begatimet e detyruara, d.m.th. çdo herë kur, pikërisht për të mbrojtur pronarin kundër vendosjes së përgjegjësisë nga begatimi, i hiqet mundësia edhe personit të ndërmjetëm për të vepruar gjyqësisht.

Si konkluzion, përsa kohë që, mundësia për padinë e begatimit në rastet e pasurimit *ex alieno contractu,* nuk përkthehet në një përdorim të tepruar të këtij mjeti, doktrina kontinentale nuk ka kundërshtime të veçanta për të pranuar parimisht mundësinë e përdorjes së kësaj padie. Ajo që gjithsesi duket e pamohueshme është që, përveç rasteve të transferimit falas (neni 822 BGB), rastet në të cilat mund të pranohet konkretisht mundësia e një padie direkte, shfaqen shumë të kufizuara.

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Principal-Agent Relationship: How the Principal-Agent Tension Between Clients and Their Lawyers Affects Legal Negotiation

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The image of the lawyer in the public's perception has incessantly oscillated between two extremes. An idealistic vision has regarded the lawyer as a peacemaker whose mission is to discourage litigation and promote compromises[1]. On the other end of the spectrum, the lawyer frequently came to be seen as a self-interested agent responsible for exacerbating disputes and preventing deals or making settlements costlier[2].

In the last decades, important research work has been dedicated to the study of negotiation. The two ground-breaking works in the field are *Getting to Yes*[3] and *Barriers to Conflict Resolution*[4]. With few exceptions, this literature focused on principal-to-principal negotiation. This might strike one as surprising considering that negotiation through agents is ubiquitous.[5]

More recently, researchers have pondered over the role of agents in negotiation. They drew intensively from studies carried out in the field of principal-agent analysis within economics and transposed these findings to the negotiation framework.[6] Using agents in negotiation creates an additional level of complexity: It provides advantages but with a price.

[1] *The Collected Works of Abraham Lincoln* edited by Roy P. Basler, Volume II, "Notes for a Law Lecture" (July 1, 1850), p. 81

[2] Rachel Croson and Robert H.Mnookin, 'Does Disputing through Agents Enhance Cooperation? Experimental Evidence' (1997) 26(2) The Journal of Legal Studies 331, 331.

[3] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes* (Third edition, RH Business Book, 2011)

[4] Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky, Robert B. Wilson (eds), *Barriers to Conflict Resolution* (Norton 1995)

[5] Robert H.Mnookin and Lawrence E.Susskind (eds), *Negotiating on behalf of others* (Saga publications, 1999) 2-3.

[6] Ibid, 1-2.

The romantic or pessimistic view of lawyers in negotiation and dispute resolution is the result of heuristics and biases. The focus of this essay is to explore what are the implications of using an attorney in legal negotiation by exploiting theoretical work in the field.

We will begin by explaining what the principal-agent relationship is about and why it is so widely employed. Where does the attorney stand in this scheme and what are the advantages he can provide when representing his client in a negotiation setting? We will then move to the principal-agent tension. The attorney is simply not the alter ego of his client. He has interests of his own that might often clash with his clients'. After describing in some detail how, especially, the difference of incentives can be a source of conflict of interests, this essay will attempt to penetrate into the psychology of conflicts of interest. We will conclude by affirming that the inherent tension in the attorney-client relationship cannot be eliminated but it can be managed. In the end, it is the client's responsibility to choose the appropriate lawyer if he aspires to a successful negotiation process and outcome.

The attorney as an agent in legal negotiations and disputes

In essence, the attorney is an agent of its client.[7] Agency can be defined as the legal relationship existing between two persons in which one (the 'agent') is bound to perform certain acts on behalf of the other (the 'principal') under the control and direction of the latter.[8] The agency relationship is pervasive in the real world. Nations are represented by diplomats, minors by their parents, companies by their managers, NGO-s by their directors – to take just a few examples. Besides the obvious reasons of using agents – an abstract entity requiring a human voice to express itself, an absent principal – an agent is employed because one believes that he can procure significant advantages to the principal.[9]

This may not seem immediately evident. Intuitively, the inclusion of one or more agents representing the principals involved in negotiation results in a more complicated arrangement that necessitates appropriate management.[10] Nevertheless, the use of agents has undeniable and verifiable benefits. The agent may have knowledge or expertise in a particular area that the principal lacks.[11] In

[7] Deborah A.DeMott, 'The Lawyer as Agent' (1998) 67 Fordham Law Review 301, 301.
[8] Ibid. 303-304.
[9] Robert H.Mnookin, Scott R.Peppet and Andrew S.Tulumello, *Beyond Winning* (Belknap Harvard, 2000) 70.
[10] Jeffry Z.Rubin and Frank E.A.Sander, 'When Should We Use Agents? Direct vs. Representative Negotiation' (1988) 4 Negotiation Journal 395, 395.
[11] Mnookin et al. (n9) 71.

