From Ethics to Regulation: The Re-Organization and Re-Professionalization of Large Law Firms in the 21st Century

John Flood

john@johnflood.com
4/19/2010

Abstract: The recent history of the legal profession is presented as one where the re-regulation of the profession, as epitomized in the Legal Services Act 2007, has placed the large law firm at the centre as a site of regulation in its own right. The legal profession has redefined its professional character from that of autonomous producers to employed lawyers who now exercise discretion within tightly constrained corporate limits. This is paralleled by the move away from individualistic codes of conduct towards entity-based regulation.
**Introduction**

The regulation of the legal profession has always been based on the actions of the individual lawyer situated in a position of trust vis-à-vis the client.¹ This fiduciary responsibility has only been articulated in formal codes of ethics by the legal professions in modern times: the English Bar in 1946 and solicitors in 1960 (Boon & Levin 2008: 6-7).² Organisations within which they work are virtually ignored. Neither the UK nor the US regulatory authorities, at the level of the legal profession, hold the law firm accountable for lawyers’ actions.³ This absurd situation has obtained until recently: with the passing of the Legal Services Act 2007 regulation will shift from the individual to the “entity” or the firm. Nevertheless, this is a radical overhaul of the conventional wisdom surrounding the regulation of the legal profession. Indeed, it brings law firm regulation closer to that experienced by the accounting firms.⁴

The law firm itself becomes the site of regulation (Clementi 2004: 128) and it introduces a new dynamic to the way the organisation is perceived. In contrast to the past the ethos of solo practice is being rendered obsolete and the firm is pronounced the norm (Hunt 2009).⁵ The prime movers in this paradigmatic shift in regulation have been the larger corporate law firms that have come forcibly to dominate the legal profession out of proportion to their numbers.

The question remains that if the law firm is becoming the key site of regulation and the law firm itself is becoming more of a bureaucratic corporate entity rather than the traditional idealization of partnership is the legal profession undergoing a fundamental alteration that undermines its claims to and its jurisdiction over the profession? With the moves to a plurality of legal services providers in the modern legal market, does it even make sense to talk of a “legal profession”?  

---

¹ Footnote 1
² Footnote 2
³ Footnote 3
⁴ Footnote 4
⁵ Footnote 5
The answer given in this article is broadly an affirmative one. We are not watching the negation of professionalism but rather its reconfiguration, which will contain elements of fragmentation and deprofessionalization (Coburn 2006). In this typification professionalism is not viewed as an attempt at occupational closure (Abel 1988) and autonomy which according to Evetts (2002) is in decline. Professionalism needs to be situated in the context of organization and regulation which emphasizes the role of discretion rather than autonomy (Freidson 1994).

Globalization, transnational business and commerce have also redefined the normal boundaries of legal professional work. There is within this a paradox. While business, or economy more generally, finds expression in globalization and is seen to drive it, law has never moved beyond the local. Law is firmly rooted in national jurisdictions that occasionally accord with one another through institutions such as the European Union or unified international law (Gessner et al 2001; Gessner 2009). Does this mean law is unable to participate in globalization? Of course not; it can and does. The main mechanism for overcoming the limits of jurisdiction has been the implementation of private ordering through the use of contract as a transcendent device (Flood & Sosa 2008; Gessner 2009). The virtue of contract is that its situs can be wherever the parties wish it to be. By retreating into private justice the parties escape the clutches of individual jurisdictions and subject themselves to a global order (Dezalay & Garth 1996; Gessner 2009). This is achieved in a number of ways but principally through the export of particular types of legal system. Weber was aware of the efficacy of common law when comparing it with the “formally rational” civil code law:

Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craftlike specialization of the lawyers, but legal practice did not aim at all at a rational system but rather at a practically useful scheme of contracts and actions, oriented towards the interests of client in typically recurrent situations (Weber 1978: 787). In capital markets, for
example, work many of the agreements are embedded in a combination of New York state law and/or English law as they constitute the main capital markets (Flood 2007). The City of London Law Society (1989: 5) underpinned this view when it replied to the Thatcher government’s proposed changes to the legal profession in 1989:

The advantages of English law as a “product” enable solicitors to contribute to his country’s balance of payments some £25,000,000 per annum in invisible exports and constitute an important part of the attraction of the City of London as a world financial centre.

A further question arises from this as to whether by playing in the global market transnational law firms escape the rigours of state regulation. In part they do but they also remain enmeshed in it. The field of global law is both local and global and law firms have to be capable of exploiting both systems in order to function (Silver 2003). Part of this occurs at a technical level through the application of legal techniques in their work, i.e. private ordering through the iterative drafting of agreements. Other parts are fulfilled on a grander scale by participating in the shaping of regulation at both local and global levels (Terry 2008). Achieving this is easier in some jurisdictions than others. In the US with regulation divided among 50 state bars, the difficulties are considerable. This “fractionalized” system of state regulation depends on the state supreme courts acting in consort with the state bar associations (Maute 2008) and it is inherently conservative (Maute 2008; Schneyer 2009). In England and Wales with the adoption of the Legal Services Act extensive freedom has been granted and is still being worked out by the regulators (Schneyer 2009).

