms could be excluded from operating in some countries on the grounds that they lack some of the essential characteristics of professionalism. The risk of exclusion may be much greater if law firms adopt ABS, MDP or even LDP structures. The possibility of exclusion may reinforce the other factors deterring global law firms from adopting, in particular, the ABS structure, with the outside investment that it entails.[157]

However, eschewing these structures might not have been sufficient to save English firms from exclusion from the global legal services marketplace. For, at the heart of the reform proposals was, along with the end of self-regulation, what appeared to be the loss of the core value of professional independence. When the Legal Services Bill was proposed, the Lord Chancellor was to have the power to appoint the LSB

154. Whelan, *supra* note 6, at 1077.

155. Email from John Gould, Senior Partner, Russell-Cooke, to Christopher J. Whelan (Apr. 15, 2008).

156. *See* Ordre des Avocats au Barreau de Paris v. Klopp , 1984 E.C.R. 2971.

157. *See generally* Garamfalvi, *supra* note 143.

Chairman without consultation.[158] The LSB, in turn, would have been given sweeping powers to intervene in the work of the front line regulators and to impose substantial fines.[159] We have already seen how the Legal Services Complaints Commissioner has begun to wield the power she has been given.

While the underlying structure of most of the reforms was welcomed by the legal professional bodies, it was this particular feature of the proposal that they resisted. One typical example was a comment by a member of the Bar Council in July 2007, in the widely read *New Law Journal*, which urged the government to counter concerns about the Legal Services Bill's threat to independence.[160]

As a result, "substantial lobbying"[161] of the government continued throughout the legislative process, focusing on the role of the LSB. A particular concern was global legal practice and the fear that "some of the bill's regulatory implications could taint the [U.K.] firms' reputation for independence and complicate their foreign operations."[162] In a letter to a government minister from the Chairman of the Bar Council and the senior partners of five global law firms, "[t]he potential effect on foreign earnings, if the LSB is perceived to lack independence from government was re-emphasised. . . ."[163]

Considerable concern was also voiced by overseas Bars about the possible compromising of independence. Jo Stevens, president of the Flemish Bar, wrote an open letter in June 2007 expressing his "concerns about the independence of the Bar and the Law Society . . . from Government and outside capitalists" and "giving way to obsolete and easy ideas of consumerism."[164] He "criticised Britain for setting a bad example to other nations" and, "in strong language," quoted "a former president of the Law Society of Zimbabwe cautioning against a situation in which autocratic leaders could defend the appointment of partisans to govern the Bar and threaten the independence of the judiciary by saying they were doing no more than following the British example."[165] U.K.

158. Legal Services Bill [HL], *supra* note 70.
159. *Id.*
160. Desmond Browne, *Warning Shots*, 157 NEW L.J. 949, 949 (2007).
161. Briefing from The Law Society, *supra* note 72, at 4.
162. Garamfalvi, *supra* note 143.
163. Browne, *supra* note 160. The chairman of the Bar Council was Geoffrey Vos QC. The five firms were the so-called "magic circle": Allen & Overy, Clifford Chance, Freshfield Bruckhaus Deringer, Linklaters, and Slaughter & May. The Lawyer Global 100 2006, http://www.thelawyer.com/global100/2006/tb_1-25.html# (last visited Oct. 7, 2006). In 2006, these five were in the top seven largest law firms in the world by revenue. *Id.* (listing Clifford Chance as "number one").
164. Browne, *supra* note 160.
165. *Id.*

firms too were "worried about [their] possible exclusion from overseas markets as a result."[166]

The lobbying was reflected in concerns raised in parliament and in amendments made during the passage of the Bill. "A joint parliamentary committee scrutinizing the bill stated that public confidence in the integrity of the legal profession will not be sustained, nor will its international significance continue, if there is a perception that its independence is jeopardized in any way."[167]

In the House of Lords, the government was defeated on aspects of the bill on at least six occasions, despite its inbuilt majority. For example, Lord Neill QC proposed an amendment that would "require the concurrence of the Lord Chief Justice to the appointment of members of the LSB."[168] A senior judge, "Lord Woolf joined with the [government] peer, Lord Brennan QC, in warning of the international implications for legal business worth £2 billion a year if the perception got about that the independence of the profession was threatened."[169] The amendment passed.

Another amendment proposed was to restrict intervention by the LSB. As originally drafted, the LSB could intervene whenever it considered there had been an adverse impact on any of the eight regulatory objectives set out in the Act. The amendment proposed that intervention be restricted to cases where there was a significant adverse impact on the regulatory objectives of the Act taken as a whole.[170] This amendment also passed.