addition, the agent may possess negotiation skills that can facilitate the reaching of an agreement.[12] Other advantages include the detachment, flexibility and resources.[13]

The lawyer, as an agent, offers to the principal the same advantages. The lawyer is, in the first place, an expert of the law. His substantial knowledge of the law and the courts system can help the principal to decide whether to accept a settlement agreement or to litigate. Without the contribution of the lawyer, the client cannot know what his Best Alternative to a Negotiated Agreement (BATNA) is – the odds of winning the case in court.[14] Additionally, the lawyer, through the resources of his art, can improve the best alternative of his client. As an experienced negotiator, the lawyer is likely to be more creative in exploring options and more assertive in claiming value.[15] Furthermore, the decision to retain a lawyer might help to "separate the people from the problem"[16] especially when the relationship between the principals is emotionally charged.

Many deals involve some legal aspects; disputes require legal expertise: Unsurprisingly, attorneys are a ubiquitous agent figure. However, apart from creating value, attorneys are a source of costs – known as agency costs – to their clients.

The agency costs: The conflicting interests of the attorney and his client

The classic theory either assumes that negotiation is a principal-to-principal affair or behaves as if the agent was an impeccable conveyor of the principal's will. In the real world, this is almost never the case.[17] The agent has interests of his own that are hardly ever perfectly aligned with the principal's interests. The attorney-client relationship is no exclusion.

One source of the divergence of interests is that attorneys cannot be reduced to simple agents. Attorneys, as officers of the court, have duties toward the justice system and, as members of the bar, they are bound by professional norms which cannot be understood simply through the lenses of the agency relationship.[18] These duties of the attorney may come into conflict or may not converge with his client's interests. However, this slight dissymmetry of interests is welcome because it is a result of public policy considerations.

[12] Ibid.
[13] Rubin et al. (n10) 396-398.
[14] See Fisher et al. (n2) 99-108.
[15] Mnookin et al. (n9) 12.
[16] Fisher et al. (n2) 19-41.
[17] Mnookin et al. (n5) 2-3.
[18] DeMott (n7) 301-302.

When the attorney's interests come into conflict with his client's interests, then the situation becomes worrisome. The conflict of interests may originate from a difference in preferences, information or incentives.[19] The main and most delicate conflict of interest lies with the difference of incentives. An extensive body of research has been conducted with the purpose of identifying how different remuneration structures affect the way the attorney accomplishes the tasks assigned by his client.[20]

The attorney's services are remunerated through three main different fee structures: hourly fee, contingency fee, flat fee. Under an hourly fee agreement, the attorney is remunerated according to the amount of time he dedicates to the task. The attorney has a strong incentive to provide high-quality services as his time and efforts will be financially rewarded. On the other hand, the lawyer may be tempted to over-invest time in a case when this is sub-optimal to the client.[21] The extra time committed by the attorney may have little or no impact at all on the expected outcome of the legal negotiation. Finally, the attorney has an incentive to engage in litigation[22], which is usually time-intensive, rather than explore a negotiated agreement, which by nature and because of reciprocal concessions, takes in principal a lesser amount of time.

The contingency fee, a commission by another name, is designed to tackle this issue. By making the attorney a stakeholder in the outcome of the case, one expects that he will act as a genuine alter-ego of his client.[23] The better the outcome is for the client, the greater the attorney's payment, and vice versa. Nonetheless, there is an important difference between the client and his attorney. The client is characteristically only interested in the outcome of his own case or negotiation. By contrast, the attorney is in charge of multiple contingency fee cases and has to decide how to invest a scarce resource of him, such as time, in an optimal manner. All other things being equal, the attorney would prefer to dedicate his efforts to cases which are likely to be won through lesser investment of time.[24] Obviously, a client, whose case is time consuming, would find himself in an unfavourable position. If paid on an hourly basis, the attorney may be interested in a protracted litigation. By contrast, under a contingency fee structure, the attorney may prefer to settle quickly although the outcome might be considerably less than the expected value of trial.[25]

[19] Mnookin et al. (n9) 75.
[20] Ibid, 83-84.
[21] A. Mitchel Polinsky and Daniel L. Rubinfeld, 'Aligning the Interests of Lawyers and Clients' (2003) 5(1) American Law and Economics Review 165, 166.
[22] Don A. Moore and George Loewenstein 'Self-Interest, Automaticity, and the Psychology of Conflict of Interest' (2004) 17(2) Social Justice Research 189, 190.
[23] Earl Johnson, Jr., 'Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions' (1981) 15 Law & Society Review 567, 570
[24] Ibid, 590.
[25] Mnookin et al. (n9) 83.

