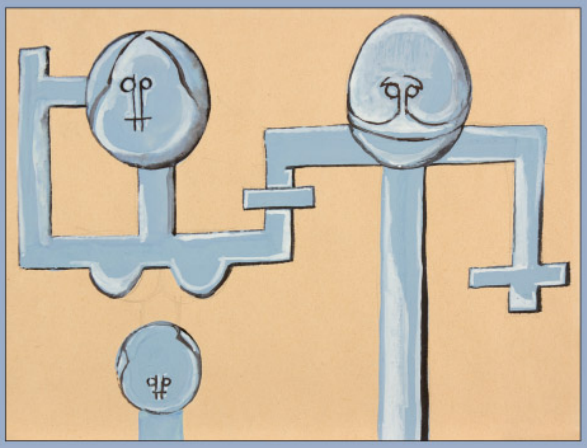
Jerzy Stelmach, Bartosz Brożek

The Art of Legal Negotiations



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Foreword

There are tens of books on legal negotiations, approaching the problem from different, often inconsistent or eclectic perspectives. It is especially true of the English legal literature, which is no surprise, as negotiations have for some time now been an important method of conflict resolution in the common law. However, it is not so obvious in those legal cultures, which follow the 'continental' paradigm of the legal system: trapped in the iron grasp of positivistic thinking, continental lawyers show little sympathy for negotiating. We attempt to identify the basic factors which are responsible for this state of affairs.

But the problem of legal negotiations is more fundamental, it transcends the differences between the common law and the continental perspectives. We believe that 'taking negotiations seriously' decisively shapes our understanding of the law: it is an inherently dialectical or open-ended phenomenon. What is most characteristic of law, is not what judges do or say – it is the process of negotiating between two freely participating parties. Such an outlook underscores the futility of the 'scholastic' debates pertaining to the 'nature of law' or the relationship between law and morality, which predominate the contemporary philosophy of law. The third dimension in which we believe to have said something novel is methodology. Instead of developing an 'ideal' model of negotiations, we have tried to show what are the possible approaches to legal negotiating. Moreover, we claim that there are no absolute, universally applicable methods of negotiations. How one negotiates is always a matter of choice, hanging together with various factors (the case at hand, its context or negotiation habits). It is, however, extremely important to reach some level

of 'methodological consciousness', to understand that there are many tools at our disposal, but each such tool is connected to certain ontological, epistemological and axiological baggage.

Finally, it is our hope to have contributed to the ongoing debates in the field of general theory of negotiations. We are critical of many of the well-established, if not famous models of negotiating (e.g., the Harvard model or the phase models). In particular, we criticize the overly psychological and economic approaches to negotiations. Although these two dimensions are important, they are in no way fundamental.

Whether we have succeeded in shedding new light on legal negotiations, remains to be judged by the Reader.

Jerzy Stelmach
Bartosz Brożek

Kraków, July 2012

Chapter I
The Phenomenon of Negotiations

In order to answer the question as to why we have decided to write a book on the 'art' of legal negotiation (the term 'art' has been used rather more for aesthetic reasons than pertaining to the content), one should consider first a different, and, in our view, key problem: who should, ultimately, the contemporary lawyer be? Should she rather become a formalist specialized in some branch of the law or primarily a negotiator? This age old discussion, both in legal theory and legal practice, has provided us with no definite answers. Usually, two diametrically different ways of thinking about the law have been propounded: the positivist and the non-positivist. For the supporters of positivism, law is a 'fixed value' even when it fails to meet the most basic requirements of rightness, efficacy or economic efficiency. Legalism and the predictability of the law, when formally understood, are considered sufficient reasons to justify the gap between legal decisions and the facts. On the other hand, the representatives of non-positivism see the possibility of a dynamic interpretation of the law, one that enables the tailoring of legal provisions to an ever changing reality. They claim that the ultimate sense of legal norms should be established through a process of direct negotiation between the conflicting parties. This is the stance we accept here. It can be further justified with a number of arguments, including one pertaining to the nature of ongoing civilizational changes. The world has 'gone off the rails', accelerated out of control and, according to some, has even gone mad. Only the law remains unruffled, maintaining its li-

brary-like hush and decorum. In Poland – as well as in other Eastern European countries – the political systems have been changed and we are now part of a global and European legal system. The world faces crisis after crisis but what has changed in the law? We keep adjusting the same legal acts; we use procedures that make efficient conflict resolution very difficult, if not impossible; we teach the law as if it were the 19th century. We fail to exercise our freedom and our power – we dismiss the procedures of negotiations when we do not want to, or do not know how to apply them whilst, at the same time, we criticize anything new.

