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# The Usage of What Country: A Critical Analysis of Legal Ethics in Transnational Legal Practice

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## 1. Introduction

In one passage of his widely cited *Essays*, the French Humanist writer Michel de Montaigne reflects on a problem that has seemed to haunt human beings at least since there has been division of labour: how to remain honest when performing a job that implies moral compromises. That is in essence the main question of professional ethics, which Montaigne answered in the following way:

> Because one is an advocate or a financier, he must not ignore the knavery there is in such callings; an honest man is not accountable for the vice or absurdity of his employment, and ought not on that account refuse to take the calling upon him: 'tis the usage of his country, and there is money to be got by it.[1]

In a very literal way, this passage is an *avant-la-lettre* statement of the theory of role morality, that is, the idea that the professional role one occupies may justify —from a moral point of view—acts that would be otherwise condemned—from a moral point of view—by the same person if one was not acting in that professional capacity.

Of the two justificatory reasons offered by Montaigne, namely, "'tis the usage of his country, and there is money to be got by it", we can easily discard the latter as a ground for ethical justification, but the former deserves more detailed consideration. The author seems to suggest that the fact that a particular employment is part of the social fabric of a country entails certain moral weight—how much weight, we do not know—that can somehow compensate for the intrinsic immorality—"the knavery ... the vice or absurdity"—of such employment. Even in this rather loose formulation, Montaigne's words closely resonate in what many centuries later has become the dominant theory of legal ethics, or as it is often referred to, the standard conception of legal ethics.

In very rough terms—a more accurate description follows in the next section—the standard conception of legal ethics starts from acknowledging the well-known historic criticism according to which lawyers frequently engage in conduct that is morally suspicious, if not overtly immoral, in the course of

I am grateful to my former students Berta Casanova Aguilera for legal and factual research on the BTC case, and Ferran Soler Gomà for proofreading of early drafts.

1. Michel de Montaigne, *Selected Essays*, edited by William Carew Hazlitt, translated by Charles Cotton (Dover, 2011) at 195.

representing their clients. In response to such criticism, the theory holds that as long as the lawyers act within the framework determined by the laws—both the general laws of the country and the specific laws that regulate the behaviour of lawyers and their conduct vis-à-vis their clients, other lawyers, and society in general—they are on safe moral ground. In other words, there is an institutional element offering moral justification for actions that would otherwise seem morally controversial or unacceptable.

Interestingly, in his formulation Montaigne makes reference to the usage of *a* country, referring to the country where the individual lives and works. That is a natural thing to do for a 16th century writer. Likewise, the standard conception of legal ethics assumes that the lawyer works within the context of a particular legal system and a well-defined professional environment—with clearly ascertainable laws, a rule of law system that works reasonably well, specific and generally honoured deontological rules, widely accepted professional customs that range from matters of etiquette to legal judgement, and so on. All these elements constitute Montaigne's "usage of the country" in the widest possible sense. However, what happens if the work of the lawyer cannot be placed within the context of one particular country? What happens if a lawyer actually operates in different nations and is therefore subject to multiple laws? Or if one works under a clearly defined jurisdiction but the consequences of one's actions are directly felt in different parts of the world? Or if one operates in a sort of legal vacuum of normative relevance besides and beyond the official system of any state? What is, in these cases, the custom of the country?

This kind of question is increasingly relevant for lawyers who are engaged in transnational legal practice, meaning *legal practice that happens in any relevant sense across national borders*.[2] The aim of this paper is to critically review and analyze the standard conception of legal ethics and its assumptions in light of transnational legal practice. In doing so I will use as a paradigmatic example the so called "contract of the century",[3] that is, a set of contracts and international treaties signed by a consortium of private companies and several sovereign states during the first decade of the 21st century to regulate the building and functioning of the BTC pipeline, a huge facility for the transport of oil built across the territories of Azerbajan, Georgia and Turkey.

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**2.** I use this widest of criteria deliberately. The use of the adjective 'transnational' to qualify legal phenomena that happen "across borders" in any relevant sense is common in the literature since the term was firstly coined by Philip Jessup, *Transnational Law* (Yale University Press, 1956) at 2: "I shall use ... the term 'transnational law' to include all law which regulates actions or events that transcend national borders. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories". Transnational law is therefore wider than—and encompasses—international law in the classic sense of the term. Sometimes I will use the term 'transnational' and 'global' as interchangeable, although it is possible to trace differences among both (see, e.g., Frank García, "Globalization's Law: Transnational, Global or Both?" (2015) in Giuliana Ziccardi Capaldo, ed, *The Global Community Yearbook of International Law and Jurisprudence* (Oxford University Press, 2015)).

**3.** Toby Carroll, "Pipelines, Participatory Development and the Reshaping of the Caucasus" (2009) Center on Asia and Globalization Working Paper Series, National University of Singapore, Working Paper No 007 at 13.

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In the next section, I will more precisely define the standard conception and clarify the importance of the institutional context in professional ethics. In particular, I will present the three assumptions that the standard conception of legal ethics holds as to the context in which lawyers operate, namely, that a legal relation is an agency relation in which both lawyer and client are individual moral agents, that such relation happens within—or in relation to—a litigation process, and that the general framework in which such relation takes place is a decently well-functioning rule of law system. In section three I will briefly describe the main facts of the BTC case. In section four, using the BTC as an example, I will analyze one by one the assumptions of the standard conception to sustain that they are highly problematic in the context of transnational legal practice. In section five I will consider the counter-argument that a lawyer who moves beyond the standard conception is actually usurping the role of the judge, an argument that, I argue, loses much of its appeal in the transnational context. Finally, I will conclude by tracing a parallel between the problems of traditional legal ethics and the more general problems of traditional legal theories, thus placing the issues dealt with in this article within the broader context of the paradigm shift in law, legal theory and jurisprudence.

It is important to clarify that this paper is jurisprudential in nature, and not a case study. It uses the BTC as a paradigmatic example, but its main object is amorality as a theoretical framework rather than the BTC case, and it should not be read as an evaluation or criticism of the work of the lawyers involved. Furthermore, it does not offer specific advice to lawyers on how they should operate in similar cases, nor does it advance an overarching alternative to amorality theory for the context of global practice. The building of an alternative theory is certainly an important and urgent project and valuable efforts are being made in this respect, but it remains beyond the scope of this piece.

## 2. Amorality and its Assumptions

### *2.1. The Importance of Context*

Lawyers and advocates typically occupy a difficult moral position. They represent the interests of their clients, thus fulfilling a partisan role, but they do so within a system of administration of justice that aims at higher communal values. It is not unusual that the interests of the client run, at least apparently, against the general interests of the system or society in general. In some areas of the law, this may be the general rule, rather than the exception. For this reason, the role of the lawyer is usually portrayed as being entangled between two potentially opposing ethical loyalties, an essential moral ambiguity that often pervades the deontological codes lawyers are subject to.[4] While representing one's clients, the lawyer

4. See Fred C Zacharias, "The Images of Lawyers" (2007) 20:1 Geo J Leg Ethics 73 at 73-74 (for an American view on the issue); Massimo La Torre, "'Juristas, Malos Cristianos' Abogacía y Etica Jurídica" (2003) 12 Derechos y Libertades 71 at 81-82 (for a European perspective on the same problem).

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will typically do things that may seem at least ethically controversial, if not overtly reprehensible. The main concern of legal ethics is thus to offer a convincing answer to the following question: "how a lawyer can justify doing an act that, if performed outside the context of a professional role, would call for moral condemnation".[5]

So far, the most widely accepted response to that question is provided by the so-called *amorality theory*, which has become the "standard conception of legal ethics".[6] Following this view, the work of the lawyer must be determined by two main principles:

- the principle of *partisanship*, according to which lawyers must zealously defend the interests of their clients, doing everything that is not technically illegal in order to further these interests, even if it implies thwarting the substantial aims of the law; and
- the principle of *neutrality*, according to which lawyers must represent their clients regardless of their own view on the moral worth of the cause and are consequently absolved of any moral responsibility for acts done in the name of the clients.[7]

It is crucial to understand that the standard conception is normative in nature, rather than descriptive; it prescribes that the right thing for lawyers is to be amoral in relation to the goals pursued by their clients and the legal means put in place to achieve them.[8] The theory is frequently misunderstood to imply a sort of advancement of lawyers' disinterestedness in moral matters. Instead, amorality theory claims that it is by being morally neutral that the lawyer behaves in a morally righteous way. Neutral partisanship demands from lawyers to explicitly sideline moral responsibility in order to perform their roles "irrespective of considerations of morality" no matter how difficult that may be, or how much personal sacrifice it may imply.[9] The subtlety of this idea, devoid of all irony, is captured in the expression 'moral amorality'.[10]

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**5.** See W Bradley Wendel, "The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations" (2017) 30:2 Can JL & Jur 443 at 445 [Wendel, "The Limits"].