According to Evetts (2006) law, as a profession, falls within a particular category apart from other professions because, more than others, it is inextricably bound to the state. Law is constituted by the state and yet interprets the very law that the state creates: it is both constitutive and regulative. We can see this as an extension of the recursiveness of law-making (Carruthers & Halliday 1998). This places lawyers in a different position to other professions such as medicine or accounting.
Their access to power and their ability to influence power is considerable (Gordon 2010; see also Krause 1996). To an extent this idea advances Foucault’s analysis (1979) of the deeply imbricated relationship of state and professions in providing the basis for governmentality.

Law and the legal profession have a dual role in regard to the state. With law it is founded on the constitutive and regulative nature of its development and interpretation. In respect of large law firms and lawyers, their role in private ordering makes them a de facto extension of the state in that they sanction a range of activities—joint ventures, sales, investments—through their role in the formation and dispute handling in private ordering. For the legal profession the dual nature manifests itself in a number of ways. At a fundamental level lawyers often act as agents of the state, for example, in the guise of prosecutor or public defender. Here their role and authority derive from their proximity to and their participation in state activities. Or their role might be more remote, for example, in their monitoring of clients’ money through the money laundering regulations (Alldridge 2003; Odby 2006). Or, as I have mentioned, their role in providing support functions in private ordering, especially in relation to the global transactions of law firms (Flood & Sosa 2008). Thus law and lawyers derive their legitimacy from the state and simultaneously support and augment it.

The regulatory side to the state and lawyers is also one of co-option and resistance. Maute (2008) argues that the state has regulated lawyers in Britain since the 13th century and that regulation indeed constituted the legal profession (Johnson 1995). However, the role of regulation and what is to be regulated has reached a pinnacle of all-embracing stature in the development of the Legal Services Act.

The Development of the Law Firm

For our analysis, Foucault’s argument makes sense when we examine the history of the legal profession, as far as it is represented by the law firm rather than the lawyer. Three phases can be
distinguished: laissez faire capitalism, the welfare state, and globalization/new public management (cf. Coburn 1999). Briefly, in the first phase law firms are small but highly leveraged with one or two partners and up to 30 or 40 managing clerks (Dennett 1989; Slinn 1984, 1987, 1997; St George 1995; Hanlon 2004; Galanter & Roberts 2008). The work of these law firms is based on the spread of the railways around the world and the development of the capital markets to support them. There is little state regulation of the professions but the legal profession itself creates its own structures to mediate with government and the judiciary (Sugarman 1996). During the 20th century the expansion of the welfare state, via the New Deal in the US and the Beveridge reforms in the UK, creates a new wave of regulation that demands greater legal inputs into business and how it is conducted. Corporate law firms come into their own and begin to grow, but they become subject to greater state intervention. However, law firms start to have less intimate relationships with clients as they formalize their structures and begin the move into transactional work (cf. Caplan 1993; Starbuck 1993). Finally in the last stages of the 20th and the start of the 21st centuries we see the growth of the big law firm with global reach and a more highly stratified structure resembling that of the large accounting firms (Rose & Hinings 1999; Hanlon 2004). And this is where some of the most significant developments in the regulation of the legal profession have occurred culminating in the Legal Services Act 2007.

**The Legal Profession Today**

An elite of large law firms dominates the 21st century legal profession. According to International Financial Services London, legal services, as a whole, contributed £16.6 billion or 1.4% of the UK’s gross domestic product in 2006 while law firm exports totalled £2,970 million in 2007 (IFSL Research 2009: 2). The largest 100 law firms generated fee income of £14 billion in 2007-08. When taken to the global level, the Global 50 law firms earned revenues of over £55 billion in 2007-08. Of this UK law firms generated 20% of the Global 50 revenues while US firms brought in nearly 60%.
Nearly 40% of this revenue came from corporate and finance work and dispute resolution produced 28% (IFSL Research 2009: 5). Since the legal profession is intimately associated with dispute resolution, London has become one of the main centres of international dispute resolution with over 10,000 such disputes resolved in 2007 (IFSL Research 2009: 7).

There is nothing unusual in the domination of elites, but the scale and size of these law firms outstrips their predecessors. The largest law firm, e.g. Baker & McKenzie has 3900 lawyers with offices in 39 countries (www.bakermckenzie.com). And the next fifteen firms have over 1,400 lawyers each and their revenues are in excess of £1 billion (IFSL Research 2009: 5). In comparison with the Big Four accounting firms they are puny, but their respective labour demands are so dissimilar (e.g. between audit and litigation) that we are dealing with qualitatively different entities. Large transnational law firms are a distinct segment within the legal profession possessing power, authority and wealth (Heinz & Laumann 2001; Faulconbridge & Muzio 2008).

Large transnational law firms resemble most law firms in that they still retain the partnership structure (Lazega 2001), but it is under stress (Empson 2007). Their size dictates that management structures now command considerable authority within the firm (Hinings et al 1999). No firm lets its partnership govern other than by majority. Maister (2005) has pointed out that a key issue for law firm partners is trust (Hanlon 2004): would a change from partnership to corporatized managerialism diminish it?

