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Julian Lonbay

University of Birmingham

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LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY IN A GLOBAL CONTEXT

JULIAN LONBAY*

In a short half hour I hope to convey to you some European contributions to the debate about “Legal Ethics and Professional Responsibility in a Global Context.” I will be giving a European perspective on the debate, and I make no apologies about this seemingly narrower vision, because one can see Europe (both “old” and “new”) as leading the way in this field. Of course, those who lead often stumble as they travel the new routes, and Europe has had its share of blind alleys, stubbed toes, scrapes with wayside holly hedges, and the like. Yet through these mistakes, pitfalls, and wanderings off the path, some valuable lessons have been learned, though not always acted upon.

Where did two world wars start in the twentieth century? The cure was to have an increasing number of structural links at the economic, political, and importantly for us, legal dimensions between European nations. The nation-State in Europe is giving way to a complex system of multi-level governance. I am not going to try and go through how this works, but I intend to point out the implications for lawyers and legal practice in Europe, in particular when it comes to deontological rules that govern professional legal life.

First, I am going to give you a quick introduction on how the free movement of lawyers across European borders came about. Certainly, there have been ethical clashes and clashes of ethical codes that have not been satisfactorily dealt with. However, I am not going to look at them in great detail, preferring to use one or two as illustrations. The main issues I am going to focus on are competence and bar admission—because some of the mobility rights allow dual or even triple qualification.

First, by way of background, there are twenty-five countries in the European Union, twenty-seven by 2007 and probably thirty or more in the not-too-distant future. In addition to actual members, several neighboring countries have joined the single market without becoming members of the EU itself.¹ They have made treaty arrangements with the EU and are

* Julian Lonbay, School of Law, The University of Birmingham, Edgbaston, England, is Chairman of the CCBE Training Committee and also the CCBE Working Group on Services. He is European Adviser to the Law Society of England and Wales. This speech was made in his personal capacity only.

1. The European Economic Area (EEA) covers all of the EU Member States along with three other European states (Norway, Iceland, and Lichtenstein). Additionally, Switzerland has a special

bound by its rules. I point this out mainly to show that Europe can be seen as having a mini global ethics problem because the lawyers in these countries have varying habits, varying cultures, and varying legal traditions.

The EU has created some quite dramatic rules allowing free movement of lawyers as well as their main modes of practice. The first Directive is the Legal Services Directive 77/249/EC.² An example of a cross-border legal service could be when a lawyer gets on an airplane and flies across the border to see a client (or the other way around), or the lawyer and client e-mail or telephone from different countries. The Legal Services Directive allows such legal services to occur and lists the types of lawyers to which it applies. However, it is quite a limited list, which does not include all lawyers or types of lawyers. I will say more about the conflicting rules on these things in a moment.

The second Directive, the Establishment Directive 98/5/EC,³ allows for the establishment of lawyers in another country. There are two modes of establishment. One is establishing a lawyer as a home state lawyer. For example, a French *avocat* comes to Britain and retains his or her status as an *avocat*. And as such, he or she can practice French law, English law, and European law without limit. There is a special mode of access for such lawyers to the local legal profession: they can convert to being local lawyers after three years with no formal examination requirements.

The third is Directive 89/48/EC,⁴ which preceded Directive 98/5/EC, but is probably less important for lawyers now because of Directive 98/5/EC. It allows lawyers (and members of other regulated professions) to have their qualifications recognized. Actually, not only lawyers, but anyone with a degree who wants to change profession or country can do so. When the professional arrives in the host State, she states her credentials and qualifications. The host country has a duty to assess them and state what elements of qualification are missing. If there is something missing, the professional must pass an aptitude test or undergo a period of adaptation in order to join the host State's equivalent profession. In the case of lawyers, there is an exception that allows the host State to insist on an aptitude test. As a result, most European Bars have a test to allow transmigration of colleagues from other EEA countries. Additionally, the

bilateral arrangement.