Meanwhile, the majority of legal cases, especially in the spheres of private and company law, may be resolved without a court trial, by the process of negotiation, with the use of tools available to us. We can save our clients and ourselves a lot of time, stress and money. And when we can, we should do so; we should participate in a new legal culture – the culture of negotiation. Still, we should disregard the controversies concerning the meaning of words and the validity of theories, looking directly at the issues at hand. Let us learn and let us teach others the art of negotiating, the art of arriving at a legally and ethically acceptable compromise, instead of engaging in prolonged disputes.

We are not over-attached to the typology of negotiation models presented below. It is justified but is far from being the only possible option. Our goal is rather to present a certain *spectrum* of negotiation, a set of negotiating tools that are at the lawyers' disposal. We are well aware that the models indicated are intertwined; one can simultaneously use the methods characteristic of different models. The choice of the utilized methods is always conditioned by the nature of the case negotiated. In the following sections of this chapter we shall attempt to provide some arguments backing the typology we develop; however, we believe that other approaches are also defensible. Our ambition is limited: we venture to show what kinds of methods – and within what limits – can be used in legal negotiations. Moreover, we are also positive that the models we present are actually used in real-life cases. The problem we try to pinpoint concerns the level

of methodological awareness: it is not 'whether' lawyers use certain methods of negotiations, but rather 'how' they do so.

It is of little help to look at the existing literature on legal negotiation since it is so vast. It is often filled with terminological chaos, and *laissez-faireism* which is difficult for a legal philosopher to accept. There are no definitions or clear typologies based on acceptable ontological or epistemological criteria. Such a 'free creation' does not contribute to the popularization of the art of legal negotiation, often – and unfairly – connected exclusively to some psychological or eristic methods. Any theoretical proposal pertaining to legal negotiations should be justifiable methodologically. Each and every one of them needs an underlying ontology and epistemology. Thus, a closer inspection of the possible justifications of legal negotiation is required.

Our proposal is to identify three different models for negotiations: the argumentation, the topic-rhetorical and the economic. The models employ different criteria for negotiation: the argumentation model uses the criterion of rightness, the topic-rhetorical – the criterion of efficacy, while the economic – that of economic efficiency. The decision as to which of the models shall be used hangs together with the nature of the negotiated case, our interpretation habits, as well as the dynamics of the negotiation process. It is necessary to stress once more that we are not trying to discover new lands. We only reconstruct several intuitions deeply rooted in the structure of legal thinking. We are fully aware that in the so-called hard cases one is forced to use different models simultaneously, testing the proposed solution from all possible perspectives. One should expect in such cases that the negotiated compromise meets the minimal requirements of rightness, efficacy and economic efficiency.

One could – and should – look at the law from the perspective of negotiation, even though it is difficult to accept for a positivist science of the law. The contemporary 'continental' lawyer is anything but a keen negotiator. She prefers procedural safety and the judge as an arbiter. Afraid of the unforeseeable results, she is not willing to negotiate. Nonetheless, in the near future, she is destined to become a negotiator. With the current dynamics of the economic

and social changes, the perspective of winning a costly trial which lasts several years is unacceptable. We require immediate outcomes, not legal rituals. Thus, we need to become negotiators searching for the compromise at any price, saving both ourselves and our clients money and time. This much is unquestionable. Moreover, negotiations should not be located at the distant borders of legal practice by identifying some spheres in which negotiation is possible. One can negotiate at any time and any type of legally relevant problem, as well as at any stage of the proceedings. Of course, the choice of negotiation for dispute resolution does not relieve us from obligations to the existing laws and from applying the criteria of correctness demanded by the process of negotiating.

And a final question: do the authors have the competence in the discipline they are willing to describe? All possible answers are wrong here. We can only point out that we have been preoccupied with the methodological problems pertaining to legal negotiations for some time now[1], and at least one of us has been using negotiation methods in legal practice for many years.

