Legal ethics and lawyering in transnational litigation. Some scattered hints

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Abstract: *Etica legale e avvocatura nelle controversie transnazionali. Alcune osservazioni preliminari* – The basic hint of this short paper is that any insight into the legal ethics in comparative perspective -as in itself that of transnational litigation- should take into account some basic differentiations in the models of legal education around the world. The reasons of these discrepancies, and serious drawbacks, here are linked to huge differences in the lawyers' perceived technical, professional, and ethical standards. This all seems to imply the urgent need to overcome such a wholesome unevenness through serious reforms at normative as well as at cultural level.

Keywords: Legal ethics; Professional obligations; Legal procedures; Lawyering; Transnational law.

1. Cultural ties and basic professional obligations in the transnational procedural arena

It is almost banal if not blatantly obvious the observation that the area of transnational legal disputes is one in which legal cultures and cultural approaches can easily collide[1]. Such an immanent eventuality represents very likely the main reason for the adoption of a set of rules like the *Principles and Rules of Transnational Civil Procedure*, as a matter of fact precisely conceived to overcome the many dangers and losses of this virtually detrimental and unprofitable clash. Given this goal, the whole organization and structure of these *Principles* and *Rules* has been devoted to structure a procedural framework at the same time simplified and workable for lawsuits of special and therefore inevitably complex nature[2].

According to this perspective it can be said that in the *Rules* has been shaped a normative context definitively characterized by highly technical as well as ideological choices. The basic feature of this set of rules seems in fact

[1] The "found manuscript" is one of the literary devices more traditionally used and in my small, I would dare to use it on this occasion, given the circumstance that actually this tiny work was rediscovered after years of oblivion. The doubt remains on the usefulness of this rediscovery. A doubt that obviously only the reader can solve.

[2] Hazard, Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 *Cornell Int. L.J.* 493 (1997).

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to have been conceived as a mighty structuring of a new procedural model, not belonging to anyone of the two legal systems traditionally referred to as common and civil law. Further peculiar of such an accomplishment is a normative framework in which one wouldn't be able to find as sharply prevailing the specific characters of the yet undoubtedly powerful American version of the adversary system of litigation. This concerning both the pleading stage of a lawsuit and the following pre-trial stage (or rather, sticking to the *Rule's* language, the "amendments phase")[3].

Inasmuch as such a basic choice can be seen as the main feature and the pervasive philosophy of the *Principles* and *Rules* here considered, this ideological choice might also become the possible source of some remarks related to the use of such as transnational discipline by lawyers belonging to different legal cultures. In fact and above all, it should be noted that the advocates' role is made especially difficult in this very context by a challenge at least demanding as that of having to operate in a procedural context however unusual and alien for anyone, and this independently from the originating legal culture and system of law. A role furthermore to be connected, inside the disciplinary setting provided by the *Transnational Principles and Rules*, to lawyers' duties as officers of the court as well as "litigators" held in special loyalty to their clients.

Quite consistently with the inevitable implications of such a setting, one as immediately to point out the extreme conciseness of this normative framework of references in describing the lawyers' professional behaviour, and this both on the lawyering and on the ethical side. This not to mention that the same presence of a double regulation -namely the ones provided for respectively in the *Principles* and in the *Rules*- could in itself bring about some sort of discomfort in lawyers engaged into the arena of transnational litigation.

Indeed, this all considered it would seem somewhat inevitable to note that the ethical side seems to have had a less than minor impact in the elaboration of the normative setting we are considering. This especially given what is nowadays widely recognized concerning the indisputable relief of legal ethics, and conversely its being by intrinsic nature -whether framed through ad hoc rules or specific *ad hoc* regulations- deeply entrenched in local cultures. A localization, it must be immediately added, in itself apparently contrasting the abovementioned *Transnational Principles and Rules* as a discipline having *ex professo* a completely different nature. A circumstance most probably true because of the inner trans-national goals of these norms, rather intended to accomplish the overcoming of virtually all the geographical and cultural limits and in any case aiming at a global operative context.

[3] Hazard, Taruffo, Sturner, Gidi, *Introduction to the Principles and Rules of Transnational Civil Procedure*, Faculty Scholarship at Penn Law, 2001, 769.

