Transnational Lawyers Need to Rethink their Legal Ethics

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César S. Arjona, The Usage of What Country: A Critical Analysis of Legal Ethics in Transnational Legal Practice, 32 **Canadian J. of L. & Juris.** 259 (2019).

When Stephen Vaughan and Emma Oakley interviewed 57 lawyers in elite London firms, they were struck by a general ethical apathy. They explore this apathy in their well-known article, "Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer, and conclude that a strong justification for this apathy, in the minds of the lawyers interviewed, is the standard conception of legal ethics. The standard conception excuses lawyers from moral accountability for clients' actions, holding that it is not the role of lawyers to judge the morality (as opposed to the legality) of clients' actions.[1] For the lawyers interviewed this justification, invoked most commonly in relation to criminal defence lawyers litigating within the confines of the adversary system, held, even though most if not all of them were engaged in transnational legal work, the consequences of which have effect across the world.

Cesar Arjona's article, *The Usage of What Country: A Critical Analysis of Legal Ethics in Transnational Legal Practice*, questions whether the standard conception holds up in relation to transnational legal work. You may think you've heard all there is to hear about the standard conception, but I urge you to read Ajona's article. He revisits the constitutive assumptions of the standard conception and asks whether those assumptions remain valid when applied to transnational practice. Spoiler, they don't.

The three assumptions Arjona considers are:

1. A lawyer is the agent of a client-principal, both of whom are acting as "individual free moral agents."
2. The lawyer is "an advocate in an adversarial context." Arjona allows that defenders of the standard conception see it extending beyond the litigation context, but he reminds us that this extension "implies the existence of a well-functioning rule of law system."
3. A reasonably well-functioning domestic rule of law system. Arjona notes that the vast majority of literature on legal ethics "is produced in countries that count themselves liberal democracies, [and that] such literature assumes the natural context for lawyers to work in a liberal democracy with rule of law and its concomitant features."

Arjona examines these assumptions using as an example the Baku Tbilisi Ceyhan (BTC) pipeline, which was designed, built and then operated by an international consortium of energy companies. The pipeline carries oil more than 1,000 miles, across Azerbaijan, Georgia and Turkey, each country agreeing to the free passage of the pipeline under a series of agreements and an inter-governmental treaty. The legal structure underpinning the pipeline was created by private transnational lawyers, the leading firm of which represented the main corporate investor. The final legal structure gave remarkable entitlements to the consortium, while raising serious concerns about human rights, environmental protection, and state sovereignty (Ajona footnotes Abigail Reyes' article Protecting the Freedom of Transit of Petroleum: International Lawyers Making (up) International Law in the Caspian, which explores these concerns in depth).

While Arjona explores in detail each assumption underpinning the standard conception, it is the third I

want to highlight here. Recent versions of the standard conception justify role-differentiated morality on the basis that it is the role of the legislature, not the lawyer, to weigh competing moral interests and then make laws accordingly. But this assumption falls away when the lawyer is operating in jurisdictions where the rule of law does not operate robustly. Thus, lawyers involved in a project such as the BTC pipeline cannot adopt the standard conception "as a justificatory model when the basic elements of the rule of law are so severely compromised." Instead, "in the absence of a clear rule of law system, one of the basic foundations of amorality collapses," and therefore both client and lawyer are morally responsible for the client's actions.

Simon Rice and I argued in *Our Common Future: The Imperative For Contextual Ethics In A Connected World* that in the absence of a domestic rule of law system of reference, lawyers must take into account the broader context of their legal work, including how that work affects those whose interests are adversely affected by it. Further, that it is incumbent on transnational lawyers to discuss those other interests with their clients, bringing competing values to the client's attention. Arjona agrees that context is key, but, rightly in my view, critiques what he calls "the stakeholder approach", in which lawyers themselves reflect on and discuss with clients the potential impact on others of the client's instructions. Noting that global lawyers operate in "a messy world of legal pluralism," that is full of "voids, ambiguities and contradictions . . . a legal wild west", he sees the stakeholder approach as raising practical issues that, "in the sort of complex cases that transactional lawyers frequently confront, become virtually intractable." In the BTC case, for example, "stakeholders" would have included governing elites, communities in different states along the pipeline route, workers (both national and foreign), neighbouring countries, the environment, consumers of oil and gas, future generations etc; in sum "a plethora of publics" with differing and sometimes opposing interests".

Arjona does not offer either specific advice to lawyers on how they should operate in cases such as BTC, nor an alternative theory for the context of global practice. He considers though, that "the building of an alternative theory is certainly an important and urgent project." Of course, much fine work has been done on alternatives to the standard conception within a rule of law system, which will offer insights for global practice. But, while Arjona does not offer solutions, his step by step demolition of the standard conception *in the context of transnational practice* is important. As Vaughan and Oakley's work shows, lawyers practising across borders justify their ethical apathy by reference to the standard conception. Removing the "amorality shield" of the standard conception means that global lawyers will need to grapple with the fact that, outside of the rule of law system, and just like other professionals, they "are morally responsible for the interests they put their expertise at the disposal of, and for the kinds of arrangements they legitimize through such expertise."

1. A classic account of this "Standard Conception" is William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 **Wis. L. Rev.** 29, 41-42. Simon later dubbed this account the "Dominant View." William H. Simon, **The Practice of Justice: A Theory of Lawyers' Ethics** (1998).

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