**6.** Among many others, Richard O'Dair, *Legal Ethics: Text and Materials* (Cambridge University Press, 2001) at 134.

**7.** The second part of the sentence can be considered a third principle in its own right: the *principle of non-accountability* (W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010) at 29 [Wendel, *Fidelity*]).

**8.** Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5:1 Human Rights 1 at 8.

**9.** Donald Nicholson & Julian Webb, *Professional Legal Ethics* (Oxford University Press, 2000) at 180.

**10.** Massimo La Torre, "Abogacía y retórica. Entre teoría del derecho y deontología forense" (2009) 25 Anuario de Filosofía del Derecho 13 at 16. Difficulties in understanding this subtlety, or maybe the hypocritical use that lawyers have often made of it, may explain why they have been so frequently described as despicable in Western literature, philosophy, and popular culture. There are hundreds of examples frequently referred to in the legal ethics literature, ranging from Plato to Luther to modern films and TV series.

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Unsurprisingly, the theory of amorality has been criticised from many quarters. In fact, the exchange of arguments between those defending and those criticizing amorality makes up the traditional battlefield of the academic literature on legal ethics, with both factions recognizing the hegemonic role of the theory. Likewise, the amorality model is widely prevalent among professionals, constituting the backbone of lawyers' "working philosophies",[11] a statement that is actually supported by social scientific evidence.[12]

This paper recognizes amorality's hegemonic role as the standard conception of legal ethics, and it does not pretend to contribute to the classic debate by either defending or attacking amorality as such. Although I find the model problematic for several reasons, I will not raise questions here concerning its internal consistency. My focus rather will be on the contextual assumptions of the theory. The importance of context is particularly crucial since amorality is a specific instance of what is called in ethical theory "role-differentiated morality", that is, a general justification of ethical behaviour that relies on the professional institutional context and on the role each individual—or group of individuals—plays within it. In fact, the problem of role-differentiated morality has been rightly described as the fundamental question in theoretical legal ethics.[13]

The basic idea of role-differentiated morality is that the role that professionals—lawyers or others—occupy within a particular institution "permits and indeed often requires them to do things which they (and others) would regard as immoral in private life".[14] Following Luban's foundational scheme, a professional doing an act *x*—an act that may otherwise be morally reprehensible—is on safe moral grounds if act *x* is necessary to fulfil an obligation that derives from its role, as long as it is a legitimate role within an institution that deserves a positive moral evaluation.[15] The philosophical magic that turns an unethical behaviour into a morally acceptable one depends entirely on the institutional context.

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**11.** William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998) at 100.

**12.** Wendel, *Fidelity*, *supra* note 7 at 30.

**13.** Wendel, *Fidelity*, *supra* note 7 at 20. The very idea that there can exist a role-differentiated morality is questioned from some philosophical quarters, especially from those working under Kantian premises. Thus, for example, Massimo La Torre draws on the principle of universalizability to conclude that there cannot be such a thing as a role-differentiated morality, since we cannot rationally expect the specific duties attached to a particular occupation to be universally extended to other roles (see La Torre, *supra* note 4 at 99; but see David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) at 113-15). If that is the case, professional ethics "must either be derived from, be identical with, or be an intensification of ordinary morality" (Daryl Koehn, *The Ground of Professional Ethics* (Routledge, 1994) at 4, reflecting, although not sharing, some of these criticisms). This view would reject the common intuition among legal ethicists that both the philosophical and the practical interest of legal ethics lies precisely in the conflict between ordinary morality and professional duties (see Kimberly Kirkland, "Confessions of a Whistleblower: A Law Professor's Reflections on the Experience of Reporting a Colleague" (2007) 20:4 Geo J Leg Ethics 1105). I will not discuss this philosophical point any further, since the object of this paper is not to examine the plausibility of the theory of amorality as such. Its dominance within both the academia and the professional ranks can be ascertained as an empirical fact.

**14.** O'Dair, *supra* note 6 at 134.

**15.** Luban, *supra* note 13 at 129-33.

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How does role-morality apply to lawyers? At the risk of being simplistic, the broad lines of the institutional justification for neutral partisan advocacy can be easily sketched by any practicing lawyer and probably by any decently articulated first year law student. Administration of justice is a collective task in which every participant plays a particular role. Different roles imply different responsibilities, and as much as a judge should not play the role of an advocate, an advocate must not be the one judging the client's cause. Moral neutrality on the part of the attorney enables the best defence of the client, and the best representation of rights and interests. According to a conception of the legal process that is shared in its basic tenets throughout the Western world—including both common law and civil law countries—justice is best achieved by the public confrontation of two opposing parties in front of an impartial third party, that is, the judge or arbiter that actually makes the decision. What interests will receive protection and what rights are allocated to whom is something up to the public authorities to decide, not to the private lawyer. If a lawyer is successful at representing a client to the point where material justice is clearly compromised, the problem does not lie with the work of the lawyer—either the other parties were not doing their jobs properly, or the system has flaws that the lawyer is thus helping to identify.

This way of thinking is institutional in nature, since it shifts the grounds for moral justification from the particular acts of the lawyer to the institution where the lawyer works. It is because we appreciate the institution that we therefore appreciate the role lawyers play within it. The degree, quality, and nature of such appreciation may vary significantly. Some versions of amorality satisfy themselves with a pragmatic justification of the institutional context, such as the self-evident statement that we need some system to solve conflicts with the additional claim there are no better alternatives to the traditional systems of administration of justice,[16] whereas others are more ambitious and claim that morally neutral lawyers are indeed necessary to advance the paramount political values of liberty or equality.[17] More recent developments, inscribed in the second generation of scholarship in the field of legal ethics,[18] take a more legalistic—or positivistic, in the jurisprudential sense of the term—turn, emphasizing the value of the rule of law and the principle of legality, understood in the context of complex and pluralistic societies that respect moral pluralism and the free moral agency of citizens.[19]

What specific justification of the institutional context is offered has consequences for the theory. In particular, the extent of what sort of actions are morally justified differs accordingly, with some versions of amorality offering a moral blank check so long as the lawyer acts in the best interest of their client, with others significantly limiting what can be justified even when the lawyer acts

**16.** See Kenneth Kipnis, "Ethics and the Professional Responsibility of Lawyers" (1991) 10:8 J Business Ethics 569.
**17.** See Stephen Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) 1986:4 American Bar Foundation Research J 613.
**18.** Wendel, "The Limits", *supra* note 5 at 448.
**19.** Wendel, *Fidelity*, *supra* note 7 *passim*.

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in the best interest of their client. But all versions, from the simplest and earliest to the most recent and sophisticated, share the basic thesis of amorality, namely, that lawyers must leave their own first-order moral reasons aside when representing their clients under the law. In other words, lawyers must not let their personal moral views interfere with their job if they want to remain faithful to the responsibilities attached to their role.

### *2.2. Three Rough Assumptions*

For a theory that is based on institutional reasoning, it is surprising how little attention amorality pays to the real empirical context of lawyers daily practice. Discussions of the institutional environment usually remain at the most general and abstract level—the legal system, the system of administration of justice, the rule of law, the adversarial system, and so on—with a noticeable lack of elaboration on the specific realities of day-to-day legal practice, and therefore a lack of subtlety when dealing with the implications of such realities for the practicing lawyer.[20] At the risk of stating the obvious, it is not the same to practice criminal law or to practice tax law, to represent a client in court or to render advice in an office, to work as a solo-practitioner or as part of a team of lawyers in a large law firm. Although intuitively these differences may be relevant for determining the ethical status of lawyers, they are largely overlooked as "legal ethics theories tend to offer a single, unvarying prescription for lawyer behavior".[21]

In this "single, unvarying prescription" a typical context of legal practice is generally assumed, frequently in an implicit manner, that reflects in broad strokes the practice of a criminal defense lawyer, since this is the kind of legal practice that has provided the touchstone of legal ethics.[22] More specifically, this context is based on three assumptions:

*First assumption*. The legal relation is an agency relation between a lawyer (the agent) and a client (the principal), both acting as individual free moral agents.