Despite these tensions from the 1990s onwards law firms decided to venture to new parts of the world in search of business (FT.com 2006). Here we find a difference between the two major legal markets in the world, the US and the UK. The UK firms have been far more expansionist on the whole than their American counterparts (IFSL Research 2009: 6). The US provides a solid and large domestic market in transactions and litigation for its legal services while the UK market
depends more on exporting legal expertise and technology to compensate for its smaller home market. Although US law firms have taken longer to accommodate to ideas of overseas offices, a number of them have established offices in the major centres for capital markets (e.g. Krishnan 2010).

Large law firms predicated their growth on two fundamental axioms. One is that creative modes of financing will drive transactions in commercial markets; the other is that business clients have no alternative to the expertise embodied in law firms, especially UK and US firms. Of late both have been uprooted and overturned. First, the financial crisis has shown that risky and overleveraged finance leads to a bubble and credit is now difficult to obtain. Second, businesses have been radically overhauling the way they use legal services both inhouse and externally. The result is that law firms find themselves in increasingly competitive markets bidding against other firms, and even inhouse legal departments, for work. Their position has been exacerbated by their push to leverage the human capital of their partners by taking on extra layers of non-equity partners, consultants, and associates (Galanter & Henderson 2008). This has left them in the parlous state of attempting to deleverage themselves by reducing partner/non-partner lawyer ratios. The days of stable lawyer-client relationships forged over time have altered dramatically. There has been a move towards the flexibilisation of relationships both within law firms and between them and their clients (Hanlon 1999; Flood 2007). It was normal for external law firms to state their charges and expect them to be paid without question. In rare cases clients paid law firms a retainer not to take action (Caplan 1993). The external lawyer must now adhere to the demands of inhouse counsel who are cautious about their budgets (Heinz et al 2001; Nelson & Nielsen 2000). The rise of the authoritative inhouse counsel has been accompanied by a new entrepreneurialism on their part. Recently, for example, Rio Tinto’s inhouse counsel forged a symbiotic link with a legal process outsourcing (LPO) company in India that made the LPO an extension of the corporate law department (McLeod-Roberts 2009a,
When we discuss large transactional law firms we need to be clear of some aspects of the nature of their work. Indeed their organization is predicated on types of work, namely, transactions. Although large law firms undertake litigation for their clients the bulk of their work—unless they are specialists or niche firms—is in the area of transactions and often based on capital markets work. This implicates two fundamental elements: standardized documentation that is varied according to the nature of the deal; and the promotion of two types of law that underpins these agreements, New York state law and English law. These two common law systems dominate the international field most notably in the area of finances since they are the domains of the main investment banks that finance such transactions. Both international organizations such as the International Swaps and Derivatives Association and large law firms have repositories of standard documents which are used to tie deals together. Of course clauses are negotiated over and altered to fit special needs but essentially these remain the same and provide a set of typified solutions to the problems that arise in transactions (Flood & Sosa 2008).

The Field of Large Law Firms
The concept of field has been adopted by a number of scholars but is mostly associated with Bourdieu & Wacquant (1992) and Scott (1994). The field is a social space wherein actors struggle for position, power and authority based around shared understandings (Hoffman 1999; Hinings & Reay n.d.), but how is it formed? According to Suddaby et al (2007) the problem lies in the lack of attention to the role of power,

That is, while there is an understanding that fields operate to reproduce the power and privilege of incumbent groups…most empirical studies of organizational fields do not specifically
identify central versus peripheral players, elite or marginal actors or dominant and subservient classes of organizations (Suddaby et al 2007: 335).

For law firms the central component of their power is not so much their own autonomous power but rather that derived from their clients. Heinz & Laumann (1982) focussed on this when they attempted to construct an idea of how the legal profession embodied ideas of professionalism. According to their analysis of 750 lawyers in Chicago, the status of the client had a direct correlation with the status of the lawyer and the law firm. But conversely, in Johnson’s terms (1972), the higher the status the “less” professional they became since they did not exercise power over their clients—since they were “patrons”—whereas solo practitioners scored high as professionals because of their power within the lawyer-client relationship.

The characteristic of this relationship is captured in a tribute to Sir George Allen, a founding partner of Allen & Overy, a Magic Circle law firm, on his retirement in 1952, that said: “He completely identified himself with his client of the moment and always gave himself wholeheartedly to the client’s interests” (Keenlyside 1999: 6). The group of law firms that fit into the elite field have claimed and controlled a dominant position in the field for a long time. We see this both in New York and London where the key members of the field were established in the 19th century (Gordon 2007; Galanter & Roberts 2008). Their long-established relationships with banks and corporates set them apart from other lawyers. What we do find, however, is that their structure and has changed substantially over this period from patriarchy to organizational bureaucracy.

