



STUDIA IURIDICA

108, 2025

MEDIATION
IN CONTEMPORARY LEGAL SYSTEMS



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I. MEDIATION

<i>Adam Zienkiewicz</i> – Prospective Subsumption and The Model Basic Norm in Mediation in Civil Cases – Some Remarks From The Perspective of Legal Theory and Practice	9
<i>Marek Dąbrowski</i> – Complaint Against a Mediator as a Mechanism for Controlling the Quality of Mediation Services from a Comparative Legal Perspective	29
<i>Cezary Rogula, Agnieszka Zemke-Górecka</i> – Settlements and Other Agreements Concluded before a Mediator.	46
<i>Ewa Gmurzyńska, Tatiana Chauvin</i> – A Democratic Toolkit Hidden in Mediation: Dialogical and Discursive Roots of Mediation and Democracy	65
<i>Omer Shapira</i> – Three Decades of Mediation in Israel: Legal Evolution, Institutional Gaps, and Comparative Lessons	89
<i>Małgorzata Skawińska, Isidoro Barbagallo</i> – Mediation and Sustainability: The Role of Decisive Actions in Promoting Sustainable Dispute Resolution – Lessons from the Italian ‘Cartabia Reform’	111

II. MISCELLANEA

<i>Marek Wąsowicz</i> – The Just Law and Its Evaluation in Legal and Political Thought and Practice in Pre-constitutional Europe (up to the 18th Century). General Remarks	133
<i>Lech Jaworski</i> – Audiovisual Work and Television Format in the Light of Copyright Law	166
<i>Michał Mariański, Elżbieta Zębek</i> – Fees As an Instrument for the Regulation and Protection of Water Resources in a Comparative Approach on the Example of Poland and France	185

I. MEDIATION

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PROSPECTIVE SUBSUMPTION AND THE MODEL BASIC NORM IN MEDIATION IN CIVIL CASES – SOME REMARKS FROM THE PERSPECTIVE OF LEGAL THEORY AND PRACTICE

Abstract

The main objective of this paper is to discuss the existence and nature of subsumption as well as the model basic norm in the decision-making process in civil mediation, conducted primarily with a view to achieve amicable resolution of a legal dispute through settlement. The analysis compares the general model of judicial application of law and the decision-making process in mediation. Furthermore, the paper characterises prospective mediatory subsumption and retrospective judicial subsumption, as well as the features and components of the so-called model basic norm involved in mediatory subsumption. The author debates the position of Krzysztof Pleszka and Michał Araszkiewicz, who contend that the principle of subsumption is derogated in the model course of mediation stages. The observations made on the grounds of legal theory – particularly concerning the components of the mediation basic norm – are followed by an overview of selected relevant empirical findings, especially regarding the objectives and effectiveness of mediation. The findings in question were obtained by this author as a result of research entitled ‘The objectives of mediation and the selection and use of mediation strategies and techniques by mediators in civil disputes, including commercial disputes between entrepreneurs’.

KEYWORDS

prospective subsumption, retrospective subsumption, mediation basic norm, decision-making process, mediation, Alternative Dispute Resolution (ADR)

SŁOWA KLUCZOWE

subsumpcja prospektywna, subsumpcja retrospektywna, mediacyjna norma podstawowa, proces decyzyjny, mediacja, *Alternative Dispute Resolution* (ADR)

I. INTRODUCTION

The main objective of this paper is to discuss the existence and nature of subsumption as well as the model basic norm in the decision-making process as part of classic mediation (problem-solving/interest-based) in civil cases, conducted primarily with a view to achieving amicable resolution of a legal dispute through settlement (settlement-oriented mediation).¹ This inquiry into the issue was inspired by the need to pursue in-depth theoretical and empirical research concerned with the nature of the decision-making process in mediation, to highlight its complexity and significance in comparison with the model of judicial application of law, as well as to underscore the professionalism requirement binding on both judges and mediators. However, this matter is also addressed to re-examine the theoretical-legal position formulated by Michał Araszkiewicz and Krzysztof Płaszka in their esteemed monograph entitled *Mediacja. Teoria. Normy. Praktyka* (Warsaw 2017). In this work, the authors discuss subsumption within the model decision-making process in mediation:

In our opinion, the principle of subsumption is a principle that is derogated to the greatest extent in the mediation model. In fact, one can legitimately consider whether this principle is not entirely derogated in the model approach, [...] it may turn out that some imitation of subsumption occurs when the parties establish their joint version of events. [...] Essentially, the manner in which the principle of dispute resolution is constructed in the model approach to mediation leads to a complete derogation of

¹ The proponents of the problem-solving / interest-based paradigm implemented within the framework of the so-called Harvard model of negotiation can be considered Roger Fisher and William L Ury, authors of the book: *Getting to Yes: Negotiating Agreement Without Giving In*, London 1981, passim. The classic type of mediation (distinguished especially on the basis of the criterion of the dominant mediation strategy) is mainly facilitative – see: Alan Scott Rau, Edward Sherman, Scott Peppet, *Processes of Dispute Resolution. The Role of Lawyers*, New York 2002, 546. For more on classical mediation see: *ibid.*, 340–374.

the principle of subsumption. With some simplification, it may be asserted that the derogation of the subsumption principle is quintessential to the understanding of mediation as an alternative to the judicial application of law.²

Thus, the authors have put forward three variants, stating ambiguously that the model approach to mediation involves ‘complete derogation’ of the principle of subsumption, ‘derogation to the greatest extent’, and they additionally suggested the potential existence of ‘some imitation of subsumption’. The above contention may raise reservations among certain representatives of mediation theory and practice, which the author intends to express in the course of this disquisition, arguing the existence and presenting the characteristics of prospective subsumption in mediation.³ The latter is distinct from the classic retrospective judicial subsumption, understood as the legal qualification of the facts of the case, i.e., where the factual circumstances of the dispute established in the evidentiary proceedings are aligned with a pertinent, properly interpreted legal norm. This particular understanding should not be transferred directly or only to the extent limited to the normative context of mediation proceedings.⁴ The author was further motivated and encouraged to comment on the issue at hand by the fact that, prior to expressing their position, Michał Araszkiewicz and Krzysztof Płeszka compared the judicial decision-making model in the application of law according to Jerzy Wróblewski (cited from *Sądowe stosowanie prawa*, Warsaw 1988) with the concept of mediation stages within the optimisation model of mediatory discourse, presented by this author in *Studium mediacji. Od teorii ku praktyce* (Warsaw 2007), which presumes the existence of a specific subsumption in mediation, in which the decision-making process relies on an identifiable model basic norm in mediation, which should be duly noted and taken into account.⁵

² Michał Araszkiewicz, Krzysztof Płeszka, ‘Pojęcie alternatywnego rozwiązywania sporów’, in Krzysztof Płeszka and others (eds), *Mediacja. Teoria. Normy. Praktyka*, Warsaw 2017, 125–126.

³ Cf the considerations on the mediation model of the decision-making process in comparison with the judicial model of applying law contained in the works: Adam Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warsaw 2007, 243–245; Anna Kalisz, Adam Zienkiewicz, ‘Wymiar sprawiedliwości a mediacja’, in Bartosz Wojciechowski, Mariusz Golecki (eds), *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej*, Toruń 2008, 269–274; Anna Kalisz, *Mediacja jako forma dialogu w stosowaniu prawa*, Warsaw 2016, 130–163; Marzena Myślińska, *Mediator w polskim porządku prawnym*, Warsaw 2018, 63–64.

⁴ On the understanding of subsumption in the model of law application adopted in Polish jurisprudence, see e.g., Leszek Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, 72–74; Tatiana Chauvin, Tomasz Stawewski, Piotr Winczorek, *Wstęp do prawoznawstwa*, Warsaw 2013, 215–216; Jerzy Zajadło, Kamil Zeidler (eds), *Wstęp do prawoznawstwa*, Gdańsk 2023, 163.

⁵ Araszkiewicz, Płeszka (n 2) 115–128; Jerzy Wróblewski, *Sądowe stosowanie prawa*, Warsaw 1988, passim; A Zienkiewicz (n 3) 96–156, 243–245.

To accomplish the main objective of this study, the first part presents a general three-stage model of legal dispute management (administering justice in a broader, objective and functional sense), a paradigm common to court proceedings, arbitration and mediation. This is followed by a comparative overview of a simplified model of the judicial application of law and the decision-making process in mediation, so as to highlight the existence of prospective subsumption and show the phase in which it occurs in mediation (conducted primarily in order to achieve amicable resolution of a dispute through settlement). This is followed by a characterisation of retrospective judicial subsumption and prospective mediatory subsumption. The subsequent section is concerned with the features and components (assessment criteria) of the model basic norm in mediation, which operates as part of mediatory subsumption. The observations made on the grounds of legal theory – particularly where they concern the basic norm in mediation – are then synthetically discussed in the light of selected relevant empirical findings, especially regarding the objectives and effectiveness of mediation. The findings in question were obtained by this author as a result of research entitled ‘The objectives of mediation and the selection and use of mediation strategies and techniques by mediators in civil disputes, including commercial disputes between entrepreneurs’.⁶

II. GENERAL THREE-STAGE MODEL OF DISPUTE MANAGEMENT (ADMINISTRATION OF JUSTICE)

At the outset, prior to contrasting and comparing simplified models of the judicial application of law and mediation – so as to outline the fundamental differences between judicial adjudication and mediation in disputes, and particularly between retrospective judicial subsumption and prospective mediatory subsumption – it should be stressed that the above sequential decision-making processes share the

⁶ For more on the author’s empirical research on, among other things, the various goals and understandings of mediation effectiveness, see: Adam Zienkiewicz, ‘Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part I)’, (2021) *Studia Iuridica Lublinensia*, Vol 30, No 5, 601–618; Adam Zienkiewicz, ‘Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes Study Report (Part II Survey Questionnaires)’, (2022) *Studia Iuridica Lublinensia*, Vol 31, No 1, 213–236; Adam Zienkiewicz, ‘Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part III – Interviews)’, (2023) *Studia Iuridica Lublinensia*, Vol 32, No 2, 303–332.

same fundamental main goal: to manage a legal dispute, either by adjudication or resolution.⁷ When adjudicating a dispute, an impartial and neutral third party (judge, arbitrator) issues a ruling that is binding on the parties while relying on heteronomous normative grounds and an established (after an evidentiary hearing) state of affairs (thus, a retrospective approach predominates). On the other hand, the resolution of a dispute consists of an amicable, voluntary settlement through negotiations conducted by the parties themselves or with the participation of an impartial and neutral third party (mediator, facilitator) who, without imposing a binding decision, in various ways helps them to arrive at an autonomous agreement that takes into account the interests and needs of both parties, creates opportunities for improving their communication and relations and rebuilding the foundations for future cooperation (prospective approach).⁸

Given the changes taking place in contemporary legal and social systems, valid critique of traditional justice as well as novel concepts concerning the structure and functioning of courts (both in terms of adjudication and amicable dispute resolution procedures on the initiative of or with the participation of a judge), it may be worthwhile to presume a broad understanding of justice as well as the continuum and plurality of its forms, which offers grounds for a more holistic approach to the institution of the court and the administration of justice.⁹ Within a broad (objective and functional) understanding, justice is primarily conceived as an activity that consists of dispute management, which is not the exclusive domain of the courts as it also includes various forms of Alternative Dispute

⁷ The notion of dispute management (including their adjudication, settlement or resolution) was defined and popularized in Polish legal theory by Andrzej Korybski, who maintained that dispute management performs a vital role within the framework of social reality construed as a domain of interlinking phenomena of cooperation, conflict and neutrality. As one of the primary social functions of law, dispute management determines its ‘substantive characteristics and social significance’ – see: Andrzej Korybski, *Alternatywne rozstrzygnięcie sporów w USA – studium teoretycznoprawne*, Lublin 1993, 8, 168–169, 193. See also the understanding of the concept of resolution in the pragmatic and apragmatic sense presented by Michał Araszkiewicz and Krzysztof Płeszcza, as well as the division of the resolution into the so-called agreements in the broad sense and authoritative decisions (adjudications) – Araszkiewicz, Płeszcza (n 2) 129–159.

⁸ For more, see: Anna Kalisz, Adam Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warsaw 2014, 21–23.

⁹ On the broader (subjective-functional) understanding of the judiciary and the administration of justice, the continuum and pluralism of its forms, complementary forms of justice and a holistic approach to the justice – see: Zienkiewicz (n 3) 221–231. Zienkiewicz, ‘Koncepcja sądu otwartego – wzmocnienie pluralizmu form wymiaru sprawiedliwości’, in Agnieszka Rekas (ed) *Mediacja – nowa droga rozwiązywania sporów*, Warsaw 2011, 29–47; Zienkiewicz, *Holizm prawniczy z perspektywy Comprehensive Law Movement. Studium teoretycznoprawne*, Warsaw 2018, 309–402.

Resolution (ADR), Comprehensive Dispute Resolution (CDR)¹⁰ and phased mechanisms which, without prejudice to the right to a court, result in dispute adjudication or resolution, thus complementing and reducing the burden on traditional court proceedings.¹¹ This is effected with respect for the right to a court, whose superior position is in no way diminished, manifesting in its capacity to verify the correctness (legality and compliance with the principles of social coexistence) of the decision of a non-judicial body or the autonomous decision of the parties to the dispute expressed in an agreement.¹²

The author's broader understanding of justice (including the institution of the court) as well as the premise that there exists a continuum and plurality of its forms, make it possible to identify – at the level of model generality – a certain *iunctim* between its various forms (e.g., court, arbitration and mediation). After all, from an adequately general standpoint, the administration of justice in the objective and functional sense within the framework of traditional court proceedings, ADR or CDR, share the same principal goal, namely (more or less holistic) dispute management, as well as a general three-stage phase structure (which is universal for court, arbitration and mediation proceedings).¹³

¹⁰ On the assumptions of the so-called third way, a more holistic, interdisciplinary approach to managing legal problems and disputes, known as Comprehensive Dispute Resolution (CDR), which complements the traditional model and practice of courts and Alternative Dispute Resolution (ADR) – see: Susan Daicoff, *Comprehensive law practice: Law as a healing profession*, Durham 2011, 54, 141–163 and Zienkiewicz *ibid* 247–273.

¹¹ Cf the position of the Constitutional Tribunal on the understanding and function of 'administration of justice', formulated in the judgment of 13 March 1996 (K 11/95, OTK 1996, No 2, item 9), and subsequently upheld under the current Polish Constitution in the judgment of 8 December 1998 (K.41/97, OTK ZU 1998/7, item 117). Drawing on its earlier findings, the Tribunal asserted in the latter that administration of justice should be construed objectively, as an activity consisting in the adjudication of legal conflicts, rather than subjectively, as the exclusive competence of the courts (meaning no monopoly of the courts). The extended understanding of forms of justice proposed by the author – including mediation, among others – is also endorsed by Anna Kalisz, who additionally recognises certain types of mediation, which are part of the proceedings and replace or determine court rulings, to constitute judicial application of law in the broad sense. See: Kalisz (n 3) 121–123, 153, 162.

¹² Similarly, Leszek Garlicki observes: 'The monopoly of the courts to administer justice means, let us emphasise once again, creating the possibility for the courts to finally resolve any case concerning the law if at least one of the parties to the dispute is an individual. This does not mean that all cases and disputes concerning legal situation of an individual must be resolved from the outset exclusively by the courts. There is no obstacle for the courts to coexist with extrajudicial adjudicative bodies, but the courts shall always have a superior position, manifesting in their capacity to review the correctness (legality) of the adjudication by any extrajudicial body'. See: Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2014, 354.

¹³ The view that, apart from the significant differences, there are also similarities between the judicial and mediation decision-making processes and that their main goal is the same, which is to

In the first stage of the sequence of administering justice, the court, arbitrators or the parties to the dispute – assisted by a mediator – determine what constitutes a fair adjudication or resolution of the legal dispute.¹⁴

In the second stage, the court (or arbitrators) impose a fair adjudication, or the parties autonomously accept a fair resolution of the dispute, most often by virtue of a conventional act, such as pronouncing a judgment or signing a settlement agreement before a mediator.

The third stage may be described as the implementation (materialisation) of a fair adjudication or resolution of a dispute, which, depending on the judicial form and the approach of the parties, may take place through the voluntary implementation of the provisions of the ruling or settlement or their coercive activation (e.g., through judicial enforcement or the execution of a custodial sentence by the state).

A detailed comparative analysis of the different understandings (objectives, scope, forms) of dispute management within the distinct paradigms of traditional court proceedings, ADR, and CDR – including the nature and course of the decision-making process in the various forms of justice – reveals their respective individual characteristics. In principle, however, this observation does not controvert the universal three-stage sequence of the administration of justice, which demonstrates that a general *iunctim* does exist between its various forms (including phased mechanisms such as Multi-Step ADR). Nor does it overlook the possibility of a relationship of subsidiarity or symbiotic complementarity between various forms as a result of potential integration or convergence of at least some of the objectives and methods of dispute management typical of each modality, which is particularly evident in the more holistic forms of courts such as Problem Solving Courts and Multidoor Courthouses.¹⁵

manage the dispute, is also shared by Anna Kalisz and Marzena Myślińska. See: Kalisz (n 3) 156; Myślińska (n 3) 65–66.

¹⁴ On the various concepts of understanding the concept of ‘justice’ or the theory of justice – see e.g.: Zygmunt Ziemiński, *O pojmowaniu sprawiedliwości*, Lublin 1992; Zygmunt Ziemiński, *Sprawiedliwość społeczna jako pojęcie prawne*, Warsaw 1996; John Rawls, *Teoria sprawiedliwości*, Warsaw 1994; Jerzy Stelmach, Ryszard Sarkowicz, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999, 133–144; Jerzy Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000, 149–162.

¹⁵ The institutions of Problem Solving-Courts and Multidoor Courthouse and their corresponding orientations: Therapeutic Jurisprudence, Restorative Justice, Procedural Justice, and Holistic Justice are discussed more broadly in Zienkiewicz (n 9) 62–100, 339–402 and the literature cited therein.

III. THE JUDICIAL AND MEDIATORY MODELS OF THE DECISION-MAKING PROCESS. RETROSPECTIVE JUDICIAL SUBSUMPTION VERSUS PROSPECTIVE MEDIATORY SUBSUMPTION

In an attempt to compare the traditional model of judicial dispute adjudication and the model of dispute resolution in classic mediation (problem-solving/interest-based, primarily oriented towards reaching a settlement), formulated specially to highlight the existence and the phase where prospective subsumption occurs in mediation, one may – bearing the risk of simplification in mind – identify the following stages in the decision-making process within each model.¹⁶

The model of judicial dispute adjudication (judicial application of law) has been discussed on multiple occasions (and in detail) in Polish legal scholarship. In substantive terms, it may be said to follow this simplified pattern:

- 1) Establishing the facts of the case;
- 2) Determining the state of law pertinent to the case (including interpretation);
- 3) Retrospective subsumption: bringing the accomplished (usually past or persisting) facts that have been ascertained under an appropriate legal norm (the so-called legal qualification of the factual situation);¹⁷
- 4) Final decision, i.e., determining and selecting legal consequences – determining the content of a fair adjudication (stage I in the general model of administration of justice);
- 5) Issuing and justifying the decision – administering justice in the strict sense through a conventional act (stage II in the general model of administration of justice).¹⁸

As in the adjudicative modality, the essential decision-making process in mediation proper (i.e., in the phase between pre-mediation and post-mediation activities) is sequential and requires the mediator and the parties to the dispute to apply significant cognitive and interpretative reasoning, which in part gives priority to other

¹⁶ For more on the comparison of the decision-making process in litigation and mediation, see e.g.: Zienkiewicz (n 3) 243–245; Kalisz, Zienkiewicz (n 3) 263–274; Kalisz (n 3) 124–163.

¹⁷ On the subject of subsumption in legal practice, including in the context of a broad view of clients' problems beyond legal issues, see: Ewa Gmurzyńska, *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warsaw 2014, 60–64, 325–326.

¹⁸ More on the model of decision-making in judicial application of the law, see e.g.: Leszczyński (n 4) 62–106.

aspects of the case than in court proceedings. This is due to the distinct detailed objectives of the mediation discourse, the roles of the parties and the mediator, as well as the fact that dispute resolution differs in its essence from court adjudication. At this point, it is worth noting that mediation discourse involves not only decision-making but also a communicative and cognitive dimension (which goes beyond the economic and legal issues of the dispute and allows for emotional or ethical aspects as well); there is also a relational and occasionally a transformative element to it, associated with such acts of the parties as apologies, forgiveness and reconciliation.¹⁹

The basic stages of the decision-making model in mediation (of the problem-solving/interest-based/settlement-oriented type) at the stage of mediation proper may be summarised as follows:

- 1) Identification of the interests and needs of the parties (replacing the judicial primacy of factual findings);
- 2) Generating options for resolving the dispute (including, in particular, determination of the scope of a potential agreement);
- 3) Prospective mediatory subsumption: bringing (qualifying) previously formulated options for resolving the dispute (settlement proposals) under the so-called 'basic norm in mediation';
- 4) Final decision, i.e., selection of specific settlement proposals – determination of the content of a fair/equitable resolution of the dispute (stage I of the general model of administration of justice);
- 5) Drafting the content and conclusion of the settlement – administering justice in the strict sense through a conventional act (stage II of the general model of administration of justice).²⁰

Here, it should be noted that during the broadly understood mediation proceedings (pre-mediation, mediation proper, post-mediation), just as in court proceedings (institution of proceedings, preliminary preparation of the case to be examined, adjudication proper as well as formal and technical final steps), many other partial decisions arise that affect its course in subjective and objective terms, concerning, e.g., entering into mediation, selection of the mediator, the rules, form or strategies and techniques of mediation, participation of attorneys or other participants in the mediation, the allocation of time and space for the discourse, the purpose and form of using documents, the content of the initial positions and the

¹⁹ For more, see: Adam Zienkiewicz, 'Prawnik jako peacemaker – przeprosiny, przebaczenie, pojednanie w opanowywaniu sporów prawnych', (2019) *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 4, 43–57.

²⁰ For more, see: Zienkiewicz (n 3) 243–245; Kalisz, Zienkiewicz (n 3) 263–274; Kalisz (n 3) 124–163.

scope of concessions, the adopted interpretation of the rules of mediation and the form of agreement. At the end of successful mediation (of the problem-solving/interest-based/settlement-oriented type) in its core phase, a final decision resolving the dispute is made, where the parties voluntarily express their willingness to comply with the provisions of the agreement (which has been reached with the assistance of the mediator). The final decision to conclude a settlement has its own specific characteristics, both regarding its form and the absence of a necessity to link its content directly with provisions of the law or supply it with a properly constructed (especially written) rationale.

Naturally, for the process of administration of justice to be complete, the conclusion of a settlement by the parties before a mediator or the pronouncement of a judgment by a court (which ends the decision-making proceedings in question) often requires a control phase (e.g., in a situation where a mediation settlement needs to be approved by a court or when a case needs to be heard by a second-instance court as a result of an appeal). This needs to be followed by an effective execution phase (voluntary or through state enforcement) in order to be able to state legitimately that the administration of justice has indeed taken place. In other words, one reifies the content of a court adjudication or an agreed-upon amicable solution that aims at resolving the dispute between the conflicting parties (stage III of the general model of administration of justice).

The constitutive differences between the analysed judicial and mediation models of decision-making processes are seen not only in the components of their individual stages, the distribution of the decision-making powers with regard to the content or form of the final decision, or the discretion to shape the rules of a given proceeding. A number are found in their third stage, which centres around the institution of subsumption. The latter demonstrates distinct characteristics in judicial adjudication and in mediation.

The main features of the classic retrospective judicial subsumption include, in particular: First, the court and the parties to the dispute rely on the past-present constellation, informed by the supremacy of formal evidentiary proceedings, to establish the facts of the case (notably categories such as fault, right, loss or contribution to the loss incurred by a party) and on the appropriate selection and interpretation of pertinent norms of substantive and procedural law.

Second, while establishing the facts necessary for correct classification and interpretative reduction of pertinent legal norms to the circumstances of the case, one cannot fail to note that objective truth often conflicts with procedural truth, determined by the more or less adversarial nature of the proceedings and the evidentiary activity of the parties, which is mainly subordinated to the will to win the court proceedings against the opposing party.

Third, as a result of judicial subsumption, the court selects and imposes consequences on the parties to the dispute primarily in accordance with the measure of justice that has been heteronomously introduced by the lawmaker or the judiciary by means of pertinent legislation or case law (depending on the legal system, which admits precedents *de iure* or precedents *de facto* only). One can, therefore, speak of a judicial, retrospective search for the reasons of the parties and the consequences of their past, proven conduct, notably in the light of the legal norms which apply to the case. This is often done without any consideration given to the various causes of the dispute, the multifaceted interests and needs of the parties, the legitimacy of their future cooperation or the actual ability of the parties to implement the court's judgment.

On the other hand, the main features of prospective subsumption in mediation include, in particular: First, the parties and the mediator rely chiefly on the present-future constellation (taking into account past events as part of a holistic diagnosis of the dispute, especially when it is necessary to identify and eliminate the causes of the conflict, on which reaching an agreement is contingent).

Second, the interests and needs of the parties, the improvement of communication, relations and the basis for their future cooperation take priority over a retrospective search to establish which party is right, given the ascertained facts of the case as well as the relevant legal norms and case law. Validation findings, i.e., the determination of the sources of law required for the legal norm to be reconstructed, as well as the interpretation of the law, are not the most important since legal norms are not usually the main grounds for dispute resolution in mediation. However, they are significant in the sense that negotiations are conducted and the content of the settlement formulated in the so-called shadow of the law, which sets boundaries that must not be violated, resulting in provisions of the agreement that are *contra* or *preter legem*.

Third, the so-called consensual (accepted) truth predominates in mediation. The 'truth of mediation' is inherently discursive in nature, being the so-called 'truth accepted' by the parties to the dispute (e.g., when establishing the so-called common version of the case). The truth in mediation is reached through a process of argumentation that seeks acceptance for specific propositions, so the discourse revolves around the consensual concept of truth, while the classical, pragmatic, evidential or coherence concepts of truth are less often encountered.²¹ Thus, mediation often features the so-called conviction of truth rather than truth in the classic sense. Individualised (accepted) truth in mediation functions in two main

²¹ For more on different concepts of truth, see e.g.: Andrzej Kucner, 'Teorie prawdy', in Stefan Opara, Andrzej Kucner, Beata Zielewska (eds), *Podstawy filozofii*, Olsztyn 2003, 84–93.

variants: a) a statement is true if the parties accept it as true and are convinced of its truth; b) a statement is true if the parties accept it as true, even though they are not convinced of its truth, but accept it in view of specific 'higher' goals/reasons (e.g., for the sake of reaching a settlement or restoring positive relations between them).

Fourth, in the decision-making process in mediation, parties (within the limits of their decision-making power and autonomy in the conflict) engage in a discursive search for a common denominator of what is fair or equitable. The parties work out a mutually acceptable solution to the dispute based on what they personally consider to be right, guided by their multifaceted interests and needs, their different understandings of rationality and effectiveness, as well as by norms and values which need not be confined to law but involve other normative subsystems such as morality, custom, religion, group or professional ethics.²²

Fifth, a prospective subsumption in mediation is 'reversed', whereby the potential/future options for resolving the dispute (i.e., the proposed consequences of the dispute which aims at its amicable resolution) are classified (subsumed) under a specific 'basic norm in mediation', whose model content and components will be characterised in a subsequent part of this study.