2. Council Directive 77/249/EC, 1977 O.J. (L 78/17).

3. Council Directive 98/5/EC, 1998 O.J. (L 77/36).

4. Council Directive 89/48/EC, 1989 O.J. (L 19/16). This has recently been replaced by Council Directive 2005/36/EC (not yet published).

law according to the *Morgenbesser* case⁵ essentially allows people who have not yet finished their training to cross the border and finish it in another State. Prior to that case, the law required that a person be a “finished product” to use economic jargon, a person was required to be a registered lawyer before crossing the frontier.

These are the new routes that the European Union has opened up allowing cross-qualification. We have then, in Europe, a regime that allows lawyers to follow their clients to different countries and advise them there. We have, in miniature, a European global trial “laboratory” to assess how ethical rules and constraints cope (or not) with cross border or multijurisdictional practice of law.

The question is which legal ethical rules will govern practice? In the Legal Services Directive, the first conflicts rule, allows for what is called “double deontology.” Article 4 of the Legal Services Directive provides a rule stating that when a lawyer is representing a client in court or before administrative authorities, the lawyer must comply with the host State’s rules, except for conditions of residence or requirements to join the local Bar. If you are only giving legal advice or doing transactions, then you are subject to your home State’s rules. Here is where the double deontology comes in: except for rules dealing with certain matters, including publicity and professional secrecy, the host State’s rules *might* apply. You can see from my description, which was very general, that this double deontology rule is not clear. It is not clear whether priority will be given to the home or host State rules. Essentially, the host State can only apply a rule if it is justified by the general good, and there is a proportionality test in assessing that justification.

So, initially there were unanswered questions about how a rule, or which rule, would apply in a given situation. The Establishment Directive, which allows for permanent establishment of lawyers in Article 6, also has a double deontology provision. Essentially, however, if a person has migrated and become permanently established, that person is subject to the host State’s rules. The ambiguities left by these directives as to exactly when a certain code of conduct would or would not apply led to the CCBE (Council of Bars and Law Societies in Europe) Code of Conduct.⁶ The Code of Conduct does not regulate ordinary national practice, but rather

5. Case C-313/01, *Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova*, 2003 E.C.R. I 13467.

6. CCBE, CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, available at http://www.ccbe.org/doc/En/code2002_en.pdf (last visited Oct. 9, 2005).

transnational practice. The provisions of the Code actually do resolve some, but not all, of the issues arising from cross-border practice.

One of the issues that has caused difficulty is double (or multiple) qualification, because what the Code says regarding conflict of laws depends on which professional status you are acting under at the time you commit the act or violation. And there are no rules with regard to dual-qualified persons to help indicate when they are acting in their capacity as a French lawyer, a German lawyer, or an Italian lawyer. There are no established tests. There are a few other peripheral issues that affect this double deontology. The E-commerce Directive⁷ allows lawyers, as well as other professionals, to have commercial communications—that is, information and publicity about their practice. For lawyers in some European countries, this was completely prohibited; even the use of a business card was questionable.

How are these things enforced? We have, in the Establishment Directive, Article 7, which essentially allows the host State to enforce the home State's rules. So the lawyer coming from France to Britain will be subject to British rules and the host State (Britain) will enforce them. The home State must be kept informed of any proceedings against one of its lawyers. It has a right to listen to the observations and see observations made at any hearing. The home State authority can act in accordance with its own rules. So we have the difficult position that a lawyer might be subject to double jeopardy for the same act, both in his home State and in the host State. If his home State disbars him, then his right to practice in the host country also disappears, and the host country cannot let him continue to practice. A host State must respect whatever the home State does.

In Article 7 there are the beginnings of a system of cooperation for disciplinary authorities. Earlier this year (2004), the disciplinary authorities of all the European Bars got together to discuss, for the first time, how they were going to implement Article 7.