*Second assumption*. The lawyer works within a litigation context, meaning that the lawyer either represents the client on an actual litigation or advises the client in relation to an actual or potential litigation.

*Third assumption*. The work of the lawyer is inscribed within the context of a particular domestic jurisdiction—typically a liberal democratic polity—where the rule of law prevails, with all its concomitant elements: clearly ascertainable rules, professionally accepted criteria of legal interpretation, an efficient and independent judiciary, and so on.

**20.** Wendel, *Fidelity*, *supra* note 7 at 82.
**21.** Andrew M Perlman, "A Behavioral Theory of Legal Ethics" (2015) 90:4 Ind LJ 1639 at 1663.
**22.** Wendel, *Fidelity*, *supra* note 7 at 187: "in legal ethics discourse, the criminal defense paradigm always hovers in the background, subtly informing our tacit assumptions about what a lawyer's duties ought to be."

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This formulation in three assumptions is purely conventional and I admit other versions could be offered, for example by breaking up some of these assumptions in further points or by combining them differently.[23] However it seems valid enough as a working hypothesis for the purpose of comparing the traditional picture offered by the amorality model with the usual environment in which lawyers find themselves when they are involved in transnational legal practice—meaning legal practice that happens in any relevant sense, including its consequences, across national borders. Even if we were to fully accept the merits of amorality as a normative ethics for practicing lawyers, there are substantial questions to be answered if that justification is going to extend to "an environment where borders and boundaries no longer reliably define the limits of cause, effect and accountability".[24] The remainder of the paper will examine the theory of amorality and its assumptions in light of such an environment, using as a paradigmatic example the so-called "contract of the century", that I present in the following section.

## 3. BTC as a Paradigmatic Example

The Baku-Tbilisi-Ceyhan pipeline (BTC for short) was designed, built and operated mainly by an international consortium of energy companies (hereafter, the BTC consortium) in order to carry oil from the Caspian Sea into the Mediterranean, crossing the territories of Azerbaijan, Georgia and Turkey.[25] The construction process began in 2002 and was completed in 2006, with an expected operational lifetime of 40 years.[26] This industrial mega-development operates under an *ad hoc* legal structure made up of several legal documents, the most important of them being three host government agreements signed between the consortium and each one of the sovereign states, and an international

**23.** Moreover, the theory of amorality draws on complicated assumptions of social psychology (see, e.g., Perlman, *supra* note 21, questioning from a psychological perspective the capacity of a lawyer of making objective judgements while playing a partisan role). I am not dealing here with this interesting issue and other similar criticisms.

**24.** Vivien Holmes & Simon Rice, "Our common future: the imperative for contextual ethics in a connected world" in Francesca Bartlett, Reid Mortensen & Kieran Tranter, eds, *Alternative Perspectives on Lawyers and Legal Ethics. Reimagining the Profession* (Routledge, 2011) 56 at 59.

**25.** The BTC consortium was incorporated with the official name of Baku-Tbilisi-Ceyhan Pipeline Company in 2002. The main shareholder was British Petroleum, with more than 30% of the total amount of shares, but there were ten other shareowners—from more to less owned shares: the Azari SOCAR, the American UNOCAL, the Norwegian STATOIL, the Turkish TPAO, the Italian ENI, the French TOTAL, the Japanese ITOCHU, the Japanese INPEX, the American CONOCOPHILIPS, and the British HESS Energy Trading Company. There were other important transnational corporations involved through the process, especially in the construction phase. For the sake of simplicity, I am leaving those aside, and concentrating solely on the BTC consortium and its relations with the states.

**26.** Technical information on the pipeline can be found at: "Operations and Projects: Pipelines: Baku-Tbilisi-Ceyhan Pipeline", *BP Azerbaijan*, online: www.bp.com/en_az/caspian/operationsprojects/pipelines/BTC.html.

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treaty signed among the states themselves.[27] The crafters of this legal architecture were private lawyers, that led the negotiations and had the initiative in drafting the agreements, including the intergovernmental treaty.[28]

The current tendency to substitute private law for public law in matters that were not so long ago an exclusive power of the state is well documented.[29] Similarly, outsourcing the creation of law into public or private agents is becoming an increasingly frequent phenomenon, for alleged reasons of efficiency and others.[30] The BTC can be inscribed in the general wave signaled by these tendencies, but it goes a step further, since it is an example of *private law that becomes public law* in a very literal way—not only at the international level, but also at the domestic level in each of the states involved. The countries incorporated the agreements as binding norms of their national legal systems and did so at the highest hierarchical rank only below the Constitution, committing themselves both to amend any existing laws inconsistent with the content of the agreements and to not legislate in ways that could obstruct their implementation. In other words, these agreements became the prevailing legal regime for all pipeline related issues in each of the affected countries.[31]

In terms of content, the letter of the contracts creates remarkable privileges for the transnational corporations involved, while raising serious issues in matters of human rights, environmental protection and state sovereignty.[32] In relation to the latter, the agreements create an obviously asymmetrical position between the states and the companies, with the BTC consortium in the strong position in matters such as warranties, controlling mechanisms, or termination rights. For example, the companies have the right to terminate the agreements at any time,

**27.** After initial negotiations that go as far back as 1992, the intergovernmental agreement between Azerbaijan, Georgia, and Turkey was finally signed by the Presidents of the countries (respectively Heydar Aliyev, Edward Shevardnadze and Süleyman Demirel) in 1999 during a meeting of the Organisation for the Security and Cooperation in Europe celebrated in Istambul, and with the signature of the President of the United States Bill Clinton as witness. The Host Government Agreements were signed on April 28, 2000 (Georgia), October 17, 2000 (Azerbaijan), and October 19, 2000 (Turkey). A fifth important pillar of the legal structure was an agreement entered with the state-owned Turkish company BOTAS concerning the construction and operation of the Turkish end of the pipeline. For the same reasons of simplicity already expressed, I am going to leave this particular contract and other legal documents aside.

**28.** The law firm in charge was the Houston based Baker & Botts, representing the main investor (British Petroleum) and also the Azari's state-owned oil company. A very informative—and fiercely critical—account of Baker & Botts' involvement in the BTC project, touching upon legal, commercial and political issues, can be found at Daphne Eviatar, "Wildcat Lawyering" (2 November 2002), *Law.com*, online: www.law.com/almID/900005532993/Wildcat-Lawyering/. There were other lawyers involved, both public lawyers representing the states and private firms.

**29.** See Sionaidh Douglas-Scott, *Law After Modernity* (Hart, 2013) at ch 5.

**30.** See Pauline Westerman, *Outsourcing the Law* (Edward Elgar, 2018).

**31.** The language "prevailing legal regime" was explicitly used in the intergovernmental treaty (Art.II, 4 (i)). For the remainder of this piece, and for the purpose of not overloading the text with footnotes, I am not going to make specific citations to the sections and articles of the agreements. The full text of the agreements (including the three host-government agreements and the intergovernmental agreement) can be found at "BP in Azerbaijan: Legal Agreements", *BP Azerbaijan*, online: www.bp.com/en_az/caspian/aboutus/legalagreements.html.

**32.** See Abigail S Reyes, "Protecting the Freedom of Transit of Petroleum: Transnational Lawyers Making (up) International Law in the Caspian" (2006) 24:3 BJIL 842, for an exhaustive analysis of the text of the agreements and the problems involved in those areas.

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whereas the states cannot do so unilaterally, but only in case of material breach of the companies' obligations under the contract, and only after giving due notice, allowing time for the companies to redress the situation and avoid the cause of termination if they wish to do so. The agreements also confer to the companies exclusive and unrestricted rights over a set of issues, that range from bureaucratic matters—such as visa permits, requirements to open bank accounts, or to operate with foreign currency—to tax exemptions in favour of the companies and their workers. These rights go beyond administrative and financial matters and extend to the very core of private law in relation to land property rights. After deciding on the most suitable route for the pipeline, the companies had right to the preferred land without having to offer any kind of compensation in return to the state authorities. In one of the host-government agreements (Georgia), things went as far as the state granting the companies the power to expropriate private land.