Sixth, the essential result of prospective mediatory subsumption is that both parties accept a selection of options to resolve the dispute, based on which they comprehensively agree on the content, conclusion and subsequent implementation of the settlement (which should meet the requirements for court approval) so as to resolve the dispute in real terms, all in line with the principles of good faith and *pacta sunt servanda*, which are fundamental to the quality and effectiveness of the mediation discourse.

IV. MODEL BASIC NORM IN MEDIATION AS PART OF THE PROSPECTIVE MEDIATORY SUBSUMPTION

As already noted, the third stage in the model of the decision-making process in mediation (problem-solving/interest-based/settlement-oriented), known as medi-

²² The 'sense of justice' subjectively established in the form of consensus by the parties to the dispute during mediation proceedings is also pointed out by: Kimberlee K Kovach, *Mediation, Principles and Practice*, Third Edition, Saint Paul, 2004, 449. Cf Lech Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988, 108.

ation proper, involves prospective mediatory subsumption, which, compared with retrospective judicial subsumption, is ‘reversed’. Unlike in court proceedings, it does not consist in bringing the past conduct of the parties to the dispute under a pertinent legal norm but in an assessment of whether the potential options for future dispute resolution formulated by the parties (which in a sense denotes the proposed consequences of the dispute which aims at its amicable resolution) are consistent with the ‘basic norm in mediation’. This mediatory norm translates into a general, universal, substantive and procedural approach to the measure of justice in mediation, one which goes beyond the normative dimension and takes into account the nature of the goals and principles of mediation discourse as a procedure for resolving rather than adjudicating legal disputes, as is the case with courts. The model content and components of the ‘basic norm in mediation’ in the Polish civil law system may be simplified as follows:

‘A particular option for resolving a dispute (or, as applicable, a set of options which constitute a part or the entirety of the draft settlement agreement) may be considered a fair/equitable solution when:

- 1) it is mutually acceptable in its entirety by both parties to the dispute;
- 2) it considers the interests and needs of both parties to the dispute in accordance with the win-win solution paradigm;
- 3) it is feasible (realistic);
- 4) it is not contrary to the law;
- 5) it does not seek to circumvent the law;
- 6) it is not contrary to the principles of social coexistence;
- 7) it is not incomprehensible;
- 8) it does not contain contradictions’.

The components (assessment criteria) of the basic norm in mediation listed in points 1–3 stem from the essence and principles of mediation – the principle of acceptability, the decision-making power of the parties to the dispute, the principle of ownership and autonomy of the conflict, the principle of mutual concessions in integrative negotiations and in the settlement, the principle of the realness of the settlement provisions (as opposed to acceptability alone) or the win-win solution principle (which in some types of disputes encompasses the interests and needs of the parties to the dispute as well as the welfare of a child or public interest, for instance).²³

²³ For more on the various principles of mediation, see e.g.: Zienkiewicz, ‘Standardy prowadzenia mediacji i postępowania mediatora – uchwalone przez Społeczną Radę ADR przy Ministrze Sprawiedliwości’, (2012) *Studia Prawnoustrojowe*, No 18, 185–200; Kalisz, Zienkiewicz (n 8) 58–61; Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka*, Warsaw, 157–171.

The components (assessment criteria) of the basic norm in mediation in points 4–8 arise from the relevant provisions of the law, i.e., Article 183(14)(3) of the Polish Code of Civil Procedure, which sets out the grounds for denying approval to a mediation settlement. When deciding whether to approve a mediation settlement, the court does not interfere with its content but only assesses whether all its provisions are lawful or do not seek to circumvent the law (components listed in points 4–5), whether they are consistent with the principles of social coexistence (and therefore, in particular, with moral and ethical standards, meaning the component in point 6) and the principles of proper communication, which ensure that the content of the settlement is comprehensible and free of contradictions, which, in effect, enables it to be fully and voluntarily reified by the parties (components listed in points 7–8).²⁴

Thus, a model decision-making process in mediation (not only in the analysed civil cases) involves subsumptive reasoning (which should be applied accordingly by the parties, the mediator and the court), which consists of bringing (qualifying) the formulated options for resolving the dispute (proposed settlement provisions) under the basic norm in mediation. This is done, on the one hand, in order to jointly agree on the fair/equitable content of the agreement between the parties so as to resolve the dispute and, on the other, to examine its compliance with the requirements of the law, the principles of social coexistence and proper communication, so that, if necessary, the mediation settlement can be approved by the court and obtain the status of enforcement order, should the need arise for its coercive implementation. Furthermore, such subsumption, which serves to qualify the options formulated with respect to dispute resolution (proposed settlement provisions) based on the components (categories of assessment) of the basic norm in mediation listed in points 4–6, prevents the settlement from being subject to the *ex lege* invalidity sanction provided for in Article 58 of the Polish Civil Code, which could apply to some or all of the settlement provisions proposed by the parties.²⁵

²⁴ Article 183 (14) § 3 of the Code of Civil Procedure states: ‘The court shall refuse to grant an enforcement clause or approve a settlement concluded before a mediator, in its entirety or in part, if the settlement is contrary to the law or principles of social coexistence or aims to circumvent the law, as well as if it is incomprehensible or contains contradictions’. See: Consolidated Version of the Code of Civil Procedure Act of 17 November 1964 (Journal of Laws 2024, item 1568).

²⁵ Article 58 of the Civil Code provides as follows: ‘§ 1. A legal act contrary to the law or aimed at circumventing the law is invalid, unless a relevant provision specifies a different effect, in particular that the invalid provisions of the legal act are replaced by the pertinent provisions of the law. § 2. A legal act contrary to the principles of social coexistence is invalid. § 3. If only part of a legal act is invalid, the remaining parts of the act remain in effect, unless it appears from the circumstances that without the provisions affected by invalidity, the act would not have been

Given the above findings, the author does not share the view of M Araszkievicz and K Pleszka, who have argued that the model approach to mediation involves a ‘complete derogation’ or ‘derogation to the greatest extent’ of the principle of subsumption, or – at most – possible occurrence of ‘some imitation of subsumption’.²⁶ As has been attempted to demonstrate, the principle of subsumption (construed as in court proceedings) does indeed feature in the model decision-making process in mediation in the form of reasoning that seeks to assess whether certain ‘objects’ fall within the purview of a specific norm. However, this is not the retrospective subsumption employed as part of the judicial application of the law, where the rules of substantive law are applied to assess the facts of the case established in evidentiary proceedings, but prospective subsumption of the mediatory type, in which the basic norm in mediation (which, due to its complexity, goes beyond the rules of substantive law that dominate in classic subsumption) is applied to the formulated options of resolving the dispute (potential settlement provisions).

In weighing the findings so far against the principal arguments advanced by M Araszkievicz and K Pleszka to support their position on subsumption in the model approach to mediation, it should be noted that their contention that the role of substantive law changes, as it is no longer the foundation for a decision but a reason invoked by the parties to determine their position in the dispute or a boundary condition, can, in fact, be reconciled with the concept of prospective subsumption in mediation, whereby the parties do take the norms of substantive law norms into consideration, also while applying the basic norm in mediation to assess whether the formulated options of resolving the dispute (potential settlement provisions) do not violate or circumvent the law.²⁷ It may, therefore, be argued that in the model approach to the decision-making process in mediation, one can identify a general, universal, substantive and procedural rule that establishes a model for dispute resolution in the shape of the basic norm in mediation. The norm in question is then related to the catalogue of the formulated options for dispute resolution (proposed settlement provisions) rather than the established facts, as in the retrospective judicial model. In any case, it would be difficult to expect the law to include a heteronomously imposed, ready-made model for dispute resolution (covering mediation as well) that would be binding, as is the case with adjudication.

performed’. See: Consolidated Version of the Code of Civil Law Act of 23 April 1964 (Journal of Laws 2024, item 1061).

²⁶ Araszkievicz, Pleszka (n 2) 125–126.

²⁷ Cf *ibid.*

Furthermore, derogation of the evidentiary principle stated by the authors or absence of the requirement to establish the facts of the case in mediation, which, in conjunction with the common version of events being agreed by the parties, would, in their opinion, offer grounds to approach it as ‘some imitation of subsumption’, does not allow for the fact that, besides the aforementioned activities, there are also other acts of obtaining knowledge in mediation proceedings, carried out for instance to determine the causes of the dispute and, in particular, the interests and needs of the parties as well as the scope for potential agreement. These supersede the classic findings of the legally relevant past conduct of the parties in court proceedings.²⁸ In fact, such activities translate into the unique nature of establishing relevant facts in mediation, as they do not prioritise those which help one identify which party is at fault and which is right – in the light of their legal rights and obligations. Instead, they focus on the significant past, present and future aspects of the parties’ lives that may promote rapprochement, serve to rebuild proper communication, relations and the basis for cooperation, as well as culminating in an amicable and lasting resolution of the dispute, including one that is open to acts of apology, forgiveness and reconciliation.

Bearing this in mind, if one does not expect mediation proceedings to involve classic retrospective subsumption based on proven facts aligned with the relevant rule of substantive law which determines the legal consequences of that situation, one can hardly agree that the principle of dispute resolution in the model approach to mediation leads to the complete derogation of the principle of subsumption or its derogation to the greatest extent. After all, within the framework of the distinct, prospective subsumption in mediation, one formulates options for resolving the dispute (potential settlement provisions) and subjects them to assessment (adequate extension) in line with the components (criteria) of the basic norm in mediation.

Thus, it would appear that common ground may be found between the position of this author and the view presented by M Araszkiewicz and K Pleszka if they concurred that the model decision-making process in alternative mediation involves a distinct prospective subsumption, whose sole departure concerns the assessment of the factual circumstances of the case from a legal standpoint. Importantly, regarding the final decision in mediation proceedings, in which the parties come to an agreement with the intention of managing the dispute, the authors aptly observe that it is a formal element of dispute resolution, accompanied by communicative and psychological solutions, as well as any other solutions that permanently alter the relationship between the parties. The basic norm in media-

²⁸ Cf *ibid.*

tion, which encompasses non-legal, amicable components as well, accommodates such solutions to a broader extent than the standard norms of substantive law.²⁹

This conclusion is also corroborated by selected results of the author's empirical research, obtained as part of the study entitled 'The objectives of mediation and the selection and use of mediation strategies and techniques by mediators in civil disputes, including commercial disputes between entrepreneurs'. Among other things, it was established that the professional mediators participating in the survey (members of the National Network of Attorneys-at-Law Mediation Centres) identify other vital objectives of mediation, such as: 1) generating realistic options of amicable settlement of a dispute; 2) determining and eliminating the causes of the dispute; 3) improving communication and mutual understanding between the parties to the dispute; 4) improving relations between the parties to the dispute; 5) rebuilding the basis for cooperation between the parties to the dispute for the future; 6) satisfying significant psychological needs of the parties (e.g., the need to be heard, the need for recognition, understanding, for venting negative emotions or playing an important role in the decision-making process); 7) reinforcing self-consciousness (introspection) of the parties and learning (self-determination) of the parties with respect to diagnosing disputes and their amicable resolution; 8) getting the parties to apologise, forgive and reconcile; 9) supporting the parties' attitudes and behaviours that are in line with the law and ethics.³⁰

Furthermore, the manner in which the mediators surveyed understood the effectiveness of mediation was linked to the components of the basic norm in mediation, which validates its importance for both prospective mediatory subsumption and the effectiveness of the mediation process. The study also found that the effectiveness of mediation in civil cases (including family and commerce-related cases) should be considered in terms of whether the mediation settlement is not only mutually acceptable but also beneficial to both parties, feasible, and whether it has been approved by the court and voluntarily implemented. In addition, next to the conclusion of the settlement, the accomplishment of other important objectives of mediation (e.g., improvement of communication, relations, or reconciliation between the parties) also proved important.³¹ This warrants considering whether, in mediation proceedings that allow for various objectives of mediation

²⁹ Ibid, 127.

³⁰ For more, see: Zienkiewicz, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes Study Report (Part II Survey Questionnaires)', (2022) *Studia Iuridica Lublinensia*, Vol 31, No 1, 213–236; Zienkiewicz, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part III – Interviews)', (2023) *Studia Iuridica Lublinensia*, Vol 32, No 2, 303–332.

³¹ Ibid.

besides the conclusion of a settlement concerning economic and legal matters, the basic norm applied as part of prospective subsumption should not be enhanced with additional components (assessment criteria) of the formulated options of dispute resolution (potential settlement provisions). Such components would serve to examine the said options so as to ascertain whether they improve communication and relations, promote cooperation, forgiveness, reconciliation between the parties and their moral growth.³²

V. CONCLUSION

The present paper has highlighted the essence of the general, three-stage model of legal dispute management (administration of justice), common to court proceedings, arbitration and mediation. With the main objective of the study in mind, the author has compared a simplified model of judicial application of law with the mediation decision-making process, characterised retrospective judicial subsumption and prospective mediatory subsumption, as well as outlined the features and components of the model basic mediation norm applied in mediatory subsumption. Subsequently, the author has debated the view formulated by K Płaszka and M Araszkievicz on the derogation of the subsumption principle in the model course of mediation stages, simultaneously recognising a possible ground for rapprochement between the two positions. Finally, selected relevant results of the author's empirical research on the objectives and effectiveness of mediation have been presented as a follow-up to the preceding theoretical-legal observations, particularly where they concerned the elements of the basic norm in mediation.

In conclusion, it may be noted that the discussed essence and components of the model basic norm in mediation, in conjunction with the Polish civil law in force (notably the provisions of Article 58 of the Civil Code and Article 184(14) of the Code of Civil Procedure), deserve further in-depth analyses, both theoretical and empirical. Such an inquiry should also adopt a broader scope encompassing other mediation paradigms, e.g., transformative mediation or the three procedural

³² Cf Gmurzyńska's apt remarks by concerning a comprehensive, holistic approach to a case under mediation, which relies on dialogue and acknowledgement of the various interests of the parties to the dispute, including psychological, emotional or ethical ones. Such an approach represents an alternative to the classic subsumption used in court proceedings, which is concerned with facts or events of legal significance and remains confined to financial and material objectives, since most often only such objectives may be secured in court. See: Gmurzyńska (n 17) 325–326. For more on the holistic diagnosis of the case and the parties to the dispute, see: Zienkiewicz (n 9) 139–176.

models of mediation distinguished by E Waldmann in view of the role of legal norms and other normative systems in mediatory discourse and the varied approaches of mediators, characteristic of the so-called ‘norm-generating’, ‘norm-educating’ and ‘norm-advocating’ models of mediation.³³ Due to the limited space of this paper, the author plans to present the results of that more comprehensive analysis in subsequent texts, which, from a comparative perspective, will explore various aspects of the model decision-making process in mediation.

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³³ For more, see: Ellen Waldman, ‘Identifying Role of Social Norms in Mediation: A Multiple Model Approach’ (1997) *Hastings Law Journal*, Vol 48, issue 4, 703–769.

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COMPLAINT AGAINST A MEDIATOR AS A MECHANISM FOR CONTROLLING THE QUALITY OF MEDIATION SERVICES FROM A COMPARATIVE LEGAL PERSPECTIVE

Abstract

The article analyses the institution of a complaint against a mediator in the Polish legal system, recognising it as a key mechanism for ensuring the quality of mediation services in the light of Article 4 of Directive 2008/52/EC. The analysis was supplemented by three distinguished models of disciplinary liability, integrating various solutions in force in the EU Member States. The results indicate that effective mechanisms for quality control of mediators' work require the implementation of a system of disciplinary responsibility for mediators in order to ensure high ethical and professional standards. In Poland, this system is poorly developed, and the regulations in force are incomplete, taking the form of quasi-disciplinary responsibility of mediators. The lack of effective disciplinary procedures, limited competences of supervisory bodies and the lack of obligation to comply with the codes of ethics undermine the credibility of mediators and trust in mediation. The comparative legal analysis distinguished three models of disciplinary liability of mediators in the EU: centralised, decentralised and hybrid. They differ in their supervisory structure, scope of competences and complaint-handling mechanisms. The conclusions from the conducted analysis emphasise the need to harmonise the regulations in force in Poland, including the introduction of transparent and dedicated complaint procedures as well as the expansion of the catalogue of sanctions and their effects. Such

actions will enable the achievement of the objectives of Article 4 of Directive 2008/52/EC by ensuring the effectiveness of mechanisms for controlling the quality of mediators' work and strengthening public confidence in mediation.

KEYWORDS

quality of mediation, control of the mediator, disciplinary liability of the mediator

SŁOWA KLUCZOWE

jakość mediacji, kontrola mediatora, odpowiedzialność dyscyplinarna mediatora

I. INTRODUCTION

Mediation regulated by Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters has come 'of age' since its entry into force.¹ However, the formal 'age of majority' of mediation does not correspond to its maturity, which should be manifested in well-established, stable and effective mechanisms of functioning in the legal system and society. These are the features that determine the level of trust in mediation.² The lack of maturity of the mediation institution is manifested in the discrepancies between EU Member States in the harmonisation of Article 4 of Directive 2008/52/EC, which is crucial for ensuring effective mechanisms for quality control of mediation and from which two main obligations arise.

The primary obligation is focused on the proper preparation of mediators, development of good practices, quality standards, codes of ethics, high training requirements, accreditation and rules for maintaining registers of mediators.³ The secondary one is focused on effective control mechanisms and improving the qual-

¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/24, hereinafter 'Directive 2008/52/EC'.

² See: Włodzimierz Broński and others, 'Research report on public needs and expectations regarding the National Register of Mediators and competency gaps in mediator training' (John Paul II Catholic University of Lublin 2021) 17, 56–58 < <https://krm.gov.pl/materialy-do-pobrania> > accessed 3 May 2025; Włodzimierz Broński and others, 'Readiness to Use Mediation – Judges and Entrepreneurs Perspective' (2024) 20 Utrecht Law Review 21, 24 < <https://utrechtlawreview.org/articles/10.36633/ulr.1020> > accessed 8 May 2025.

³ See: Marek Dąbrowski, 'Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of 21 May 2008 on Some Aspects of Mediation in Civil and Commercial Matters

ity of services through compliance with applicable standards, professional ethics and the expectations of the parties. They enable simultaneous monitoring, evaluation and improvement of the quality of mediators' work, in particular, by establishing the right of mediation participants to file complaints against mediators. This power plays a key role in the secondary quality control mechanism, which allows for a response in the event of improper performance of duties, triggering disciplinary liability of mediators. Complaint procedures that ensure compliance with the principles of mediation can effectively monitor the quality of mediators' work, supporting compliance with ethical and legal standards. Such a mechanism also promotes corrective action, education and prevention of future violations, which in turn increases trust in mediators. Therefore, 'mediation providers should establish and maintain fair and effective complaints and disciplinary mechanisms to deal with disputes concerning mediators or administrators of mediation processes'.⁴

The 'age of majority' of the institution of mediation, therefore, requires the development of effective mechanisms for controlling the quality of the mediation services provided.⁵ This is crucial for building the parties' trust in the mediators and the mediation process itself, as well as for ensuring its effectiveness. Hence, the subject of the present article is the analysis of the secondary mechanism for controlling the quality of mediators' work in the form of a complaint against a mediator, which is a tool for social control of the quality of mediators' work and is part of the system of disciplinary liability in this profession. This analysis covers models of disciplinary liability of mediators developed on the basis of the integration of solutions in force in selected legal systems of the European Union Member States. The aim of the article is to justify the need to implement in the Polish legal system the right of mediation participants to file complaints against mediators within the framework of disciplinary liability of mediators, which should constitute an integral part of the system ensuring the appropriate quality of mediators' work, fully implementing the objectives specified in Article 4 of Directive 2008/52/EC.⁶

in the Polish Legal System' (2022) 14 *Krytyka Prawa* 5 <<https://repozytorium.kozminski.edu.pl/pub/7077>> accessed 4 May 2025.

⁴ See: European Commission for the Efficiency of Justice (CEPEJ) 'Mediation Development Toolkit on Ensuring Implementation of the CEPEJ Guidelines on Mediation. European Code of Conduct for Mediation Providers' (CEPEJ 4 December 2018) <www.coe.int/en/web/cepej/mediation-tools> accessed 3 May 2025.

⁵ See: European Commission for the Efficiency of Justice (CEPEJ) 'Mediation Development Toolkit on Ensuring Implementation of the CEPEJ Guidelines on Mediation. Mediation Pilot Monitoring Checklist' (CEPEJ 27 June 2018) 8 <www.coe.int/en/web/cepej/mediation-tools> accessed 3 May 2025.

⁶ See: European Commission for the Efficiency of Justice (CEPEJ) 'European Handbook for Mediation Lawmaking' (CEPEJ 14 June 2019) 37 <www.coe.int/en/web/cepej/mediation-tools> accessed 3 May 2025.

The conclusion emphasises the need to supplement and harmonise regulations in order to ensure greater transparency and responsibility of mediators for the quality of mediation processes, which could contribute to increasing public confidence in both mediators and the institution of mediation itself.

II. COMPLAINT AGAINST A MEDIATOR IN THE FRAMEWORK OF DISCIPLINARY LIABILITY IN THE POLISH LEGAL SYSTEM

In the Polish legal system, a complaint against a mediator's actions is an unregulated institution, which appears increasingly often in a non-normative space. It has become a tool for mediation participants to report their reservations to the presidents (chief judges) of regional courts in response to the improper performance of their duties by mediators. Although the right to lodge a complaint is constitutional in nature and may constitute an 'effective mechanism for controlling the quality of mediation services', ensuring the implementation of Article 4(1) of Directive 2008/52/EC, this right and the procedure for handling complaints are not directly regulated in Polish law. However, the widespread use of mediation, the varying forms of training, or lack thereof, for mediators, the different styles of mediation and the varying experience of mediators, combined with the lack of obligation to comply with certain standards and codes of ethics, create a real risk of an increase in complaints and claims against mediators.⁷

The specific nature of the regulation of the legal status of a mediator in Poland, in the context of the right of participants to file complaints about improper performance of duties under disciplinary liability of mediators, requires explanation. To put it simply, the Polish legal system distinguishes two groups of mediators: 'permanent mediators' – registered on the lists kept by the presidents of regional courts⁸ or entered on the list of mediators in criminal cases,⁹ and 'non-permanent mediators' – not registered or included on the lists. In the case of unregistered mediators, there is no disciplinary liability system or possibility of filing complaints for improper performance of duties, also in cases when they have

⁷ See: AKC Koo, 'Exploring Mediator Liability in Negligence' (2016) 45 C.L.W.R. 165, 166.

⁸ See: Art 157 (b) (1) of the Act of 27 July 2001 Law on the System of Common Courts consolidated text [2024] JoL 34.

⁹ See: para 2 of the Act of 7 May 2015 Ordinance of the Minister of Justice on mediation proceedings in criminal matters [2015] JoL 716. On quality control of mediation in criminal cases, see: Julien Lhuillier, 'The Quality of Penal Mediation in Europe' (CEPEJ 22 August 2007) 1–15 <<https://rm.coe.int/1680747b73>> accessed 4 May 2025.

been entered on the lists of mediators kept by non-governmental organisations or universities establishing mediation centres. These centres are not obliged to regulate disciplinary liability procedures, and their regulations often exclude liability for acts or omissions, limiting the mediator's liability to cases of wilful misconduct. This means that neither the mediator nor the centre is liable for gross negligence or failure to exercise due diligence, and the system of disciplinary liability of unregistered mediators or those operating within mediation centres is autonomous. As a result, mediation participants are not able to file complaints against unregistered mediators, which weakens the quality standards of mediation services. This situation may reduce the motivation of mediators to comply with professional ethics and mediation standards, especially in the absence of sanctions and guarantees ensuring the safety of the mediators and the parties. The lack of disciplinary liability may be perceived as a concession for inappropriate conduct, jeopardising the interests of the parties and undermining public confidence in mediation, while at the same time preventing the quality control of services required by Article 4 of Directive 2008/52/EC.

In the case of 'permanent mediators' entered on the lists kept by the presidents of regional courts, disciplinary liability for improper performance of duties is illusory. It is not initiated by the mediation participants by way of a complaint, but consists in authorising the presidents of regional courts to remove a permanent mediator from the list in the event of the mediator failing to properly perform duties. The right to notify the president of the regional court that issued the decision on entry on the list of permanent mediators of each case, justifying removal from that list due to improper performance of duties, lies exclusively with the court, not the parties. The decision on removal is made by the president of the court after initiating administrative proceedings, which may be initiated *ex officio*.¹⁰ This is the only regulation of the disciplinary liability of permanent mediators, which constitutes only an apparent and ineffective mechanism for controlling the quality of mediation services provided. The regulations constructed in this way have numerous flaws that limit their effectiveness.

Firstly, granting the court the exclusive power to notify the president of the regional court and the president to initiate disciplinary proceedings to remove a mediator from the register limits effective control over the quality of mediation services provided. This is particularly important in cases of improper performance of duties by a mediator, as it excludes the possibility of supervision and enforcement of high professional standards by the mediation participants. Mediation participants are not listed among the entities authorised to file complaints against the

¹⁰ See: para 10 of the Act of 20 January 2016 Order of the Minister of Justice on keeping the list of permanent mediators [2016] JoL 122.

mediator, nor do they have the status of a party within the meaning of Article 28 of the Code of Administrative Procedure.¹¹ As a result, their supervisory role may be limited solely to pursuing claims for damages against the mediator, provided that damage has occurred, excluding the possibility of holding the mediator liable for disciplinary action. This leads to a situation in which control over compliance with service quality standards remains limited and improper performance of duties is, in practice, not subject to disciplinary sanctions. In terms of granting a mediation participant the right to file a complaint against a mediator in the Polish legal system, the Voivodeship (Provincial) Administrative Court expressed the position that ‘information on the need to initiate proceedings by the competent body¹² can be obtained from any source, even anonymous. (...) If the body finds that the application to initiate the proceedings was filed by an entity that does not have the status of a party, and moreover, the proceedings may be initiated ex officio, then the body may initiate the proceedings ex officio, even though in fact it learned about errors in the conducted proceedings or the need to initiate new proceedings in connection with the application filed by an unauthorized entity’.¹³ The analysis of this position is crucial for assessing the rights of the mediation participants to file a complaint against the permanent mediator for improper performance of his duties. It follows from this that a complaint filed by an unauthorised entity participating in mediation may – but does not have to – result in the initiation of disciplinary proceedings. The president of the regional court is authorised to initiate proceedings ex officio, but may also, pursuant to Article 61a §1 of the Code of Administrative Procedure, issue a decision on refusal to initiate proceedings if he finds that the person filing the complaint is not a party within the meaning of the provisions of administrative procedure, without initiating proceedings ex officio, which will ultimately exclude the initiation of disciplinary proceedings against the mediator. In addition, it should be remembered that mediation participants have the right to choose a permanent, registered mediator in out-of-court mediation not initiated by the court. In such cases, neither the court nor the president of the regional court has access to information about any possible improper performance of duties by the mediator. The only entity authorised to submit reservations in the form of a complaint is the mediation participant, who is not granted the right to file a complaint under substantive law, which results in the lack of an effective mechanism for controlling the quality of mediation services. As a result, the participants’ reaction to improper provision of services

¹¹ Act of 14 June 1960 Code of Administrative Procedure consolidated text [2024] JoL 572, hereinafter ‘KPA’.

¹² The president of the district court which maintains the list of mediators in a particular court.