As a matter of fact, in a traditional allocation of normative consistency with ethical provisions and ethical problems, the scant ethics retraceable in this transnational set of rules is substantially "relegated" to the *Principles*, namely and essentially to II *principle* 4.2 (4.c, 4.d). Here the "Right to engage a lawyer" is related to a vast array of duties. That is to a wide definition of lawyers' basic ethical ties as well as professional boundaries, either in terms of "professional independence", of "loyalty to the client", and of "responsibility to maintain... confidences"[4].

In any case, it has to be said that the general terms of this disciplinary definition appear rather self-evident as well as in many ways unambiguous in telling how refrained must have been the approach of the rulemakers in connection to these problems. An approach moreover showing a very conscious choice, given the paramount intellectual personalities of the two principal authors of these *Principles* and *Rules*. Besides, this sort of self-restraint concerning lawyers' professional ethical accountability results somewhat clarified by the statement contained in *comment*-D to the same *principle* 4.2, according to which "the principles of legal ethics vary ... among various countries"[5]. Most probably, recognizing such a widespread mutability has also justified in the *Principles* the shaping of the ethical prescriptions in very general terms, and somehow subsequently limiting their range more than anything else to wishful suggestions not by chance wholly lacking specific sanctions[6].

2. Multiple normative references and ad hoc procedural standards (pleading stage and case management)

In this connection, that is with regard to legal ethics and lawyering, a somewhat different approach than in the *Principles* seems to be characterizing the *Rules of Transnational Civil Procedure*. It should first of all be pointed out that as a matter of fact these two disciplines do not deal expressly with advocates' ethics. Nevertheless, while not approaching directly ethical problems as such, both the *Rules* and the *Principles* do in fact regulate powerfully lawyers' professional behaviour, and hence affect in many ways also some basic ethical problems.

Among these norms of "quasi-ethical nature" a fundamental role seems to be played by the presence of an apparatus of sanctions, in which the sanctions against the parties are significantly distinguished from those against the lawyers. Unlike the European which tends to overlap the two

[4] Taruffo, *Principles and Rules of Transnational Civil Procedure: An Evidentiary Epistemology*, 25 *Penn State Int. L. Rev.* 509 (2006).
[5] See Hazard, Taruffo, Sturner, Gidi, *Introduction to the Principles and Rules of Transnational Civil Procedure*, cit., esp. 798.
[6] See, e.g., Hazard, Dondi, *Legal Ethics - A Comparative Study*, Stanford 2004, p. 109 (also in the Italian version, *Etiche della professione legale - Un approccio comparato*, Bologna, 2005).

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positions of the client and the advocate, such an approach seems to be clearly deriving from the American one in which lawyers are taken personally responsible for the wrongdoings brought about by their professional behaviour or anyhow by their strategic choices (F.R.C.P. 11 and 37)[7].

Be that as it may, this regulation provided for the advocates' behaviour during the development of a transnational lawsuit can be seen as basically working in the perspective of lawyering (that is regarding lawyers' proper conduct in the course of a civil litigation while making use of the procedural norms) [8]. Hence, it appears fundamentally to match with the dispositions of *Rules* and *Principles* in dealing with lawyers' professional duties, both at the pleading and at the pre-trial stage. In this very perspective, it must be noticed that both *Rules* manifest a fundamental originality of approach. Their normative framing in fact does not seem to belong -as besides abovementioned- to one of the two prevailing procedural systems trying rather to mingle some features of both. In the *Principles* as well as in the *Rules* such a feature seems to be particularly true for the regulation of the pleading stage.

Precisely in this regard, it appears at least noteworthy in the *Principles* the characterization of lawyers' duties to represent their clients in terms of overall fairness (*principle* 11.2.3). A goal this one to be achieved mainly through well-defined modalities of drafting claims and counterclaims. That is, necessarily containing "in reasonable detail the relevant facts, their contentions of law, and relief requested". This -furthermore provided with specified supporting evidence- in order either "to promote fair, efficient, and ... speedy resolution" and "refrain from procedural abuse". All in all inspired by, and consistent with, the same philosophy seems besides to be the corresponding discipline contained in the *Rules*. In fact, the commencement of a transnational proceeding the "statement of claim - complaint" must accordingly (*rule* 12) be conceived by the advocate as setting forth in detail the "facts", the "legal grounds", and the "remedy requested"[9].