But probably the most original and exuberant rights are those related to the oil itself. In the intergovernmental agreement, the states committed themselves to completely give up ownership or possessory rights over the petroleum either found in their territory or in transit through it. Furthermore, by virtue of an alleged international law principle of "free transit of petroleum", the states agreed not to interrupt or impede in any manner such transit, and to take all reasonable measures—including the use of state force—to prevent such interruption or impediment. The sum of all these *sui generis* legal provisions has led a commentator to affirm that the BTC legal structure creates a *de facto* "thousand-mile swap of militarized corporate sovereignty".[33]

In the next section I am going to examine the assumptions of the standard conception of legal ethics in light of the context of transnational legal practice, using the BTC as a paradigmatic example. In doing so I am going to concentrate solely on the result of the process, as reflected in the agreements. All legal information that will be presented here in relation to the case is publicly available, as it appears in the text of the contracts and official legal documents that were signed and approved and made public. As mentioned in the introduction, this is a jurisprudential essay rather than an empirical study of the BTC case, and analyzing the specific operations of the lawyers involved in the case is not the aim of this paper, which should not be read as a criticism of the conduct of such lawyers. The internal workings leading to the binding legal documents, including the interactions among lawyers or between lawyers and clients, the specific negotiations among them and all parties, or the structure and functioning of the firms involved, are all issues that remain outside the scope of this article.[34]

**33.** *Ibid* at 879.

**34.** Furthermore, undertaking an empirical study on the particulars of the BTC operation would have had methodological problems of its own. Although receiving severe ethical criticism from some quarters (*ibid* at 884), the BTC is not widely identified in the public opinion as a corporate scandal and it has not generated even a fraction of the massive body of literature produced in relation to other contemporary corporate cases. Things are subtler here, what adds an extra layer of interest to the case, but also implies that information is scarce and consequently research becomes more difficult. Since the case has not been seriously challenged at either the legal or the political levels, there are no legal proceedings or independent inquiries offering objective and easily accessible information.

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## 4. The Three Assumptions Revisited

### *4.1. The Legal Relation as an Agency Relation: the Actors*

The first assumption is that the legal relation is an agency relation between a lawyer (the agent) and a client (the principal), both acting as individual free moral agents.[35] Amorality theory frequently relies on a rather stereotypical and often romanticized picture of the relationship between these actors. Consistent with its lack of empirical subtlety noted above, the standard conception usually accepts a traditional account of the legal profession as a monolithic entity made up of broadly characterized individuals that share an idea of professionalism "as a unitary and fixed ideology [creating] a single and mutually-reinforcing set of institutions and beliefs guaranteeing that lawyers will act as honest fiduciaries for their clients and zealous defenders of the rule of law."[36] Thus, in this account professionalism protects clients from dishonest and rapacious behaviour, contributing at the same time to the advancement of societal interests.

But any insider—or any layperson with even the slightest contact with actual professional lawyers—knows that things are much more nuanced. For a start, 'the legal profession' is a term denoting different groups of professionals that place themselves in different strata with a diversity of functions, level of education and professional knowledge, clientele, economic interest, and even ideology and demography.[37] Rather than blindly sharing the same creed, these groups "construct—and contest—the meaning of professionalism for a range of competing—and often conflicting—purposes".[38] This internal competition around the meaning of professionalism becomes especially fierce in relation to the so-called globalization of legal practice, around which differences among lawyers exacerbate. In parallel to the tendencies that one can observe, for example, in the world of legal academia, for some legal professionals globalization may be a phenomenon they can insulate themselves from, whereas others will feel an urge to resist or even fight against it, many will see it as a new arena for business opportunity, and a select group—low in numbers but qualitatively relevant—will be totally immersed in it, with some lawyers being themselves active leaders in the process of globalizing law and legal practice.

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**35.** The term 'agent' is used here with two different meanings. Firstly, I refer to the lawyer as an agent of the client, authorized to act legally in her place. This is the usual meaning of the term within the context of the agency relation, in all its possible manifestations. But I also speak of both lawyer and client as agents in a second meaning, as autonomous beings that have the power to act freely and to produce effects in the world through their actions. This is the usual meaning of the term in the context of moral philosophy.

**36.** David B Wilkins, "Where the Action is: Globalisation, Law and Development, the Sociology of the Legal Profession, and the 'GLEE-full' Career of Dave Trubek" in Gráinne de Búrca, Claire Kilpatrick & Joanne Scott, eds, *Critical Legal Perspectives on Global Governance* (Hart, 2005) 439 at 445.

**37.** HW Arthurs, "A Global Code of Legal Ethics for the Transnational Legal Field" (1999) 1:3 Legal Ethics 59 at 66.

**38.** Wilkins, *supra* note 36 at 445.

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This professional confrontation has an evident sociological translation. Although this paper does not pretend to offer empirical insights into the organization of the global legal profession, one does not need to undertake an exhaustive study to understand that transnational lawyers differ from the usual picture of the almost heroic solo-practitioner defending the interests of a client while battling with ethical dilemmas. Almost inevitably, this kind of practice is carried out in large complex organizations, typically transnational law firms—or at least law firms with transnational ramifications.[39] It has been noted many times that the law firm context introduces a whole set of problems for legal ethics inasmuch as it points towards new ways of attributing and evaluating moral responsibility.[40] In the case of transnational legal practice, these kinds of problems are the rule rather than the exception.

There is a structural connection between large law firms and the globalization of the law. As sociologists of the legal profession have made abundantly clear, large law firms are "a response to the needs and contingencies of capitalism in the late twentieth and early twenty-first centuries".[41] Far from being a business accident, the close relation between leading global law firms and the transnational business corporations they serve is intrinsically tied to the dominant strands of global law.[42] This relation turns mainly around business interests, but it is also ideological, and that is the reason why we can talk about these firms as being themselves active agents in the advancement of capitalist globalization.[43]

This perspective also sheds light on the other main actor of the legal relation, that is, the client. In the classic account of the standard conception, the client is presented in terms that are at least as general and abstract as the lawyer. Lacking the specific technical knowledge that creates the need for lawyers in the first place, the client is often portrayed as an ignorant and innocent figure, traditionally a "man-in-trouble"—in any case a person in urgent need of help, what has made of "consumer protection" the paramount value in the rhetoric of professional regulation.[44] Along this line of thinking, some ethicists within the ranks of amorality but concerned with the consequences of limitless zealousness highlight the danger of lawyers putting forward aggressive or unnatural interpretations of the law—somehow perverting the candid view of the client as a technically unsophisticated law-abiding citizen.[45]

Here again, however, the realities of transnational legal practice challenge this romanticized sketch. The kind of clients that transnational lawyers typically deal

**39.** See John Flood, "Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice" (1996) 3 Int'l J of the Legal Profession 169.

**40.** The usual reference to "the lawyer" ignores the rather obvious fact that humans behave differently when we are in group than when we act alone. This is well documented in social psychology and has led to both theoretical and practical developments considering the implications of the law firm context for legal ethics (Perlman, *supra* note 21 at 1665).

**41.** John Flood, *What Do Lawyers Do? An Ethnography of a Corporate Law Firm* (Quid Pro Books, 2013) at 17.

**42.** Mikhail Xifaras, "The Global Turn in Legal Theory" (2016) 29:1 Can JL & Jur 215 at 219.

**43.** Arthurs, *supra* note 37 at 68.

**44.** John KM Ohnesorge, "Corporate Lawyers as an Infant Industry? Legal Market Access and Development Policy" in *Critical Legal Perspectives on Global Governance*, *supra* note 36 at 426.

**45.** There seems to be empirical evidence supporting such concern, as reported in Wendel, *Fidelity*, *supra* note 7 at 64.