**The Elision of Patriarchal Domination and Bureaucratic Authority**

The modern law firm rose during the 20th century but law firms remained small until the late 1960s. The 1862 Companies Act imposed a limit on professional partnerships of twenty partners which limit was removed by the 1967 act. By 1970 Allen & Overy and Freshfields had 20 partners each,
Norton Rose 23, Coward Chance 24, Simmons & Simmons 26, Herbert Smith and Linklaters 27, and Slaughter and May with 28 (Galanter & Roberts 2008: 153). The structure of the firm was changing with a decline in managing clerks and a consequent rise in assistants who would take articles or enter with a law degree. Moreover, assistants were prospective partners in waiting. The “Cravath” model was beginning to insinuate its way into British law firms (Swaine 1948; Galanter & Palay 1991).

This is the period in which we see the rise of domination by bonoratires as characterized by Weber. For English professionals, notably lawyers, the period 1870 to 1910 created the elite educational system that gave rise to the establishment that dominated Britain until the Thatcher governments of the 1980s (Krause 1996: 79). The professions were entirely absorbed into it and the large law firms became dominated by graduates from the elite educational institutions. It is, in effect, the professionalization of patriarchal authority with a move away from family domination towards a collegiate style of partnership (Galanter & Roberts 2008). Yet already by the second half of the century there were tensions in partnership as a form of governance for professional service firms.

These tensions can be expressed in two ways. First, there was a progressive move away from partnership in its formal sense to a more bureaucratized form of governance that is based within partnership yet contains a strong element of corporate control (Smigel 1964; Nelson 1988). Hinings et al (1999) described this as a change of archetypes from traditional partnership (P2) to Managed Professional Business (MPB). The former is integrative, replete with peer control, decentralized and based on trust. In contrast to P2 the MPB archetype is centralized, focussed on targets, rule-based with less trust. The fall and decline of John Gellene, a partner at Milbank Tweed who lied in the Bucyrus-Erie bankruptcy proceedings and was eventually convicted illustrates how this can occur (Regan 2006). Milbank Tweed was a traditional partnership with a lockstep form of remuneration.
As competition for business intensified, it changed its structure to one approximating the MPB form and switched its remuneration form from lockstep to a merit-based system (“eat what you kill”). Gellene had started his career in the traditional form and then found himself competing with his partners in the new bearpit where traditional values seemed less relevant to a modern, dynamic style of practice. Gellene’s story encapsulates the decline of informal norms as one of the organizing forces of cultural boundaries with a concomitant rise in regulation as their replacement (Martin 2002; Greenwood 2007).

The second tension is related to the first in that the market for professional services was changing from a trustee-based model of professionalism to an expertise-based one (Brint 1994). As Greenwood tells us

Redefining the professional as ‘expert’, rather than ‘trustee’, has three consequences. First, professional success is related to profitability and serving those who pay, not to serving clients in need. Second, clients are paymasters and therefore should have a powerful voice. Third, technical competence is downgraded because other attributes, that is managerial and entrepreneurial skills, are given equal status (2007: 192).

The pressures on lawyers to bill enormous numbers of hours as hourly billing became the norm have increased through the years (Flood 1996; 2007; Stracher 1999; Regan 2006). One consequence has been a gradual divergence between the commercial pressures of the firm from the ethical standards of professionalism.

There is, however, a curious aspect to this interpretation. It presumes a change from a moral state of professionalism to an amoral state of commercialism. Yet we know both the 19th and 20th centuries were replete with moral panics, defalcations and corruption. Many of the companies promoted in the 19th century were empty and valueless and we know how intricately involved lawyers were in persuading the public to buy their shares. There is, however, a change in the role of the lawyer that has taken place in the 20th century that has had a large impact on the nature of the
lawyer-client relationship. Ideas of trusteeship entail the concepts of collegiality and equality in the sense that clients and lawyers were co-equals in their ventures. The change that occurred moved the lawyer from adviser and co-equal to expert and technician. Consequent on this change is a detachment of the lawyer from the client: the cultural boundaries between the two became less permeable as in the 19th century (Kreiner & Schultz 1995). The change in part occurred on the back of the rise of the investment bank as a mediator in business networks. It took over the lead role from the lawyer, which was a dramatic shift in power from the previous century.

Greenwood (2007) seems to suggest these changes might mean a lessening in ethical behaviour on the part of the professional, but again what we have seen of the professions in the 19th century would suggest we treat that comparison cautiously. Books such as John Grisham’s The Firm and Frank Partnoy’s F.I.A.S.C.O. imply that lawyers can be immoral and unethical and reckless in their clients’ affairs (See also Lisagor & Lipsius 1988 and Eisler 1990). Nevertheless, Greenwood makes a powerful point when he says: “breakdowns in professional behaviour are directly linked to the increasing rates of competition, size, and complexity and the associated adoption of more formal management structures” (2007: 193). Commercialized professionalism had become the dominant form in the late 20th century (Hanlon 1999).

The 20th century wrought significant changes in the reproduction and control of work of professionals. Education and training was shifted out the workplace (apprenticeship/articles) into the academy: a degree became a prerequisite for admission although firms did not give up all training responsibility. The formalities of professionalism were enshrined in professional rules and law (Freidson 1986; Coburn 2006). This period could be viewed as the apotheosis of the codes of conduct as the moral arbitrers of professional life and epitome of self-regulation. Law firms also expanded as they adopted the tournament model of growth (Galanter & Palay 1991) and merged
with other firms (Aronson 2007). With the rise in transactional work and the concomitant rise in the power and authority of in house counsel, competitive tendering became a normal part of business relations between lawyers and clients thus reducing the intensity of prior relationships which had been enduring and strong (Sugarman 1993; 1996).