Unsurprisingly, the attorney's and his client's interests are under tension as in any other principal-agent relationship. The question arises what is the attorney's psychological attitude to the conflict of his own interests with his professional, contractual and statutory, obligations.

The psychology of conflicts of interest

There is more to the story of the divergence of interests between principal and agent. Through a combination of different measures, one would expect the conflict of interests to be mitigated. The legal market has invented several fee structures in order to moderate the difference of incentives between lawyers and their clients. Professional norms require attorneys to adopt ethical behaviour and to act in the best interests of their clients. In case of violation of these rules, attorneys are liable to penalties.[26]

These measures assume that attorneys are aware that in following a particular course of action they are pursuing their own interest to the detriment of their clients'. As a consequence, under moral obligations and under the threat of sanctions, they would trump bias and behave ethically.

Unfortunately, an important body of research has demonstrated that individuals are unaware of their own bias.[27] The adoption of a self-interested option is not a matter of deliberate choice; on the contrary, it happens automatically and unconsciously.[28] Our view of the reality is frequently biased in a self-serving manner. If we want to reach a specific conclusion, we would be primed to look only for confirmatory evidence and ignore facts that challenge our conclusion.[29] This self-serving bias seems deeply rooted into our psychology. Research has shown that, given the same facts, we would reach quite different conclusions according to the role – claimant or defendant – we were assigned[30]. More strikingly, even if we were paid to accurately guess the judge's decision, we would over-estimate our case's merit[31]. Warning beforehand the participants of the risk of bias didn't work either[32]. We are, additionally, blind to our own vulnerability to bias.[33]

Researchers have explained this phenomenon through the "dual processes" paradigm of information processing by human brains. The first process, known as

[26] Larry E.Ribstein, 'Ethical Rules, Agency Costs, and Law Firm Structure' (1998) 84(8) Virginia Law Review 1707, 1713-1714.
[27] Max H. Bazerman & Don A.Moore, *Judgement in Managerial Decision Making* (Wiley 2013 8th ed.), 154.
[28] Max H.Bazerman, George Loewenstein and Don A.Moore, 'Why good accountants do bad audits' (2002) 80 (1) Harvard Business Review 97, 97.
[29] Ibid, 98.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Bazerman et al. (n28) 113.

automatic, is unconscious, quick and effortless. The second one, known as controlled, is voluntary, slow and requires effort.[34] Self-interest, it seems, has an automatic influence into our decision-making, whereas professional responsibilities require voluntary effort to be summoned into our decision-making analysis.[35]

As self-interested bias happens in the unconscious, policies promoting more stringent ethical rules and stricter penalties are unlikely to succeed.[36] Furthermore, experiments have shown that disclosure of conflict of interest does not help. It has been demonstrated that actually disclosure can make things worse and increase biased judgement.[37]

The ultimate guarantee to the client: The Attorney's reputation

This essay described how the interests of the client and his attorney are far from being aligned. Moreover, there is much evidence that the attorney's pursuit of his own self-interest is often outside of his controlled mental process. Therefore, the crucial question arises whether individuals should use attorneys in legal negotiation.

First, attorneys can, indisputably, provide significant added value in the negotiation table. Second, many negotiations involve complex legal questions that individuals not trained in law cannot properly deal with. Finally, in some circumstances, for the client, it is not only advantageous but, in practice, obligatory to retain an attorney. A considerable amount of legal negotiations are conducted under the threat of litigation or during litigation.[38] To begin with, this is the case when parties have a (legal) dispute which they are willing to resolve through amicable discussions. If negotiations fail, one of the parties is likely to initiate court proceedings. A second instance is when parties have been litigating for some time but prefer to find an out-of-court settlement in lieu of a judicial award. If parties don't reach a mutually satisfactory settlement, their dispute will be resolved through a court-imposed decision. Negotiating "in the shadow of the law"[39] is different from other negotiation contexts. In other situations, the alternative to a negotiated agreement is the absence of agreement. In legal disputes, if the parties cannot reach an agreement, they will obtain a court-imposed solution.[40] This permeability in both directions makes unavoidable the appointment of an attorney, who has a legal or practical monopoly of litigation.

[34] Moore et al., (n22) 190-192.
[35] Ibid, 195.
[36] Ibid, 198.
[37] Daylian M.Cain, George Loewenstein and Don A.Moore, 'When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest' (2011) 37(5) Journal of Consumer Research 836.
[38] Gary Goodpaster, 'Lawsuits as Negotiations' (1992) 8 Negotiation Journal 221.
[39] Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950
[40] Russell Korobkin and Chris Guthrie, 'Psychological Barriers to Litigation Settlement: An Experimental Approach' (1994) 93 Michigan Law Review 107, 138.