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with are neither ignorant, nor innocent, and it is debatable how much protection they really need. More often than not, this client will be a transnational corporation, and "[b]y and large, transnational corporations and other powerful actors in the global economy are not in the same position vis-à-vis their professional advisors as typical domestic clients"[46]. Clients of transnational lawyers are transnational players themselves, sophisticated both in their structure and functioning, repeat consumers with experience in the legal field that possess much legal knowledge. In fact, such clients will commonly have high-quality in-house legal staff, so in a quite literal sense the clients of global lawyers will be global lawyers themselves. As expressed in colourful terms by a commentator, "transnational companies are at least as likely as their lawyers to be sinners rather than sinned against".[47] Add that to a highly competitive legal services market in which lawyers need to please their clients in order to keep them,[48] and it becomes evident that rhetoric of the needy lay citizen and the value of consumer protection is very much out of place in this context.[49]

The BTC may be the best real example one can find of a hugely influential client. If any of the large oil and energy companies in the world would make a textbook illustration of a powerful legal client, what we have in the BTC is a partnership of many of the most important among them pushing in the same direction. To make things even more complex, and interesting, the lawyers in the case served a plurality of clients with a variety of interests, sometimes aligned, sometimes in conflict, sometimes intertwined in different ways. Thus, the working out of the BTC legal structure can be somehow read as a confrontation between the interests of the companies (that were the initial clients) and the states (of which we have to presuppose have a vested interest in ensuring their national sovereignty remains intact). But as a matter of fact, as lawyers worked "behind closed doors in conjunction with the international oil companies and host statemen",[50] states also became in a quite literal sense clients of the lawyers, who designed the legal architecture, led the negotiations, and drafted the documents that at the end of the process became domestic and international public law.[51]

**46.** Arthurs, *supra* note 37 at 66.
**47.** *Ibid*.
**48.** Mark A Sargent, "Lawyers in the Moral Maze" (2004) 49:4 Vill L Rev 867 at 883.
**49.** A further problem, of huge philosophical significance, is that corporations—in spite of being treated as persons for legal purposes—are mere legal fictions "and not autonomous moral actors capable of free will or autonomous responsible citizenship", and therefore lack the moral agency to "justify an attorney's suspension of moral judgment" (Judith McMorrow & Luke M Scheuer, "The Moral Responsibility of the Corporate Lawyer" (2011) 60:2 Cath U L Rev 275 at 278). Fundamental as it is, I leave this point aside from the analysis, since it does not exclusively affect transnational practice but corporate lawyers in all different contexts, including the domestic arena.
**50.** Holmes & Rice, *supra* note 24 at 74.
**51.** Indeed, Azerbaijan was formally represented by Baker & Botts through its state-owned oil company. The fact that there were three countries involved made things particularly difficult, especially since the differences among them in terms of legal background and (legal and non-legal) culture, and economic and political interests (both geo-strategically and in relation to the pipeline project), were innumerable. This is why, besides treasuring extraordinary legal skills, the lawyers responsible for the agreements had to have "a secretary of state's political savvy" (see Eviatar, *supra* note 28).

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In sum, and differently to the clear-cut picture presumed by the standard conception, in the context of transnational transactions the relationship between lawyer and client differs markedly from a bilateral exchange of knowledge and technical expertise, on the one side, and money on the other. Indeed, things are so intricate that even defining who the client is may become far from obvious.

### *4.2. The Legal Relation as an Agency Relation: the Object*

In the traditional account, the object of the legal relationship is usually conceived as the defense of the interests of the client within the limits of what is legally permissible. Although this criterion has pervaded professional rhetoric almost universally, it has become evident for legal ethicists, even among the ranks of those who defend amorality, that such formulation ought to be subtler. The "acting within the limits of the law" mantra does not go too far in terms of practical relevance, since much of what lawyers do in their professional capacity is precisely to discuss, contest or enlarge the limits of the law. For lawyers who clearly breach such limits we do not need legal ethics—traditional positive law with its body of sanctions is enough to deal with that. It is in the grey zone where things become interesting, and lawyers probably more than any other professionals know how to live and work in grey zones.

This is the reason why more sophisticated versions of amorality, such as the one advanced by Bradley Wendel, underline the crucial distinction between clients' entitlements and interests.[52] Although both terms—and others such as rights—[53] are often seen as interchangeable in the professional discourse, the fact is that clients are not legally entitled to fully advance all their interests, and it is the former not the latter that makes up the object of legal representation.[54] Lawyers as agents must zealously defend and represent clients' entitlements, and it is legitimate to try to enlarge the scope of such entitlements as long as reasonable interpretations of the law allow for it. But engaging in unduly aggressive interpretation, holding frivolous legal positions that would be implausible to sustain in good faith, manipulating the letter of the law with the obvious purpose of circumventing it or avoiding its application, and other not-so-uncommon practices among lawyers—all those are not a legitimate object of the legal relation, and therefore must be considered simply bad professional behaviour, even within the framework of the dominant amorality theory.[55]

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**52.** Wendel, *Fidelity*, *supra* note 7 *passim*.

**53.** Wendel defines a legal entitlement—in a very Hohfeldian way—as "a substantive or procedural right, created by the law, which establishes claim-rights (implying duties upon others), privileges to do things without interference, and powers to change the legal situation of others (e.g., by imposing contractual obligations)" (*ibid* at 50).

**54.** Wendel, *Fidelity*, *supra* note 7 at 59, adding: "This is such an obvious point that it is hard to understand why lawyers sometimes fail to appreciate it. But it may be the most pervasive feature of the normative framework of practicing lawyers that they proclaim an obligation to defend their clients' *interests* within the law, rather than vindicating their clients' legal entitlements".

**55.** *Ibid*, *passim*.

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This "correction" of amorality places lawyers in a singular middle position: on the one hand they have a duty of loyalty towards their clients, but on the other hand they ought to show fidelity to the law (that creates the lawyer-client relation in the first place), so that the lawyer can be considered "a quasi-public official—an officer of the court".[56] However, in the case of transnational legal practice such a middle position seems at the very least difficult to articulate. Even if—notwithstanding the problems and nuances described in the previous section—we were to succeed in defining who is the client and what are the clients' interests, the more serious problems come with the other side of the equation—the one that is meant to moderate those interests. In the lack of a clear domestic system of reference, what must be the true object of lawyers' fidelity? A foreign legal system that is alien to both lawyer and client? A reduced set of generally ambiguous international law principles and precedents that hardly put any limit on the interests of the client? A thin layer of professional custom and regulation in a transnational and transcultural setting?

More will be said below on how the standard conception depends on a reasonably well-functioning rule of law system. In any case, amorality combined with the lack of such legal context naturally allows for over-identification with the clients' interests, as the BTC case exemplifies. Add to that a milieu of close connection—organizational as well as personal—between lawyers and corporate managers, and the end product is a group of lawyers so closely identified with their clients' interests that it might have been difficult for them even to consider "the economic, human rights and environmental concerns expressed at the time" by the communities affected by the BTC pipeline, not to speak "of the potential impact their legal work would have on the development of public international law, and consequently on other communities who will be affected by similar future ventures".[57]

In such a professional context, the practical legal questions aimed at distinguishing interests from plausible entitlements cannot be answered in any meaningful way. For example, is the BTC consortium entitled to advance its interest in

**56.** *Ibid* at 210.

**57.** Holmes & Rice, *supra* note 24 at 74. The authors put forward the idea that in the absence of a clear domestic system of reference, lawyers should take directly into account the broader context of their actions. Thus, moving legal ethics into paths more often trodden by business ethicists, they suggest that business lawyers must consider how their decisions affect their client's *stakeholders*. The starting point of such approach shares the main thesis of this paper, namely, that the key to legal ethics lies in context, and in the absence of a clear domestic rule of law system, another relevant framework must be found for amorality to be a justifiable model. However, the stakeholder approach raises practical issues that, in the sort of complex cases that transnational lawyers frequently confront, become virtually intractable, if only because the actions of these lawyers may affect "a plethora of publics with differing and often opposing interests" (Arthurs, *supra* note 37 at 66). The BTC case is again a perfect example, with its relevant stakeholders including at the very least the governing elites of the states, its populations, the communities directly affected by the pipeline, national and foreign workers, other companies that benefited from the project or were negatively affected by it, national and foreign competitors, neighbouring countries, and the environment—not to mention the ultimate consumers of oil and gas, other pipeline communities around the world, the international community or even future generations.

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the free transit of petroleum without disruptions through the pipeline and along the affected countries? Maybe it is not, until the moment that lawyers actually incorporate a principle of free transit of petroleum in the text of the agreements and the states go along with it. Are the BTC companies entitled to expropriate private land, thus circumventing any well-established universal principle of private law? Maybe they are not, until the moment such privilege is incorporated in the agreement signed between the consortium and a sovereign state, that goes along with it. In these cases, what an entitlement is—as different from a sheer interest—is something that simply cannot be defined *a priori*, and therefore cannot act as a criterion to guide lawyers' work. In fact, it is lawyers themselves who through their work turn corporate interests into legal entitlements.