¹³ Case III SA/Wr 229/ 22 May 2023 Voivodeship Administrative Court in Wrocław <<https://orzeczenia.nsa.gov.pl/doc/96B2A1AB36>> accessed 3 May 2025.

may only be to refrain from using mediation again, and in the event of damage occurring – to seek liability for damages.

Secondly, the Polish legal system has a significant deficit of regulations concerning the administrative procedure in cases of disciplinary liability of a mediator for improper performance of duties. The current legal status does not provide for provisions guaranteeing the maintenance of procedural standards, especially in terms of the principle of confidentiality of mediation or the participation of the parties to mediation in disciplinary proceedings. The lack of developed regulations may lead to ambiguity and limited transparency in the process of considering violations of mediators' obligations. Additionally, a significant problem is the insufficient regulation of the legal framework related to the guarantee function of this process, in particular, with regard to the deadline within which a party may file a complaint after finding that the mediator has not performed their duties properly.

Thirdly, there is currently no requirement for mediators to comply with even arbitrarily selected codes of ethics or mediation standards that could serve as a point of reference for assessing their conduct in the context of reliability and proper performance of duties. Therefore, it is not clear what criteria should be used by presidents of regional courts when assessing the conduct of mediators. This leads to limiting the assessment solely to the procedural aspects of the regulation of mediation proceedings and the obligations arising therefrom, which is insufficient in the context of informal and limited regulation of mediation. It also constitutes a breach of the obligation under Article 4 of Directive 2008/52/EC to provide support to mediators and organisations providing mediation services in complying with codes of conduct. Introducing the obligation to comply with codes of ethics selected at the stage of entry on the list of mediators could significantly facilitate the assessment of the quality of mediators' work. This is particularly important in the light of the lack of a normative requirement for mediators in civil cases to guarantee proper performance of their duties, which indicates the need to standardise and specify ethical standards in this area.¹⁴

Fourthly, the evaluative nature of the norm providing for 'improper performance of duties' is crucial for the application of the sanction resulting from it. The observation of such a violation results in the automatic removal of the mediator from the register, without the need to prove its materiality or persistence. The literal interpretation of the provisions does not specify whether the breach must be of a repeated or serious nature, which implies that any breach of obligations may

¹⁴ In Poland, this requirement does not exist for civil mediators but only for criminal mediators, see: para 4(7) of the Act of 7 May 2015 Ordinance of the Minister of Justice on mediation proceedings in criminal matters [2015] JoL 716.

constitute grounds for removing the mediator from the register. This approach emphasises that this sanction may be imposed already for a single violation, which makes it particularly severe in the context of disciplinary liability of mediators.

Fifthly, the current system of sanctions for improper performance of duties is insufficient, being limited only to the removal of a mediator from the list, without the possibility of applying more lenient measures, such as warnings, reprimands, an obligation to train or participate in co-mediation. The lack of gradation of sanctions does not take into account the different degrees of violations, which makes it difficult to respond flexibly to cases that may have different degrees of severity, requiring a different approach. The introduction of a differentiated system of sanctions, including various degrees and forms of response, is crucial to increasing the effectiveness of supervision, improving the quality of services and motivating mediators to maintain high professional standards.

Sixthly, there are no legal regulations excluding or limiting the possibility of resubmitting an application for entry on the list of mediators after being removed from the register. In the Polish system, there is no single, nationwide register of mediators. Lists of mediators are maintained by the presidents of the regional courts for the area of jurisdiction of a given judicial district. Mediators have the right to apply for entry on the lists in all regional courts, but there are no regulations governing the obligation to transmit information about removal from the register in one court to other courts. Consequently, the removal of a mediator from the list in one court does not result in automatic removal from the lists kept by other courts. This is particularly incomprehensible, as the decision to enter a mediator on the list in one court constitutes the basis for entry in another court on the basis of the mediator's request.¹⁵ However, removal from the list in one court does not entail consequences in the form of removal in other courts.

The current defects in the regulation of the system of disciplinary liability of permanent mediators weaken its effectiveness, which translates into the apparent disciplinary liability of mediators. The current provisions are insufficient and not only do they not ensure the effectiveness of Article 4 of Directive 2008/52/EC in terms of establishing effective mechanisms for controlling the quality of mediation services, but they also do not meet the requirements of the Directive at all. Moreover, they do not grant mediation participants the right to file a complaint or initiate disciplinary proceedings, even though these participants are direct recipients and natural subjects of evaluation of the quality of the mediation ser-

¹⁵ Art 157d (4) of the Act of 27 July 2001 Law on the System of Common Courts consolidated text [2024] JoL 34.

vices provided.¹⁶ The lack of clear ethical standards, consequences for improper performance of duties or a system for exchanging information on entries and deletions from the list of mediators contributes to the inefficiency of the disciplinary liability system. As a result, the current system does not provide effective mechanisms for supervision over the quality of mediation services provided and does not hold mediators accountable for improper performance of their duties, which may lead to lower quality standards and confidence in mediation in Poland. Thus, it does not implement the recommendations that ‘where mediators breach a code of conduct, member states and mediation stakeholders should have in place appropriate complaints and disciplinary procedures’.¹⁷

III. MODELS OF MEDIATOR’S DISCIPLINARY LIABILITY FROM A COMPARATIVE LEGAL PERSPECTIVE

A comparative analysis of the legal regulations concerning the submission and consideration of complaints against mediators within the framework of their disciplinary responsibility reveals a significant diversity of legal and organisational approaches in the Member States of the European Union. This diversity results from different structures, procedures and methods of transposing Article 4(1) of Directive 2008/52/EC.¹⁸ The present article distinguishes three models of handling complaints against mediators within the framework of their disciplinary responsibility: centralised, decentralised and hybrid, which are the effects of the integration of similar legal solutions in force in the EU. The aim of the analysis is to show the diversity of approaches to the disciplinary liability of mediators in the perspective of different experiences and the design of quality control mechanisms for mediation services provided in EU Member States.¹⁹

¹⁶ In Poland, it is also not possible to fill in evaluation questionnaires after a mediation, although a model of such questionnaires is available, see for example: European Commission for the Efficiency of Justice (CEPEJ) ‘Mediation Development Toolkit on Ensuring Implementation of the CEPEJ Guidelines on Mediation. Standard mediation forms’ (CEPEJ 4 December 2018) 37–38 < www.coe.int/en/web/cepej/cepej-work/mediation > accessed 6 May 2025.

¹⁷ The European Commission for the Efficiency of Justice (CEPEJ) ‘Better Implementation of Mediation in The Member States of The Council of Europe. Concrete Rules And Provisions’ (CEPEJ 7 December 2007) 19 <<https://rm.coe.int/16807475b6>> accessed 5 May 2025.

¹⁸ See: Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market [2005] OJ L98/16; Jędrzej Maśnicki, ‘Metody transpozycji dyrektywy’ (2017) 8 Europejski Przegląd Sądowy 4.

¹⁹ To understand the philosophy behind the initial creation of the disciplinary procedure with standards of conduct as well as the specific procedures that were adopted in Florida in the US, which was the first state court system to recognise the importance of including a disciplinary procedure

The first of the distinguished models, referred to as centralised, is characterised by supervision over mediators exercised by a central body – the ministry of justice of a given country.²⁰ Under this model, the ministry is responsible for maintaining a register of mediators, supervising their activities, considering complaints and imposing sanctions for breaches of obligations. The most classic form of this model can be found in the Czech Republic, with similarities also present in Italy and Slovenia. In the centralised model, the list of disciplinary misconduct is usually clearly defined in the act²¹ or results from the rules and regulations, as well as codes of professional ethics in force in mediation centres.²² Failure to comply with these regulations will result in disciplinary liability for the mediator. The right to file complaints is granted to participants in mediation, and complaints are lodged with the appropriate ministry body responsible for the supervision and registration of mediators.

Disciplinary proceedings in this model are carried out in accordance with administrative provisions,²³ which, due to their universal nature, do not take into account the specifics of the mediation procedure or the functioning of mediators in the registers. Alternatively, in some countries, such as Slovenia, the provisions of the regulation governing mediation are applied, which allows for the procedures to be adapted to the specifics of mediation. Under the disciplinary procedure in Slovenia, the complaint is sent to the mediator with a 30-day deadline for response, and then it is forwarded to the Mediator Supervision Commission, which assesses the compliance of the proceedings with the regulations and ethical principles.²⁴ If violations are found, the Commission requests the Minister to impose disciplinary sanctions. This model is, therefore, distinguished by a diverse, though not very extensive, catalogue of sanctions, including, among others, a written admonition,²⁵ warning,²⁶ suspension,²⁷ and in the event of serious or repeated breaches

in mediator misconduct proceedings, see: Sharon Press, 'Mediator Ethical Breaches: Implications for Public Policy' (2014) 6 *Arbitration Law Review* 107 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464108> accessed 8 May 2025.

²⁰ See: para 13 of Act 202/2012 Sb zákon o mediaci (CZ), hereinafter 'Czech Mediation Act 2012'; Art 3 of Decreto 23 luglio 2004, n. 222 (IT) hereinafter 'Italian Decree 2004'; Art 1(5) of Pravilnik o izvajanju mediacije po Družinskem zakoniku Uradni list RS, št 76/19 (SI), hereinafter 'Slovenian Mediation Rules 2019'.

²¹ See: para 26 Czech Mediation Act 2012.

²² Art 16(4) of Decreto Legislativo 4 marzo 2010, n. 28 (IT).

²³ See: para 42 of Act Zákon č. 500/2004 Sb Zákon správní řád (CZ).

²⁴ Art 36, 37 of the Slovenian Mediation Rules 2019.

²⁵ See: para 22 of the Czech Mediation Act 2012.

²⁶ Art 38 of the Slovenian Mediation Rules 2019.

²⁷ Art 4(4) and (5) of the Italian Decree 222.

of duties or in the event of a disciplinary sanction being imposed on the mediator by the mediation centre to which he belongs – by removal from the register.²⁸

The centralised model is particularly advantageous in countries where lists of mediators are not dispersed and are managed by one central body. In this model, mediators are supervised by a central body that ensures uniformity of standards, monitors the quality of services and enforces ethical and professional standards. This solution promotes transparency of activities, which is crucial for maintaining public trust and credibility of mediators. However, in order to effectively implement this model, it is necessary to adapt disciplinary regulations and procedures to the specific nature of mediation, ensuring the protection of its principles, the interests of participants and fair and effective consideration of complaints and control of violations based on specific assessment metrics resulting from particular codes of ethics or standards of mediators' work.

The second of the mentioned models, the decentralised one, takes into account the integration of regulations in force in, among others, Latvia, the Netherlands and Spain, and is characterised by the lack of a central supervisory institution. Supervision over the proper performance of duties by mediators is entrusted to private and autonomous entities. In Latvia, this function is performed by the Council of Certified Mediators, which supervises the quality of mediation by reviewing complaints against certified mediators.²⁹ In the Netherlands, this responsibility lies with the independent foundation MfN, which manages the register of mediators and upholds the professional standards, among others, by monitoring the quality of services and handling complaints under disciplinary responsibility. In Spain, disciplinary supervision is carried out by mediation centres, which control compliance with quality standards of mediators' work,³⁰ with the Ministry of Justice exercising only general supervision.

In the presented model, mediation participants have the right to file complaints against the mediator and the procedure for their consideration is regulated in detail in the relevant rules and regulations, which guarantee their quick consideration

²⁸ For example in Romania, in addition to these sanctions, there is a fine of up to 500 Lei Romanian, see: Nicoleta E Buzatu, 'The responsibility of the mediator' (2013) 4 AGORA International Journal of Juridical Sciences 10 <<https://univagora.ro/jour/index.php/aijjs/article/view/849/197>> accessed 7 May 2025.

²⁹ Art 25(4) Mediācijas likums 'Latvijas Vēstnesis', Nr 2014/108.1 (LV), hereinafter 'Latvian Mediation Law 2014'.

³⁰ Art 5(3) Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles (ES), hereinafter 'Spanish Mediation Act 2012'.

and compliance with the key principles of mediation, including confidentiality.³¹ Complaints may concern breaches of statutory obligations, mediation principles or professional ethics by a mediator,³² and may even be the result of ‘dissatisfaction with their work’ as a mediator.³³ Persons designated by institutions supervising the quality of mediators’ work are appointed to consider complaints. This model is also distinguished by a diverse catalogue of sanctions.

In Latvia, if the complaint is found to be justified and a material violation of the regulations governing the activities of certified mediators or professional ethics standards is found during disciplinary proceedings, the mediator’s certificate expires.³⁴ In the Netherlands, the consideration of a complaint may result in the imposition of sanctions in the form of a reprimand, suspension of registration or removal of the mediator from the register. These decisions may be appealed against to the Minister of Justice and then to court.³⁵ In addition, the complainant has the possibility to submit a complaint to the Independent Disciplinary Commission of the Disciplinary Mediators Foundation (STM), responsible for disciplinary jurisdiction over affiliated mediation institutions. In Spain, the mediation institution to which the mediator belongs may also be held liable for failure to fulfil the obligations arising from the mediation function entrusted to the mediator.³⁶

This model involves entrusting liability for the quality of mediation services exclusively to autonomous, specialised entities, excluding the Ministry of Justice. In order to ensure transparency, dedicated complaint-handling procedures are available to participants in mediation processes. Despite its numerous advantages, this model may have limitations, such as the lack of direct control and supervision by public institutions. Private supervision of mediation may reduce the incentive to maintain high standards and enforce sanctions, especially when the primary goal is to protect the mediation centres’ own reputation, their priorities and different interpretations for breaches of the same duties.³⁷ However, this model may prove more appropriate in countries where there are scattered registers of mediators and different institutions maintain separate lists, formulating their own standards and obligations. However, the effectiveness of such an approach depends on the

³¹ See: Art 4(4.1) (Complaints procedure MfN register, 2025) <https://mfregister.nl/content/uploads/Klachtenregeling_2025.pdf> accessed 3 May 2025, hereinafter ‘Complaints procedure MfN 2025’.

³² Art 13 Latvian Mediation Law 2014.

³³ Art 1(d) Complaints procedure MfN 2025.

³⁴ Art 22(1) Latvian Mediation Law 2014.

³⁵ Art 22 (3) and (4) Latvian Mediation Law 2014.

³⁶ Art 14 Spanish Mediation Act 2012.

³⁷ Jonathan Crowe, ‘Mediation Ethics and the Challenge of Professionalisation’ (2017) 29 *Bond LR* 5, 8 <www.austlii.edu.au/au/journals/BondLawRw/2017/2.pdf> accessed 7 May 2025.

obligation of mediators to comply with established norms and standards in order to ensure consistency of service quality despite the decentralisation of the system.

The third of the distinguished models, the hybrid one, is the result of the integration of solutions functioning, among others, in Belgium, Austria, Lithuania and Greece. It is characterised by the participation of specialist bodies established on the basis of legal acts, such as the Disciplinary and Complaints Committee in Belgium,³⁸ State Guaranteed Legal Aid Service with the Mediators' Work Evaluation Commission in Lithuania,³⁹ and bodies appointed by the Minister of Justice, e.g., the Advisory Council for Mediation in Austria⁴⁰ or the Central Mediation Commission in Greece, with a functioning Ethics and Disciplinary Control Commission.⁴¹ These entities supervise, create regulations, receive complaints, conduct proceedings and impose sanctions or issue opinions⁴² for the Minister of Justice regarding disciplinary liability of mediators.

Mediation participants have the right to file complaints against mediators for disciplinary offences that may result from actions or omissions that violate obligations arising from laws and ethical codes in Belgium,⁴³ Code of Ethics for Accredited Mediators in Greece⁴⁴ or obligations arising from the European Code of Conduct for Mediators in Lithuania.⁴⁵ An important guarantee solution is to grant mediation participants the right to file a complaint within three years from the moment of the breach of obligations by the mediator in Belgium⁴⁶ and two years in Greece.⁴⁷ The procedure for handling complaints is specified in detail in the rules and regulations, e.g., in Belgium, where a five-page complaint form is attached to the regulations⁴⁸ or in the Act, as in Greece, in the section on 'disci-

³⁸ Art 1727 *Gerechtelijk Wetboek* 1967 (BE).

³⁹ Art 5(1) Lietuvos Respublikos civilinių ginčų taikinamojo tarpininkavimo įstatymo Nr. X-1702 pakeitimo įstatymas 2017 (LT), hereinafter 'Lithuanian Mediation Act 2017'.

⁴⁰ See: para 4 and 5 *Zivilrechts-Mediations-Gesetz*, BGBl I Nr 29/2003 (AT), hereinafter 'Austrian Mediation Act 2003'.

⁴¹ Art 10(1) Νόμος 4640/2019 Διαμεσολάβηση σε αστικές και εμπορικές υποθέσεις ΦΕΚ Α 190/30.11.2019 (GR), (Law 4640/2019 Mediation in civil and commercial matters) hereinafter 'Greek Mediation Law 2019'.

⁴² See: para 14 *Austrian Mediation Law* 2003.

⁴³ Art. 1727(2) *GERECHTELIJK WETBOEK* 1967 (BE) and Art 21(2) *Règlement de procédure de la Commission disciplinaire et de traitement des plaintes du 29 septembre 2020* (BE), hereinafter 'Rules of Procedure of the Disciplinary 2020'.

⁴⁴ Art 17(b)(1) *Greek Mediation Law* 2019.

⁴⁵ Art 4(3) *Lithuanian Mediation Law* 2014.

⁴⁶ 21(1) *Rules of Procedure of the Disciplinary 2020*.

⁴⁷ Art 17(c)(1) *Greek Mediation Law* 2019.

⁴⁸ See: Art 8(1) *Rules of Procedure of the Disciplinary 2020*.

plinary law'.⁴⁹ The hybrid model is also characterised by the widest range of sanctions of all models, including warnings, reprimands, the obligation to complete an internship, suspension, and removal from the list of mediators. In Austria, after obtaining the opinion of the Mediation Commission, the Minister of Justice may remove a mediator from the register if, despite a warning, the mediator grossly or repeatedly violates his or her obligations.⁵⁰ In Belgium, the Disciplinary Commission may impose a warning, a reprimand, an obligation to complete an internship or order the mediator to practice only in co-mediation, as well as suspend the mediator for up to one year or withdraw the registration.⁵¹ In Lithuania, upon detection of violations, the Commission may issue a warning, publish a public warning or remove a mediator from the list.⁵² In Greece, disciplinary sanctions include a written reprimand, temporary withdrawal of accreditation for up to one year, or permanent withdrawal.⁵³ In addition, the consequence of imposing a disciplinary sanction and deletion from the register is a three-year ban on re-entry.⁵⁴ Additionally, each country has an appeals procedure in which the final instance is court proceedings.

The hybrid model constitutes an extremely procedurally extensive and comprehensive form of disciplinary responsibility, integrating mechanisms that ensure effective and fair handling of complaints. It is characterised by completeness and flexibility of procedures, enabling the adaptation of actions to the specifics of mediation, along with the determination of the effects of imposed disciplinary sanctions. In addition, this system provides for an extensive gradation of sanctions, ensuring proportionality of penalties and a precise response to breaches of duties. This model enables effective handling of complaints, prevention of breaches and ensuring transparency, reliability and ethics of the mediation process. It is the foundation of a high-standard mediation system, protecting the interests of participants and building trust in mediation as a dispute resolution tool.

IV. CONCLUSION

In the Polish legal system, mediation participants do not have the right to file complaints against mediators in the event of improper performance of their duties.

⁴⁹ Art 17 Greek Mediation Law 2019.

⁵⁰ Para 14 Austrian Mediation Law 2003.

⁵¹ Art 21(1) Rules of Procedure of the Disciplinary 2020.

⁵² Art 26(1) Lithuanian Mediation Law 2014.

⁵³ Art 17 Greek Mediation Law 2019.

⁵⁴ Art 26(4) Lithuanian Mediation Law 2014.

In practice, rarely filed complaints may only indirectly contribute to the initiation of disciplinary proceedings by the presidents of regional courts *ex officio*, thus performing a quasi-disciplinary function in relation to mediators. However, the lack of separate procedural regulations regarding the handling of complaints constitutes a significant gap in the legal system, which limits the effectiveness of supervision over the quality of mediation services.

In order to ensure a high standard of quality of mediation services, it is necessary to introduce a control mechanism based on a complaints procedure, focused on disciplinary liability of mediators for improper performance of their duties. Such a system not only performs a sanctioning function but also supports the proper functioning of mediation, ensuring the professionalism of mediators and building the parties' trust in the mediation process. Developing effective and transparent procedures encourages adherence to high ethical and professional standards. It also enables early detection of and response to potential violations. In addition, the complaints procedure has a protective and preventive role at the same time, performing the functions of guarantee and confidentiality,⁵⁵ contributing appropriately to protecting the interests and sense of security of both the parties and the mediators, eliminating irregularities and future violations, as well as building trust in mediation and the mediator. A well-organised complaints system helps maintain high ethical and professional standards, which directly translates into the quality of mediation services provided and the credibility of the mediation procedure itself.

The effectiveness of the institution of complaints against a mediator depends on the appropriate shaping of the disciplinary liability system, which fits into the framework of effective mechanisms for controlling the quality of mediation services provided. In centralised models, supervisory bodies must have clearly defined competences and procedures enabling complaints to be dealt with quickly and effectively, while maintaining the confidentiality and autonomy of the mediators' work. Hybrid models combining elements of decentralisation and centralisation may be an optimal solution, provided that a balance is maintained between the independence of mediators and the effectiveness of supervision. The selection of the appropriate model for a specific legal system should result from the specificity and details of legal regulations on mediation, the status of the mediator and the maintenance of the register of mediators in a given country. The formulated models may only serve as a reference point for designing or amending regulations, indicating potential directions of changes in the standards of quality control of mediators' work. However, the implementation of consistent,

⁵⁵ On the function of disciplinary responsibility, see: Radosław Giętkowski, *Odpowiedzialność dyscyplinarna w prawie polskim* (Wydawnictwo Uniwersytetu Gdańskiego 2013) 51–52.

transparent complaint procedures, including a catalogue of disciplinary sanctions enabling mediation participants to submit complaints, is crucial for building public trust and improving the quality of mediation services. Thus, the harmonisation of regulations and the consistent implementation of quality control mechanisms for the mediation services provided may contribute to ensuring the full implementation and effectiveness of the objectives arising from Article 4 of Directive 2008/52/EC.

The determination of which of the outlined models of mediators' disciplinary liability would be the most appropriate for the Polish legal system cannot be undertaken in abstraction from the broader normative framework. As a preliminary step, it is imperative to establish a coherent and systemically regulated status of mediators within Polish law. Only upon this normative foundation may a comprehensive and effective system of disciplinary accountability be developed. Such a framework cannot be introduced in the form of piecemeal amendments, by superimposing disciplinary provisions onto the existing, fragmented regulations governing both permanent mediators and ad hoc mediators. A fragmented and incremental approach of this kind would constitute a merely formal exercise, lacking both substantive coherence and the capacity to ensure the quality of mediation services or to foster public trust in the institution of mediation. Consequently, the point of departure must be the harmonisation of the legal status of mediators, encompassing their qualifications, duties, and ethical obligations. Only thereafter should a disciplinary liability regime be constructed, designed to be transparent, proportionate, and normatively consistent. The prospective trajectory of reform may draw upon one of the three comparative models discussed – centralised, decentralised, or hybrid – contingent upon the legislative choices adopted with regard to the regulation and revision of the status of both permanent and ad hoc mediators.

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SETTLEMENTS AND OTHER AGREEMENTS CONCLUDED BEFORE A MEDIATOR

Abstract

The development of the use and awareness of civil (business, family) mediation in Poland over the last 20 years of its functioning in the Code of Civil Procedure has shown the multitude of situations that can be encountered in mediated disputes. This raises doubts as to whether the current legal framework of Polish substantive law, regulating the contract of settlement, and procedural law referring to a court settlement and settlement agreement concluded before a mediator, exhausts all the possibilities for unanimous arrangements available to the parties in mediation. It is further influenced by, inter alia, the basis for conducting mediation, the interests of the parties to be reflected in the agreement concluded before a mediator, a legally determined possibility to modify parties' legal relations, or a form of declaration of will prescribed by law. The article includes an analysis of the above problems, selected by the authors, in light of applicable law, case law and legal texts. It leads to the question whether, at this stage of the development of mediation in Poland, a new normative concept – a mediated settlement agreement should be considered.

KEYWORDS

mediation, settlement agreement, court settlement, mediator, civil proceedings

SŁOWA KLUCZOWE

mediacja, ugoda, ugoda sądowa, mediator, postępowanie cywilne

I. INTRODUCTION

In civil (business, family) mediation, if the parties reach a consensus on resolving their dispute, the content of the agreement is reflected in the settlement agreement concluded before a mediator. However, the multitude of situations that can be encountered in mediated disputes raises doubts as to whether the use of the term ‘settlement agreement’ exhausts all possibilities of the parties’ unanimous arrangements made in mediation. For the purposes of this article, the authors assume that the scope of the legal term ‘settlement agreement concluded before a mediator’, referred to, e.g., in Article 183¹⁵ § 1 of the Code of Civil Procedure,¹ includes all such parties’ arrangements regarding the mediated dispute.

Many factors influence the scope and effectiveness of declarations of will made in an agreement concluded before a mediator. These include in particular:

- the basis for conducting mediation (court decision to refer the parties to mediation and/or mediation agreement),
- the interests of the parties to be reflected in the agreement concluded before a mediator,
- a legally determined possibility to modify parties’ legal relations, being the basis for the agreement settling the dispute,
- a form of declaration of will prescribed by law.

The above stimulates to join the discussion on the need to determine the relationship between the normative concepts of a settlement agreement concluded before a mediator under Article 183¹⁵ § 1 of the Code of Civil Procedure and a settlement agreement under Article 917 of the Civil Code.² Unquestionably, a settlement agreement provided by the civil substantive law is a universal tool for resolving disputes, but when it is confronted with mediation, further questions arise.

¹ Code of Civil Procedure of 17 November 1964 [2024] JoL [Journal of Laws] 1568, as amended.

² Civil Code of 23 April 1964 [2024] JoL 1061, as amended.

Whether and to what extent, in a settlement agreement concluded before a mediator, the parties can regulate other legal relations than those at their disposal, e.g., in divorce cases, i.e., when the nature of the court's decision is constitutive. Why does a settlement agreement concluded before a mediator not always end the dispute, but can constitute the basis for further actions by the parties or the court? This leads to the issue of whether, in light of the development of mediation over the last 20 years of its functioning in the Code of Civil Procedure, a need has arisen to introduce a new normative concept – a mediated settlement agreement.

The authors' considerations were based on the analysis of legal acts (formal-dogmatic method), legal texts (non-reactive method) and the study of case law.

II. MEDIATION AS A UNIVERSAL METHOD FOR RESOLVING DISPUTES

Mediation, since its introduction to the Code of Civil Procedure in 2005, has evolved from a rarely used alternative to court proceedings to an increasingly acceptable and recognised method of dispute resolution. Civil procedure increasingly emphasises various ways of resolving a dispute – primarily under the general directive of Article 10 of the Code of Civil Procedure, which includes court settlement and mediation.³ Additionally, in 2023, conversion, i.e., submitting a pending dispute before a state court to an arbitration court was introduced under Article 1161¹ of the Code of Civil Procedure.⁴

Recently, noticeable attempts to introduce conciliation alongside mediation could be observed, although the concept of conciliation does not appear in Polish statutory law. It seems that the impulse for such practice could have been the Rules of Court and Procedure before the Arbitration Court at the General Counsel to the Republic of Poland,⁵ which use both concepts. § 50 section 3 of the Rules – 'Conducting mediation' indicates: 'The mediator does not resolve the dispute between the parties, but tries to support the parties in an impartial and independent manner in the negotiations they conduct', while in accordance with § 54 section 1 of the Rules, 'the purpose of the conciliation procedure is for the

³ See Anna Kalisz, Adam Zienkiewicz, 'Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)' [2021] Państwo i Prawo 10, 90.