1. The negotiable law

It is our goal to show that the law – out of its very ontological and epistemological nature – has a negotiation sense. In the philosophy of law, discussions have often centred on the 'dialogical' or 'discursive' character of the law. The dialogical dimension of the law has been analyzed, *inter alia*, by the representatives of phenomenology

[1] The most important monographs include: J. Stelmach, *Współczesna filozofia interpretacji prawniczej (Contemporary Philosophy of Legal Interpretation)*, Kraków 1996; J. Stelmach, *Kodeks argumentacyjny dla prawników (Argumentation Code for Lawyers)*, Kraków 2002; J. Stelmach, B. Brożek, *Methods of Legal Reasoning*, Dordrecht 2006; B. Brożek, *Defeasibility of Legal Reasoning*, Kraków 2004; B. Brożek, *Rationality and Discourse. Towards a Normative Model of Applying Law*, Warszawa 2007; J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa (Ten Lectures on the Economics of Law)*, Warszawa 2007.

and hermeneutics[2]. In particular, they have indicated that when there is a promise, there must be an attempt to fulfill it; when there is a question, there must be an answer; when there is a claim, there must be a corresponding obligation. Contemporary theories of legal argumentation in turn, stress the discursive nature of the law[3]. The acceptance of the views pertaining to the dialogical or discursive character of the law enables one to recognize the special status of the problem of legal negotiation, i.e. to connect it directly to the 'basic discussion' concerning the ontological and epistemological nature of the law.

Any account that takes legal negotiations as a problem of its own, and the consequent rejection of ontological and methodological justifications must lead to the marginalization of negotiations in legal practice. This is the *modus operandi* of the critics of employing negotiation techniques in the law. They tend to look at negotiations as a kind of method which is of secondary importance compared to the standard, dogmatic methods that are grounded in the long, positivist tradition. One makes recourse to negotiations only after 'basic methods' fail, when all paradigmatic, formal tools have been tested. Instead at the beginning of the dispute, when the conflict has not yet escalated, negotiations are deployed only at a later stage, often when it is impossible to reach an 'effective compromise'. There are at least three reasons for this. Firstly, a broader philosophical perspective is neglected. In legal practice certain more general theses (what is the law? what are legal methods?) are usually taken for granted, accepted 'once and for all' through tradition, standards of legal education or trained habits. Usually, these are positivist standards and habits. No one realises that legal philosophy has developed many competing conceptions. Secondly, it often transpires because of the

[2] Cf. H.G. Gadamer, *Wahrheit und Methode. Ergänzungen. Register* (in:) *Gesammelte Werke*, vol. II, Tübingen 1986; A. Reinach, *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgerlichen Rechts*, 2nd ed., München 1953; A. Kaufmann, *Beiträge zur juristischen Hermeneutik*, Köln–Berlin–Bonn–München 1984.

[3] Cf. Ch. Perelman, *Logique juridique: Nouvelle rhetorique*, Paris 1999; R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, Oxford 2010.

lack of competence: lawyers may not be keen negotiators, as they do not know how to negotiate. They are afraid of leaving the 'safety net' provided by the provisions of the law. The lawyer knows how to write a complaint, is well prepared when it comes to the nuances of legal procedure, easily accommodates the stress connected with a legal trial. Meanwhile, she does not want to negotiate, to engage in any activity which – in addition to the knowledge of the law – requires additional skills, only indirectly connected with her legal background (i.e., skills pertaining to logic, rhetoric, psychology or economics). Finally, it may be due to her professional opportunism. When your work brings the required level of income and satisfaction, there is no need to change anything, to take a risk without a guarantee of success. One can speak also of yet another, more cynical justification. Well prepared and conducted negotiations may lead to the quick resolution of the dispute. Therefore, we have a choice: negotiations leading to a quick and economically effective compromise, or a court trial: long, ineffective and costly. All would seem to indicate that the former alternative is better. In practice however (at least in civil law systems), the 'negotiations variant' is quite rare: ultimately, one needs to earn money! And negotiations – making the dispute a short episode – are less likely to bring income. This opportunistic point of view is reinforced by the legal system itself. In particular, it is impossible (at least in Poland) to collect success fees or bonuses, which in a natural way leads to the dominance of ritualized legal behaviour, for which there is an official tariff. That is why we would like to look at the problem of legal negotiations from a more general, philosophical perspective, binding together the discussion over the models of negotiations with more fundamental, ontological and epistemological questions pertaining to the 'nature of law'.