A further amendment, also successful, required the LSB to respect the principle that the primary responsibility for regulation rested with the approved regulator and to intervene only when the approved regulator exceeded the ambit of what was reasonable.[171]

All the lobbying paid off; it was "extremely successful."[172] The Law Society "lobbied successfully to secure key improvements to the original bill. . . . [The A]ct now provides a sound basis for the regulation of legal services . . . , and secures our standing as a highly-regarded and independent legal jurisdiction."[173]

Fundamental to the issue of independence is the extent to which the judiciary plays a part in the appointment of the chair and members of the

166. Young, *supra* note 72, at 10.
167. Garamfalvi, *supra* note 143.
168. Browne, *supra* note 160.
169. *Id.*
170. *Id.*
171. *See* Legal Services Bill [HL], *supra* note 70, § 41(1)(b).
172. Briefing from the Law Society, *supra* note 72, at 4.
173. *Id.* at 3.

new Legal Services Board. Now, the Lord Chancellor only—and not, as proposed, the Minister of Justice—can appoint the Chair (a lay person) and members of the LSB, after consultation with the Lord Chief Justice ("LCJ").[174] The Lord Chancellor has a statutory duty to uphold the rule of law and will also be expected to follow guidelines issued by the Office for the Commissioner of Public Appointments ("OCPA").[175] The OCPA is also independent of the government and her role is to regulate, monitor, report and advise on public appointments.[176]

The Law Society received assurances that this consultation means a real involvement in the process for the LCJ. The Society seems to be convinced that "the involvement of the LCJ further helps to ensure there can be no arbitrary elements in the procedure and that no appointment is political in nature. Maintaining the independence of the legal profession is now one of the eight regulatory objectives for the LSB contained in the act."[177] Thus, one of the most significant changes was to "preserve the independence of the legal profession from government."[178]

The Act now makes clear that the primary responsibility for regulation is with the front line regulators.[179] Day-to-day regulation of legal services should take place free from undue interference by the LSB. Before intervening and exercising its powers, the LSB must first try to resolve matters informally.[180] The LSB is independent of government and can interfere only when the actions of regulators are "palpably unreasonable,"[181] that is, only if there is a significantly adverse impact on the regulatory objectives.[182]

So, why did the government agree to these amendments? With its significant inbuilt majority, it clearly was not forced to do so. Were they belated concessions to professionalism and a resuscitation of the business/profession dichotomy? On the contrary, it is apparent that the government was persuaded that it was in the U.K.'s economic interests to protect the competitive advantages enjoyed by English law and by English global law firms.

As one commentator noted, "U.K. firms are a dominant force in the international market, and English law is used as a basis for a large

174. LSA, *supra* note 36, sched. 1, § 1(3).
175. Briefing from The Law Society, *supra* note 72, at 4.
176. OCPA, The Office of the Commissioner for Public Appointments, www.ocpa.gov.uk (last visited Oct. 7, 2008). The Commissioner issues a Code of Practice. *Id.*
177. Briefing from The Law Society, *supra* note 72, at 4.
178. *Id.*
179. LSA, *supra* note 36, pt. 4.
180. LSA, *supra* note 36, § 41(3).
181. John Ludlow, *A Class Act*, 157 NEW L.J. 1553, 1554 (2007).
182. Browne, *supra* note 160.

percentage of international transactions, but leading firms have warned that the changes could compromise this competitive advantage."[183] The data are indeed impressive: "The industry generated £19 billion (about $36 billion) of revenue in 2003, accounting for 1.73% of the UK's GDP."[184] The exportation of the U.K.'s legal services abroad grew in size almost six times between 1991 and 2006, from £445 million to £2,612 million.[185] The surplus created by the "gap" between these exports and imports of legal services into the U.K. widened from £425 million in 1991 to over £2 billion in 2006.[186]

A large percentage of international business transactions rely on English law. English lawyers have successfully exported their services to support such transactions, in competition with lawyers from other countries. English law firms are, however, the dominant force in the international market. Thus, for example, after many years of negotiations, the English Law Society "persuaded the Korean authorities to start . . . to liberalise their legal services market."[187] In the Middle East, in 2008, "[t]here is no question that English law and London-based law firms are the dominant force."[188]

Therefore, English lawyers and law firms remain very well placed in the global legal services market. With the principle of mutual recognition in the EU allowing English lawyers to practice elsewhere in the EU, with London as an international financial centre, and with U.K. lawyers leading the way, all that was required from the government was to ensure that one of the core professional values—independence—be preserved. As a result, English lawyers should continue to enjoy a competitive advantage in a EU where professional values, such as independence and confidentiality are protected, but where English firms can compete freely in other Member States. Thus, while the Dutch, according to EU law, lawfully prohibit MDPs, Dutch firms may have to compete with English firms, constituted as LDPs or as ABSs, offering services that the Dutch firms cannot offer, but which Dutch clients may prefer.