And it goes without saying that a similar duty to comply with the abovementioned fairness standards of specification is also laying on the advocate for the defendant (*rule* 13). Besides, all in all similar are also the provisions' effectiveness standards provided for with respect of the guarantees of their compliance by lawyers. These standards of compliance in fact rely upon the same sanctions (discretionary and in any case suggested

[7] See, e.g., James, Hazard, Leubsdorf, *Civil Procedure*, V ed., New York (NY), 2001, 205, 328; Friedenthal, Kane, Miller, *Civil Procedure*, IV ed., S. Paul (MN). 2005, 298, 446; in Italian, see Dondi, *Questioni di efficienza della fase preparatoria nel processo civile statunitense (e prospettive italiane di riforma)*, in *Riv. trim .dir. proc. civ.*, 2003, 561.

[8] For the meaning of this expression, see, e.g., Hazard, Koniak, Cramton, *The Law and Ethics of Lawyering*, III ed., New York (NY), 1999, 20.

[9] For the full text of the Principles and Rules mentioned see e.g. *Principles of Transnational Civil Procedure*, 69 *The Rabel Journal of Comparative and International Private Law*, XXX, 345 (2005).

as monetary whenever concerning the lawyer) set forth by the abovementioned *principle* 17 and *rule* 22[10].

3. Determination of facts and lawyers' duties (toward the court, the opposing advocate, and the client)

A further remark having a clear structural character seems essential at this point. It should be noted that the sanctions apparatus mentioned above is practically cloistered into a normative context all in all somewhat self-consistent. Actually, they appear to have been configured to be all the way coherent with the whole framework of the proceeding disciplined by *Principles* and *Rules*, and furthermore with the wide case management powers conferred to the court. A circumstance having at least some importance to grasp the actual features, as well as the possible shortcomings, of lawyering in a transnational civil litigation context.

The key question here is indeed represented by how might or would lawyers belonging to different legal cultures react to such a procedural structure and its related managerial judicial powers. Likewise arises also the problem of the American lawyers' possible attitudes in connection to a context so strongly characterized by a complex intertwining of both procedural and ethical aspects.

Precisely in this respect is highlighted the very importance of some features of the procedural framework we are considering. The reference is to aspects such as above all the presence here of a sort of fact pleading approach to claims and counterclaims. But not only that, since it should also be taken into account, in succession, the absence of a machinery of discovery similar to the one of *Federal Rules of Civil Procedure* (notoriously provided for in *rule* 26 and following) so much as of a close and -on the US model- immanent judicial control on expert evidence[11]. The quite different overall disciplinary configuration of this area through the almost exclusive choice of the court appointed expert model is amply justifying the huge gap existing here for that purpose[12].

Be that as it may, it must be added that all in all and despite the sharp differences from the American approach, the three abovementioned aspects characterizing the transnational procedure framework do not seem to contain such asperities to cause actual troubles to experienced American

[10] See note n. 9 *supra*.
[11] For some fundamental reference of the American discovery machinery according to Federal Rules of Civil Procedure, see e.g. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 *Stan. L. Rev.* 1393 (1994); Marcus, *Discovery Containment Redux*, 39 *B.C. L. Rev.* 747 (1998). For a keen updating of these problems, see Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, Faculty Scholarship at Penn Law, 2015, 649.
[12] See, e.g., Dondi, Ansanelli, Comoglio, *Processi civili in evoluzione*, Milano, 2018, 163 et seq.

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lawyers, and obviously even lesser to European ones. Albeit the traditional scheme of the "easy and simple form" of pleading as notice pleading predicated in *federal rule* 8, it is definitively a long while since a fact pleading culture has had a wide circulation also in the U.S.[13]. Such a transformation notoriously occurred especially in complex cases, as besides demonstrated by the now long-lasting and harsh discussion even called "war on pleading" brought about by fundamental leading cases like *Twombly* and *Iqbal*[14].

Also by reason of this cultural change affecting very pervasively the American legal profession currently somewhat accustomed to interact with the court in setting up the pleadings' factual and legal grounds (*federal rule* 9, 11), it seems possible to assume that even American lawyers wouldn't find too difficult to face the duties incumbent upon them according to the transnational discipline of the pleading stage[15]. On the contrary, and for the same reason, to feel a little jeopardized by the detailed and specifying approach embodied in this same discipline might be many European lawyers, especially those belonging to Latin legal cultures as for instance the Italian[16]. In other words, concerning the initial stage of a transnational lawsuit, these last would most likely perceive as unusual, if not even decidedly disturbing, any immediate supervision by the court on the elaboration of claims and counterclaims.