Now I move on to my second point, looking at competence to enter the legal profession. I would view this as an ethical issue. Lawyers should be competent; the entry controls essentially govern that competence. Several factors influence how entry requirements are regulated. They are under sustained assault from various European activities. The entry barriers and rigorously regulated access to the professions of lawyer in each country have been trumped by European free access rules. One no longer has to

7. Council Directive 2000/31/EC, 2000 O.J. (L 178/1) (Directive on Electronic Commerce).

follow the prescribed national routes into the host State profession. It is not only the free movement rules that knock down the door. The European competition (anti-trust) authorities are also asking for justifications of access-restricting rules (and a lot more besides) and that is where we will start.

The European Commission issued a White paper on competition and professional services, and, prior to that White paper, which was published earlier this year in February,⁸ the Commission published a study on legal services, which was highly critical of many European Bars. The study did a scale from the worst and most restrictive Bar up to the top one. The competition rules hit quite hard, and in this White paper, the Commission mentions entry requirements for lawyers as possibly being overly restrictive and unnecessary. The Commission found many of the monopolies lawyers have, which vary in different European countries, to be excessive and unnecessary. Many of those services could be done cheaper and better by other people, and the examples tended to come from the more liberal countries where monopolies are being diminished or disbanded. The Commission is saying, if they can do it in England, or if they can do it in Sweden, why can't they do this in France, or Germany, or another country that has a higher level of restraint?

Secondly, one must examine the Establishment Directive 98/5/EC. Article 10 of this Directive allows lawyers to cross-qualify very quickly. The only requirement is that the lawyer has practiced for three years. If you have practiced for three years and present a portfolio of your cases, then you can join the local profession. Now this may seem odd because what a Cypriot lawyer does in his initial training is completely different, perhaps, from what a German lawyer does. Yet, after three years of practice in a second country, they can swap and join the Bar of the host State. Well, of course, that is tremendous for those lawyers, but it does raise problems of competence, or could be perceived to raise problems of competence. However, the law is respected, and quite a few people have taken advantage of it.

The third pressure on entry regimes is provided by a combination of the traditional Directive 2001/19/EC, which is the revised Mutual Recognition Directive 89/48/EC, and the *Vlassopoulou* case.⁹ These rules here mandate

8. See generally The Directorate General for Competition of the European Commission, at <http://europa.eu.int/comm/competition/liberalization/conference/libprofconference.html> (last visited Oct. 9, 2005).

9. Case 340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- u. Europaangelegenheiten Baden-Württemberg*, 1991 E.C.R. 2357.

that the doors must be open, but you can test if there is a missing attribute in your lawyering or other professional skills. In the case of lawyers, it is specifically stated, and it is the only exception actually written into the Directive, that rules of conduct or codes of deontology can be tested for lawyers. The Community recognizes the importance of ethical codes and explicitly, and their definition of an aptitude test allows that to be tested. The Directive is currently being reformed and a new consolidated Directive has just been adopted (July 2005). The reform was potentially rather radical. The option for Bars to insist on a test is likely to disappear, in an earlier draft. The Directive also allows professions, themselves, at the European level, to create what is called “a common platform.” That is, the professions, and in the case of lawyers it would be the CCBE, could say, “this is what we think are the attributes of somebody who wants to join our professions.” Therefore, if lawyers reach the common platform, it could serve as a passport to practice law in other EU states, if the European Commission adopts the common platform. There would be no testing or adaptation periods.

The third radical proposal, which was canceled in the negotiations on this Directive, is the partial practice provision. The draft directive said that an incoming migrant who is not sufficiently qualified to go through an adaptation period or test must be allowed to practice the bit at which he is skilled. In other words, you could get a very specialized lawyer, say in bankruptcy law, from a Union member State, who could come and say, “I don’t know anything about English property law, English tax law, English company law, etc., but I am really hot at bankruptcy deals (or whatever his specialty is). I’ve got no chance of passing your test, which covers all of these other areas, like criminal law, which I am not interested in. Allow me please to practice bankruptcy law.” What is the professional body going to do? This new person would not be a member of the legal profession after admission, but he or she will have a license to practice bankruptcy law or some other particular specialty, but nothing else. In response, the Bars (and other professions) joined forces to try to persuade the governments to nix this particular provision, successfully.