There are two aspects of concern to the legal profession in the 20th century: regulation and internationalization. Both became pre-eminent in the latter part of the century. The Thatcher government, moreover, is implicated in both aspects. The government moved to regulate and control all the professions in the 1980s and while it was successful with most, it singularly failed with the parts of law that concern us (Hanlon 1999). Hanlon convincingly argues that government successfully took conveyancing and legal aid work to task: removing the monopoly in the former and reining in the latter. This was an attack on the smaller firms and sole practitioners in the legal profession rather than the big firms. Burrage (1992) saw the attacks as an attempt to destroy professionals’ ideal of self-regulation. Yet corporate lawyers largely escaped these incursions into the legal professions’ turf. They managed this because they predominantly served capital and it was an aim of the Thatcher government to liberalize capital, which Big Bang helped to bring about (Flood 1995; Hanlon 1999). Another strand to their management strategy was to defend themselves by adopting specifically the organizational form of the large law firm as a kind of double closure which allows employees to be controlled within the organization as well as facilitating informal cooperation (Ackroyd 1996).

Government was interested primarily in domestic regulation of professions, e.g. removing lawyers’ monopoly on conveyancing; they were not interested in what happened overseas as long as it was remunerative. Corporate law firms understood this and took advantage of the liberalization of capital to expand their operations outside the UK border. Of course law firms and lawyers had
always worked for overseas clients, but lawyers did not think of themselves as international lawyers. As far as they were concerned they were English lawyers who occasionally worked in other countries because their clients needed them. The 1980s brought two advantages to lawyers. One was their involvement in the privatization of UK state-owned companies that led to their involvement in Eastern Europe after the fall of the Iron Curtain. Their expertise was immediately exportable to these environments (Neate 1987).

They also exported the rule of law as framed by institutions like the World Bank. Law firms were called in to draft laws on investment, banking and budgets for states that had none. Gordon is critical of these moves accusing lawyers of self-seeking behaviour:

Even as faithful agents of business clients, lawyers often seriously disserve both the workings of capitalism and the Rule of Law. Their interest, after all, is in securing good deals and favorable treatment for clients—subsidies, exemptions, concessions, licenses, franchises, or protection from competition—not the overall efficiency of the economy (2010: 11)

But international law was, however, little understood. The *International Financial Law Review* commented in the 1980s that there was little consensus on the interpretation of the meaning of international law. To most lawyers it was the export of their domestic expertise to other jurisdictions. But the international drive took hold and law firms expanded overseas (Flood 2007).

The market was, and is, dominated by two legal forms: English law and New York state law, both of which are intimately connected to capital markets. Law firms set up offices overseas, hired local lawyers, moved into practising local law and attempted to deterritorialize themselves (Faulconbridge et al 2008; but cf. Silver 2000).

It appears as though the large law firm sector escaped unharmed from these moves against the profession. But law firms initiated a process that led to their dependency on transactional work. They created and standardized their documentation (cf. Suchman 2003). It was inevitable this would have to happen since law firms could not generate profits unless they could capitalize on their
research and development. Law firms became heavily involved in organizations such as the International Swaps and Derivatives Association, which were designed to bring order into a dispersed market. It was the lawyers of the large law firms that created the documentation that became the standard for these transactions. Again, we can view this as a reflexive set of actions. The documentation is a set of private orders to which actors subscribe for their transactions. It binds them and regulates their interactions. The creation of these documents, while facilitating transactions, meant that less was demanded from the law firms. By creating new legal orders they had circumscribed their own positions and statuses and redefined their roles.

As these practices grew and new markets were entered into, the law firms became increasingly complex organizations, taking in marketing, human resources, IT specialists, etc. Moreover, the tournament model, if it had ever been truly adopted (Wilkins & Gulati 1998), gave way to a corporate style of organization that was no longer designed to offer the rewards of a few decades earlier. Muzio and Ackroyd (2008: 46) highlight how partnership was no longer an anticipated reward for hard work: it had become an exceptional boon occasionally endowed. Despite these apparent attacks on collegiality, professionalism as an ideal and form endured. Muzio and Ackroyd see this a sign of resilience and the ability to co-opt parts of the business world without becoming corrupted. Firms are more exploitative and extract more rent but they remain professional service firms (but see Rutkoff 2006).

The Rise of the Dominance of Bureaucratic Control

Weber unambiguously states, “the decisive reason for the advance of bureaucratic organization has always been its purely technical superiority over any other form of organization” (1978: 973). Administration by notables inevitably reaches its limits and cannot be continued. The field of arbitration examined by Dezalay and Garth (1996) showed that as the field became more densely
populated, the notables who had dominated international arbitration lost power to lawyers from large law firms who shifted the rules of the game from informality to a more formal and legal basis. The question for the 21st century is to what extent is the professional organization a resilient and adaptable institution (DiMaggio & Powell 1991)?