If the principal-agent tension existing in the attorney-client relationship cannot be eliminated, it can nonetheless be managed. Big corporate clients can appoint in-house counsel to monitor external law firms.[41] Reporting requirements can bridge the information gap. Different fee structures and an intelligent combination of them, according to the type of legal negotiation, can significantly reduce the difference in incentives.[42] On the public policy level, also, if ethical rules and fear of sanctions are not panacea, they still can play a positive role in curbing some self-interested behaviour.

Ultimately, the client's closest ally is, paradoxically, the attorney's self-interest. Typically, attorneys get most of their clients through referrals.[43] The greatest asset to acquire clients through this method is reputation.[44] It is therefore not surprising that lawyers invest great efforts in building and maintaining a good reputation.

Some attorneys and law firms may purposefully decide to specialize in a cooperative approach to negotiations and dispute resolutions.[45] Such an attorney will not only develop the necessary skills to become a cooperative problem-solver but also will have a financial incentive to maintain this reputation because his future income in the long term will depend upon the trustworthiness of his services.[46]

As a conclusion, any generalization upon whether the appointment of an attorney exacerbates disputes or facilitates negotiated outcomes is plainly wrong[47]. According to the attorney's personality, mandate and type of negotiation setting, the effect of the attorney's behaviour on negotiation will be different. Therefore the crucial concern for the client is not whether to retain legal counsel or not but what type of attorney to choose for a given strategy and an aspired outcome.

Conclusion

The attorney is a valuable and sometimes indispensable agent in legal negotiations and disputes. His expertise, resources, skills and strategic advantages can significantly increase his client's chances of reaching an advantageous deal from negotiations. Nevertheless, not unlike any other principal-agent relationship, the attorney-client rapport is not immune to tensions. The principal-agent costs arise

[41] Mnookin et al. (n9) 85.
[42] Polinsky et al. (n21) 186-187.
[43] Herbert M.Kritzer and Jayanth K.Krishnan, 'Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases And Their Implications for Case Handling' (1999) 21 Law & Policy 347.
[44] Ibid, 365.
[45] Ronald J.Gilson and Robert H.Mnookin, 'Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation' (1994) 94(2) Columbia Law Review 509, 557.
[46] Ibid, 564.
[47] Ibid, 510.

from the difference of interests that exist between the attorney and his client. The main and most troublesome conflict of interests lies in the difference of incentives. According to the fee structure agreement, the attorney may be more interested to protracted negotiations and litigation or may prefer a quick settlement. In either case, the client risks an impasse in negotiations or a bad deal.

The principal-agent tension cannot simply be wished away. The self-interested bias is deeply rooted into our psychology. It occurs automatically and without us being aware. As a consequence, traditional policy measures, such as ethical obligations and disclosure, have a very limited impact on curbing this bias.

However, if the tension cannot be eliminated, it can be managed. The question for the client is not whether he should hire a lawyer or not. In some complex legal negotiations or in negotiations occurring under the threat of litigation, an attorney is indispensable. Due to market pressure, some attorneys specialize in a cooperative problem-solving approach. Therefore, for a client aspiring to a negotiated agreement, the solution lies with finding an attorney with a reputation for being a skilled negotiator.

E drejta për arsim, punësim dhe përfshirje sociale e grupeve të marzhinalizuara. Rasti i minoritetit rom në Shqipëri

Dok. Anila Nanaj

Abstract

Education, health and living standards are the three dimension of Millennium Development Goals platform.Albania, as other developing countries has been undergoing through radical structural reforms as a consequence of the changes trajectories of the democratization process, economic transition, administrative reforms, changing dynamics of social groups as well as the country integration process to the European Union. From 2010, Roma community has been part of social platforms and on focus of social policies .An important part of one of most persistent recommendations of the European Commission is the respect of fundamental rights and, in particular, through the education and the employment is the social inclusion of the minorities in the Albanian society, in particular the Roma minority. The aim of this paper is to introduce which are efforts nowadays and how they have to match with Roma community needs.Along the descriptive analyze we try to underline the promotion of suitable policy mechanisms which guarantee effective protection of Roma minority rights in the country, in line with the recommendations of the European Commission against Racism and Intolerance (ECRI). This study has concluded in a number of recommendations directed to public administration bodies, both locally and centrally, such as a wider inclusion of members from the Roma minority into vocational training and employment programs; amendments in the normative legal basis for definition of criteria, procedures and economic assistance