### *4.3. The Lawyer as a Litigator*

According to the second assumption of amorality theory, the lawyer is seen as a litigator, an advocate in an adversarial context. The theory holds that in this particular institutional environment the model of morally neutral partisanship works best for discovering the truth and reaching a just legal outcome according to the law, which are the main goals of the legal process. A lawyer who would allow one's own moral views to interfere with the legal job of representation, would be creating a distortion in this process, judging a client in place of the judge or jury, thus leading to an undesirable system malfunction.

It has been very frequently noted that "much of professional legal ethics takes its cue from the adversarial system and the advocate's role".[58] Crucially, this applies not only to theoretical legal ethics, but also to the law regulating the lawyer's conduct, mostly based on the litigator's role.[59] However, "we must bear in mind how atypical and unrepresentative judicial decisions are as legal events".[60] As David Luban clearly illustrates using the pyramid of disputing, only a minor number of disputes actually result in judicial decisions. More importantly, disputes themselves are atypical legal events, since "a great deal of legal work has little or nothing to do with disputes", and in fact, "the most basic activity in the legal system [is] the consultation between lawyer and client, in which the client sketches out a problem and a lawyer tenders advice".[61] In other words, there is much more to disputes than the actual adversarial process, and there is much more to lawyering than disputes.

The adversarial context implies a whole set of elements and conditions such as "an impartial referee, orderly procedures, rules for obtaining, introducing, and excluding evidence, and a competent opposing party",[62] that are completely absent when lawyers act as consultants or transactional agents. In such circum-

**58.** Nicholson & Webb, *supra* note 9 at 166.
**59.** Holmes & Rice, *supra* note 24 at 60.
**60.** Luban, *supra* note 13 at 146.
**61.** *Ibid* at 151-52.
**62.** W Bradley Wendel, "Professionalism as Interpretation" (2005) 99:3 Nw UL Rev 1167 at 1182.

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stances, "one wonders why anyone has ever thought to analogize the role of lawyer from one context to the other",[63] but that is exactly what has happened. The main consequence is that lawyers acting as advisers or counsellors are not under direct scrutiny from any other relevant player in the system—differently to litigators, who are scrutinized by the other actors playing in the very same institutional context. As it has been pointed out, in litigation lawyers share with those other actors their responsibility for "getting the law right". However, in a meeting with the client behind closed doors, "the lawyer is frequently the only actor who has any power to render a judgment about what the law permits".[64] In such context, "there is no adversary to challenge the client's statement of facts, to sharpen the issues, to seek clarification of positions, or to point to countervailing considerations.... There is no third-party tribunal, no adverse party, and no rules of procedure; the lawyer and the client are on their own".[65] The devastating consequences of unscrupulous lawyering shielded from public view have been abundantly documented in cases such as Enron.[66]

Transactional and advisory practice is precisely "the area of lawyering which most usually takes lawyers across borders and into globalized legal practice",[67] and the BTC is again a textbook example. In global legal practice, the adversarial context is the exception squared—leaving aside some specialized niches such as commercial arbitration, that in itself differs significantly from domestic litigation in ways that can be ethically relevant. The fact that most matters never reach a neutral tribunal is not only a true empirical statement, but points to the very core of transnational lawyering, since one of its usual goals is precisely to prevent litigation from happening. In the BTC case things went even further, with the rules of the agreements insulating the consortium from potential liability resulting from human rights violations related to pipeline security measures, and possibly providing for the states to indemnify the companies in case they were found responsible in a court of law.[68] Leaving value judgements aside, it is at least intellectually awkward to morally justify the actions of lawyers on a theory based on litigation, when the result of such actions is precisely to materially nullify the effects of such litigation if it ever was to happen.

Defenders of amorality have tried to extend the validity of the theory beyond the litigation context. In a classic piece that is still widely cited in the

**63.** *Ibid*.
**64.** Wendel, *Fidelity*, *supra* note 7 at 54.
**65.** Murray L Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66:4 Cal L Rev 669 at 677.
**66.** Among many others see Roger C Cramton, "Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues" (2002) 58:1 Bus Lawyer 143.
**67.** Holmes & Rice, *supra* note 24 at 56.
**68.** Abigail Reyes suggests that this "innovation in private international law" is a direct response to the growing litigation around human right abuses committed along pipeline corridors (*supra* note 32 at 850). The first of these actions in the US, *Doe vs Unocal*, was filed in 1996, just three years before the first of the BTC agreements was signed. The "indemnification clause" is not literally to be found in the agreements but according to Reyes is a plausible interpretation of the actual clauses (*ibid* at 870).

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legal ethics literature,[69] Stephen Pepper holds that the law allows the citizens to do things—such as creating valid wills, setting corporations, or entering into all kind of contractual relationships—that are technically complex and therefore demand the professional advice of a lawyer. But if that lawyer was not morally neutral and would let one's moral views interfere with one's advice, for example, by ill-advising the client when setting up a company which object was morally repugnant for the lawyer, one would be curtailing the fundamental political value of autonomy. Furthermore, Pepper holds that this moral screening would also compromise equality among citizens, who would have different access to the law depending on the moral views of the lawyer with whom they consult.

This extension of the scope of the theory beyond litigation implies the existence of a well-functioning rule of law system that privileges the value of freedom within the limits of a clearly defined set of prescriptive rules that make clear what must not be done. Therefore, without discussing the merits of Pepper's approach *per se*, it clearly points towards the importance of context for amorality. And in this respect, it is evident throughout his argumentation that he is thinking within the framework of the domestic legal system of a liberal democracy. This is not, however, a plausible framework for global legal practice, as will be immediately discussed in the next subsection.

### *4.4. The Reasonably Well-Functioning Domestic Rule of Law System*

The third assumption of amorality theory holds that lawyers typically perform their professional functions within a reasonably well-functioning domestic jurisdiction where the rule of law prevails. This is the often implicit—but occasionally explicit—legal background of the standard conception, which should not be surprising at all. To start, the structure of the legal profession, including the body of professional regulations, is organized around national and subnational entities, with global deontological codes being yet an exotic element in the field.[70] But there are also reasons of legal theory at play. As it has been repeated *ad nauseam*, even in the age of globalization law remains a distinctively national field. Most legal ethicists—who are lawyers themselves—write within the framework of a domestic legal system, and since the vast majority of literature in the field is produced in countries that count themselves as liberal democracies, such literature assumes that the natural context for lawyers to work is a liberal democracy with rule of law and its concomitant features.

Although some traditional accounts of amorality aimed at first order moral principles as the ultimate justification of the institution, and therefore of the work of the lawyers involved in it (Pepper's version discussed above, with his

**69.** See Pepper, *supra* note 17.

**70.** Not only exotic, but also controversial as regards their efficacy and even desirability (see, e.g., Arthurs, *supra* note 46 or Andrew Boon & John Flood, "Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct" (1999) 2:1 Legal Ethics 29).

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emphasis on freedom and equality, is a good example), more recent versions, such as the one put forward by Wendel, explicitly point towards legality and the prevalence of the rule of law as the paramount values of a theory on legal ethics. In complex societies characterized by ethical pluralism "[l]egality may be seen as narrower than morality in general, but ... it ... represents a distinctive way for citizens to live together and treat each other with respect, as equals".[71]

However, "the 'rule of law rationale' that underpins the standard conception of ethics falls away when a lawyer's work is in jurisdictions where the rule of law does not operate robustly",[72] and this is precisely what happens in transnational legal practice inasmuch as it "increasingly operates, or has effect, outside the reach of liberal democratic rule of law".[73] The BTC case perfectly illustrates the weakened role of the state as a regulator of transnational activity, and its transformation into a more ambiguous player in the global legal arena. In practical terms, and from the perspective of the BTC lawyers, the states involved in the project may have been seen at the same time, or at different stages during—or in different aspects of—the same process, as the opposing party to their clients, as very powerful and urgent stakeholders, or as their clients themselves. As a consequence, the final result of the work of these lawyers is a model example of the creation of legislative instruments "that do not have their origin in the State, in which the role of the State is transformed, but the State does not disappear"—it is integrated instead "in a deep and radically changed legal context that puts [its] prerogatives into perspective while, at the same time, offering it new mechanisms of action".[74]

In the absence of states acting in their traditional monopolistic role over legal creation and implementation, many elements that the amorality theory takes for granted become highly problematic. The most articulate defense of amorality claims that "it is a good thing for a political community to resolve disagreement and conflict using procedures that take competing views into account, resolve them in the name of the community as a whole, and create general public, accessible reasons that may be given by community members as a justification of actions that affect other citizens".[75] All these are appealing elements of the democratic process under the rule of law, but it is ostensibly difficult to find them present in the BTC case. Even accepting that a political community of reference can be clearly identified—what would be problematic in itself—there were no formal recognizable procedures in place to take into account the conflicting views within that community. Moreover, and as we have seen, this *ad hoc* legal regime partly aimed at materially nullifying the negative effects of the possible outcome in case of actual litigation.