⁴ See Marcin Dziurda, 'Art. 1161(1)' in *Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023* (Wolters Kluwer Polska 2023), accessed via LEX.

⁵ The latest, unified version as of 16 September 2022 is available at: <<https://www.gov.pl/attachment/b927511c-97eb-46ed-8a3d-9c779cf9e835>> accessed 22 October 2025.

Conciliator to issue a non-binding position for the parties, containing a proposal to resolve the dispute'. Such a distinction could be found in the doctrine of law, which also indicates practical problems it may create.⁶ At the same time, the possibility of the interchangeable use and equivalence of those terms were raised.⁷ This relates to the division of mediation, introduced by Leonard L Riskin: (1) evaluative mediation, in which the mediator can communicate their opinions and suggestions regarding the resolution of the dispute and (2) facilitative mediation, in which the role of the mediator is limited to moderating the discussion and supporting communication between the parties, without going into the merits.⁸ It seems that if mediation is understood in this way, the division between mediation and conciliation is unnecessary.

Since 2018, this distinction has been put to an end worldwide by the amended UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.⁹ The term 'conciliation' was replaced by the term 'mediation', supporting the position on their equivalence in favour of 'mediation', adapting to the current practice in order to contribute to the popularisation of this instrument.¹⁰

As far as the Polish Code of Civil Procedure is concerned, this distinction ceased to be relevant in 2016 with the introduction of Article 183^a which *expressis verbis* allows the mediator to use various methods aimed at amicable resolution of the dispute, including supporting the parties in formulating their settlement proposals, and even non-binding indication of manners for settling the dispute upon the parties' joint request.¹¹ At the stage of legislative works, the proposed amendment gave rise to numerous comments,¹² but ultimately it stayed in the amended Code

⁶ See Robert B Davidson, 'International Mediation Basics' in Rufus V Rhoades, Daniel M Kolkey, Richard Chernick (eds), *Practitioner's Handbook in International Arbitration and Mediation* (2nd edn, JurisNet, LLC 2007) 451.

⁷ See Henry J Brown, Arthur L Marriott QC, *ADR Principles and Practice* (2nd edn, Sweet & Maxwell Limited 1999) 127.

⁸ See Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' [1997] *Harvard Negotiation Law Review* 1, 7, 23; see also Ewa Gmurzyńska, '9.2.1. Mediacja facylitatywna i mediacja ewaluatywna (ocenna)' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024) 179–184, Adam Zienkiewicz, *Studium mediacji. Od teorii ku praktyce* (Wydawnictwo Difin S.A. 2007) 173–175.

⁹ Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_book_rev.pdf> accessed 22 October 2025.

¹⁰ See footnote 2 on p 56 of the Model Law.

¹¹ See Małgorzata Sekuła-Leleno, 'Mediacja jako nowoczesny sposób rozwiązywania sporów - analiza zmian wprowadzonych z dniem 1.01.2016 r.' [2016] *Rejent* 8, 93.

¹² See Cezary Rogula, 'Nowy kształt postępowania mediacyjnego w świetle zmian Kodeksu postępowania cywilnego' in Barbara Jelonek-Jarco, Rafał Kos, Julita Zawadzka (eds), *Usus magister*

of Civil Procedure. Thus, the Code of Civil Procedure, which does not contain a legal definition of mediation, opted for a broad understanding of this term, instead of distinguishing between mediation and conciliation.

In view of the above, there is no justification for perceiving informatory meetings, provided for in Article 183⁸ § 4 of the Code of Civil Procedure, as judicial conciliation, i.e., conducting settlement talks also by professionally active judges, who *ex lege* cannot be mediators, as stipulated by Article 183² § 2 of the Code of Civil Procedure. Informatory meetings serve to present methods of resolving disputes available to the parties other than obtaining a court decision,¹³ but do not introduce a new method used by a judge or any other person. Such an interpretation – an informatory meeting as a basis for conducting conciliation by judges, presented primarily by the Polish Section of the European Association of Judges for Mediation GEMME¹⁴ is, in the authors' opinion, incorrect, especially since the meaning of the term mediation in the Code of Civil Procedure includes conciliation.

Thus, when it comes to non-adjudicatory methods of resolving a dispute, the Polish Code of Civil Procedure recognises: (1) a call for a pre-trial settlement, (2) a court settlement and (3) mediation. Due to the fact that the Code of Civil Procedure does not contain a legal definition of mediation, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters¹⁵ may provide additional help. Article 3 letter a) of the Directive broadly defines mediation¹⁶ as ‘a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator’.

Such a general definition reflects the interests of the parties that may be related to a given dispute. These may include, among others, the interests:

- recognised by substantive law, remaining at the disposal of the parties, e.g., a claim for payment for a service provided,

est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi, (Wydawnictwo C.H. Beck Sp. z o.o. 2016), 721–722.

¹³ See Ewa Stefańska, ‘Art. 183(8)’ in Małgorzata Manowska (ed), *Kodeks postępowania cywilnego. Komentarz aktualizowany*. Vol I. Art. 1–477(16), (LEX/el. 2022).

¹⁴ See <<https://polska.gemmeeurope.org/>> accessed 22 October 2025.

¹⁵ [2008] OJ L 136/3, as amended.

¹⁶ See Rafał Morek, ‘V. Definicja pojęcia “mediacja”’ in Paweł Grzegorzcyk, Karol Weitz (eds), *Europejskie prawo procesowe cywilne i kolizyjne* (Wydawnictwo Prawnicze LexisNexis 2012) accessed via LEX.

- recognised by substantive law, remaining at the disposal of the parties, with the statutory requirement to observe a prescribed form of declarations of will, e.g. division of marital assets, including real estate,
- recognised by substantive law, not remaining at the disposal of the parties, but which can be modified by a joint procedural motion specifying the contents of a constitutive court decision, e.g. the expectation of no-fault divorce,
- other interests, not recognised by substantive law and not subject to procedural protection, e.g. mutual expectation of keeping the house clean and tidy.

It should also be stated that concluding a settlement agreement does not have to be equivalent to the parties' reconciliation, except for the legal protection of personal interests, where a mediated agreement may include an apology.

Moreover, the scope of the agreement concluded before a mediator also refers to the basis on which mediation may be conducted, as provided for in Article 183¹ § 2 of the Code of Civil Procedure. According to this criterion, a distinction is made between contractual (out-of-court) mediation – conducted on the basis of a mediation agreement, and court-annexed mediation – conducted on the basis of a court decision referring the parties to mediation.¹⁷ Furthermore, the amendments to Article 183¹³ § 2 and Article 183¹⁴ § 2¹ of the Code of Civil Procedure enacted in 2023 allow claims not covered by the lawsuit, as well as claims covered by different court proceedings, to be included in the settlement agreement concluded before a mediator.¹⁸ Because of the above-mentioned issues, there is also a hybrid form of mediation that may include both court-annexed and contractual mediation. Therefore, the possible situations are as follows:

- court-annexed mediation: the subject matter of mediation is the same as that of the court proceedings in which the court decision referring the parties to mediation was issued,
- contractual mediation:
 - there are no court proceedings pending within the scope of the subject matter of mediation specified by the parties (this includes a mediation clause obliging the parties to undertake a pre-trial mediation attempt), or
 - the parties decide to conduct mediation within the scope of the subject matter of one or more court proceedings in which court decisions referring the parties to mediation were not issued,

¹⁷ See Ewa Gmurzyńska, '9.2.5. Mediacje sądowe i mediacje umowne' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024) 192–194.

¹⁸ See Magdalena Skibińska, *Mediacja po reformie KPC* (LEX/el. 2023).

- mixed mediation: the court decision referring the parties to mediation was issued, but during the talks, the parties decided to extend the subject matter of mediation to include other pending court proceedings or other claims and concluded a mediation agreement.

Each of the above types is currently widely used, including the situation where a mediation agreement refers solely to pending court proceedings. Such mediation has similar effects to court-annexed mediation (including reimbursement of the court costs under Article 79 of the Act of 28 July 2005 on court costs in civil cases).¹⁹ The indicated mediation types are also one of the factors that affect the permissible scope of the agreement concluded before a mediator and the degree of flexibility granted to the parties in formulating settlement provisions.

III. THE CONCEPT OF A SETTLEMENT AGREEMENT IN SUBSTANTIVE AND PROCEDURAL LAW

The Code of Civil Procedure does not contain a legal definition of a ‘settlement agreement concluded before a mediator’, as referred to in Article 183¹² § 2, Article 184¹⁴ § 1 or Article 183¹⁵ § 1. As a side note, in view of the wide use of means of distance communication in mediation, expressly permitted by Article 183¹¹ of the Code of Civil Procedure, the expression is rather outdated, as the parties may not be physically present next to a mediator. Fortunately, the use of postal services for the exchange of signed copies of settlement agreements concluded as a result of mediation,²⁰ e.g., as prescribed by Article 78 § 1 of the Civil Code, is widely accepted.

In light of the above, the new Article 183¹² § 2² of the Code of Civil Procedure, which introduces the possibility of submitting to the court a settlement agreement signed with a qualified electronic signature or electronically certified copy of the agreement, may be considered as the next step in the development of the use of mediation.

Due to the lack of a definition of a settlement agreement in the Code of Civil Procedure, the starting point for further considerations is substantive law²¹ – Article

¹⁹ Consolidated text: [2024] JoL 959, as amended.

²⁰ See Aneta Arkuszewska, ‘Sposoby i formy zawarcia ugody mediacyjnej w dobie pandemii COVID’ [2022] *Acta Iuridica Resoviensia* 1 (36), 15–17.

²¹ See Piotr Nazaruk, ‘Art. 917’ in Barbara Bajor and others, *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2024).

917 of the Civil Code, which recognises and defines a settlement agreement as a separate type of contract:

By the contract of settlement, the parties shall make mutual concessions within the scope of the legal relation existing between them for the purpose of setting aside uncertainty as to the claims arising from that relation or ensuring their performance or setting aside a dispute which exists or which might arise.²²

The key element (*essentialia negotii*) for a given agreement to be considered a contract of settlement within the meaning of substantive civil law involves mutual concessions. That has been repeatedly emphasised in legal texts²³ and case law.²⁴ Mutual concessions are assessed from the perspective of the parties' subjective perception of their terms and do not have to be uniform in their type, value, etc. or be equivalent, as long as they occur mutually. The circumstances of concluding the settlement agreement are sufficient to determine mutual concessions, they do not have to be precisely indicated in the text of the contract.²⁵ Thus, the Civil Code allows for a very broad interpretation of 'mutual concession' and recognises that they may be of either substantive or procedural nature (e.g., resigning from obtaining a court judgment protected with *res iudicata*).²⁶ A settlement agreement is not independent in the sense that, in order for it to be concluded, there must be a prior legal relation in which a dispute arose between the parties, including a dispute as to the existence or nature of this relation (e.g., whether the prior contract concluded between the parties is a franchise agreement or a contract for providing services). The parties are granted considerable freedom in shaping the settlement agreement, as long as it falls within the framework of freedom of contracting provided by Article 353¹ of the Civil Code, although Article 58 of the Civil Code (grounds for nullity of legal actions) should also be observed.²⁷

The subject of the settlement agreement may be any legal relation, regardless of the source of this relation [...] from the sphere of obligations, property, family, inher-

²² Translation based on the English version of the legal acts available at LEX.

²³ See Katarzyna Krziskowska, 'Art. 917' in Mariusz Fras, Magdalena Habdas (eds), *Kodeks cywilny. Komentarz*. Vol V. Zobowiązania. Część szczególna (art. 765–921(16)) (Wolters Kluwer Polska 2018), accessed via LEX.

²⁴ See, e.g., case I ACa 230/22 28 November 2023 Court of Appeal in Kraków (Sąd Apelacyjny w Krakowie), LEX No 3791209.

²⁵ See Katarzyna Krziskowska, 'Art. 917' in Mariusz Fras, Magdalena Habdas (eds), *Kodeks cywilny. Komentarz*. Vol V. Zobowiązania. Część szczególna (art. 765–921(16)) (Wolters Kluwer Polska 2018), accessed via LEX.

²⁶ See Przemysław Buczkowski, 'Ugoda w prawie cywilnym materialnym i procesowym – wady i zalety' [2010] *Przegląd Prawa Handlowego* 5, 39.

²⁷ See Krzysztof Falkiewicz, Magdalena Romatowska, 'Ugoda w postępowaniu mediacyjnym w sprawach cywilnych' [2012] *Temidium* 5, 24.

itance or labour relations, provided they are not excluded from the parties' disposal. The subject matter of the settlement agreement is all claims resulting from a given legal relation that is covered by the settlement agreement, and this settlement agreement is binding for the parties, with the proviso that it is possible to avoid its legal effects, based on the given circumstances.²⁸

The purpose of the settlement is to end the dispute and eliminate the uncertainty that has arisen between the parties. The parties should have no doubts with regard to the factual basis, as their declarations of will are to cause specific legal effects.

The settlement agreement as a legal action is subject to all provisions on the requirements for the effectiveness of declarations of will, general provisions on the methods of concluding a contract, the form of legal actions and defects of declaration of will, with the exception of avoiding the effects of an agreement concluded under the influence of error. The form of the settlement agreement is arbitrary; however, if a specific form is required for a specific legal action due to its subject matter, then the settlement agreement should also be concluded in such form.²⁹

From the perspective of substantive law, a settlement agreement is a contract, and therefore, it is binding until, e.g., it is effectively challenged.³⁰ The lawmaker's goal is to protect the durability of the settlement agreement,³¹ which was expressed in Article 918 of the Civil Code, which takes precedence over Article 84 of the Civil Code (error as to the content of legal action). This provision allows for freeing oneself from the legal consequences of a settlement agreement concluded under the influence of an error only if the error regarded the state of facts which both of the parties considered undisputable according to the settlement agreement's content, and the dispute or uncertainty would not have arisen had the parties known of the real state of affairs. Moreover, one may not free himself from the legal consequences of a settlement agreement due to having found evidence as to the claims being the subject matter of the settlement agreement, unless it has been concluded in bad faith. As indicated by the Court of Appeal in Szczecin: 'the causes of the defects of the declaration of will of the party concluding the settlement agreement must be clearly documented',³² and according to the judgment of the Court of Appeal in Poznań:

²⁸ Case III AUa 1338/19 15 July 2020 Court of Appeal in Gdańsk (Sąd Apelacyjny w Gdańsku), LEX No 3259795.

²⁹ Ibid.

³⁰ See case III PRN 66/72 13 October 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 602642.

³¹ See case II CSKP 2319/22 29 May 2024 Supreme Court of Poland (Sąd Najwyższy), LEX No 3719754.

³² Case I ACa 474/14 14 November 2014 Court of Appeal in Szczecin (Sąd Apelacyjny w Szczecinie), LEX No 1649299.

The one freeing himself from the consequences of a settlement agreement should submit appropriate statements in writing within one year of discovering the error, i.e. from the date of obtaining knowledge that the true state of affairs is different from the one unanimously recognised by the parties in the settlement agreement as unquestionable.³³

On the other hand, the Code of Civil Procedure provides for a settlement agreement concluded before a court (a court settlement), also without providing its legal definition. Undoubtedly, a court settlement is of a dualistic nature, i.e., in addition to the substantive element provided for by Article 917 of the Civil Code, there is also a procedural element, as the court settlement should have specific effects on the pending court proceedings.³⁴ However, a court settlement is closely linked to the legal concept of a settlement ability, which means that in a given category of disputes, legal provisions do not prohibit the conclusion of a court settlement (e.g. legal proceedings on the exclusion of a shareholder from a company do not have settlement ability).³⁵ Furthermore, a court settlement can be concluded only between the parties to a given court proceedings,³⁶ within the scope of their subject matter.

Since a court settlement is concomitantly a procedural action, it is being examined on the basis of Article 203 § 4 (grounds for the inadmissibility of withdrawal, relinquishing or limiting of a claim) and Article 223 § 2 (grounds for the inadmissibility of court settlement) of the Code of Civil Procedure. Furthermore, it should be clear from the content of a court settlement that it finally resolves the dispute in terms of the entire legal relation or a precisely indicated claim, taking into account the fact that its provisions should be capable of being enforced through enforcement proceedings.³⁷ The Court of Appeal in Białystok also indicated:

³³ Case I ACa 1416/17 4 December 2018 Court of Appeal in Poznań (Sąd Apelacyjny w Poznaniu), LEX No 2775956.

³⁴ See Marcin Białecki, 'Uгода zawarta przed mediatorem – charakter prawny' in Marcin Białecki, *Mediacja w postępowaniu cywilnym* (Wolters Kluwer Polska 2012), accessed via LEX, invoking Jerzy Lapiere, *Uгода sądowa w polskim procesie cywilnym* (Wydawnictwo PWN 1968). See also case V CSK 157/10 8 December 2010 Supreme Court of Poland (Sąd Najwyższy), LEX No 688708.

³⁵ See Dobrosława Tomzik, '1.2. Zdolność ugodowa a zdatność mediacyjna' in Cezary Rogula, Agnieszka Zemke-Górecka (eds), *Mediacja w praktyce mediatora i pełnomocnika* (Wolters Kluwer Polska 2021) 192.

³⁶ See Leszek Jantowski, 'Art. 917' in Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak (eds), *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2025).

³⁷ See Henryk Pietrkowski, 'Rozdział XI Uгода sądowa. Postępowanie pojednawcze. Mediacja' in *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* (Wolters Kluwer Polska 2024) 360.

If the parties' intention was to exclude some claims, or in other words, to cover only part of the claims resulting from this relation, they should unequivocally express such intention in the content of the settlement agreement, since the general rule is that the settlement agreement concerns the entire legal relation, i.e., all its elements, and not only particular claims.³⁸

As for freeing oneself from the substantive legal consequences of a court settlement, according to the Supreme Court's case law:

Freeing oneself from the substantive legal consequences of a court settlement after the final conclusion of the proceedings shall be made by means of a lawsuit to determine the non-existence of the court settlement (Article 189 of the Code of Civil Procedure). In such proceedings, the party may invoke defects in the declaration of will (Article 82 et seq. of the Civil Code) or demonstrate – by referring to the provisions of substantive law – that the court settlement as a legal action is invalid on the grounds indicated in Article 58 of the Civil Code.³⁹

Therefore, if the party, in the appeal against the court decision discontinuing the proceedings as a result of concluding a court settlement, invokes defects in the declaration of will provided by substantive law, this issue will require examination in light of the previous proceedings by the court examining the appeal or – in the event of the need to conduct complex evidentiary proceedings – by the court of first instance after the decision discontinuing the proceedings has been set aside.⁴⁰

The above deliberations lead to the main question posed by the authors: are the above regulations sufficient and consistent with the agreements that can be achieved in mediation?

IV. SETTLEMENT AGREEMENT CONCLUDED BEFORE A MEDIATOR

Referring to the basis of conducting mediation, while an analogy between the settlement agreement concluded before a mediator and the court settlement may be observed in court-annexed mediation, such a reference seems insufficient in the case of contractual or mixed mediation. First, in contractual or mixed media-

³⁸ Case I ACa 558/18 15 November 2018 Court of Appeal in Bałystok (Sąd Apelacyjny w Białymstoku, LEX No 2596549, see also case II CSK 375/17 12 April 2018 Supreme Court of Poland (Sąd Najwyższy), LEX No 2490618.

³⁹ Case V CKN 953/00 16 April 2002 Supreme Court of Poland (Sąd Najwyższy), LEX No 57200.

⁴⁰ Case II CZ 129/67 16 February 1968 Supreme Court of Poland (Sąd Najwyższy), OSNC 1968, No 8–9, item 158.

tion, the link between the subject matter, specified parties of the civil proceedings (which may not have been initiated) and the appropriate scope of a settlement agreement concluded before a mediator ceases to exist. People who use the services of the mediator indicate the issues they want to solve themselves, and, while mediating, it may turn out that other parties will join. Furthermore, not every interest that the parties have is protected by law (i.e., it cannot form a legally viable claim). Finally, mediation does not seem to fit in with the procedural concept of settlement suitability. Intra-organisational mediation is one of such instances,⁴¹ in which, procedurally speaking, a claim for exclusion of a shareholder from the company does not have settlement ability, whereas such disputes are increasingly resolved with the participation of a mediator.

Divorce mediation, conducted either on the basis of a court decision referring the parties to mediation (although divorce proceedings do not have settlement ability) or a mediation agreement, is an example of an agreement that, if any, has a minimal substantive law element but instead is, in its essence, a set of procedural motions regarding further (or planned) court proceedings.

The separation of the settlement concluded before a mediator from the regulations of substantive and procedural civil law has already occurred in criminal proceedings. Hence, the application of analogy to Articles 917 and 918 of the Civil Code has been limited, even if the content of such a settlement agreement may include redress, e.g., payment of a sum of money by the accused to the injured party, which is an enforceable obligation in civil law. It has been pointed out, however, that the concept of such a settlement agreement is broader and thus treating it exclusively in terms of civil law is impossible to align with the idea of restorative justice.⁴²

The authors claim that a civil law settlement agreement concluded before a mediator may be either a settlement agreement in the strict sense or a settlement agreement in the broad sense. A settlement agreement in the strict sense meets the requirements specified in Article 917 of the Civil Code and concerns legal relations remaining at the disposal of the parties, which they can modify by themselves. It may contain procedural elements, e.g., a motion for its approval by the court, and provisions on court costs in court-annexed mediation. It is effective *per se*, whereas the possibility of its approval by the court, also by issuing a writ of

⁴¹ See Przemysław Nawojski, Katarzyna Purc-Kurowicka, '3. Rodzaje sporów korporacyjnych na przykładach' in Agnieszka Zemke-Górecka, Cezary Rogula (eds), *Mediacja z udziałem przedsiębiorców. Zagadnienia praktyczne* (Wolters Kluwer Polska 2025).

⁴² See Cezary Rogula, Agnieszka Zemke-Górecka, 'Mediacja' in Mariusz Olęzałek (ed), *Praxis. Prawo karne procesowe dla sędziów, prokuratorów, obrońców i pełnomocników* (Wydawnictwo C.H. Beck Sp. z o.o. 2024) 201.

execution pursuant to Article 183¹⁴ of the Code of Civil Procedure, only facilitates the forced enforcement of the settlement agreement in the event of non-compliance with its provisions on a voluntary basis.

The settlement agreement, in the broad sense, also called by the authors a mediated memorandum of understanding, reflects the multitude of agreements that can be achieved in mediation. It may refer to mediation:

- concerning legal relations for which, although they are at the parties' disposal, the law requires a specific form of legal action to modify them, e.g., the law requires a notarial deed for the dissolution of co-ownership of real estate. Hence, unless the mediator is also a notary public, the settlement agreement in such instances contains:
 - an obligation to conclude a contract of specified content before a notary public, or
 - an obligation to conclude a court settlement of specified content that meets the requirement of a specific form of legal action, or
 - a joint procedural motion as to the way the court will regulate the legal relation
- concerning legal relations that are not at the parties' disposal, and a constitutive court ruling is necessary to change or terminate the legal relation, e.g., in a divorce case, the settlement agreement is a joint procedural motion of the parties as to how the court should proceed,
- concerning the interests of the parties that are not recognised by substantive or procedural law (e.g., indicating when a family member cleans the apartment).

The above distinction proves that it is possible to reach such agreements in mediation that may not meet the requirements of Article 917 of the Civil Code or procedural law (e.g., the settlement ability). Moreover, although it is not legally prohibited in light of Article 183¹⁴ § 2 of the Code of Civil Procedure, a mediated memorandum of understanding containing a joint procedural motion of the parties regarding further court proceedings does not require its approval by the court,⁴³ but should result in the court taking further necessary actions.

This leads to the conclusion that the settlement agreement concluded before a mediator goes beyond the existing legal framework of the substantive settlement agreement or the court settlement. Therefore, it may be justified to consider the introduction of separate provisions regulating a mediated settlement agreement. This is the authors' proposal as a contribution to further discussion, while

⁴³ See Rafał Morek, 'Ugoda zawarta przed mediatorem' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacja. Teoria i praktyka* (Wolters Kluwer Polska 2024) 326–327.

additionally recognising that such a next step is justified by the current stage of development of civil mediation in Poland.

First, this would allow for acknowledging the possible scope of a mediated settlement agreement, especially in the case of legal relations that are not at the parties' disposal, so far considered by many authors as incapable of being the subject matter of a settlement agreement.⁴⁴ Moreover, introducing the general possibility of including the parties' procedural motions in a mediated settlement agreement would also allow the parties to include withdrawal of a lawsuit. Currently, case law and scholars deny it,⁴⁵ hence, if the parties wish to discontinue the proceedings by withdrawing a lawsuit while simultaneously taking advantage of the benefits of mediation prescribed by law (such as a higher refund of the court fees), the settlement agreement must include, e.g., the plaintiff's obligation to submit a statement of withdrawal of the lawsuit, instead of including it in the agreement.

In addition, the authors support the postulate that a mediated settlement agreement should have legal effects also when the law requires a specific form of legal action.⁴⁶ It seems that in such a situation, the approval of a mediated settlement agreement by the court provides for sufficient means of control. In light of Article 183¹⁵ of the Code of Civil Procedure, the judiciary takes the position that a settlement agreement concluded before a mediator, even after its approval by the court, does not meet such a requirement.⁴⁷ This, in turn, means for the parties that, in such a situation, they must currently use one of the options indicated above in the case of legal relations that are at the disposal of the parties, but the law requires a specific form of legal action to modify them. This generates unnecessary additional time and costs for the parties, e.g., for notarial deeds. To make this postulate fully functional, it is also necessary to include in Article 183¹⁴ § 1 of the Code of Civil Procedure the prescribed time, e.g. 30 days, within which the court shall approve the mediated settlement agreement. Unfortunately, it is not included in the amendment to that provision that will come into force on 1 March 2026, as it leaves the current imprecise term 'without delay'.

⁴⁴ See Henryk Pietrzkowski, 'Rozdział XI Ugoda sądowa. Postępowanie pojednawcze. Mediacja' in *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* (Wolters Kluwer Polska 2024) 374.

⁴⁵ See case III PRN 23/72 10 May 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 7089; Tadeusz Ereciński, 'Art. 183(14)' in Paweł Grzegorzczak and others, *Kodeks postępowania cywilnego. Komentarz*. Vol II. Postępowanie rozpoznawcze (5th edn, Wolters Kluwer 2016), accessed via LEX.

⁴⁶ See Joanna Dominowska, 'Ugoda zawarta przed mediatorem a ugoda sądowa' [2018] *Przegląd Prawa Handlowego* 2018 6, 40.

⁴⁷ See case I CSK 2079/22 28 October 2022 Supreme Court of Poland (Sąd Najwyższy), LEX No 3515919, case I ACa 404/16 23 September 2016 Court of Appeal in Katowice (Sąd Apelacyjny w Katowicach), LEX No 2137014.