However, Case C-330/03¹⁰ has put this issue before the European Court of Justice, which may decide on this issue in any event. This is a case of an Italian hydraulic engineer who was going to Spain. Briefly, in Italy you can specialize as an engineer in hydraulics, or some rather narrow area of being an engineer, whereas in Spain, the engineers have to be skilled in all

10. This case has not yet been decided.

aspects of engineering. The Italian wanted to practice in Spain, and the Spanish court asked the European Court of Justice what to do with this applicant, whether it should give him partial permission to practice or reject him. The Court may well decide to let him partially practice, in which case, whatever the legislature does, we will be faced with the difficulty of professional deregulation on quite a grand scale.

Another significant issue, which has caused even bigger ripples, was presented last November 2003 in the *Morgenbesser* case. This is the case of a law student who finished her law degree in France, and then went to Italy and said, "please let me into your professional practice courses. I want to be an Italian *avvocato*." The Italian Bar replied that she needed an Italian law degree or to get an Italian University recognize her French law degree. Anyway, this ended up in court, and was referred to the European Court which came out with several key rulings.

First, the Bar itself must decide on the necessary qualifications; it can not rely on a university or a Ministry of Education or anybody else to check academic equivalence. Second, the Court extended the case law to allow semi-finished lawyers to travel and have access to legal training in a host State. The effect has a highly deregulatory effect on accredited access routes to the professions because, if you can come in with a completely off-the-wall diploma, which is not recognized in any way in the host State, and say, "well, sorry, nonetheless you've got to assess me. I think I'd be really good dealing with clients. I've had practice, you know, on summer holidays in Portugal. . .," the host State must assess the applicant's qualifications. It cannot say to that person, "go and get an English law degree, go and do the English legal practice course, go and pass all the exams and then come back." The host State's competent authority must assess their credentials and see what is missing. If there is nothing missing, it must let them into the practice course. If elements are still missing, then it is up to the person seeking entry to fill in the gaps.

It is still questionable whether a host State can say, "Sit this exam. We'll let you in. We think you're missing these things." It is clear you can do this as an option for the migrant, but it is not at all clear that the State can make the migrant do it. They can say, "No. I'm going back to Uncle Furges's law firm. He'll give me the experience I need to fill this gap."

This poses a major assessment burden on the host State's Bar. In Italy, for example, the Bars were not used to assessing law degrees, and did not know anything about foreign law degrees. It considered this a university job. In Germany, and other places where the State (or courts) actually admit applicants to the Bar, there are real problems in determining who should make these assessments and upon whom the burden should fall.

This is a highly deregulated route to practicing law, and the likely result is an increase in the number of Bar exams because they are considered a neutral means of assessing a person's ability. A State can just say, "Well, everybody passes the exam. You must do it as well."

I have outlined a whole series of events and cases where access to the legal profession has been opened and ethical questions raised about competence.¹¹ The result has been increased pressure on the CCBE and the European Law Faculty Association (ELFA) to find commonality in legal training.

There is great pressure for the professions and for the professional regulators to try to find commonality in terms of training. They used to say, "we had to do so many thousands of hours training in this and that in order to become a lawyer, therefore we couldn't possibly accept somebody who's only done a mere three years." For example, the application of *Morgenbesser* signifies that there has to be a lot more transparency in access to a Bar. The CCBE has started that work. A parallel ELFA process is affecting law degrees at the university level. All these developments have significant implications for lawyers and their competence to practice in Europe with concomitant knock on effects on ethical rules.

11. Although I do not have time to cover it in depth, there is also a draft Services Directive that basically says, "if you can do it at home, you can do it elsewhere." And the question is, are lawyers exempt from this? Because if they are not, all their rules about which Code of Conduct will apply, all that double deontology will go out the window. So there is heavy lobbying going on regarding the proposed Services Directive. See *Commission Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, COM (2004), available at http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0002en03.pdf (last visited Oct. 9, 2005).