All in all similar observations could also be referred to the pre-trial stage and, in such a context, to the discovery machinery embodied into the transnational norms.

As a matter of fact, it should be noted immediately that inside this specific context there are certainly some notable shortcomings in comparison with the American discovery machinery. Notably, in the transnational procedure model there is nothing like the discovery conference provided by *federal rule* 26, a.1[17]. Therefore, actually lawyers may have no chance to elaborate an effective discovery plan together with the judge, and no chance to carry out before the hearing many of the fundamental activities especially belonging (or anyhow intrinsically proper) to discovery, such as the taking of depositions, interrogatories, and so forth.

[13] See, e.g., Dodson, *The Changing Shape of Federal Civil Pre-trial Practice: Comparative Convergences in Pleading Standards*, in 158 *U. Pa. L. Rev.* 441 (2010).
[14] Dondi, Ansanelli, Comoglio, *Processi civili in evoluzione*, cit., 110; Fitzpatrick, *Twombly and Iqbal Reconsidered*, in 87 *Notre Dame L. Rev.* 1621 (2012); Miller, *From Conley to Twombly to Iqbal: a double Play on the Federal Rules of Civil Procedure*, in 60 *Duke L.J.* 1 (2010).
[15] For a general survey, see again Dondi, Ansanelli, Comoglio, *Processi civili in evoluzione*, cit., 108.
[16] For a critical evaluation of the Italian approach, see e.g. Dondi, *Obiettivi e risultati della recente riforma del processo civile. La disciplina della cognizione a una prima lettura*, in *Riv. trim. dir. proc. civ.*, 2021, 927; Id., *Prime impressioni su una riforma forse* non tentative, in *Pol. dir.*, 2021, 557.
[17] For an external evaluation of this aspects of the American Civil Procedure, see Dondi, *Questioni di efficienza della fase preparatoria nel processo civile statunitense (e prospettive italiane di riforma)*, in *Riv. trim. dir. proc. civ.*, 2003, 161-174.

At the same time and despite these relevant shortcomings, in the transnational discipline there is something for certain worthy of underlying and appreciation. That is the judicial powers conferred to the court by *transnational rule* 21, an attribution of powers so relevant as to constitute a serious and reliable prerequisite to allow an efficient interaction among lawyers and judges in framing the path of a transnational lawsuit. In this respect American as well as European lawyers might feel sufficiently at ease, especially because of the prevailing documentary character of the disclosures provided for, all in all rather similar to the English discovery model[18]. This evidently despite the inevitable tension linked to the circumstance of having the lawyer to be candid to the court, while at the same time trying not to jeopardize his own client's interests.

For certain, as abovementioned, some more "inconveniences" may affect American lawyers facing the taking of scientific or technical knowledge through court appointed experts (*transnational rule* 26). Undoubtedly this represents a clear differentiating factor between an European and an American approach for several decades now marked by the "revolution" carried out through the strong ideological shuffle begun with the *Daubert* case (in itself yet confirming how culturally entrenched is there the party appointed expert vision or approach)[19].

Just a last remark. It is a fact as certain as inevitable that for at least a few decades legal systems all over the world are getting closer. In such a context of mutual rapprochement, lawyers are rapidly acquiring a common, or *soi-disant* globalized, professional culture. Nevertheless, assisting alien clients -as it is most often the case in transnational litigation- might be a source of many problems for lawyers. And this basically due to the type of perception of the mutual duties and powers shared between the advocates and the court. This perspective, evidently much beyond the limits of this writer, seems to represent an enormous open problem embodying much of what today constitutes the so-called procedural law.

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[18] See, e.g. Zuckerman, *Civil Procedure*, London 2003, *passim*; Andrews, *English Civil Procedure — Fundamentals of the New Civil Justice System*, London, 2003, *passim*.

[19] In a very extended literature and for a comparative perspective, see e.g. Dondi, *Problemi di utilizzazione delle "conoscenze esperte" come expert witness testimony nell'ordinamento statunitense*, in *Riv. trim. dir. proc. civ.*, 2001, 1133-1162.