The authors also call for the clarification of the grounds on which the parties may 'revoke' their mediated settlement agreement. This need is particularly visible in cases of legal relations whose creation, change or termination requires a constitutive court ruling. Such settlement agreements concluded before a mediator are currently not sufficiently protected by either substantive law (including the qualified form of error under Article 918 of the Civil Code) or procedural law. At the same time, a mediated settlement agreement of that subject matter does not seem to require court approval. Instead, it needs further court proceedings based on the joint procedural motions, which subsequently should not be freely changed, modified or even revoked by the parties without a clearly prescribed legal basis.

The introduction of a separate regulation of the mediated settlement agreement may also fully take into account the conditions of conducting contractual mediation. If a motion for the court approval is filed, the court in such instance does not have any court files based on which it could verify what legal relation and what claims have been settled, as well as what mutual concessions have been made, which should certainly remain *essentialia negotii* of the mediated settlement agreement,⁴⁸ while maintaining the possibility for the court to examine them.

Finally, further extension of the newly regulated mediated settlement agreement may be considered. This may refer to currently questionable cases, such as concluding a mediated settlement agreement for the duration of mediation, which in a way may replace the court's decision on interim measures, or the possibility of concluding a mediated settlement agreement in enforcement proceedings. This seems to be a natural next step, after the amendments to Article 183¹³ § 2 and Article 183¹⁴ § 2¹ of the Code of Civil Procedure enacted in 2023 and taking into account the amendments to those provisions that will come into force on 1 March 2026, which do not relate to the issue raised above.

The framework of this article cannot provide an exhaustive answer to the question of whether and how to regulate a new mediated settlement agreement; therefore, it aims to indicate potential problems and issues for further discussion.

V. CONCLUSION

The growing use of mediation, which increasingly enters new areas of legal relations and the existence of various entities, allows for the presentation of the

⁴⁸ See Aneta Małgorzata Arkuszewska, '4. Uгода a porozumienie (pojednanie)' in Aneta Małgorzata Arkuszewska, Jerzy Plis (eds) *Zarys metodyki pracy mediatora w sprawach cywilnych* (Wolters Kluwer Polska 2014), accessed via LEX.

entire spectrum of what the parties can achieve as a result of their talks. The multitude of settlement agreements concluded before a mediator is a ground for further development of mechanisms that take into account, e.g., disputes without settlement availability or those requiring a specific form of legal action. Concomitantly, it shows the inadequacy of the currently functioning legal provisions, which do not reflect all the possibilities that may appear as a result of each type of mediation: court-annexed, contractual and mixed. This can even be considered an obstacle to the further development of mediation.

Twenty years ago, when mediation was introduced into the Code of Civil Procedure, there was hardly any awareness of the existence of contractual mediation, not to mention mixed mediation. Those two decades have allowed society to acquire new skills dedicated to this method of resolving disputes. Appreciation of this state of affairs should also be given to judges, who, by issuing decisions to refer the parties to mediation, acknowledged its potential. In that way, they often facilitate the discontinuation of court proceedings due to a concluded mediated settlement agreement, which has a much wider extent than settlement possibilities granted to judges by the Code of Civil Procedure.

Hence, the authors, taking into account the presented multitude of possible agreements concluded as a result of mediation, propose the next step – introducing a mediated settlement agreement that will adjust this type of contract to the reality of mediation.

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A DEMOCRATIC TOOLKIT HIDDEN IN MEDIATION: DIALOGICAL AND DISCURSIVE ROOTS OF MEDIATION AND DEMOCRACY

Abstract

Mediation has emerged as a socially significant practice whose relevance extends beyond legal efficiency to the cultivation of democratic attitudes, civic competencies, and cooperative forms of conflict management. This article argues that mediation can be understood as a micro-practice of deliberative democracy, embodying core democratic principles such as participation, equality of voice, autonomy, mutual recognition, and consensus-building through dialogue. Drawing on interdisciplinary scholarship in legal theory, political philosophy, and mediation studies, the analysis integrates discourse ethics, dialogical philosophy, and theories of procedural justice to provide a philosophically grounded account of mediation's normative significance. Rather than treating mediation as a merely technical alternative to adjudication, the article conceptualizes it as a communicative and relational practice through which individuals actively exercise democratic capacities. By situating mediation within a broader democratic framework,

the study highlights its potential to strengthen social capital, foster civic engagement, and contribute to democratic culture beyond formal political institutions.

KEYWORDS

mediation, mediator, democracy, equality, economy, discourse, dialogue

SŁOWA KLUCZOWE

mediacja, mediator, demokracja, równość, ekonomia, dyskurs, dialog

1. INTRODUCTION

Mediation has become an increasingly important institution in contemporary legal systems, not only as an alternative to adjudication but also as a practice that shapes how individuals manage conflict, negotiate meaning, and relate to one another. Its relevance extends far beyond legal efficiency. One can observe that mediation profoundly affects the attitudes, behaviours, and forms of cooperation. For this reason, mediation is not merely a technical procedure but a socially significant practice with implications for civic culture and democratic life.¹ Understanding these broader implications is essential for both legal scholars and practitioners, particularly at a time when democratic norms and civil discourse face mounting pressure in many societies.

Existing scholarship has already explored certain connections between mediation and democracy, including attempts to conceptualize mediation as a consensual or participatory process that mirrors democratic values.² Some authors emphasise the democratic ethos of mediation, while others analyse mediation through

¹ Srđan Šimac, 'Mediation as Generator of Change in Judicial System and Legal Profession in Santiago Madrid Liras', Kevin Brown & Emilio Navas Paús (eds), *Mediation across the Globe: Excerpts from the World Mediation Summit* (Cambridge Scholars Publishing 2018) 1–37.

² On different aspects of democracy and mediation see generally: Carrie Menkel-Meadow, 'Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity' (2005–2006) 12 *Disp. Resol. Mag.* 18; Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (John Wiley & Sons 2004); Robert A Baruch Bush & Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 *Ohio St. J. on Disp. Resol.* 1; Carrie Menkel-Meadow, 'The Lawyer's Role(s) in Deliberative Democracy' (2004) 5 *Nev. L.J.* 34; Katherine R Kruse, 'Learning from Practice: What ADR Needs from a Theory of Justice' (2004/2005) 5 *Nev. L.J.* 389; Jacqueline

the lenses of deliberation, empowerment, or civic participation. However, these reflections are often fragmentary, focused on isolated procedural aspects, or primarily normative in character. What remains underexplored is a systematic and philosophically grounded account of mediation as a micro-practice of deliberative democracy – an account that integrates legal doctrine with discourse ethics, dialogical philosophy, and theories of procedural justice. The present article seeks to fill this gap.

Our main argument is that mediation embodies the core principles that constitute deliberative democratic theory: participation, equality, autonomy, mutual recognition, and the pursuit of a justifiable agreement through dialogue. Mediation is, therefore, not simply compatible with democratic values; it actively implements them in ways that can strengthen social capital, and support democratic culture. By analysing mediation through this conceptual lens, we propose a model that understands mediation not merely as a dispute-resolution tool but as a normative practice through which individuals learn and exercise democratic competencies.

Theoretical and conceptual analysis offered by authors is grounded in interdisciplinary literature from legal studies, political philosophy, and mediation scholarship. We draw on the philosophical interpretation of discourse ethics (Habermas), dialogical thought (Buber, Tischner), and theories of procedural justice (Summers, Solum), while also engaging with doctrinal definitions of mediation and the lived experience of mediators. Our purpose is not to provide empirical data but to bridge normative theory with insights from mediation practice in order to articulate the democratic significance of mediation and its implications for legal and social theory.

The methodology adopted in this article is rather theoretical and conceptual, combining approaches from legal theory, political philosophy, and mediation studies. The analysis begins with a normative conceptual reconstruction of central democratic principles and examines their relevance outside the strictly political sphere. These principles are then interpreted with reference to philosophical concepts that appear most relevant to understanding the nature of mediation. In our view, they provide a useful interpretive framework for conceptualizing mediation as a communicative and relational practice. We also draw on doctrinal and scholarly definitions as well as procedural standards regulating mediation. This integrated methodological approach enables a multidimensional account of mediation as a democratic practice and ensures that the conceptual claims advanced here remain grounded in both philosophical reasoning and legal realities.

M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 *Notre Dame L. Rev.* 775.

2. DEMOCRACY AS A SET OF PRINCIPLES AND NORMATIVE FRAMEWORK FOR MEDIATION

Paraphrasing John Dewey's remark that 'society is one word but many things,' one may say the same of democracy.³ Democracy is a historically rich and conceptually diverse idea, discussed for more than two and a half millennia and interpreted through numerous political, institutional, and philosophical frameworks. Democracy is also difficult to define due to the various qualifiers associated with it, such as participatory, deliberative, procedural, social, radical, aggregative and so on.⁴ Given this conceptual ambiguity, we will move away from democracy's strictly political dimension and focus on the fundamental assumptions underpinning it. For the purposes of this article, it is, therefore, necessary to adopt a focused and coherent definition of democracy. One that is compatible with an examination of mediation as an interpersonal, dialogical practice.

The authors embrace the normative conception formulated by the Polish scholar Paweł Śpiewak. He identifies several core principles that capture the ethical essence of democratic systems.⁵ These include: (1) the promise of emancipation, grounded in the protection of individual freedom and the possibility of articulating one's needs and expectations; (2) transparency and justice, understood as the pursuit of the common good rather than the interests of state power; and (3) civic engagement, expressed in the active participation of individuals in dialogically constructed processes of public reasoning. According to this view, a political order is democratic when:⁶ (1) citizens have equal rights to express their views and take part in decision-making; (2) public debate precedes all decisions; and (3) individuals remain invested in political processes because these directly affect their interests. This normative framework captures what is most relevant for the present analysis: democracy understood as participation, equality, autonomy, and cooperative problem-solving.

This conception is compatible with sociological perspectives offered by Robert D Putnam, who emphasizes that democratic systems depend not only on

³ John Dewey, *Democracy and Education*, Pennsylvania State University, Electronic Classics Series, Jim Manis, Faculty Editor, Hazleton, PA 18202-1291; <<https://nsee.memberclicks.net/assets/docs/KnowledgeCenter/BuildingExpEduc/BooksReports/10.%20democracy%20and%20education%20by%20dewey.pdf>> accessed 1 December 2025.

⁴ *Encyclopedia Britannica*, 'Democracy' <<https://www.britannica.com/topic/democracy>> accessed 3 February 2025.

⁵ Paweł Śpiewak, *Obietnice demokracji* (Pruszyński i S-ka 2004) 27.

⁶ Marek Bednarz, 'Demokracja uczestnictwa i społeczeństwo informatyczne a szanse na przezwycięzenie nierówności społecznych' (2004), 4 *Nierówności społeczne a wzrost gospodarczy*, 139.

institutions but also on everyday practices that build social capital – trust, reciprocity, and civic cooperation.⁷ While Putnam does not offer a normative definition of democracy, his insights reinforce the idea that democratic life is sustained through interpersonal relations, communication, and collaborative engagement. These are precisely the kinds of interpersonal competencies that mediation helps cultivate.

By grounding democracy in Śpiewak's principled account and supplementing it with Putnam's sociological observations, this article adopts a definition that is both theoretically grounded and directly relevant to mediation. This approach avoids the need to navigate competing models such as radical, aggregative, or deliberative democracy. Although it should be emphasized that in deliberative theory the essence of democracy also lies in the process of deliberation, which involves considering and justifying various perspectives.⁸ Instead, it focuses on democracy as a normative order and a lived practice in which individuals participate as free and equal agents, engage in dialogue, and work toward solutions that respect both individual and collective interests. Such a perspective provides the conceptual bridge for understanding mediation as a micro-democratic practice. Mediation embodies the same commitments – participation, equality of voice, respect for autonomy, and the search for mutually justified solutions – that characterize democratic life in Śpiewak's framework. This concept, after all, aligns with the republican tradition and traces back to the ancient Greek model, where free citizens engaged in dialogue, persuasion, and argumentation to determine what was beneficial for all. At its core, the democratic system rests on recognizing the individual as a subject – an autonomous agent capable of participating in collective decision-making and engaging with others on terms of equality.

3. MEDIATION AS A MANIFESTATION OF DEMOCRATIC PRINCIPLES

In the definition of mediation, emphasis is usually placed on the mediator's role and involvement in helping the parties communicate and identify their interests. Mediators are not authorized to make binding decisions and their role is to help the parties reach an agreement.⁹ When analyzing different definitions of mediation, it

⁷ Robert D Putnam, 'What makes Democracy work' (1993), National Civic Review. Spring, 101–107.

⁸ Janusz Węgrzecki, 'Przyszłość demokracji deliberatywnej' (2009) 22 Athenaeum. Polskie Studia Politologiczne, 27.

⁹ Rafał Morek, 'Wprowadzenie' in Ewa Gmurzyńska, Rafał Morek (eds) *Mediacje. Teoria i Praktyka* (Wolters Kluwer 2024) 22; Adam Zienkiewicz, *Studium Mediacji. Od teorii ku praktyce* (Difin 2002) 32.

is difficult to identify *a priori* the realization of democratic values within them. At first glance, these two concepts may seem analytically distant. Democracy pertains to the form of a political system, while mediation deals with the individual situation of the conflicting parties. However, if we examine the basic principles of democracy in the context of an individual meeting between the parties with the participation of a neutral third party, we can find fundamental similarities between mediation and democracy. This suggestion, however, requires a slightly different and multifaceted view of mediation. A useful definition in this context is provided by Kenneth Cloke, who defines mediation as a voluntary and democratic method of resolving disputes consensually, allowing for maximum connection between the parties with minimal expenditure of energy, time, involvement, and resources.¹⁰ Cloke emphasizes the democratic nature of mediation, manifested in the absence of elites imposing solutions or decisions, and portrays consensus as the result of the parties' will.¹¹

A broader analysis of the concept of mediation as a 'democratic method' also requires presenting the evolution that has occurred in the understanding of this concept. In the traditional approach, the ADR movement emphasizes that the main attribute of mediation is its speed and low costs for the parties and the justice system, which helps alleviate court backlogs and ensures better access to justice for citizens. Mediation is usually assessed through the lens of efficiency.¹² However its operational dimension reduces mediation to a simplified mechanism, where there is no time for true dialogue.¹³ It should not be forgotten that mediation brings a new, democratic quality to conflict resolution by offering the opportunity for face-to-face meetings and dialogue between participants, an experience that can have significant consequences in future approaches to disputes or in dealings with others.¹⁴ The impact of mediation, which is invaluable from a social, moral, psychological, and educational perspective, has been recognized by the Comprehensive Law Movement.¹⁵ According to this approach, mediation is more than just a narrowly defined tool for quickly and cheaply resolving disputes. It highlights the benefits of mediation, noting that it realizes procedural justice, and, above all,

¹⁰ Kenneth Coke, *Mediation: Revenge and the Magic of Forgiveness* (Center for Dispute Resolution 1994) 382.

¹¹ *Ibid.*

¹² Adam Zienkiewicz, *Holizm prawniczy z perspektywy Comprehensive Law Movement* (Difin 2018) 54.

¹³ *Ibid.*

¹⁴ Zienkiewicz (n 13) 116–117.

¹⁵ Zienkiewicz (n 16) 55.

it fosters social bonds, interpersonal relationships, and connections with members of the community.¹⁶

A look at the principles of democracy mentioned by Śpiewak, such as individual autonomy, ensuring the common good, achieving consensus, and shaping civic attitudes, proves that these principles are reflected in mediation. It can be said that mediation is the realization of democratic axioms at the micro level, in the context of resolving an individual dispute. The essence of mediation, like in democracy, is to exercise the autonomy of the parties, both through their direct participation in resolving the dispute, influence on the process itself and on the final outcome. It is also an expression of individual freedom, as the parties have the opportunity to make decisions in their own matters and determine for themselves what they consider fair, within the limits of the law. Mediation lacks authoritative figures who make decisions on their behalf. It requires a mature approach to both the dispute and the other person. Its essence also lies in the recognition of the other party, at least by acknowledging and attempting to understand their arguments.¹⁷ In mediation, people seek consensus and to end their dispute, but also a sense that the solution will be fair and achieved with respect for both their own and the other party's subjectivity. In mediation, the parties take responsibility for their actions, adhere to jointly established rules, show tolerance, and accept that the other party may have a different view of the same situation.

When analyzing the concept and significance of mediation in the context of democratic principles, it is worth noting that the concept of democracy is constantly evolving. Putnam has argued that 'democracy is not only a way of governing but also a way of living our lives'.¹⁸ The concept of 'living democracy' or social capital, also developed by other authors, assumes that democracy is not only about the functioning of democratic institutions, but must also be complemented by citizen participation in activities outside those institutions.¹⁹ ²⁰ Democracy involves including people in the decision-making process, dialogue, conversation, and giving them opportunities to influence. There is a kind of feedback loop between

¹⁶ Susan S Daicoff, *Comprehensive Law Practice. Law as Healing Profession* (Carolina Academic Press 2011) 33.

¹⁷ Zienkiewicz (n 13) 120.

¹⁸ Robert D Putnam, *Making Democracy Work: Civic Tradition in Modern Italy* (Princeton University Press 1993) 163.

¹⁹ See generally: Frances Moore Lappe, Paul Martin DuBois, *The Quickening America: Rebuilding Our Nation, Remaking Our Lives* (Jossey-Bass 1994).

²⁰ Ibid 119. Jakub Wygnański, 'Inny pomysł na demokrację', *Więź* (1 June 2021) <<https://wiesz.pl/2021/06/01/inny-pomysl-na-demokracje>> accessed 3 February 2025.

democracy and mediation. Democratic principles lie at the heart of mediation, and mediation is an essential element of democracy.

4. PHILOSOPHICAL INTERPRETATIONS OF MEDIATION AND DEMOCRACY

The analysis of the titular concepts, even in the modest scope in which we present them for the purposes of this study, leads us towards very specific philosophical concepts: the philosophy of discourse and the philosophy of dialogue. Both dialogue and discourse are polysemous terms. Therefore, it is important to clarify them for the purposes of our discussion, in accordance with their aim.

At first glance, it seems that, as in democracy, mediation will primarily be related to the philosophy of discourse, due to the way it is regulated in legal provisions. But the relationship between mediation and democracy can be more clearly understood when viewed through two complementary philosophical perspectives: discourse-oriented theories of communication and dialogical philosophies of interpersonal encounter. These traditions offer interpretive frameworks that illuminate the normative and relational dimensions common to both practices.

The first relevant perspective is offered by discourse theory, particularly in the formulations of Jürgen Habermas and Robert Alexy. Habermas's notion of practical discourse refers to a mode of communication in which participants exchange reasons, examine arguments, and work toward a justified agreement under conditions of inclusiveness, equality, reciprocity, and freedom from coercion (the so-called ideal speech situation).²¹ Habermas also claims that 'anyone acting communicatively must (...) raise universal validity claims: a comprehensible expression, intention to communicate the true proposition, express his intentions truthfully, and choose the utterance that is right.'²² We engage in argumentation within discourse only in normative situations in which different interpretive courses of action are available.²³ Discourse is not just a synonym for language or speech: only speech that is explicitly oriented towards reaching rationally motivated consensus counts as discourse.²⁴ Discourse is a higher order of communication, with the aim of renewing or replacing a problematized consensus.

²¹ 'Ideal Speech Situation' in Amy Allen & Eduardo Mendieta (eds), *The Cambridge Habermas Lexicon* (2016), chapter (Term) 46.

²² Jürgen Habermas, *Communication and Evolution of Society* (Press 1979) 2.

²³ Jerzy Stelmach, *Kodeks argumentacyjny dla prawników* (Zakamycze 2004) 15.

²⁴ Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984) 42.

Unlike theoretical discourse, which seeks truth, practical discourse concerns norms and values and aims at determining what is fair, appropriate, or acceptable for all involved.²⁵ A related and particularly relevant contribution is offered by Robert Alexy, whose theory of legal argumentation adapts Habermas's discourse principles to the domain of law.²⁶ According to Alexy, legitimate legal decisions must emerge from a process of practical discourse conducted under conditions of rationality, equality of participation, openness to counterarguments, and the requirement of justification.²⁷ Alexy, however, distinguishes Habermas's ideal discourse from real discourse, in which the assumptions of the ideal speech situation may not be fulfilled, or may be fulfilled only to a very limited extent.²⁸ These criteria closely resemble the procedural structure of mediation, in which parties exchange reasons, test proposals, and work toward mutually acceptable solutions under conditions of equal voice and absence of coercion.

Discursive ideas align closely with theories of procedural justice, which emphasize that individuals assess the fairness of a process not only by its outcome but by whether they were allowed to participate, express their views, and be treated with dignity: any outcome, after its application, is accepted by the participants. Unlike substantive justice, which concerns the evaluation of the content of norms, procedural justice focuses on the conditions under which those norms are created and on their relation to the purposes they serve.²⁹ It refers to the organization of processes of information gathering, analysis, argument exchange, and decision-making in a way that allows the outcome to be regarded as just.³⁰ Thus, the procedure itself becomes the relevant criterion of adjudication. Process values serve as standards by which a process can be judged as good, regardless of its outcome.³¹

Procedural justice can be viewed in two ways. First, a fair procedure is one that just conforms to the previously adopted rules – a formal approach ensuring com-

²⁵ Stelmach (n 23).

²⁶ Robert Alexy, 'Legal Argumentation as Rational Discourse' in *Law's Ideal Dimension* (Oxford University Press 2021), 288–298; online edn, Oxford Academic, 19 August 2021, <<https://doi.org/10.1093/oso/9780198796831.003.0019>> accessed 28 November 2025.

²⁷ Robert Alexy, 'Idée et structure d'un système du droit rationnel in La philosophie du droit aujourd'hui', *Archives de philosophie du droit* t 33 (Sirey 1988) 25–26.

²⁸ Robert Alexy, 'A Discourse-Theoretical Conception of Practical Reason' in *Law's Ideal Dimension* (Oxford University Press 2021) 255–274 online edn. Oxford Academic, 19 August 2021, <<https://doi.org/10.1093/oso/9780198796831.003.0019>> accessed 28 November 2025.

²⁹ John Rawls, *Teoria sprawiedliwości* (Wydawnictwo Naukowe PWN 1994) 122 ff; John Rawls (English ed), *A Theory of Justice* (Harvard University Press 1971).

³⁰ Zbigniew Kmiecik, *Postępowanie administracyjne w świetle standardów europejskich* (Wydawnictwo ABC 1997).

³¹ Robert S Summers, 'Evaluating and Improving Legal Process. A Plea for Process Values' (1974) 60 *Cornell Law Review* 1, 1.

pliance with the law. Second, in a broader sense, procedural justice encompasses compliance with principles that establish the conditions for rational and effective argument exchange.³² This corresponds to Habermas's concept of communicative rationality. Here, the focus is on the *how?* rather than the *what?* In addition to classical concepts, such as those of J. Rawls, it is worth noting R. Summers' proposed understanding of the procedure through values that guarantee a fair process. Summers included the following values: a) participation in the decision-making process (participatory governance);³³ b) the legitimization of the process based on the democratic consent of citizens; c) the peaceful nature of the process; d) humanitarianism and respect for human dignity; e) privacy; f) the possibility of opting out of participation in the process; g) procedural fairness, meaning ensuring equal access to the process and binding all parties by the outcome, whatever it may be; h) procedural rule of law, meaning certainty and predictability in applying procedural rules; i) procedural rationality, meaning a careful and objective analysis of arguments and facts, impartial decision-making based on the merits, and a thorough justification for the decision made.³⁴ The philosophy of discourse has been the foundation for developing the social theory of procedural justice. John Rawls, in *A Theory of Justice*, defined justice as 'the first virtue of social institutions', linking it with the concept of fairness.³⁵ Rawls argued that if procedural justice is ensured, then regardless of the decision made by a public institution, as long as it follows a 'pure' procedural justice, the process will always be fair to the parties, regardless of whether the decision is favorable to them.³⁶ When procedural justice principles are applied, participants always emerge as 'winners'.³⁷ The organization of discourse has a greater impact on participants' evaluation of the process than the outcome itself.³⁸

These ideas offer a meaningful philosophical interpretation of mediation. Mediation creates a structured space for discursive interaction in which parties articulate their interests, offer reasons, and work toward a mutually acceptable solution. The

³² Jerzy Stelmach, *Współczesna filozofia interpretacji prawniczej* (Wydawnictwo Uniwersytetu Jagiellońskiego 2001) 128.

³³ Participation, in its various forms, constitutes a key element of the principle of procedural justice also for Solum: Lawrence Solum, 'Procedural Justice' (2004), 78 *Southern California Law Review* 1, 273.

³⁴ Robert S Summers, 'Evaluating and Improving Legal Process. A Plea for Process Values' (1974) 60 *Cornell Law Review* 1, 1.

³⁵ Rawls (n 29) 12.

³⁶ *Ibid* 75.

³⁷ Tomasz T Koncewicz, 'Poszukując modelu sprawiedliwości proceduralnej w prawie wspólnotowym. Mit, czy rzeczywistość' (Centrum Europejskie 2009) 12.

³⁸ Ewa Gmurzyńska, 'Sprawiedliwość a mediacja' in *Księga pamiątkowa ku czci Profesora T Erecińskiego*, Jacek Gudowski, Karol Weitz (eds), Vol II (Lexis Nexis 2011) 1674.

commitment to equality of voice, neutrality of the mediator, and voluntariness of participation reflects discursive and procedural principles that are equally central to democratic practice.

5. DIALOGUE AS AN INTERPRETIVE LENS FOR THE INTERPERSONAL DIMENSION OF MEDIATION

The dialogical perspective deepens the interpretation of mediation by drawing attention to its interpersonal and ethical dimensions. Mediation encourages parties not only to articulate interests but also to acknowledge the other's perspective, recognize their emotions and needs, and engage in processes of apology, forgiveness, or mutual understanding when appropriate. In this way, mediation supports moral growth, self-reflection, and the repair of social bonds – goals that resonate with broader democratic values of respect, recognition, and civic cooperation.

A second interpretive framework emerges from dialogical philosophy, developed by thinkers such as Hermann Cohen, Franz Rosenzweig, Martin Buber, and, in the Polish context, Józef Tischner. Although these thinkers differ in method and emphasis, they share the conviction that human identity and moral agency are constituted in relationships with others. Dialogue, in this tradition, is not merely an exchange of propositions but a personal encounter marked by openness, recognition, and ethical responsiveness. The philosophy of dialogue originates from existentialism, phenomenology, and personalism. It is primarily connected with 20th-century Jewish philosophy, which is of fundamental importance in the context of the interpersonal relations that constitute its very subject matter. All strands of dialogism are linked by a reference to the biblical tradition, critique of Western philosophy, and the experience of WW I and/or II.³⁹ As Anna Rossmannith notes, dialogue can be understood in two ways. In the narrower sense, it derives from the traditions of ancient Greece, especially Socrates and Plato. Dialogue means conversation, question, and answer. Communication is possible thanks to the mediating role of reason (*dia* – mind and *logos* – word).⁴⁰ In a broader sense of this philosophy, dialogue 'becomes primarily a term for the essential, interpersonal bond' and refers to conversation as a 'live encounter'.⁴¹

³⁹ Ilya Dworkin, 'Philosophy of Dialogue: A Historical and Systematic Introduction', *Judaica Petropolitana Scholarly Journal* 13 (2020) 6–24.

⁴⁰ Anna Rossmannith, *Dialogiczna koncepcja prawa* (Wolters Kluwer Polska 2019) 75.

⁴¹ *Ibid* 76.