[The open-endedness of legal interpretation] In contrast to Dworkin, we do not believe that there exists a single correct answer to any legal question, especially in hard cases. The acceptance of such a view leads us back to 19th century positivism. The judge is no Hercules, but an interpreter who strives to find the best solution to the case at hand.

The open-endedness of legal interpretation is equivalent to the open-endedness of legal negotiations. If we accepted the one right answer thesis, any conception of legal negotiations would be senseless. But in hard cases we are dealing with some questions and some possible answers – the space between the question of interpretation and its possible answers is the 'negotiation space'.

The theses pertaining to the open-endedness of legal interpretation and to the definition of law as a 'negotiable phenomenon' mutually reinforce each other. On the one hand, legal interpretation is open-ended as the law has a negotiable structure; on the other, if one assumes that the primary sense of the law is negotiating, one needs to accept the open-endedness of legal interpretation. Indeed, we are reaching out here to the same epistemological and ontological intuitions. The open-endedness of legal interpretation gives the interpreter unlimited freedom. Of course, such a claim would undoubtedly be rejected by adherents of the positivist paradigm. The problem lies, however, in the question of whether the positivist paradigm is the only acceptable one. Yet does the negotiator possess unlimited freedom? A positive answer to this question requires further comment. We are fully aware of the numerous limitations imposed on the interpreter by, *inter alia*, the *ius cogens* legal rules. The freedom of an interpreter (or a negotiator) is characteristic, however, of the initial phase of conflict resolution: the phase of negotiations, driven by the criteria of rightness, efficacy or economic efficiency. It is the consecutive phase which is more formal (dogmatic). It serves to ensure that the agreement reached complies with existing legal regulations. In negotiations one takes into account various reasons, of which the legal are only one type. The search for an optimal solution may be guided by legal, but also ethical, psychological or economic justifications. It is in this space, and only this, that the negotiator has unlimited freedom. This stance, however, cannot be accepted by legal positivists since positivism makes us reason in terms of a legal rule – not the case interpreted. The process of interpretation is confined to the establishment of the 'real' or 'intended' meaning of a legal rule. In consequence, the negotiation space disappears; everything is deter-

mined by pre-existing legal rules. What positivists call 'negotiations' are perhaps anything but negotiations. These *quasi*-negotiations can best be described as a dispute between two 'Herculeses', who both formulate 'right answers', defend them fiercely and then... Then the case goes to court and stays there for years.

[What is a legal rule?] One of the 'myths' of legal positivism – the thesis that the law is reducible to the concept of a legal rule – is a source of recurring discussions and misunderstandings, including debates over legal negotiations. Positivists regard legal rules as the only acceptable source of establishing rights and obligations. In consequence, legal rules are apodictic: they 'operate' in an all-or-nothing fashion[4]. Such an understanding of a legal rule leads, however, to the disappearance of the problem of negotiations: there is nothing to negotiate – we either have a claim or not. There is no room in which the negotiation space can appear – everything is predetermined by the law. Fortunately, this is not the case. We accept here a thesis that the law can be characterized by its open-endedness. In connection to this, we believe that any legal rule can be fulfilled to different degrees. It is especially true of situations in which we negotiate. In the negotiation phase of a conflict we may consider legal rules as realizing different degrees of rightness, efficacy or economic efficiency. It follows that one cannot distinguish between legal rules and principles by recourse to the criterion of fulfillment. In the process of negotiations we utilize both legal rules and legal principles, as well as other standards[5]. Our choice and the order of their application depends solely on the way negotiations proceed. Ultimately, we accept or reject them on the basis of the same criteria. The resignation from an apodictic understanding of a legal rule enables us to apply to legal rules the same measures we apply to principles or other standards. Thus, the negotiation space is significantly widened.

There is one consequence that follows from this since, in the theory of legal argumentation, a view is defended that legal discourse

[4] Cf. R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass. 1978.
[5] Cf. *ibidem*.