The rise of the international law firm in the late 20th century delayed the consideration of the appropriate form of organization. For many lawyers it was a moot point because state law effectively prohibited any other form for the provision of legal services. But the accelerating moves overseas to establish offices in greater numbers of countries were a symptom of the anticipated unbridled growth that would continue. The creation of complex financial instruments was an argument for the dispersion of risk such that shocks to the financial system would always register as minor. The financial crisis when it erupted put paid to the idea of containment of risk. Indeed, the very instruments that were supposed to prevent shocks only served to exacerbate them (Flood 2009).

The financial crisis has forced professionals to review their structures in remarkable fashion. The job for life—partnership as marriage—had been declining but the crisis ensured it was no longer available. Large law firms began to cull staff with draconian vigour. Associates, support staff, and even partners have been laid off in great numbers. Some law firms came up with project names for their restructurings. Linklaters called its restructuring ‘New World’—a fanciful name redolent of the conquistadors annihilating Indians in South America in the 15th century. Partners had to prove their business case and those who practised in ‘structured complex financial products’ found their services no longer needed.

The net result of these culls, restructurings and re-inventions has been to scale back the growth of the late 20th century. Equity partnerships have shrunk, largely in order to bolster declining revenues; salaried partners found they were no longer on a track to the equity; and associates found...
that they were welcome for a shorter number of years than before and only if they were prepared to abandon the partner track. The resemblance between the 21st century law firm and that of the 19th century is striking. Power and wealth accrue to a small number of people while the ranks of employees grow in inverse proportion to the shrinking partnerships. The deprofessionalization of the legal profession became the norm (Ritzer & Walczak 1988; Demailly & de la Broise 2009) and became re-characterized as the “commercialized professional” (Hanlon 1999).

The New Regulation of the Legal Profession

But if institutions are seen as the embodiment of conventions and routinized structures, then a series of shocks have begun to hit the legal profession. Two parallel processes have been running. Antimonopoly sentiment had been growing in Europe and the UK which put professions in the firing line. Their restrictive practices when subject to economic analysis by the competition authorities failed to stand up for lack of convincing evidence (OFT 2001). In addition, the rise in consumerism, fostered by government policies, gave voice to a massive number of complaints against lawyers. Admittedly these were small firm lawyers not those in the large firms. But being a member of a unitary profession means culpability is shared. The result was a thoroughgoing regulatory review—the Clementi Review (2004)—and a new Legal Services Act (LSA) in 2007 (Flood 2008).

Neither of the processes mentioned above directly impinged on the activities of the large law firms. Their consumers were sophisticated, knowledgeable corporate clients who did not perceive themselves under a yoke of monopoly restraint. The thrust of the regulatory reform was directed at smaller law firms from which the majority of the legal complaints derived. The main lobbying group for the large law firms, the City of London Law Society (CLLS), was not able to influence Clementi and the formation of the Legal Services Bill as it wished. In its evidence to the Hunt Review, it said:
We suggest that your review of regulation, like regulation itself, should not be done on a “one size fits all” basis...[A] number of objective of regulation, as articulated by Clementi and which found their way in an extended form into the LSA, are not relevant to the practices of firms represented by committee...nor, therefore, to the way in which those firms should be regulated. These objectives are improving access to justice, protecting and promoting the interests of consumers...and increasing public understanding of the citizen’s rights and duties...we do not believe they should have a bearing on the regulations that Corporate Work firms are subject to.  

The CLLS found its intellectual base in the Smedley Review (2009) which was commissioned by the Law Society to examine the regulatory structures of corporate law firms. The justification for the review was the lack of trust between the large law firms and the regulator, the Solicitors Regulation Authority (SRA). The problem with the SRA was that it had a “small-firm” mindset in that it used the same approach to all firms. From this perspective the CLLS felt that the SRA did not possess the necessary skills to regulate large, international law firms. The large law firms lobbied for a separate regulator, preferably based in London and who was conversant with their operations. Smedley rejected this option preferring an inhouse group within the SRA that could deal exclusively with large law firms which because of their size would and could initiate sophisticated compliance and risk systems.

The scope of regulation as it affects the large law firms is still unclear. But the Smedley Report and the Hunt Report (2009) both advocate a return to an era of self-regulation for large law firms. Hunt decided to go further than Smedley and attempt to embed the enlightened version of self-regulation throughout the profession. He adhered to the idea of a unified profession despite its differences. Hunt therefore advocated an institutional approach to regulation that would be “principles-based” and based on best practice in the profession. For this to occur the SRA “should instigate a system of Authorised Internal Regulation (AIR), which firms would be allowed to adopt if the regulator believes their risk, compliance and governance processes are sufficiently sophisticated and robust” (2009: 9). Moreover, the AIR model would apply to alternative business structure legal
service providers when they entered the market. The regulator has now adopted the ideas in the reviews. The SRA has committed itself to “outcomes focussed regulation” that will be arms-length and will be a “risk-based regulatory regime based on core principles and the high-level outcomes firms must achieve” (Gibb 2010).