From the perspective of mediation, the works of dialogic philosophers such as Martin Buber and Józef Tischner deserve special attention. Buber distinguished two fundamental relations: I-Thou and I-It. The latter refers to the relationship between a person and an object and is based on an experiential attitude.⁴² The former, however, is the key relation, as it is a relation or encounter in which one enters deeply with their essence. Tischner brings us even closer to the essence of this encounter. For him, a person is presented as the subject of the meeting.⁴³ The meeting happens between I and Thou, and it is an event that ‘entails a significant change in the space of encounters – the essence of the meeting is Goodness’.⁴⁴

In connection with the dialogical stance and principle, mediation objectives sometimes focus on the personal and interpersonal dimension.⁴⁵ Alongside the process of self-recognition and self-improvement of each party, a process of moral growth occurs. This allows one to perceive the Other, acknowledge certain of their arguments, understand their feelings and needs, and develop the ability to apologize and to forgive.⁴⁶

6. INTEGRATING DISCURSIVE AND DIALOGICAL INTERPRETATIONS

Taken together, these discursive and dialogical perspectives offer a coherent philosophical interpretation of why mediation and democracy share meaningful affinities. The discursive view underscores the procedural conditions – participation, equality, voluntariness, rational justification – that allow mediation to function as a fair and inclusive process. The dialogical view highlights its interpersonal, relational, and often transformative potential. Both aspects reflect and reinforce the normative principles associated with democratic life. Mediation, therefore, can be understood as a practice that combines procedural fairness with interpersonal recognition. Its commitment to voluntary participation, equality of voice, mutual understanding, and cooperative problem-solving parallels the values identified by democratic theorists such as Śpiewak. Through this lens, mediation appears not as

⁴² Michael Zank, Zachary Braiterman, ‘Martin Buber’, *The Stanford Encyclopedia of Philosophy* (Summer 2023), Edward N Zalta, Uri Nodelman (eds), <<https://plato.stanford.edu/archives/sum2023/entries/buber/>> accessed 1 Decemeber 2025; Martin Buber, *Ich und Du [I and Thou]* (1923), Leipzig: Insel Verlag.

⁴³ Józef Tischner, *Filozofia dramatu* (Znak 1990) 10.

⁴⁴ Ibid 27.

⁴⁵ Zienkiewicz (n 13) 116–117.

⁴⁶ Ibid 117.

a mere alternative to adjudication but as a communicative and relational practice that expresses, on a micro level, the democratic commitments of participation, autonomy, respect, and shared inquiry. To understand why mediation resonates so strongly with democratic theory, it is necessary to consider both its discursive and dialogical dimensions. While each perspective highlights different aspects of mediation, their integration provides a fuller account of how mediation operates simultaneously as a procedural system and a relational practice.

6.1 MEDIATION AND THE PHILOSOPHY OF DIALOGUE

Tischner believed that dialogue is a form of thinking *with* someone and *about* someone. Thus, dialogue is not only a means of expression and an articulation of our thoughts but also a different quality of thinking. Conflict and difference can be the sources of dialogue. The language used in a dialogue is not merely a transmitter but creates a new reality for its participants.

As mediators, we see the application of the philosophy of dialogue in practice. We often say that mediation is not an arcane science but rather a return to ordinary conversation, supported by a third party. Despite the emphasis on the informal nature of this method, the lack of procedural complexities, and the use of relatively simple communication tools, mediation creates a new reality. It is manifested by reconciliation, forgiveness, or understanding of the other party. Tischner described the values of dialogue as follows: ‘Only in dialogue, dispute, opposition, and the pursuit of a new community does the awareness of myself emerge as an independent entity, separate from the other. I know that I exist because I know that the other exists’.⁴⁷

Mediation is not just a process to learn about our own reactions or develop communication and respect for others in difficult, conflicting contexts. It also leads to the recognition, or even acknowledgment that each of us may have a different perspective on the same issue. In this sense, an encounter with the other frees us from a situation where we place our own world and its vision at the center of our attention. Tischner expressed this idea by stating: ‘Only the other can ask me what I see, and this question makes me aware that there is another world beside me – the one he sees and experiences’.⁴⁸

Judges who have referred parties to mediation reveal that, even if an agreement was not reached, something changed between the parties – they communicate

⁴⁷ Tischner (n 34) 272.

⁴⁸ Ibid 63.

better and listen to each other more attentively. In mediation, precisely from the meeting of two individuals, an agreement is born that fosters a sense of community and unity.

Through the lens of dialogical philosophy, the essence of mediation is bringing parties closer together, transforming them toward understanding each other's viewpoints, creating bonds, reducing divisions, and achieving mutual comprehension. Such a change leads to more lasting effects, including community-building and deeper social relationships.

6.2 MEDIATION AND PHILOSOPHY OF DISCOURSE

Discourse emphasizes principles and adherence to rules, particularly the inclusion of parties in the decision-making process, the freedom to express opinions, equality, and autonomy. Unlike the philosophy of dialogue, discourse focuses on fair procedures, which have the advantage that their observance leads to a sense of fair treatment, regardless of the final outcome of the dispute.

Research by John Thibaut and Lawrence Walker led to the development of the instrumental model, which assumes that giving parties a voice in decision-making enhances their perception of having control over the final decision and the course of proceedings, resulting in positive reactions.⁴⁹ E Allan Lind and Tom R Taylor, continuing this research, formulated the thesis that 'people form their opinions about what is fair and what is not based on the process and procedure, and then incorporate this information into their overall assessment of fairness or unfairness'.⁵⁰ Their relational model suggested that not only does control over the process create positive feelings among participants, but also an appropriate relationship with the decision-maker or process facilitator and other participants.⁵¹ According to the relational model, giving the parties a voice and listening to them is crucial, as it makes them feel treated with respect and dignity, emphasizing their status and, consequently, evoking a sense that the process is fair.

Mediation seems to fit perfectly into these assumptions. The core of mediation is giving the parties a voice – they make independent decisions regarding both the procedure and the final settlement. They also have the opportunity to 'tell their

⁴⁹ Tom R Tyler, 'Psychological Model of the Justice Motive: Antecedents of Distributive and Procedural Justice', 67 *Journal of Personality and Social Psychology* (1994) 850, 855.

⁵⁰ E Allan Lind, Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 42.

⁵¹ John Thibaut, Lawrence Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates 1975) 56.

story' fully, with the mediator's role being just to help them communicate in a way that allows them to listen to and understand each other while maintaining mutual respect. Mediation also ensures equality between the parties, which is upheld through the principles of mediator impartiality and neutrality. The confidentiality of mediation allows the parties to share sensitive information without fear, while the mediator's oversight of the process provides them with a sense of security.⁵²

7. DEMOCRATIC PRINCIPLES IMPLEMENTED IN MEDIATION

Participation, equality, and autonomy of the parties, which have already been mentioned multiple times in this article are the key principles that bridge democracy, particularly its deliberative model, and mediation. Below, we provide a brief discussion of major mediation principles in relation to the principles of democracy formulated by Śpiewak.

7.1 PARTICIPATION

According to Putnam, an effective democracy requires not only functioning public institutions but also the active support and engagement of citizens. In this light, the participatory nature of mediation is fundamental: without the genuine involvement of the parties, mediation may formally proceed, but its essence – shared negotiation and joint decision-making – is lost.⁵³

Just as citizens in a democracy influence decisions that affect them, the assumption in mediation is that parties take an active and conscious role in shaping both the procedure and the outcome. In this sense, mediation reflects the principles of participatory democracy. Participation requires effort: the willingness to engage with the other side, to negotiate, and to search for mutually acceptable solutions. This effort is qualitatively different from court or arbitration proceedings, where

⁵² Gmurzyńska (n 45) 1684.

⁵³ See for example: R DeVault, Wesley Parks and Mara Aruguete, 'The Benefits of Promoting Party Self-Determination in Mediation', *Colorado Lawyer* (October 2022), 12; Chris Guthrie and James Levin, 'A Party Satisfaction Perspective on a Comprehensive Mediation Statute', *13 Ohio State Journal on Dispute Resolution* (1998), 885; Craig A McEwen and Richard J Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent', *Law & Society Review* (1984), 11; Debby Damen and others, 'The Effect of Perspective Taking on Trust and Understanding in Online and Face-to-Face Mediations', *29 Group Decision and Negotiation* (2020), 1121. <<https://doi.org/10.1007/s10726-020-09698-8>> accessed 1 December 2025.

decision-making authority is transferred to a judge or arbitrator and where lawyers typically dominate the process.

In mediation, the parties' participation is the foundation of the method. The mediator facilitates communication but does not decide; lawyers support rather than lead, assisting in negotiations, legal clarification, or drafting the final settlement. Active involvement is therefore indispensable: just as democracy loses meaning without active citizens, mediation loses its value without the committed participation of the parties.

7.2 EQUALITY

Mediation calls for the implementation of the principle of equality, based on the idea of egalitarianism deeply rooted in the phenomenon of democracy. It guarantees all participants the same opportunity to speak, participate, and be treated equally. The mediator's mandate is to reduce differences between the parties and treat them equally.⁵⁴ On a practical level, it means that he/she assigns comparable time for each party's statements, meets with all parties alternately in caucuses, addresses participants without using titles, or encourages the less active party to be more involved in a discussion. Each participant has the same voice in presenting proposals and reaching an agreement. Moreover, the role of a mediator is to manage the process in such a way as to reduce an imbalance between the parties. In some cases, the differences are so great that mediation should be interrupted or should not take place at all (e.g., in cases of domestic violence). In other cases, there are several ways to ensure greater equality. One of the examples of the power imbalance may appear when one of the parties has legal representation and the other does not.⁵⁵ In such situations, a mediator may suggest that the non-represented party should receive free legal help, should be allowed to be joined by a member of the family or a friend, or suggest that both parties meet with the mediator without legal representation. In the absence of a person who makes a top-down decision and leaves it to the parties, mediation closely fits in

⁵⁴ See for example: Gazal-Ayal, Oren, and Ronen Perry, 'Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes', 39 *Law & Social Inquiry* (2018), 791; Adam Zienkiewicz, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part III – Interviews)', 32 *Studia Iuridica Lublinensia* (2), (2023), 303; Aneta Jakubiak-Miłośnik, 'Effectiveness of Mediation – Between Effort and Result', 27 *Studia Iuridica Lublinensia* (2018), 13; Albie M Davis, Richard A Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes', 6 *Mediation Quarterly* (1984), 17.

⁵⁵ Summers (n 29) 25.

the concept of egalitarianism. The principle of equality that structures mediation reflects the core democratic value that all persons deserve an equal voice and equal standing in shaping outcomes that influence their lives.

7.3 COMMON GOOD

Mediation is fundamentally a cooperative method. Through cooperation, parties can achieve more than in typical adversarial settings, where one side often exploits the other, frequently damaging relationships. In mediation, one party's gain does not have to come at the expense of the other. Engaging in meaningful and sincere dialogue encourages creative solutions, allowing the needs and expectations of both parties to be addressed without domination or exploitation. Mediation reflects the constant tension between integrative, problem-solving approaches and positional, distributive approaches. Participants face a central question: will we cooperate to achieve greater outcomes together, or will we ignore the potential for collaboration and focus solely on claiming the largest share?⁵⁶ This orientation toward cooperation naturally evokes the concept of the common good, which highlights the benefits of pursuing outcomes that advance the welfare of all members of a community.⁵⁷ In political discourse, the 'common good' refers to those facilities – whether material, cultural or institutional – 'that the members of a community provide to all members in order to fulfill a relational obligation they all have to care for certain interests that they have in common'.⁵⁸ The philosophical model of democracy assumes that citizens stand in a 'political' or 'civic' relationship with one another and that this relationship requires them to create and maintain certain facilities on the grounds that these facilities serve certain common interests. The relevant facilities and interests together constitute the common good and serve as a shared standpoint for political deliberation.⁵⁹ General assumption is that citizens share common interest which leads to positive outcomes for all, not just for the chosen individual. It excludes actions aimed

⁵⁶ On analyses of common good in mediation/conflict resolution see for example: Amy Gutmann and Dennis F Thompson, 'Valuing Compromise for the Common Good', *Daedalus* 142(2) (2013), 185; Nancy A Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System', 5 *Cardozo Journal of Conflict Resolution*, (2004), 117; George Pavlich 'The Power of Community Mediation: Government and Formation of Self-Identity', 30 *Law & Society Review* (1996), 707; Debbie De Girolamo, 'The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice', 39 *Oxford Journal of Legal Studies*, 834.

⁵⁷ Radosław Tymiński, 'Zagadnienie tworzenia prawa w filozofii niemieckich prawnonaturalistów Ernsta-Wolfganga Bockenfordego i Otfrieda Hoffego' (2006) *Studia Iuridica* Vol XLV, 233, 244.

⁵⁸ *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archIves/sum2025/entries/common-good/?utm_source=chatgpt.com> accessed 30 November 2025.

⁵⁹ *Ibid.*

at gaining something at someone else's expense and only caring for one's own interest.⁶⁰ However, the common good is not the antithesis of individual good, as both can be realized without excluding one another.⁶¹ A crucial element of the common good is not only creating a new state of affairs but also shaping the individual, internally influenced by the new reality and social cooperation.⁶² In mediation, the process of building an agreement involves expanding the range of possible outcomes for both parties. With the mediator's guidance, participants explore options that increase the overall 'share' available, recognizing that the assumption of a zero-sum conflict – where one party's gain requires the other's loss – is often false. Through cooperation and joint problem-solving, both parties can achieve more than they could individually, satisfying their own interests while also creating value for the other. In this way, mediation allows participants to meet their individual goals while simultaneously contributing to a shared benefit, effectively generating a common good within the negotiation process.

7.4 AUTONOMY OF THE PARTIES

The autonomy of the parties (self-determination) is a key concept in mediation. Reference to autonomy distinguishes mediation from other ADR methods, making it the most democratic alternative dispute resolution method. The phenomenon of mediation is defined by terms such as: the parties' control over the process and the outcome; the direct involvement of the parties; and informed consent.⁶³ One could even argue that autonomy is the super-principle in mediation, determining the course of the process, the role of the mediator, and the role of the legal representatives.⁶⁴

⁶⁰ Andrzej Szostek, 'Dobro wspólne: Kluczowa kategoria polityczna. Przyczynek do zagadnienia: moralność a polityka' (1998) 31 Etyka, 32.

⁶¹ Ibid 86.

⁶² Ibid 87.

⁶³ Nancy Welsh, 'Do You Believe in Magic? Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation' (2017) 70 SMU Law Review 721, 725.

⁶⁴ On autonomy in mediation see for example: Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed', *Harvard Negotiation Law Review* 1 (1996), 7; Robert A Baruch Bush, Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons 2004); Carrie Menkel-Meadow, 'Peace and Justice: Notes on the Evolution and Purposes of Legal Processes', 94 *Georgetown Law Journal* (2001), 553; Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking', 10 *Cardozo Journal of Conflict Resolution* (2012), 1; Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Work in Progress', 1 *University of Missouri Journal of Dispute Resolution* 2004, 1; Ellen Waldman, 'What ADR Needs

Autonomy is also linked to procedural justice. When the parties are heard, treated equally and with due respect, they begin to exchange information in a more sincere and open way, which contributes to greater possibilities for reaching an agreement.⁶⁵ This concept applies to both, their relationship with the other party, the mediator, and their lawyers. The essence of the relationship with the mediator is that he/she helps in negotiations, but the parties themselves make decisions about the course of the procedure and the resolution of the dispute. In their relations with legal representatives, autonomy means that the parties participate directly in the mediation, and the role of the representatives is limited to supporting them in emotionally difficult situations, protecting their interests, or providing legal advice. Positioning of the parties in mediation emphasizes their subjectivity and respect for their dignity.⁶⁶ Self-determination also involves informed consent to participate in mediation and having full information about the mediation process provided to the client by their lawyers. Withholding this information and limiting the role of parties is a form of paternalism, which fails to treat the individual as a subject capable of making their own decisions. Autonomy, without informed consent in mediation, would be illusory. This concept boils down to the ability to make a mature and deliberate decision about one's own affairs.⁶⁷ The autonomy central to mediation aligns directly with the autonomy that underpins a democratic society, where individuals are respected as capable decision-makers whose informed choices shape both their own affairs and the collective life they share with others.

7.5 HUMANISTIC NATURE OF MEDIATION

Advocates of transformative mediation believe that mediation changes people and influences their future attitudes and relationships with others.⁶⁸ Robert A Bush and Joseph P Folger, in their book *The Promise of Mediation*, critically assessed the view that the main goal of mediation is mere dispute resolution.⁶⁹ Instead, they emphasize that mediation serves broader, universal goals, widely recognized in both literature and practice. In conflict, parties undergo transformation in a moral dimension, responding to deeply rooted needs for social bonds, empathy,

to Learn From Procedural Justice: The Case of Divorce Mediation', University of Missouri Journal of Dispute Resolution (2011), 49.

⁶⁵ Welsh (n 65) 733.

⁶⁶ Ibid 759.

⁶⁷ Gmurzyńska, *Rola prawników w alternatywnych metodach rozwiązywania sporów* (CH Beck 2014) 163.

⁶⁸ Morek (n 13) 23.

⁶⁹ Robert A Baruch Bush, Joseph P Fogler, *The Promise of Mediation. Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 2024) 35.

and moral development. On the one hand, mediation includes a strong element of empowerment, restoring individuals' sense of self-worth and their ability to solve problems independently.⁷⁰ On the other hand, recognition is central – it fosters respect and empathy for the other person's situation and interests. By integrating empowerment and recognition, parties gain greater clarity regarding their goals, options, and preferences, enabling them to make considered decisions. Participants grow by combining individual autonomy with care and compassion, forming the basis for human moral maturity.⁷¹

This humanistic dimension directly relates to democratic practice. In a democracy, citizens are expected to engage respectfully with one another, deliberate on issues, and act in ways that consider both individual and collective interests. Mediation cultivates these democratic capacities at the interpersonal level: participants learn to listen actively, understand alternative perspectives, exercise self-determination, and collaborate in problem-solving. The process transforms not only relationships but also civic dispositions, encouraging habits of dialogue, mutual respect, and cooperative engagement. Thus, mediation is valuable for democracy not merely because consensus is desirable or conflict is to be avoided, but because it develops the very capacities that underpin democratic life: responsible participation, recognition of others, and the ability to negotiate solutions that respect both individual and shared interests. In this way, the humanistic transformation fostered in mediation contributes to the cultivation of a democratic culture grounded in empathy, autonomy, and civic-minded cooperation.

7. CONCLUSION

Although the image of mediation presented in this article may appear idealized – especially given the practical risks such as inadequate mediator competence, pressures on the parties, or difficulties in securing autonomy and equality – it nevertheless emerges as a practice deeply aligned with the principles of deliberative democracy. As demonstrated throughout this article, mediation provides an inclusive and egalitarian space in which participants exercise voice, autonomy, and mutual respect, embodying the procedural fairness emphasized in discursive philosophy. Mediation also nurtures the relational capacities highlighted in dialogical approaches. By fostering skills such as active listening, communication, and collaborative problem-solving, mediation not only resolves disputes but also

⁷⁰ Ibid 36.

⁷¹ Ibid 31.

cultivates civic attitudes that strengthen social bonds and support a culture of dialogue, cooperation, and responsibility. In this sense, mediation functions as a microcosm of democratic life – where procedural justice and humanistic transformation meet – and contributes meaningfully to sustaining a democratic society grounded in participation, equality, and constructive engagement across differences.

In sum, by combining the procedural rigor of discursive approaches with the relational depth of dialogical philosophies, mediation realizes democratic principles at the interpersonal level and contributes to cultivating the values, skills, and dispositions that sustain a thriving democratic community.

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THREE DECADES OF MEDIATION IN ISRAEL: LEGAL EVOLUTION, INSTITUTIONAL GAPS, AND COMPARATIVE LESSONS

Abstract

This article examines the institutionalization of civil mediation in Israel over the past three decades. Introduced in 1992 via legislative amendment, mediation was gradually integrated into the judicial system through regulations, a court-linked mediation unit, mandatory orientation sessions, and training standards. These reforms strengthened institutional capacity and increased referrals, yet despite these efforts, mediation remains court-dependent, underregulated, and limited in use.

Drawing on legal sources, empirical data, and case law, the article critically analyses the Israeli model, highlighting structural and cultural barriers to broader adoption. It argues that successful adoption requires a cultural shift, sustained public investment, and coordinated engagement across sectors.

The article offers policy recommendations, including comprehensive legislation, ethical oversight, educational efforts, and data collection. These insights may inform other jurisdictions and invite comparative dialogue on institutional design, the professionalization of mediation, and mediation as a tool for social reform.

KEYWORDS

ADR, mediation regulation, mediator qualifications, court-connected mediation, Israel, civil disputes, mandatory orientation, institutionalisation, ethics, reform, justice

SŁOWA KLUCZOWE

alternatywne metody rozwiązywania sporów, regulacje dotyczące mediacji, kwalifikacje mediatorów, mediacja sądowa, Izrael, spory cywilne, obowiązkowe szkolenie wprowadzające, instytucjonalizacja, etyka, reforma, sprawiedliwość

I. INTRODUCTION

For many years, Israel's judicial system has struggled with heavy caseloads, prolonged delays, and limited access to justice. In response to these challenges, the state has invested considerable effort over the past three decades in developing a civil mediation infrastructure linked to the court system.

The article traces the institutionalization of mediation in Israel and critically examines the achievements, limitations, and lessons of the Israeli model. The central thesis is that despite significant progress in embedding mediation, particularly through the introduction of mandatory pre-mediation orientation sessions and accompanying regulatory efforts, the model's success remains limited with low referral rates, an excessive focus on court mediation, and the absence of comprehensive ethical regulation.

The article offers a unique contribution through a comprehensive and interdisciplinary analysis of Israel's mediation landscape, drawing on legal sources, committee reports, empirical data, and case law. It also initiates a comparative dialogue with other jurisdictions considering mediation reforms.

The following sections present the historical and regulatory background (Part II), key developments in case law (Part III), a critical analysis and institutional lessons (Part IV), and recommendations for future regulation (Part V). Ultimately, the article argues that mediation should not be viewed as a mere technical reform, but as a profound cultural shift that requires sustained investment, ethical clarity, and coordinated engagement from the judiciary, civil society, and the private sector.

II. THE DEVELOPMENT OF MEDIATION REGULATION IN CIVIL DISPUTES IN ISRAEL

1. ISRAEL'S MIXED LEGAL SYSTEM

Israel's legal system is a mixed one, combining elements of common law with components and influences from continental (civil) law and religious law.¹ The resemblance with the common law tradition stems from a shared legal history: during the British Mandate period, English law was applied in the region, and its influence persisted after the establishment of the State of Israel in 1948. This influence is clear in the adoption of English legislation and key doctrines from the common law and equity, as well as the hierarchical structure of the court system, which is headed by a Supreme Court with authority over all lower courts. The principle of binding precedent and the judge's authority to develop the law through case law also reflect this tradition.

However, Israel's legal system also incorporates significant elements of continental law. These influences date back to the Ottoman period and continued through the codification of Israeli civil law. This includes the adoption of general legal principles such as good faith, and the view that judges may fill legislative gaps by referring to the broader normative framework and the foundational principles of the legal system. Religious Hebrew law primarily serves as a non-binding comparative source, except in matters of family law, where it constitutes a binding normative source in the fields of marriage and divorce.

In line with this layered legal tradition, the development of mediation in Israel began with partial legislative initiatives but evolved through an ongoing dialogue with the judiciary, which took an active and significant role in shaping mediation law and promoting its use both within and outside the court system.²

2. THE PROBLEM OF JUDICIAL OVERLOAD

Israeli courts have long faced a structural case backlog. In 1980, the Landau Committee, appointed by the Minister of Justice, warned that delays threatened the system's ability to fulfil its public mandate.³ The Or Committee echoed this

¹ The following discussion is based on Aharon Barak, 'The Legal System in Israel – Its Tradition and Culture' (1992) 40 HaPraklit 5–38.

² See Pt III. Below.

³ Committee on the Structure and Jurisdiction of the Courts, in Aharon Barak & Eliyahu Mazuz (eds), *Landau Book* Vol A (1995) 205.

in 1997, promoting alternative dispute resolution (ADR), including mediation, to ease courtroom congestion and delays.⁴ Comparative research ranks Israel among the highest globally in litigation and caseload; a 2004 study placed it third among 17 developed countries in judicial workload.⁵ The trend persists: in 2023, some 900,000 cases were filed, served by just 765 judges.⁶

3. THE INTRODUCTION OF MEDIATION INTO THE JUDICIAL SYSTEM

The 1992 amendment to the Courts Law authorised judges to employ three ADR methods: judgment by consent without full trial or reasons; referral to mediation (then ‘conciliation’); and arbitration, already recognised under Israeli law.⁷ The amendment’s explanatory notes highlighted mediation’s potential to reduce judicial backlog through swift case resolution.⁸

In 1993, the Minister of Justice enacted the Courts (Mediation) Regulations (hereafter *Mediation Regulations*) covering referrals in civil and labour disputes.⁹ The regulations allowed for suspended proceedings during mediation, defined mediator duties, and introduced a standard agreement for commencing mediation. Israel still lacks general legislation regulating mediation, leaving privately initiated processes unregulated.¹⁰ Two relevant legislative bills have not advanced.¹¹

4. REGULATING MEDIATOR QUALIFICATIONS IN COURT-ASSIGNED CASES

In 1996, the Minister of Justice established a court roster of mediators.¹² Two years later, a committee chaired by Judge Gadot defined qualification standards,

⁴ Committee on the Structure of Ordinary Courts in Israel (1997) 96–104.

⁵ Raanan Sulitzeanu-Kenan, Amnon Reichman & Eyal Vigoda-Gadot, *Judicial Workload: A Comparative Study of 17 Countries*, Haifa Ctr for Public Mgmt & Policy (2007) (Heb).

⁶ Courts Administration, Annual Report 2023 9–10 (Heb) <<https://tinyurl.com/2w85akkm>> accessed 6 July 2025.

⁷ Courts Law (Amendment No 15) (1992) s 79C (Heb); M Mironi, ‘The Limitations of Settlement Conference and the Promise of Mediation’ (2012) 6 Haifa L R 487, 491-492 (Heb).

⁸ Courts Bill (Amendment No 15) (1991) (Heb).

⁹ Courts Reg (Mediation) 1993 (Heb) (‘Mediation Regs’).

¹⁰ Omer Shapira, ‘Israeli Perspectives on Alternative Dispute Resolution and Justice’ (2019) 19 *Pepperdine Dispute Resolution L J* 273, 279.

¹¹ Mediators Bill 2017; Mediation Bill 2018 (Heb).

¹² Courts Regs (Mediator Appointment) 1996 (Heb).

published in the *Gadot Report*,¹³ which formed the basis for the Courts (Mediator List) Regulations,¹⁴ still the accepted minimum training standard in Israel.¹⁵ Rejecting the Israel Bar Association's view that only lawyers should mediate and no formal training was needed,¹⁶ the regulations required an academic degree, five years of professional experience, and completion of a 40-hour course (60 hours for family mediation).