**71.** Wendel, *Fidelity*, *supra* note 7 at 49. Therefore, "the normative attractiveness of the lawyer's role depends on the normative attractiveness of legality" (*ibid* at 92).
**72.** Holmes & Rice, *supra* note 24 at 70.
**73.** *Ibid* at 62.
**74.** Xifaras, *supra* note 42 at 220.
**75.** Wendel, "The Limits", *supra* note 5 at 445.

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Finally, in spite of its huge consequences for the citizens of the countries involved, the reasons given for the actions taken were not general, public, or easily accessible, and they were certainly not based on the relevant existing law, since one of the explicit goals of the process was precisely to circumvent and avoid the application of such law.[76]

To be clear, this does not amount to a criticism of the BTC project on substantive moral grounds. The focus of this piece is on amorality as a justification for lawyers' actions, and what follows from the points discussed above is that the lawyers involved in a project of this kind cannot consistently resort to amorality theory as a justificatory model when the basic elements of the rule of law are so severely compromised.

Of course, lawyers could still put forward a justification of their actions based on first-order moral considerations that support the consequences of such actions. As was said before, many lawyers involved in global legal practice are indeed leaders of globalization themselves, and they may well have an ideological agenda of their own. Thus, for example, a strong supporter of global free markets may think that advancing the interests of large companies operating in weakened facilitative host states is a laudable goal, and it is *prima facie* legitimate for lawyers to hold such views and to contribute to their progress. What is not legitimate, however, is to shield these views under the guise of amorality. Such ideologically-driven lawyers would be moral activists in the strict sense of the term, and therefore directly responsible for the moral good or the moral evil involved in their behaviour.[77] If, for example, damage to the environment results from their legal work, it would be consistent for the lawyers to build a utilitarian moral argument claiming that such consequences were necessary to realize a greater good such as job creation, but it would be inconsistent to say that they were only following clients' instructions and therefore it is the client—rather than the lawyers—the one to blame. 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 to blame.[78]

Besides these broadly political considerations, there is also a technical side to the rule of law requirement. A rule-of-law-based theory of amorality demands "a significant degree of legal determinacy [that] is possible because the law possesses what might be called systematicity or immanent rationality".[79] Amorality is logically incompatible with positions that hold the radical

**76.** In the words of the Baker & Botts head of the BTC project: "without having to amend local laws, we went above and around them by using a treaty" (cited in Reyes, *supra* note 32 at 856).

**77.** In this sense, "[t]he morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation" (Luban, *supra* note 13 at xxii). As a consequence, neither the principle of neutrality nor the principle of non-accountability apply to her.

**78.** In the words of Vivien Holmes and Simon Rice: "A lawyer cannot justify acting on a client's instructions simply because those instructions are 'legal', or even 'not illegal', in circumstances where institutions of the state cannot be relied on to mediate between the diverse range of views of what ought to be done" (*supra* note 24 at 70).

**79.** Wendel, "The Limits", *supra* note 5 at 462.

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indeterminacy of legal language, or that reduce law to politics. Instead, it holds—it must hold—that "law has autonomy and self-sufficiency as a normative system" and that "it is distinct from politics and first-order morality".[80]

However, it is difficult to identify systematicity, immanent rationality, or normative autonomy in the BTC case. Instead, when searching for the distinctive legal arguments one finds exactly the opposite—namely, that the work of lawyers crucially differs from traditional legal reasoning, even in its most aggressive or creative techniques. Probably the most striking example is the principle of "free transit of petroleum", as crafted by the lawyers and recognized in the text of the agreements, by virtue of which petroleum is considered a legal subject holding rights which must be protected and secured by the states. This legal concept is introduced as if it was an integral part of international public law, but without elaborating on its origins, precedents, or actual scope of application. This lack of detail is not the result of professional negligence but indicates a deeper problem—lawyers are actually creating the principle and incorporating it into international law as they design, build and implement the BTC legal architecture.

And this is the ultimate problem for legal ethics in cases of this nature. The BTC lawyers are acting as law creators, confirming the words of Benoît Frydman according to whom "everybody in global law can claim themselves legislators". Rather than being subject to the rule of law, global lawyers operate in a complex and messy world of legal pluralism, a world that "is no longer a virgin forest in which we perceive several independent national legal orders, but a tangle of regimes, institutions, jurisdictions, prerogatives, powers, immunities, norms, labels, rankings, standards, privileges, doctrines, concepts, etc."[81] Far from the "systematicity or immanent rationality" presupposed by amorality, global lawyers live and work in a legal world full of voids, ambiguities and contradictions, a legal wild west, where they frequently act as legislators, "us[ing] the law to undermine the state via private lawmaking—creating law from the ground up".[82] Private law making, but *real* law making, that not only binds the negotiating parties, but that by virtue of the agreement between the states becomes public international law—susceptible from that point on to be used as a relevant precedent—and binding national law for the citizens and the law-creating and law-applying institutions of such states.

This capacity of law creation by private lawyers can be professionally rewarding, intellectually challenging, and some may claim that it eventually is beneficial for society as a whole. But in any case, it represents a total subversion of amorality, a justificatory model that can only thrive in the framework of a solid rule of law system. Nobody in the context of a liberal democracy would claim that legislators must be amoral, and less than anybody the legislators themselves. Rather the opposite, they typically justify their decisions for passing laws, modifying

**80.** *Ibid.*
**81.** Xifaras, *supra* note 42 at 221. The previous quote from Benoît Frydman, *ibid* at 221, n 12.
**82.** Christopher J Whelan, "Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?" (2001) 34:4 Vand J Transnat'l L 931 at 946.

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laws, or voting against laws, on substantial moral terms, and in those terms they are routinely judged and evaluated by other institutions, the public opinion, and the electorate. Why should morals be left out of the equation when law is made by lawyers on a private capacity? It is not the agent that matters here, but the function. Disclaiming moral responsibility for laws that are positively created contradicts our most basic intuitions about the role of law in society, and crucially these are the intuitions that make amorality theory plausible in the first place.

## 5. Usurpation vs Renunciation

A traditional defense of the proponents of the standard conception of legal ethics against their critics is to reason *a contrario* affirming that lawyers engaging in moral decision-making vis-à-vis their real or potential clients would be usurping a role that has not been ascribed to them. In a classic formulation, "[t]he lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury".[83] To morally screen a client before accepting a case, or once accepted to limit the scope of advice or the strength of representation on moral grounds, would amount to professional arrogation.

Of course, the rhetoric of judge and jury make complete sense within the traditional context of amorality theory, as it has been presented above. However, in the absence of an adversarial context, it becomes more elusive to determine who exactly the lawyer would be usurping. It might be claimed that when lawyers are acting as advisors the equivalent to a judge or jury would be some sort of supervisory agency. According to this argument, for example, tax lawyers leaning towards the prudential side of things when engaged in tax planning would be unduly curtailing the autonomy of their clients by usurping the role of the tax inspection body.

Controversial as this line of reasoning may be in a domestic environment, it is absolutely implausible in the context of transnational legal practice. In the global arena, big economic agents can act without other actors counterbalancing their power, therefore with impunity.[84] There is no one or nothing playing—not even analogously—the role of judge, jury, prosecutor, opposing party, or supervising agency. In the absence of such counterbalancing actors, amorality loses its grip, and lawyers do not walk on safe moral grounds by simply claiming that they are acting according to their client's instructions, or that they are simply doing whatever their client wants them to do. At this point, macro-economic figures enter the field of legal ethics, and the well-known fact that "the largest MNEs have budgets, outputs and turnovers exceeding those of many of the world's sovereign

**83.** The words are from the 19th century Judge George Sharswood, as quoted in Luban, *supra* note 13 at 10.

**84.** Frank J Garcia, "The Moral Hazard Problem in Global Economic Regulation" (Boston College Law School Faculty Papers, presented at the IALS Conference on The Law of International Business Transactions: A Global Perspective, delivered at the Bucerius Law School, Hamburg, Germany, 10-12 April 2008).