The one area in which the reviewers and regulators stayed away from was the international dimension of regulation for multinational law firms. The “double deontology” problem whereby law firms have to comply with their headquarters regulatory system and that of the host country where their overseas office is based creates a need for regulation that transcends borders. As yet no structures achieve this end. Partial attempts exist such as the Council of Bars and Law Societies of Europe (CCBE). Although it has published model codes of conduct for European lawyers, they adhere to a conservative mode of thinking that places the individual lawyer at the centre with little acknowledgement of the realities of the law firm as the governing unit of analysis.

Laurel Terry (2008a) describes a set of movements that subscribe to a common core: the inclusion of lawyers as one of a set of “service providers”. This approach has been adopted by NAFTA, GATS, and various US bilateral free trade agreements. What is not clear is the unit of analysis in service providers—the individual lawyer, the law firm, or the legal profession? Given that the firm is rarely mentioned, it appears either individual lawyers or the profession are dominant. In fact the key player is likely to be the profession as the individual is part of the profession and Terry further argues that, in the globalized world, the individual is under threat and unauthorized practice of law (UPL) rules will not suffice to protect (2008b: 558). For example, strict UPL rules in the US are being criticized by the Department of Justice and Federal Trade Commission. These are powerful challenges to the orthodoxy of professionalism and mark the shift from ethics to regulation as a fundamental change in the ethos of professionalism (Suddaby et al 2007).
It is in the field of transnational governance and regulation that large law firms have their greatest opportunity for defining the rules of the field. We see this, for example, in operation with rules on conflicts of interest. Griffiths-Baker (2002) demonstrates that in spite of clear rules to the contrary, the big law firms are prepared to counteract these rules for their clients and act for both sides in transactions. Because the large law firms have been able to behave in this manner without sanction, and with lobbying from the CLLS, the SRA has now redrafted its rules to permit relaxation (Dean 2010).

Because they are so large, external regulation becomes crude and unresponsive to organizational needs. A system designed to cope with all types of firm from a two-partner operation to a 1,000 partner firm is bound to be inadequate. The Smedley Report was the articulated response, but, as with the accounting firms, law firms are becoming sites of regulation themselves and shaping the content and form of that regulation (Suddaby et al 2007). Risk management and compliance are ingrained and prevalent. The role of professional indemnity insurance, for example, exerts a strong regulatory pressure on the firm to comply with the necessary structures. And the Hunt Review has reinforced these shifts in thinking with its introduction of its AIR model that embeds the firm as regulatory locus.

The profession has found itself with a new set of regulators with vigorous views on how the profession should be organized and delivering its services to clients. The most radical constituent of the new order is the introduction of the alternative business structure which will enable non-lawyers to invest in and own providers of legal services. How it will develop remains unclear. But some years ago, Steven Brill, then editor of the American Lawyer, wrote an article, one that was based on an unreal scenario but yet has become prescient, in which a major law firm had merged with a large investment bank to produce a seamless service to the bank’s clients. Partnership was abolished as
inefficient, hourly billing gave way to premium pricing based on the value of the transaction and services were regularly cross-sold throughout the new enlarged multidisciplinary practice. In 1985, when it was published, such a concept was unthinkable. US professional conduct rules are clear about external ownership of law firms—it is forbidden, still. But in 2007 the first law firm, Slater & Gordon of Melbourne, was listed on the Australian Stock Exchange as an incorporated law firm. Partnership was abolished, directors were shareholders and the rest were employees as in any other corporation (Parker 2009; Nordenflycht 2009). Professionalism had embraced the corporation and its ideology.

The Legal Services Act 2007 will permit similar entities to exist in England and Wales from October 2011. It is not just law firms that are affected. Any entity will be able to apply for a licence to offer legal services. The law firm will no longer be sacrosanct: indeed, institutionally it will be in for a shock. A range of new actors and networks will come into play with unexpected effects.

There is one other element to this 21st century transformation which will stretch the ideology of professionalism further than it already has, namely legal process outsourcing (LPO) (Krishnan 2007). Law firms, corporations with corporate law departments, insurance companies and more are outsourcing their standardized work consisting of both “back-office” work around file management and legal work (see Cotts & Kufchock 2007). Much of this routinized, commoditized work—such as document review, litigation support, contract management—is offshored to countries like India and South Africa where lawyers are trained in cognate systems. What appeared initially to be a minor role for these LPO companies has begun to alter. Some of the LPOs are large organizations, e.g. Infosys with large its IT capacity, and CPA Global, which are attempting to expand their operations and move into providing a greater range of legal services in competition with the US/UK law firms.
There is an important distinction to be drawn here between the argument Suddaby et al (2007) put forward for accounting services at the global level and for law. Accounting has had a stronger linked relationship with financial regulators as well as its own. Suddaby et al show how the Securities and Exchange Commission and the International Organization for Governmental Securities Commissions promoted the new institution, the International Accounting Standards Board (IASB) (2007: 353). It represented a shift from a former body founded by professional associations to one based on new regulatory logics that included positions especially for the Big Four accounting firms. They argue:

The old assumption that professional associations, along with the coercive authority of state governments, are the legitimate means of creating rules has been replaced by an assumptive logic that large accounting organization, with the legitimating authority of capital markets regulators, are the appropriate bodies for creating accounting rules. More significant, perhaps is the observation that the institutional logic of professionalism as trusteeship and volunteer committees are being supplanted by a corporatist logic of paid employees funded by multinational...corporate donors (Suddaby 2007: 353).