Over 30,000 individuals have completed such courses.¹⁷ However, the court-approved list drew criticism for lacking quality control and admitting underqualified mediators.¹⁸ Judges had few tools for informed selection and tended to rely on a small group of trusted professionals, while most graduates never entered active practice.¹⁹

In 2006, the Rubinstein Committee, appointed by the Minister of Justice to enhance mediation use in courts, identified dissatisfaction with mediator competence as a key barrier to growth. It proposed a small group of skilled mediators subject to ongoing evaluation.²⁰

In 2008, the court mediator list and its criteria were abolished.²¹ However, courts continued to apply these standards until 2017, when a new Mediators' List Regulations introduced stricter eligibility and an advisory committee was formed to support implementation of the regulations.²²

The Mediation Unit within the Court Administration now oversees three rosters: general, small claims, and family. General list eligibility requires (1) academic degree; (2) five years' professional experience; (3) a 60-hour approved course; (4) practicum involving observation and engagement in six mediations; (5) facilitation of eighteen mediations over five years; and (6) completion of a professional assessment and personal interview evaluating skills, knowledge of mediation, and

¹³ Consulting Committee on Mediation in the Courts, Report on the Qualifications and Expertise Required for Inclusion on the Mediators List (1998) ('Gadot Report').

¹⁴ Courts Regs (Mediators' List) 1996 (Heb); Michal Rubinstein, 'The Nature of MAHUT – On the Integration of Mediation into Israel's Court System' in Aharon Barak and others (eds), *Strasberg-Cohen Book* (2017) 334 (Heb).

¹⁵ Shapira (n 10) 279.

¹⁶ Gadot Report (n 13) 14–20.

¹⁷ Mordechai Mironi, 'Mediation v Case Settlement: The Unsettled Relationship – A Case Study' (2014) 19 *Harvard Negotiation LR* 173, 193 n 79.

¹⁸ Shapira (n 10) 289.

¹⁹ *Ibid* 281.

²⁰ Committee to Examine Ways to Increase Use of Mediation in Courts (2006) ('Rubinstein Report') 9, 25, 49–50.

²¹ Courts Regs (Mediators' List – Revocation) 2008 (Heb).

²² Courts Regs (Mediators' List) 2017 (Heb) ('Mediators' List Regs').

familiarity with legal procedures and law.²³ For small claims, criteria include the first four requirements plus six mediations, which may include those from the practicum.²⁴

Family roster admission is more stringent and requires (1) degree in law or designated fields (e.g., Masters in social work or psychology); (2) five years' relevant experience (for lawyers, in family law) within the past ten years; (3) completion of both general and a 40-hour family mediation course; (4) supervised practicum; (5) twenty mediations in five years, ten in family cases; and (6) professional assessment and interview evaluating the candidate's knowledge, skills, and competencies in family mediation and family law.²⁵

As of May 2024, the rosters included 301 general mediators, 128 in family mediation, and 880 for small claims, a sharp decline from past figures.²⁶ Registration must be renewed every five years, with submission of five mediated agreements and successful periodic reassessment via interviews, observation, or feedback.²⁷

5. INSTITUTIONAL LEADERSHIP AND SUPPORT FOR THE ADVANCEMENT OF MEDIATION

In 1998, the Ministry of Justice founded the National Centre for Mediation and Conflict Resolution to advance state-backed frameworks and professionalise mediation, aiming to shift public perception toward mediation as a preferred mechanism for dispute resolution.²⁸

Supreme Court President Aharon Barak endorsed the Centre as a vehicle for a 'mediation revolution' to transform Israeli society.²⁹ In early 2000s remarks, he argued that mediation should serve not merely to ease judicial backlog but to cultivate a culture of agreement: 'Mediation is not intended to solve the problems of the courts. Mediation is meant to solve the problems of society'.³⁰ Barak emphasised the state's role in supporting consensual frameworks³¹ and called to mobilise 'all governmental and private forces' in this effort.³²

²³ Ibid s 3(a).

²⁴ Ibid s 3(b).

²⁵ Ibid s 4.

²⁶ Letter, Minister of Justice, 1 July 2024 (on file with author).

²⁷ Mediators' List Regs (n 22) s 8.

²⁸ Mironi (n 7) 491; Peretz Segal, 'The "Mediation Revolution"' (2019) Ministry of Justice, Legal Roots Project (1 April 2019) (Heb).

²⁹ Aharon Barak, 'On Mediation' (2002) 3 Sha'arei Mishpat 9, 11 (Heb).

³⁰ Ibid 11.

³¹ Ibid 10.

³² Ibid 11.

Until its closure in 2009, the Centre implemented this vision through practicum design, mediator training, legislative advocacy, and partnerships with bodies such as the State Comptroller and Police.³³ Its closure reflected a shift in Ministry policy favouring court-centred implementation over a social approach.³⁴

The Attorney General supported mediation as well. A directive concerning state-party disputes recommended ADR, including compromise and mediation.³⁵ Though a committee was formed in 2000 to execute this, its 2003 recommendations were never implemented,³⁶ and litigation remains the state's preferred method.³⁷

6. INSTITUTIONALISATION OF MANDATORY PRE-MEDIATION ORIENTATION SESSIONS ('MAHUT') IN CIVIL CASES

From 2001, courts developed case-routing units to refer civil cases to mediation,³⁸ either to internal mediators (e.g. affiliated lawyers, clerks, labour tribunal representatives) working pro bono, or to private mediators paid by parties.³⁹

A decade after mediation's formal introduction, voluntary referrals remained limited and public frustration over delays grew.⁴⁰ The Rubinstein Committee identified limited familiarity with mediation and concerns about mediator quality as key obstacles.⁴¹ Its 2006 report proposed a pilot of mandatory pre-mediation orientation sessions, known by its Hebrew acronym, MAHUT, consisting of free, introductory sessions led by external mediators. Unlike mandatory mediation, these aimed to explain mediation benefits, clarify issues, and assess prospects for consensual resolution. The parties retained discretion to proceed or litigate. Continuing with mediation incurred payment for the mediator's services.⁴²

The Committee viewed MAHUT as balancing mediation promotion and safeguarding access to justice.⁴³ Following its recommendations, the 2007 regula-

³³ Segal (n 28).

³⁴ Mironi (n 7) 521; Segal *ibid*.

³⁵ Directive 60.125 (1999), 'Dispute Resolution by Mediation Where the State Is a Party', s 1.

³⁶ Steering Committee on Mediation in State-Party Disputes, Report – Vol A (2003); Mironi (n 7) 521.

³⁷ Shapira (n 10) 301.

³⁸ Michal Alberstein, 'Jurisprudence of Mediation' (2007) 98.

³⁹ Yitzhak Zamir, 'Mediation in Public Affairs' (2004) 7 *Law & Gov't* 119, 124 (Heb).

⁴⁰ Mironi (n 7) 523.

⁴¹ Rubinstein (n 14) 334.

⁴² Rubinstein Report (n 20) 9.

⁴³ *Ibid* 19–21, 41.

tions introduced the pilot in three magistrates' courts, allowing cost sanctions for non-attendance.⁴⁴ Mediators were selected via tender, requiring roster listing, experience, and prior court-approved settlements.⁴⁵

The pilot between 2008 and 2010 was deemed successful. In 2010, MAHUT expanded to six more courts.⁴⁶ As of 2021, with the new Civil Procedure Regulations, it became a permanent feature across all magistrates' courts.⁴⁷

7. EXPANSION OF MANDATORY PRE-MEDIATION ORIENTATION SESSIONS IN FAMILY DISPUTES

Based on recommendations from a 2005–2006 steering committee, a therapeutic version of the MAHUT model was adopted in family courts in 2016.⁴⁸ Rather than filing for divorce immediately, parties submitted a general request to resolve the dispute, avoiding early escalation. Each side attended one to four orientation sessions, led by court-affiliated social workers from assistance units and held without lawyers, free of charge.⁴⁹

The assistance units operating under the Ministry of Welfare offer counselling, therapy, and short-term mediation (three to four meetings).⁵⁰ After orientation, parties decide whether to litigate or pursue a consensual resolution.

8. RATIFICATION OF THE SINGAPORE CONVENTION

In August 2019, Israel signed the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention). It was approved in November 2024 and adopted via amendment to the Courts Law.⁵¹ To date, of 59 signatories, 18 states have ratified it.⁵²

The Convention promotes mediation in international commercial disputes by establishing simplified enforcement of mediated settlements across member

⁴⁴ Civil Procedure Regs (Temporary Provision) 2007 (Heb); Rubinstein (n 14) 335.

⁴⁵ Rubinstein *ibid* 334, 336.

⁴⁶ *Ibid* 338–39.

⁴⁷ Civil Procedure Regs 2018, ss 34–37 (Heb).

⁴⁸ Settlement of Litigation in Family Disputes Law 2014, eff 1 Jan 2016; Settlement of Litigation in Family Disputes Regs 2016 (Heb).

⁴⁹ *Ibid*.

⁵⁰ Shapira (n 10) 296.

⁵¹ Courts Law (Consolidated Version) 1984, s 79C(a) (Heb).

⁵² United Nations Convention on International Settlement Agreements Resulting from Mediation.

states. Israel's ratification aimed to position it as a hub for global business mediation.

III. CASE LAW DEVELOPMENTS IN ISRAELI MEDIATION AS A RESPONSE TO PARTIAL REGULATION

1. APPLICATION OF MEDIATION NORMS TO PRIVATE PROCEEDINGS

Mediation in Israel is only partially regulated, with the Courts Law and Mediation Regulations formally applying to court-referred cases.⁵³ Nonetheless, private mediators often include clauses in agreements adopting these provisions voluntarily.⁵⁴ In addition, the courts have recognised circumstances in which it is appropriate to apply principles derived from the law and regulations, such as fairness, confidentiality, privilege, and conflicts of interest, even in the absence of judicial referral, in order to uphold the integrity and reliability of the mediation process.⁵⁵

2. JUDICIAL RECOGNITION OF A DOCTRINAL PRIVILEGE IN MEDIATION PROCEEDINGS

Israeli case law on mediation largely concerns confidentiality, inadmissibility, and privilege, yet neither the Courts Law nor Mediation Regulations explicitly grants privilege.⁵⁶ The Courts Law prohibits using mediation communications as evidence in civil proceedings,⁵⁷ while the Mediation Regulations require mediators to keep mediation-related information confidential from non-parties.⁵⁸ A standard agreement also prohibits calling mediators to testify or disclose documents.⁵⁹

⁵³ Shapira, 'Following Permission for Civil Appeal 1496/15 *Levi v Drory et al*' (2018) 21 *Law & Bus* 133, 144, n 41 (Heb).

⁵⁴ *Ibid* 150.

⁵⁵ Arbitration Motion (Jerusalem DC) 55780-06-18 *Nechmias v Talpiot* (Nevo, 27 November 2019) (s 5(h) applies to private mediation); SC (AP) 4781/12 *Eini v Bank Leumi* (Nevo, 6 March 2013) (confidentiality applies pre-litigation); SC (AP) 1496/15 *Levi v Drory* (Nevo, 21 May 2015) para 7 (conflict rules guide private mediators).

⁵⁶ Shapira (n 53) 166.

⁵⁷ Courts Law (n 51) s 79C(d) (Heb).

⁵⁸ Mediation Regs (n 10) s 5(e) (Heb).

⁵⁹ S 3(f) *ibid* provides that the standard agreement applies to the parties and mediator unless otherwise agreed in writing.

The lack of express privilege created years of ambiguity. Eventually, Supreme Court rulings recognised a doctrinal, relative privilege,⁶⁰ even extending to mediator testimony, subject to the parties' waiver.⁶¹ However, lower courts later adopted a stricter view, asserting that the privilege covers both participants and the mediator, who may not be compelled to testify even with the parties' consent, a stance pending final resolution by the Supreme Court.⁶²

3. MEDIATOR LIABILITY FOR HARM

Although the Mediation Regulations impose duties on mediators, they do not address the consequences of breach. While academic literature has debated mediator liability,⁶³ damages awarded in practice remain rare.⁶⁴

One exception in Israel involved a mediator who submitted an affidavit supporting a party in a family dispute, disclosing text messages exchanged during mediation.⁶⁵ The court found this breached the orally agreed confidentiality⁶⁶ and amounted to bad faith, serving only one party's interests.⁶⁷ Damages of 60,000 NIS (≈64,000 Polish złoty) were awarded. The judge stressed that 'only a guarantee of confidentiality and [its] enforcement... will encourage and promote mediation [and] strengthen the status of mediators so that parties place their trust in them'.⁶⁸

⁶⁰ SC (AP) 2235/04 *Bank Discount v Shiri* [2006] PD 61(2) 634 (privilege over ADR documents); SC (AP) 4416/09 *Gabai v Rubin* (Nevo, 3 September 2009) para 9 (privilege may be waived); Eini (n 55) para 4 (relative privilege applies).

⁶¹ Levi (n 55) para 8.

⁶² Legal Motion (Central DC) 17350-05-15 *Plonit* (Nevo, 11 June 2018); Agreement Case (Jerusalem Family) 21092-01-21 *Ploni v Plonit* (Nevo, 13 September 2022); CC (Herzliya Mag) 67060-02-23 *Ploni v Migdal* (Nevo, 16 September 2024); Shapira (n 53) 165-178; Yitzhak Amit, *Privileges and Protected Interests* (2021) 590 (Heb).

⁶³ Orna Deutsch, *Mediation: The Awakening Giant* (1998) 68–99 (Heb) (mediator liability in Israel); Michael Moffitt, 'Suing Mediators' (2003) 83 *Boston Univ L Rev* 147 (mediator liability in the US).

⁶⁴ Moffitt, 'Disciplining Mediators' in Shapira (ed), *Mediation Ethics: A Practitioners' Guide* (2021) 309.

⁶⁵ CC (Tel Aviv Mag) 55994-04-19 *Marom v Rosenthal* (Nevo, 3 February 2021).

⁶⁶ *Ibid* para 5.3.

⁶⁷ *Ibid* para 5.5.

⁶⁸ *Ibid* para 5.7.

IV. EVALUATION AND LESSONS LEARNED

1. SCOPE OF THE REGULATION OF MEDIATION

Israel lacks a comprehensive legal framework for mediation, and past legislative proposals have stalled.⁶⁹ This regulatory void poses the risk of unqualified practitioners delivering substandard services, undermines the field's credibility, and perpetuates its image as amateur. It has also prompted the judiciary to fill the resulting legal gaps through case law,⁷⁰ an approach that, while adaptive, could be viewed as judicial overreach into legislative and executive domains.

Moreover, the judiciary focus on mediation has also hindered mediation's potential as a tool for societal transformation. Without dedicated legislation, funding is limited, and no central professional body exists to guide or coordinate development at scale. The optimal path forward is the enactment of a general Mediation Law to regulate the whole field alongside a national entity responsible for its implementation and ongoing development.⁷¹

2. BETWEEN LEGAL EFFICIENCY AND SOCIAL TRANSFORMATION

Israel's judiciary has long faced chronic case overload, delays, and a shortage of judges.⁷² As a result, a procedural approach to mediation has emerged, viewing it primarily as a tool to enhance efficiency, reduce caseloads, and shorten legal proceedings.⁷³ Mediation success is often quantified through settlement rates and closures,⁷⁴ reflecting a narrow conception of justice as efficiency, rather than a broader notion of substantive justice.⁷⁵ This diverges from earlier judicial leaders' views that embraced mediation as a mechanism for societal dialogue and agreement-building beyond relieving pressure on the courts.⁷⁶

Mediation's role in solving internal judicial challenges, combined with courts serving as its primary source of referrals for mediation and training, has entrenched a legalistic model of mediation. Rights-based discourse, evaluation, and case

⁶⁹ Note 12 above.

⁷⁰ Pt III above.

⁷¹ See recs 1–2 below.

⁷² Pt II.1 above.

⁷³ Mironi (n 7) 532.

⁷⁴ Ibid 493.

⁷⁵ Shapira (n 10) 276.

⁷⁶ Pt II.4 above.

closure dominate, being familiar to judges and lawyers,⁷⁷ but restrictive for the development of alternative mediation styles.⁷⁸ Mediator training has followed suit, shaped by the legal mediation model⁷⁹ and raises concerns about limits on party autonomy, mediator neutrality, and mediation's potential to serve as a genuine alternative to adjudication.⁸⁰ In practice, mediation has yet to produce meaningful social change, a stronger dialogue culture, or lower litigation rates.⁸¹ It seems that to advance mediation, it must be embraced not solely for efficiency but as a broader form of justice across the legal system and society.⁸²

One promising path is found in family court assistance units, where social workers employ therapeutic methods, including mediation.⁸³ A 2012–2013 study showed 65% of families received mediation, with 73% reporting high satisfaction and 48% reaching at least partial agreements.⁸⁴ A 2024 study indicated that most parties continued to engage in dialogue-based dispute management, with 70% noting staff neutrality, 48% gaining better self-understanding of needs, and 38% improving understanding of points of disagreement.⁸⁵

3. SCOPE OF MEDIATION USE WITHIN AND BEYOND THE JUDICIAL SYSTEM

Due to low voluntary uptake, the judiciary explored making mediation a litigation precondition, leading to the MAHUT model of mandatory orientation se-

⁷⁷ Shapira (n 10) 295; Orna Rabinovich-Einy, 'Pre-Action Protocols, Mediation and Access to Justice under the Proposed Reform of Israeli Civil Procedure Rules' (2005) 9 *Mishpatim Al Atar* 33, 43 (Heb).

⁷⁸ Faina M Sivan & Orna Rabinovich-Einy, 'Mediating Procedure and Substance: On the Privatization of the Justice System and Equality at Work' (2008) 11 *Law & Gov't* 517, 532–533 (Heb); Shapira (n 10) 295.

⁷⁹ Mironi (n 7) 493.

⁸⁰ Shapira, 'The Paradox of Power in Mediation' (2006) 6 *Kiryat HaMishpat* 371, 419–420 (Heb); Shapira, 'On Human Dignity in Mediation' (2008) 8 *Kiryat HaMishpat* 373, 392–393 (Heb); Ruth Halperin-Kaddari & Bryna Bogoch, 'The Voice is the Voice of Mediation, but the Hands are the Hands of the Law: Mediation and Divorce in Israel' (2007) 49 *HaPraklit* 293, 328, 331 (Heb); Shapira, 'On the Meaning and Justification of Mediators' Ethical Duty of Impartiality' (2012) 28 *Bar-Ilan Law Studies* 259, 284 (Heb); Ronit Zamir, 'The Myth of Mediator Neutrality' (2013) 17 *Law and Business* 411, 428 (Heb); Mironi (n 7) 532–533.

⁸¹ Mironi (n 7) 526–527; Shapira (n 10) Pt III B.

⁸² See recs 3–5 below.

⁸³ Shapira (n 10) 296; Pt II.6 above.

⁸⁴ Tali Bayer-Topilsky and others, *Family Court Social Services – National Evaluation Study* (Myers-JDC-Brookdale Institute 2015) (Heb).

⁸⁵ Yoa Sorek and others, *Family and Religious Court Social Services: A National Evaluation Study RR-993-24* (Myers-JDC-Brookdale Institute 2024) (Heb).

ssions.⁸⁶ Launched as a pilot in three magistrates' courts, the programme underwent professional evaluation to guide improvements.

A) MAHUT PROGRAMME EFFECTIVENESS AND CHALLENGES

A May 2009 interim report showed high satisfaction with orientation sessions, mediators, and the process.⁸⁷ About 40% of litigants said they would not have considered mediation absent the referral.⁸⁸ 52.9% of sessions proceeded to mediation, and 61.4% of those mediations settled.⁸⁹ The pilot also identified case types, e.g., traffic and personal injury, as better suited for early evaluation.⁹⁰

Later findings affirmed MAHUT's impact. In 2013, 58% of mediated cases settled, 61% of users reported high satisfaction, 69% reported improvement in perceived court service, and 75% willingness to use mediation again.⁹¹ In light of these findings, the programme was extended nationwide to all magistrates' courts.

However, mediator remuneration in MAHUT remains unresolved. Sessions are free for litigants, and this has caused frustration among mediators and raised ethical concerns, particularly regarding potential pressure on parties to proceed to paid mediation.

B) UNDERUTILISATION OF MEDIATION

Despite encouraging outcomes, referral rates to mediation remain low relative to case volume. In 2014, of 344,349 pending cases, just 7,041 were referred to MAHUT; 2,326 proceeded to mediation, and 59% settled.⁹² By 2023, 497,799 cases were pending,⁹³ with 10,062 referred to MAHUT; 3,570 proceeded to mediation, yielding 2,106 settlements (59%).⁹⁴

An additional 8,295 cases from magistrates', district, and small claims courts were referred directly to mediation,⁹⁵ producing 2,547 mediations and 1,607 settlements

⁸⁶ Pt II.5 above.

⁸⁷ Rubinstein (n 14) 336.

⁸⁸ Ibid.

⁸⁹ Mironi (n 7) 524 n 168.

⁹⁰ Rubinstein (n 14) 342.

⁹¹ Ibid 340.

⁹² Shapira (n 10) 293–294.

⁹³ Courts Administration, *Annual Report 2023* 9 (Heb).

⁹⁴ Adv Natali Levi, Director, Court Mediation Unit, emails dated 3–4 March 2025 and Zoom Meeting 10 March 2025.

⁹⁵ Judicial Authority, *Freedom of Information Report 2023* 72 (Heb).

(63%).⁹⁶ In sum, of roughly 900,000 cases filed in 2023, of which 360,000 in civil courts,⁹⁷ only 18,500 reached MAHUT or mediation, with 6,200 mediation sessions recorded. Though partial, these figures highlight unrealised potential. Contributing factors include weak incentives: prevailing parties rarely receive realistic costs,⁹⁸ and court filing fee reimbursement applies only to plaintiffs, as defendants pay none.⁹⁹ A proactive policy shift is needed to boost participation in MAHUT and formal mediation.¹⁰⁰

C) PROMOTING MEDIATION OUTSIDE THE JUDICIAL SYSTEM

Outside the courts, mediation remains underused. Public awareness is low, and no significant independent market has formed. Although tens of thousands have trained in mediation, few practice professionally, relying largely on court referrals. Limited demand impedes experience-building and professional growth. Community mediation, though expanding, depends on local initiatives, volunteers, and political sponsorship, calling for coordinated support from central and municipal government.¹⁰¹

The private sector remains tied to court-driven training and caseloads. This reliance curbs independent initiatives and overemphasises court-defined qualifications, limiting diversity in training and practice.¹⁰² The preferred policy is to expand mediation beyond courts and support autonomous, private-sector development alongside court-related frameworks.¹⁰³

4. OVERSIGHT AND REGULATION OF MEDIATORS

A) CLARITY CONCERNING MEDIATOR DUTIES

Israeli mediation law offers limited regulation for private-sector practice and only general guidance on mediator duties in court-referred cases.¹⁰⁴ The concise

⁹⁶ Note 95 above.

⁹⁷ Courts Administration, *Annual Report 2023* (n 101) 25, 37.

⁹⁸ Mironi (n 7) 529 n 190.

⁹⁹ *Ibid* 522 n 161.

¹⁰⁰ See recs 6–11 below.

¹⁰¹ Shapira (n 10) 298.

¹⁰² *Ibid* 297.

¹⁰³ See recs 12–15 below.

¹⁰⁴ Omer Shapira & Carmela Zilberstein (eds), *Mediation Ethics: Codes of Ethics and Dilemmas* (2018) 32–33 (Heb).

language of the Mediation Regulations grants wide discretion, risking ethical inconsistency.¹⁰⁵

Critics have pointed to the lack of practical, concrete instruction necessary to preserve the integrity of mediation, as well as the absence of clear rules on core issues such as party autonomy,¹⁰⁶ conflicts of interest,¹⁰⁷ impartiality,¹⁰⁸ confidentiality,¹⁰⁹ addressing power imbalances,¹¹⁰ and mediator responsibility for the outcome of the process.¹¹¹

The recommended policy is to adopt clear and specific definitions for mediator duties, both for court-connected and private mediation.¹¹²

B) LEGISLATIVE REGULATION OF MEDIATION PRIVILEGE

Courts have applied regulatory norms to private mediation to fill oversight gaps,¹¹³ yet developing mediator duties through case law causes inconsistency, uncertainty, and conflicting interpretations. Judicial doctrine on mediation privilege is particularly ambiguous: its scope, exceptions, and whether mediators may invoke it if parties waive privilege remain unclear.¹¹⁴ This highlights the need for legislation defining mediator duties and codifying mediation privilege and its limits.¹¹⁵

C) INSTITUTIONAL ETHICAL FRAMEWORK FOR MEDIATORS

Israeli law provides limited oversight of mediator conduct. Oversight mechanisms in mediation should reflect three concurrent responsibility levels:¹¹⁶

¹⁰⁵ Shapira (n 10) 291.

¹⁰⁶ Shapira (2008) (n 80) 383–385.

¹⁰⁷ Shapira (n 53) 151–154.

¹⁰⁸ Shapira (2012) (n 80) 261–262.

¹⁰⁹ Limor Zer-Gutman, 'Ensuring Confidentiality in Mediation' (2002) 3 Sha'arei Mishpat 165 (Heb)

¹¹⁰ Shapira (2012) (n 80) 282–283.

¹¹¹ Deutsch (n 63) 106, 113.

¹¹² See rec 16 below.

¹¹³ Pt III.1 above.

¹¹⁴ Shapira (n 53).

¹¹⁵ See rec 17 below.

¹¹⁶ Shapira, 'The Significance of Suing Mediators' in A Hinshaw, AK Schneider and SR Cole (eds), *Discussions in Dispute Resolution: Volume II* (2025) 223–227. For implementation, see IMI Code of Conduct for Mediators (Draft 2024) <https://imimmediation.org/wp-content/uploads/2024/12/Non-binding_Draft_IMI_Code_of_Conduct_for_Mediators_2024.pdf> accessed 6 July 2025.

- *Ethical accountability* – minimum professional expectations typically outlined in a code of ethics. Ethics committees interpret these duties in response to mediator queries, provide guidance and facilitate learning without imposing sanctions, e.g., for unintentional confidentiality breaches or isolated misconduct.
- *Disciplinary responsibility* – arises from serious ethical violations. Complaints that pass preliminary scrutiny may lead to formal proceedings before disciplinary panels and to soft sanctions, such as retraining or warnings. Instances may include repeated confidentiality violations or conduct that undermines professional standing.
- *Legal liability* – reflects minimum obligations under the law determined by courts in exceptional cases involving harm, e.g. injurious confidentiality breaches¹¹⁷ or public policy violations voiding settlements.

Ethical duties encompass disciplinary and legal obligations. Classification depends on institutional policy and regulatory considerations.

Despite significant court-based mediation activity in Israel, no formal ethics committee exists to guide practice or consolidate field knowledge. A voluntary Ethics Forum has operated since 2012,¹¹⁸ issuing opinions and codes of ethics for community and private mediators.¹¹⁹ However, it lacks statutory authority and funding, relying on volunteerism and reputation. The recommended course is to establish a national statutory ethics committee within a broader regulatory framework.¹²⁰

D) ESTABLISHING A DISCIPLINARY OVERSIGHT MECHANISM

Unlike established professions such as law or medicine, Israel lacks a formal disciplinary body for mediators. While the advisory committee may remove a mediator from the court-approved roster following conviction of a serious offence or breach of the Mediation Regulations,¹²¹ the process is opaque, with no published procedures or decisions and no known removals to date.

The preferred policy is to create a structured, accessible national mechanism with clear rules on complaint submission, investigation, hearings, sanctions, and public disclosure.¹²²

¹¹⁷ Note 64 above.

¹¹⁸ Shapira & Zilberstein (n 104) 109–113.

¹¹⁹ Ibid.

¹²⁰ See rec 18 below.