English firms – MDPs or ABSs – may also have a competitive advantage over law firms in the U.S. too, where MDPs have been, for the

183. Garamfalvi, *supra* note 143.
184. *Id.*
185. Faulconbridge et. al., *supra* note 7, at 457.
186. *Id.* at 458.
187. Des Hudson, *Grasping the Nettle*, 157 NEW L.J. 132, 134 (2007).
188. Edward Fennell, *Helping to Build the New Byzantium*, THE TIMES (London), June 12, 2008, at 61 (quoting Joseph Huse, an American lawyer with Freshfields, based in Dubai).

most part, rejected.[189] Indeed, the spill-over effect of globalization within the U.S. is already being felt.[190] For example, Rider Bennett, a Minnesota firm, closed its doors after forty-seven years stating that it was unable to keep up with the global market.[191] The firm only had offices in the Twin Cities.

U.K. law firms, after the reforms, with their independence and confidentiality privileges protected and with the value-added services that they can offer, will also be in an excellent position to compete globally with accountancy firms. It should not be forgotten that although the largest accountancy firms far exceed the size of the largest global law firms, the legal marketplace sector, at around £217 billion globally, is about twice that of the accountancy sector.[192]

## VII. CONCLUSION

In the U.K., the idea that the lawyer's professional function is an essential condition in society has been flatly rejected. The predominant political view which seems to have emerged is that legal services ought to be treated more like a business than a profession; they should be regulated by the market rather than by professional self-regulation.

The U.K. reforms, set out in the Legal Services Act of 2007, appear to signal an end to professionalism, the final intrusion of the marketplace into legal services, and the victory of the business vision of legal practice. That is why the reforms are often characterized as the birth of "Tesco Law" (the functional American equivalent would be "Wal-Mart law").[193]

Yet, what has emerged confounds this analysis. Rather than ditch finally the illusions and pretensions of professionalism, the U.K. reforms have instead sought to enshrine key elements of professionalism within a market model. In England at least, law *should* be both a business *and* a profession.

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189. John Gibeaut, *It's a Done Deal: House of Delegates Vote Crushes Chance for MDP*, 86 A.B.A. J. 92 (2000).

190. James C. Moore, *Economic Globalization and Its Impact Upon the Legal Profession*, N.Y.B.J., May 2007, at 35; Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001).

191. All Things Considered, *Rider Bennett law firm closing its doors* (NPR radio broadcast Apr. 10, 2007), *available at* http://minnesota.publicradio.org/display/web/2007/04/10/riderbennett/.

192. David Gray, *New Study Shows Elite Firms Less Dominant as Fee Pressures Mount Profession-Wide*, OF COUNS., Apr. 2008, at 8.

193. It should be noted that Tesco has been offering legal services in the U.K. since at least 2004, when it began to offer advice on divorce, employment and business online.

But, in coming to this conclusion, U.K. reformers have not accepted the rhetoric of the CCBE, the ABA, or other professional associations that self-regulation is a core principle. Nor have they accepted the assertion that the lawyer's professional function is an essential condition for the rule of law and democracy in society. Instead, what has emerged in the debates about business versus profession is an analysis that appears to reconcile the dichotomy: professionalism is good for business! So, global law practice has been reconstituted as a hybrid: business and profession.

One of the paradoxes of this analysis is that the beneficiaries of the reforms, at the international level, are not the consumers of legal services, but the law firms themselves. Whereas in an unregulated market, competitors of global law firms—accountants especially—have an advantage, in the reconstituted global legal services market, only law firms can offer clients legal services which add value in terms of the professional protections exclusive to the practice of law—confidentiality and independence in particular.

It has been suggested that "[t]he aggressive international performance of English firms is something the government does not want to lose."[194] Boon and Levin's prediction, that this might lead the state to make a compromise with the legal profession through "continued sponsorship of professional power,"[195] was spot on. Indeed, this may be why the Legal Services Act will be amended in the near future after it was discovered that it "(unintentionally) prevents LLPs from having more than one level of corporate membership."[196] Many large international law firms, "[f]or regulatory and financial reasons . . . developed complex, multi-tiered structures incorporating several corporate members."[197] After the SRA warned that these firms may have to change their structures in order to comply with the Legal Services Act,[198] the SRA indicated that, instead, the Act may be amended to allow a law firm, whether an LDP or an ABS, to have more than two tiers of corporate ownership.[199]

Jurisdiction over work in the workplace has been called the "key to professional power."[200] In the U.K., the professional image that has been re-constructed is no longer one that "disqualifies outsiders as too close to

194. BOON & LEVIN, *supra* note 11, at 67.
195. *Id.*
196. Melanie Lane, *Opportunity Knocks*, LEGAL WK. (U.K.), June 19, 2008, at 3.
197. *Id.*
198. *Id.*
199. Solicitors Regulation Authority, Legal Services Act—update on our work, *supra* note 136.
200. BOON & LEVIN, *supra* note 11, at 67.

business—too unprofessional"[201] but, rather, one that embraces a business vision and disqualifies outsiders in order to protect the business of law. The U.K. public interest, as redefined, *is* macroeconomic, and the legal profession has been protected to further *that* public interest. In the global legal services marketplace at least, from a U.K. perspective, profession and business have become, synonymous.

201. Dezalay & Garth, *supra* note 5, at 617.