Law, law firms and the legal profession have never faced these pressures; they have never been situated such that institutional logics pushed them to create analogous structures or adopt similar philosophies. As Terry (2008) shows there are forces that are challenging the perception of restrictive practices that prohibit the free flow of legal services, but none exist that impel the legal profession towards the establishment of a transnational regulator. Indeed, such an institution would, it could be argued, be an anathema to the profession and to state governments. While accounting rule formation occurs at both domestic and transnational levels, the creation of legal rules is still largely domestic. The deployment of private ordering achieves actors’ ends without a panoply of supranational regulation. Moreover, the size of international law firms is small and so fails to create a need for transnational regulation in the same way as for accounting. 14
Conclusion

The legal profession has always been flexible and adaptable even if at times it seems rigid and hidebound. The narrative of the profession from the 19th to the 21st centuries is one of constant change and response to state and commercial interventions. The roles of lawyers have taken on new forms from entrepreneur to technician to perhaps entrepreneur again. The biggest sets of changes have been organizational where the dominance of the large law firm now appears impregnable. Yet this is now open to challenge as new forms of production enter the market: lawyers and law firms may lose their sacrosanct positions and the field reconstituted. Professional identification is under threat from external incursions by other suppliers. Actors and network become more heterogeneous and less strongly identified with each other. New forms of social capital will emerge as institutions respond to their new environments.

There has been a move from a profession imbued with ethical ideals to one that is regulated in similar fashion to other professions and occupations. Boon and Levin (2008) portray the history of the legal profession as rooted in notions of trust, aristocracy, adversarial justice, and individualism that appeal to the morality of ethics. While these were sufficient for the early development of the professions, they lost appeal as the profession grew and faced the challenges of modernization and globalization. Here a space is created for the emergence of the role of regulation as a replacement and a perceived improvement on ethics as a mode of governance.

The new regulatory structures favour the large law firms, which themselves have become, and will see their positions strengthened, sites of regulation as new modes of regulation are introduced. They have the capacity to produce internal regulatory structures that fit the state’s purpose. Their position is augmented as the new regulations open up the legal market to alternative providers of legal services. These new players will be adopting regulatory codes and will have no
history of the former ethical commitments of the legal profession. The reconfigured field of the legal profession will have new logics and will be challenged by new actors and institutions, but they are unlikely as yet to usurp the dominance of the large law firms (cf. Sterling & Reichman 2010).
REFERENCES


Gibb, F “Solicitors to be Freed from Red Tape for a ‘Grown-up Relationship’ with Regulator”, TimesOnline, 30 March 2010, http://business.timesonline.co.uk/tol/business/law/columnists/article7081491.ece


\[1\] Instances of this approach can be seen in Cohen (1916) and Hollander 1964).

\[2\] American lawyers took to formulating codes of conduct much earlier than the British profession. The ABA promulgated its first code in 1908 (Abel 1989: 142).

\[3\] There are exceptions to this. At the time of the savings and loans scandal Fried Frank, a US corporate law firm, was ordered to take firm-wide action. These orders came from a federal bank regulator rather than the “normal” regulator, the state bar (Simon 1998).


\[5\] Indeed to practise as a sole practitioner now requires special permission from the regulator. See Rule 20.03 of the Solicitors Regulation Authority Solicitors’ Code of Conduct at http://www.sra.org.uk/rule20/#r20-03.

\[6\] This has been reinforced in interviews with corporate lawyers who see themselves as legal technicians first and foremost. In part it is due to the nature of transactional legal work which lacks the continuity that lawyers had in earlier times.

\[7\] Interview with City lawyer February 2010.

\[8\] Freshfields, a Magic Circle law firm, is concerned to ensure that its partner leverage ratio does not rise above 1:3 and is now using contract lawyers to maintain the ratio (Hodges 2010).


\[10\] The CLLS was peeved that the chairman of the SRA was not conversant with the ways of the large law firms. He was eventually replaced by a former senior partner of one of the City’s large law firms (Rogerson 2010).
Scotland is considering its own legislation, the Legal Services (Scotland) Bill in which section 92 provides for alternative business structures including incorporated practices.

For example, an Indian law firm is forming a joint venture with a New York health insurance company, which already has a business process outsourcing company in India, to run an LPO for the healthcare services sector in the US (Ganz 2010).

Nor has there been a demand for an international legal credential similar to that in accounting mentioned by Suddaby et al (2007: 348-51). At present, an LLM from a major US or UK law school with membership of either the New York Bar or the English legal profession fulfils the need. However, the large law firms are increasing their influence in the realm of postgraduate legal education where LPC institutions are providing law firms with bespoke programmes that use the firms’ documentation.