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states, and they exercise economic power superior to small or even medium-size states"[85] becomes ethically relevant for the lawyer.[86]

In cases such as the BTC, the usurpation critique loses much of its appeal. On the contrary, by ignoring that "their actions on behalf of clients could result in significant harm or good, far beyond the jurisdiction in which they are based",[87] amoral global lawyers would be neglecting the ethical dimension of the fundamental role they play within the global economy. The responsibility of the lawyer here is impossible to overestimate, as—in the words of David Kennedy—law is "the glue that binds the global economy together", but "law" not understood exclusively as state official law. Instead, "the institutional roots of the global economy and polity [lie in] local and private rules with transnational effect, in informal networks and professional practice, and in the dispersed regulatory and administrative regimes of many nations and localities".[88] The BTC exemplifies such complex scenario of legal pluralism in its most dramatic version, with different levels of legality so intertwined among themselves that international, national and private made law are difficult, if at all possible, to differentiate.

Although sometimes unfortunately presented as an intricate technical field with no interest for the moral philosopher, transnational economic law is ultimately about justice.[89] The role of the lawyers designing and planning complex commercial transactions such as the BTC, and negotiating and drafting the accompanying legal instruments, becomes crucial as we consider that "through transnational economic and social activities, and through international and economic law and other forms of regulation, we may be in the process of creating an emerging global market society" with all the progressive possibilities but also the huge dangers and risks involved in it.[90] In fact, "[t]he global trading system is the most extensive form of socioeconomic organization that we share today",[91] and lawyers operating within it play a key role in determining how the gains and losses of globalization are distributed.

The consequences of renouncing to the moral responsibility involved in the role, but performing the role nonetheless, are immense. In a world where knowledge and expertise are the ultimate asset, professional amorality contributes to "the rift between politics and economics as a project undertaken everywhere

**85.** Douglas-Scott, *supra* note 29 at 147.

**86.** This is the most persuasive response against the counter-argument that in a case such as the BTC it is ultimately the signature by the sovereign states that gives authority to the agreements as binding law, thus liberating the private lawyers from moral responsibility. True as this may be from a purely formal perspective, it hides and distorts the substantial economic and political dimensions of the case. It is of course an option to turn a blind eye on those, but such option is not ethically neutral—it carries a moral weight.

**87.** Holmes & Rice, *supra* note 24 at 73.

**88.** David Kennedy, "Law and the Political Economy of the World" in *Critical Legal Perspectives on Global Governance*, *supra* note 36 at 66.

**89.** See, e.g., Frank J Garcia, *Global Justice and International Economic Law: Three Takes* (Cambridge University Press, 2013), heavily drawing on the ideas on (global) justice advanced by contemporary political thinkers such as John Rawls and Amartya Sen.

**90.** Frank J Garcia, *Consent and Trade: Trading Freely in a Global Market* (Cambridge University Press, 2018) at 211.

**91.** Garcia, *supra* note 90 at 4.

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at once by professionals and experts who are simply doing their job, interpreting their competences and pursuing their interests".[92] Lawyers, as much as other professionals, are morally responsible for what interests they put their expertise at the disposal of, and for what kind of arrangements they legitimize through such expertise. Citing the powerful words of French thinker Simone Weil, Frank Garcia affirms that "[i]f socioeconomic relations are not just ... then by institutionalizing them we risk gratifying what Weil terms that 'shameful, unacknowledged taste for conquest which enslaves under the pretense of liberating'".[93] In the BTC example, the role of lawyers as "institutionalizers" becomes obvious, inasmuch as they not only represent or reinforce the existing institutions, but in a very literal sense create the institution itself. Liberation or enslavement, lawyers are decisively contributing to it, and they deserve either the moral praise or the moral blame proportional to their contribution.

## 6. Conclusion

This paper has focused on the context that underpins the theory of amorality. By questioning the oft-romanticized picture of the lawyer-client relationship as a personal affair between two independent moral agents, by emphasizing the role of lawyers beyond and besides litigation, and above everything by weakening the rule of law rationale, we see how the traditional context fades away and as a consequence amorality theory loses much of its appeal. More than that, this shift in context challenges the very foundations of role-differentiated morality as a theory of professional ethics. According to the traditional account, by means of advancing the good of the client, the professional—be it a lawyer or otherwise—is indeed concerned not only—or not even mainly—with that client, but with the good of "other members of the community".[94] This is the philosophical core of the traditional counter-argument used by criminal defendants who are criticized for representing highly unpopular clients—by protecting the rights of their clients they are indeed protecting the rights of everyone else. Making sure that the legal process works faultlessly, that individual rights are strictly respected, and that limits to the power of the state are never surpassed, are all things that benefit society as a collective and all of us individually, especially those who may end up sitting in the bench of the accused without means, knowledge or resources to pay for a good lawyer. The argument is consistent, but the necessary condition for it to work is the actual existence of a specific system of administration of justice, with clearly defined procedures, rules, rights, and principles. Suppress that condition, and the argument stands on the void.

To be clear, this is not only a problem in the global arena. The issues that have been raised in this paper affect also the lawyer working exclusively within the borders of a particular nation or state. It is also true in the domestic environment

**92.** Kennedy, *supra* note 88 at 72.
**93.** Garcia, *supra* note 90 at 3.
**94.** Koehn, *supra* note 13 at 174.

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that the relations between law firms and powerful clients deviate from the classic account, that lawyers mostly act in other functions different from litigation, and that the rule of law rationale and the debatable charms of positivism raise a whole set of complicated issues for the practicing lawyer. However, in transnational practice these problems are more frequent, intense, and urgent, and the context presupposed by amorality still more implausible, to the point that picturing a global lawyer working under the traditional assumptions demands a gigantic exercise of imagination.

From a jurisprudential point of view, the global turn in legal ethics underlines the problems that the standard conception had anyway in the domestic context, but that now become inevitable. In this respect, we can see the criticism of amorality as a particular instance of the more general paradigm shift in legal theory. In the same way in which globalization is taking academic lawyers in every field out of their comfort zones by challenging secular theories solidly inscribed within the Westphalian paradigm, the realities of the global context take practicing lawyers into unsecure and uncertain moral grounds.

Indeed, professional comfort is one of the main appeals of amorality, since it "anaesthetizes the moral conscience"[95] and "simplifies the moral universe",[96] thus allowing lawyers to concentrate fully on their job, to perform their functions properly, to serve clients, to win cases, to make money. All those are legitimate and possibly laudable professional goals. Without a bit of cynicism, not taking moral responsibility is the most comfortable way of taking moral responsibility. Having to deal with the extraordinary complex environment that global lawyers face in its legal, social and political dimensions, is difficult enough without having to add the moral dimension. But once the shield of amorality is removed, and this paper sustains that—in the lack of the appropriate environment—it must be removed, there is no other philosophically consistent and honest option but to confront reality as it is. In one way or another, global lawyers must take moral responsibility for their actions, uncomfortable as this may be.

And let the paper finish exactly where it began. Montaigne's words, cited in the introduction, are certainly thought to offer relief for the lawyer or any other professional reading them. The great French Humanist wrote those lines in a passage of his *Essays* where he was justifying his personal work as mayor of the city of Bourdeaux, an official position he occupied for two two-year terms. Therefore, it is not unreasonable to believe that when he mentioned the "usage of the country" he had a very local framework in mind. In fact, the French term "*pays*", as it appears in the original, can be translated into English as "country" or "nation", but also—depending on the context—as "land", "area", or simply "town". And one can easily agree that the custom of Bourdeaux makes up a good ethical frame of reference for evaluating the work of the mayor of Bourdeaux. But, for the contemporary global lawyer, the usage of what country will do the trick?

**95.** Nicholson & Webb, *supra* note 9 at 224.
**96.** Wasserstrom, *supra* note 8 at 8.

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