¹²¹ Mediators' List Regs (n 22) ss 6, 11.

¹²² See rec 19 below.

5. DATA COLLECTION ON MEDIATION

A major barrier to evaluating mediation's adoption is the lack of systematic, longitudinal data. Existing information is limited and anecdotal, e.g., MAHUT evaluations¹²³ or partial annual reports to the Knesset (parliament).¹²⁴ Private mediation data is virtually absent.

This gap hinders informed policy and reform. The challenge is not unique to Israel: the U.S. also lacks comprehensive ADR data, as noted by Professor Welsh.¹²⁵ Key metrics should include ADR eligibility of cases, referral and settlement rates, participant perceptions, trust levels, costs, compliance, and demographics.¹²⁶

6. JUDICIAL INVOLVEMENT IN MEDIATION

Israeli law allows judges to propose or approve settlements at any stage of proceedings.¹²⁷ With fewer than 10% of cases concluding by reasoned judgment,¹²⁸ and chronic overload in the system, settlement is increasingly viewed as preferable to judicial determination.¹²⁹ Judges face institutional pressure to resolve cases quickly, sometimes viewing full trials as failures.¹³⁰

While judicial facilitation offers benefits, e.g., leveraging a judge's authority and experience to move parties and deterring litigants from abusing procedural rights,¹³¹ it also risks blurring mediation and adjudication and compromising party autonomy. Specialised training¹³² and revised ethical codes are needed for judges in quasi-mediator roles.¹³³

¹²³ Notes 85–86 and 88–92 above.

¹²⁴ Mediators' List Regs (n 22) s 14.

¹²⁵ Nancy A Welsh, 'But Is It Good: The Need to Measure, Assess, and Report on Court-Connected ADR' (2021) 22 *Cardozo J Conflict Resol* 427, 449; 'Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution' (2020) 88 *Fordham L Rev* 2449, 2384–2387.

¹²⁶ *Ibid*; rec 20 below.

¹²⁷ Courts Law (n 51) s 70A(b); Civil Procedure Regs (n 47) s 63(B)(17); Karni Perlman, 'A Settlement Judge? On Judicial Dispute Resolution and a Proposal for Israeli Law' (2015) 19 *Law & Business* 365 (Heb).

¹²⁸ Issachar (Issi) Rosen-Zvi, 'Privatising Adjudication' (2022) 33 *Legal Stud* 715, 774–775 (Heb).

¹²⁹ *Ibid* 720.

¹³⁰ *Ibid* 775.

¹³¹ Louise Otis and Eric H Reiter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (2006) 6 *Pepperdine Disp Resol LJ* 351, 365–366.

¹³² *Ibid* 367.

¹³³ *Ibid* 365.

The Judiciary Ombudsman in Israel permits settlement facilitation based on informed consent,¹³⁴ but prohibits judges from mediating civil disputes¹³⁵ or holding separate meetings even with the parties' consent.¹³⁶ Still, judicial settlement efforts often resemble mediation, a practice likely to expand.¹³⁷ The preferred path is to adapt judicial training and ethics to reflect this evolving reality.¹³⁸

V. SUMMARY OF RECOMMENDATIONS FOR THE REGULATION OF MEDIATION

The following set of recommendations aims to offer policy directions and operational mechanisms to advance the institutionalisation, quality, and reach of mediation, both locally and in comparative discourse.

1. Enact a general Mediation Law positioning mediation as a national tool for societal change beyond court efficiency.¹³⁹
2. Establish a national authority responsible for mediation and a national mediation centre with state support.¹⁴⁰
3. Adopt a systemic approach framing mediation as justice beyond efficiency for cultural change.¹⁴¹
4. Integrate mediation into public institutions and the education system to promote respectful dialogue and peaceful conflict resolution.¹⁴²
5. Legitimate diverse mediation styles beyond settlement-focused models.¹⁴³
6. Expand referrals to orientations sessions across courts and case types.¹⁴⁴
7. Improve continuation rates post-orientation sessions via mediator assessment and success metrics.¹⁴⁵
8. Implement a fair compensation structure for orientation sessions.¹⁴⁶

¹³⁴ Ombudsman of the Israeli Judiciary, Opinion 8/04.

¹³⁵ *Ibid* Opinion 157/14 'Mediation Before a Family Court Judge'.

¹³⁶ *Ibid* Opinion 9/07.

¹³⁷ Shapira (n 10) 307–308.

¹³⁸ See rec 21 below.

¹³⁹ Pt IV, sections 1–2 above.

¹⁴⁰ *Ibid*.

¹⁴¹ Pt IV, section 2 above.

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

¹⁴⁴ Pt IV, section 3 above; see also Rubinstein (n 14) 341.

¹⁴⁵ Pt IV, section 3 above.

¹⁴⁶ *Ibid*.

9. Introduce additional ADR mechanisms (e.g., Early Neutral Evaluation) for cases less amenable to mediation.¹⁴⁷
10. Empower courts to mandate ADR at suitable litigation stages.¹⁴⁸
11. Authorise courts to sanction refusals to engage in ADR without cause.¹⁴⁹
12. Institutionalise mediation as a national endeavour through funding, public campaigns, training, and integration across public services.¹⁵⁰
13. Embed mediation values in education from early childhood onward.¹⁵¹
14. Expand government and municipal support for community mediation.¹⁵²
15. Encourage judicial endorsement of mediated agreements outside formal litigation.¹⁵³
16. Define clear and concrete mediator duties for both court and private mediators.¹⁵⁴
17. Codify mediation privilege, including scope and exceptions.¹⁵⁵
18. Establish a statutory ethics committee for mediators.¹⁵⁶
19. Create a disciplinary mechanism for mediators with transparent procedures and enforcement powers.¹⁵⁷
20. Build a centralised system for data collection on mediation processes.¹⁵⁸
21. Statutorily recognise judges' settlement facilitation roles and adapt training and ethical codes accordingly.¹⁵⁹

VI. CONCLUSION

Three decades of mediation in Israel reflect a history of partial success and a complex journey. While there has been significant institutional development within the courts, this contrasts with the absence of comprehensive regulation,

¹⁴⁷ Ibid; see e.g., United States District Court for the Northern District of California, Early Neutral Evaluation (ENE) <<https://cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/early-neutral-evaluation-ene>> accessed 6 July 2025; Civil Procedure Rules (UK), r 3.1(2)(m).

¹⁴⁸ Pt IV, section 3 above.

¹⁴⁹ See e.g. Civil Procedure Rules (UK), r 44.2(5)(e); Law No 6325 on Mediation in Civil Disputes (Turkey), Art 18/A(11).

¹⁵⁰ Pt IV, section 3 above; see also Rubinstein (n 14) 342.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ In Israel, this is enabled through Courts Law (n 52) s 79C(h).

¹⁵⁴ Pt IV, section 4 above.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Pt IV, section 5 above.

¹⁵⁹ Pt IV, section 6 above.

low referral rates, limited use outside courtrooms, and unresolved ethical challenges. The Israeli experience demonstrates that integrating mediation requires more than technical adoption; it demands a cultural and legal transformation, sustained governmental support, and coordinated efforts across sectors. These insights may inform other jurisdictions as well, can lay the groundwork for comparative dialogue and promote mediation as an alternative culture.

The policy proposals presented in the article seek to broaden the perspective on mediation, suggesting that it should be viewed not merely as a procedural tool, but as a socio-legal mechanism that requires an institutional, ethical, educational, and cultural infrastructure. The recommendations emphasize the need for comprehensive legislative regulation, the establishment of dedicated bodies, the integration of mediation values into the education system, and the development of monitoring, ethics, and data collection mechanisms to ensure the quality of mediation and public trust in it.

Alongside these, a new understanding is also required regarding the role of the mediator, the function of the judge, and the state's responsibility for promoting mediation as a national mission. I believe that only through a combination of a moral vision, institutional planning, and consistent regulatory action will it be possible to realise the potential of mediation in advancing an accessible and fair justice system and a society based on the values of dialogue, respect, and consensual resolution.

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MEDIATION AND SUSTAINABILITY: THE ROLE OF DECISIVE ACTIONS IN PROMOTING SUSTAINABLE DISPUTE RESOLUTION – LESSONS FROM THE ITALIAN 'CARTABIA REFORM'

Abstract

There is an undeniable need for decisive actions to advance mediation as a sustainable method within Poland's dispute resolution framework. Italy's recent approach serves as a noteworthy example, with the 'Cartabia Reform', enacted through Legislative Decree No 149 on 10 October 2022, and supplemented by additional decrees, offering actionable insights into the effective promotion of sustainable dispute resolution practices. The Italian experience, marked by financial incentives and clear regulatory frameworks, suggests a pathway for Poland to integrate mediation more deeply into its legal system, presenting it as a cost-effective and socially beneficial alternative to traditional litigation. Enacted in late 2022, the reform significantly strengthens mediation to improve access to justice and reduce court congestion, aligning with broader EU goals for Alternative Dispute Resolution (ADR).

A core element of the reform is the implementation of robust fiscal incentives. By expanding tax relief – such as exemptions from stamp and registration duties on mediation documents and agreements – the reform provides a significant financial advantage over traditional litigation. This alleviates financial barriers, encouraging broader adoption among individuals and businesses, especially in high-value disputes, promoting mediation as a pragmatic, cost-effective choice.

Beyond financial benefits, the reform introduces key procedural updates. These include extending mediation duration, enabling remote participation for greater accessibility, and granting judges the power to refer disputes to mediation even during appeal proceedings. These measures frame mediation as a sustainable process that fosters dialogue and social integration while easing the strain on the judicial system.

Italy's systematic approach, leveraging regulatory improvements and targeted incentives, positions it as a leading EU example. By adopting insights from the Cartabia Reform, Poland can strengthen its legal framework around mediation, achieving both economic efficiency for parties and broader societal benefits in conflict resolution.

KEYWORDS

mediation, sustainability, sustainable dispute resolution, Cartabia Reform

SŁOWA KLUCZOWE

mediacja, zrównoważony rozwój, zrównoważone rozwiązywanie sporów, reforma Cartabii

I. INTRODUCTION

In an era defined by sustainability across multiple dimensions – governance, economy and law – the need for effective and forward-looking dispute resolution mechanisms has become more urgent than ever. While societies commit to achieving the objectives set out in the United Nations Sustainable Development Goals (SDGs), in particular Goal 16 – which promotes peace, justice and strong institutions – the legal world is called upon to rethink traditional methods of conflict management.¹ In this context, mediation emerges not only as an alter-

¹ United Nations General Assembly (2015), *Transforming our world: The 2030 Agenda for Sustainable Development* (Resolution A/RES/70/1), adopted 25 September 2015, <<https://sdgs.un.org/publications/transforming-our-world-2030-agenda-sustainable-development-17981>> accessed 13 December 2025.

native to litigation but as a fully-fledged sustainable legal process: a method that prioritises dialogue, alleviates the burden on the courts, and promotes cooperative rather than adversarial solutions.

The concept of sustainability in dispute resolution calls for a shift beyond efficiency or cost reduction. It also includes the environmental, economic and social implications of legal proceedings. Therefore, sustainable methods must be accessible, inclusive and capable of delivering outcomes that are not only legally sound but also socially constructive. Mediation, in this broad sense, contributes to institutional resilience, relieving pressure on the judiciary and allowing the parties to retain control over the resolution of their own conflicts. It also promotes a culture of accountability, participation and trust – fundamental values for democracy and the rule of law.

The European Union has long recognised the value of mediation as a tool for sustainable justice, as demonstrated by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.² The Directive stresses the importance of promoting amicable dispute resolution and improving access to justice in order to strengthen the internal market.

In line with this vision, Member States are encouraged to introduce regulatory frameworks that facilitate mediation, support its voluntary and mandatory use, and ensure the enforceability of agreements.

However, the practical implementation of mediation varies greatly between legal systems. In Poland, despite a growing body of legislation and academic interest, mediation still faces cultural and systemic obstacles. Its voluntary adoption remains limited, and the procedural framework has not yet fully embedded it within the dispute resolution system. This requires decisive action – legislative, institutional and fiscal – to make mediation a credible and attractive choice.

Mandatory mediation was introduced in Italy in 2010. Previously, there were various forms of conciliation, both judicial and extrajudicial (conciliator, then repealed, justice of the peace, conciliation in labour disputes, bank ombudsman, etc.). Initially, during its first years, mandatory mediation worked poorly because almost all mediations did not go beyond the first meeting, at which the other party often did not appear or stated that there were no grounds for continuing mediation (and thus the condition of admissibility had been fulfilled and the case could be started).

² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. OJ L 136 on 24 May 2008, 3–8, available at: <<https://eur-lex.europa.eu/eli/dir/2008/52/oj>> accessed 13 December 2025.

In the commercial field, arbitration was more common than mediation, especially in international disputes, as is still largely the case today. However, with the new rules introduced in Italy on ‘civil and commercial mediation’, commercial mediation (whose rules are the same as those for mediation in civil cases, for which Italian law refers without distinction to ‘mediation in civil and commercial matters’) has become more cost-effective and sustainable.

It is only with the introduction of the ‘Cartabia Reform’ in 2022 and, now, with its ‘Cartabia Corrective’ of 2024, which entered into force in January 2025, that mediation is undergoing a growing phase of development. The reform is named after the Minister for Justice at the time when it was launched, Marta Cartabia. The ‘Cartabia Reform’ – as it is well known – covers not only civil and commercial mediation, but also different areas of civil proceedings, including judicial debt recovery actions and criminal trials. However, the Cartabia Reform has focused significantly on mediation, broadening its scope with a view to making the economy more efficient and resolving civil and commercial disputes.

In this context, Italy offers an instructive example. The Cartabia Reform – named after then Minister of Justice Marta Cartabia – introduced a comprehensive set of measures to consolidate the role of mediation in the Italian legal system. Of particular interest are the tax incentives introduced by the reform, which make mediation not only legally viable but also economically advantageous. Italy’s legislative choices, therefore, provide a tangible example of how mediation can be promoted through a systemic design, becoming a cornerstone of sustainable legal development.

The following analysis draws on the Italian experience as a point of reference for a broader reflection. By examining the approach taken by the Cartabia Reform, with a focus on tax and regulatory aspects, this article aims to identify actionable insights for the development of a sustainable dispute settlement culture in Poland and across the European Union.

II. THE ITALIAN MEDIATION SYSTEM: EXPERIENCE BECOMES LAW

In order to make it more effective and increase participation the mediation procedure has recently been reformed by Ministerial Decree (*D.M.*) 24 October 2023, No 150, as a result of the so-called ‘Cartabia Reform’, which amended and sometimes almost completely rewrote many articles of the previous Legislative

Decree (*D.Lgs.*) No 28/2010,³ also repealing the previous *D.M.* No 180/2010.⁴ It entered into force on 15 November 2023 and also reformed the criteria for training and continuing education for mediators and the requirements for performing the relevant mediation training activities, as well as setting out the content of the training courses.

The previous ‘Cartabia Reform’ (*D.Lgs.* No 149 of 10 October 2022)⁵ is a legislative measure aimed at making the Italian justice system more efficient. This reform addresses both procedural rules and the enhancement of the digitalisation process. In Italian law, this was a real breakthrough in the affirmation of mediation, which was originally introduced as a means of reducing the burden on the judicial process.⁶

The extension of the areas in which mediation is mandatory before access to ordinary justice has increased by the *D.Lgs.* No 149/2022 and other new regulations have been introduced through *D.Lgs.* No 164 of 31 October 2024 (‘Correctivo Cartabia’), which amended some procedural rules. Subsequently, other regulations on the matter followed through by *D.Lgs.* No 216 of 27 December 2024, entered into force on 25 January 2025.

Both recent decrees have once again highlighted the legislature’s determination to proceed expeditiously towards the de-jurisdictionalisation of civil and commercial disputes. This is clearly intended to deflate the heavy volume of court litigation and to reduce the time and cost of litigation for citizens and businesses.

The ‘Cartabia Reform’, in its part concerning civil and commercial mediation, was introduced with the aim of resolving the critical issues that had emerged in more than ten years preceding the application of civil⁷ and commercial mediation

³ *D.Lgs.* No 28 of 4 March 2010, *Implementation of Article 60 of Law No 69 of June 18, 2009, regarding mediation aimed at the conciliation of civil and commercial disputes.*

⁴ *D.M.* No 180 of 18 October 2010, *Regulation establishing the criteria and procedures for registering and maintaining the register of mediation bodies and the list of mediation trainers, as well as approving the allowances payable to the bodies, pursuant to Article 16 of Legislative Decree No 28 of 4 March 2010.*

⁵ Published in the Official Gazette (*Gazzetta Ufficiale*) of the Italian Republic on 17 October 2022.

⁶ On this point, for a schematic analysis of these rules, M Domenegotti, J Cammarano, *The civil proceedings after the Cartabia Reform Corrective Decree* (Altalex, Wolters Kluwer, Milan, 21 February 2025) <<https://www.altalex.com/documents/news/2025/02/21/processo-civile-dopo-decreto-correttivo-riforma-cartabia#p6>> accessed 12 May 2025.

⁷ A first reflection with interesting dogmatic insights into the capacity of the reform to have a real impact on reality was carried out by Federico Reggio, *The challenge of any reform: from paper rules to real rules* (Mediaries, Primiceri Ed., Padua, Italy, 2023, No 1, 1), <<https://www.mediariesri-vista.it/articolo.php?annata=2023-1&numero=0>> accessed 22 May 2025. Previously, a wide-ran-

in Italy and thus made important amendments to *D.Lgs.* No 28 of 4 March 2010, which introduced mandatory mediation of civil and commercial disputes in Italy, as a condition for the admissibility of legal proceedings (voluntary mediation is also possible on any subject of disposable rights).

Even after the entry into force of the Cartabia Reform, however, the possibility of further improvements emerged, now following a doctrinal reflection and an assessment of the problems of application that had emerged during implementation, both practical and interpretative: *D.Lgs.* No 216 of 27 December 2024 on civil and commercial mediation and assisted negotiation further amended Legislative Decree No 28/2010 and made it more efficient in terms of application than before, in line with the guidelines of the previous *D.Lgs.* No 164 of 31 October 2024. Other spaces still to be explored in Italy could be open to mediation in the future, also in the wake of international doctrinal debate.⁸

But what are the most recent developments in the last three years that will allow mediation to become a fast and sustainable way of resolving commercial disputes, as an alternative or complementary to judicial proceedings? And what are its benefits for commercial companies?

With regard to the regulatory framework of 2010, from 2022 onwards, the scope and subjects of compulsory mediation were extended.

Civil mediation in Italy can be, today: **(a)** Voluntary (with or without legal assistance); **(b)** Mandatory, with the necessary assistance of a lawyer, in the matters expressly indicated and, in such cases, it is a condition for the legal action to proceed; **(c)** Requested by the Judge (the so-called ‘delegated’, in Italian: *demandata*), in matters where mediation is not mandatory or was not mandatory at the start of the process: here, too, the assistance of a lawyer is necessary and it can also be ordered on appeal; **(d)** ordered by the judge if the mandatory mediation, prior to the start of the trial, has not been carried out.

ging reflection, even dogmatic, on the different impact of the judicial process and the mediation of the conflict, referred to as the ‘elective route for social cohesion and peace’, had been carried out by Paola Lucarelli, ‘Conflict Mediation: a generous push for change’ (*Giustizia consensuale*, Editoriale Scientifica, Naples, 2021, No 1, 23).

⁸ In order to give an example of the great potential of mediation, even on fronts that have not yet been applied in Italy, let us think of what has been described and analysed with regard to analysing the causes of university conflicts and alternative ways of resolving them, including mediation in academic disputes by Ewa Gmurzyńska, ‘Analysis of the Causes of Conflicts at Universities and Alternative Methods of Resolving Them. Part I: Mediation in Academic Disputes’ (2021) *Studia Iuridica Lublinensia*, Vol XXX, 1, 56–95, <<https://journals.umcs.pl/sil/article/view/11476/pdf>> accessed 9 June 2025.

Mediation is now compulsory ('condition of admissibility') for disputes concerning condominium cases, rights *in rem*, division, inheritance, family agreements, leases, commodatum, leasing of companies, claims for compensation for damage arising from medical and health liability and defamation by means of the press or other means of advertising, insurance, banking and financial contracts, joint ventures, consortia, franchising, manual or intellectual work contracts, network contracts, supply contracts, partnerships and subcontracting.

In the cases provided for in compulsory mediation and where mediation is requested by the court (see below), the parties must be assisted by their respective lawyers. In voluntary mediation, the presence of lawyers is not necessary, but it is advisable.

Each party shall, at the time of the submission of the request for mediation or upon its agreement to participate, pay to the mediation body an amount of compensation, including start-up and mediation costs for holding the first meeting.

When the mediation is concluded without an agreement already at the first meeting, the parties are no longer required to pay any further amounts. Otherwise, in the case of conciliation, the rules of procedure of the mediation body shall indicate the additional costs of mediation payable by the parties for the conclusion of the agreement and for the meetings following the first agreement which have not resulted in conciliation.

As regards the manner in which mediation is carried out, it is important to point out that at the first meeting, the mediator sets out the function and the manner in which the mediation is carried out, ensuring that the parties reach a conciliation agreement. It is important that the parties and the lawyers assisting them cooperate with each other in good faith, so as to make an effective comparison on the issues at stake.

A general principle of mediation has always been that the parties participate personally in the mediation procedure (although this is now mitigated by possible remote participation or through special powers of attorney and delegation to third parties). The first mediation meeting must take place no earlier than 20 days and no later than 40 days after the request.

If there are justified reasons, either party may delegate a representative with the necessary powers to settle the dispute. Entities other than natural persons (e.g., companies, consortia, etc.) participate in the mediation procedure through representatives or delegates who are acquainted with the facts. The delegation of powers to attend the meeting shall be given by a document signed with a non-authenticated signature.

In order to ascertain the technical aspects of the dispute, the mediator may have recourse to experts registered in the registers of technical advisers at the courts. At the time of the appointment of the expert, the parties may agree that his report should be produced in court.⁹

III. SUSTAINABLE DISPUTE RESOLUTION: A PRACTICAL PERSPECTIVE

In the Italian legal context, sustainability in dispute resolution is no longer an abstract ideal, but rather a concrete set of regulatory instruments, procedural measures and economic incentives, aimed at promoting a more efficient, accessible and participatory model of justice.¹⁰ Civil and commercial mediation, in particular, plays a central role as a strategic legal instrument for the modernisation of the justice system, the reduction of litigation and the promotion of long-term consensual solutions.¹¹

The constantly evolving Italian experience shows how sustainability can be integrated into justice through structured reforms, favourable tax policies, digitalisation and enhancement of the culture of dialogue.¹² The model set out in the ‘Cartabia Reform’ and the subsequent ‘Corrective’ Decree of 2024 is a concrete

⁹ For a more detailed discussion of the principles and methods of conducting civil and commercial mediation in Italy, we refer to our Isodoro Barbagallo, *Civil and Commercial Mediation in Italy – Part One: Origins and Functioning for a Comparative View*, in Kinga A Gajda, Marta Pietras-Eichberger and Małgorzata Skawińska (eds), *Mediation as an Inclusive and Sustainable Method of Resolving Conflicts* (Peter Lang, Berlin, 2025, Chapter VII); for methodological profiles on mediation see Barbagallo, *The factors of success or failure of mediation* (Mediaries, Primiceri (ed), Padua, Italy, 2024, No 2, 230), <<https://www.mediariesrivista.it/articolo.php?annata=2024-2&numero=9>> accessed 29 June 2025.

¹⁰ Giovanni Matteucci, ‘Mandatory Mediation, the Italian Experience, a Case Study – 2025’, *Beijing Law Review*, 2025, Vol 16, 353–376, <<https://doi.org/10.4236/blr.2025.161017>> accessed 13 December 2025.

¹¹ See more in Skawińska, ‘Mediation for Sustainable Resolution of Commercial Disputes within the Polish Legal Framework: A Path to Sustainable Development’, in Gajda, Pietras-Eichberger and Skawińska (eds), *Mediation as an Inclusive and Sustainable Method of Resolving Conflicts* (Peter Lang, Berlin 2025, Chapter VI).

¹² See more in Giuseppe De Palo, Leonardo D’Urso, *Achieving a Balanced Relationship between Mediation and Judicial Proceedings*, ‘In-Depth Analysis, The Implementation of the Mediation Directive’ – Workshop 29 November 2016. Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA\(2016\)571395_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA(2016)571395_EN.pdf)> accessed 13 December 2025.

response to the needs of citizens, businesses and institutions, overcoming the idea of mediation as a mere alternative to the process to propose it as an ordinary and systemic method of dispute resolution.

Sustainability, in the context of Italian mediation, is manifested at several levels: procedural sustainability, through the reduction of the judicial burden and the shortening of proceedings; economic sustainability, by reducing access costs and forecasting tax credits and tax breaks; social sustainability, by promoting fairness in access to justice, the protection of relationships, the active participation of parties and the use of flexible arrangements such as remote encounters and legal aid.

This legislative development is consistent with the European Sustainable Justice Goals, in particular in the context of the United Nations 2030 Agenda and Sustainable Development Goal 16 (Peace, justice and strong institutions).

III.1. NEW RULES TOWARDS INCREASING SUSTAINABILITY FOR ENTREPRENEURSHIP

It is clear that expanding matters, also in light of the needs of businesses and business activities, over time will also benefit the national economy, speeding up the outcome of disputes and increasing the mutual satisfaction of the parties. Civil and commercial mediation is carried out in accordance with the ‘win-win’ approach and not in the typical judicial one, which involves a ‘winner-loser’ approach.

This is the great novelty of the institution of mediation, which, however, has not yet been able to fully enter into the mindset of legal practitioners, who often see it as a mere formality prior to legal action.

Herein lies much of its superior sustainability compared to ordinary proceedings and even arbitration: today’s sustainability is enhanced not only by the deflationary effect on judicial proceedings, which is actually growing, but also, and above all, by its speed, by its significantly lower costs than ordinary litigation and arbitration, and by other factors set out below.

In addition to the above, there are considerable tax rewards, with the possibility of exemption, up to the threshold of EUR 100.000,00, from registration tax, and the granting of tax credits of variable amounts: the topic is discussed in greater detail in a later section of this text. Some tax credits have also been provided for mediation bodies.

If the new rules are correctly applied, it is very likely that mediation will, gradually over time, become established as a first choice or, in any event, as the main instrument in the resolution of commercial disputes, as it may now also be referred to by the court ‘until it fixes the hearing to refer the case to a decision’ (Article 5-quater of *D.Lgs. No 28/2010*), even in the course of proceedings in the second instance (appeal).

Mediation has become a condition for the admissibility of civil proceedings in several new areas, which have an impact on both the business and social worlds.

In these new areas, compulsory mediation encourages companies to resolve disputes faster and at lower cost than through litigation, with the added benefit of achieving a conciliation agreement that can be satisfactory to all parties, in the ‘win-win’ logic.

Mandatory mediation in cases of compensation for medical and health liability may also have a useful impact on the business community, especially in the healthcare sector, while mandatory mediation in cases of defamation with the press or other means of advertising is important for publishing companies, journalists and individual media professionals.

The timing of mediation also aligns with the efficiency that businesses demand, allowing disputes to be resolved promptly so that parties may proceed with their development programmes.

Now the mediation procedure has a maximum duration of six months,¹³ but may be extended several times after it has been initiated and before its expiry. More restrictive provisions apply, where mediation is entrusted by the court under Article 5 (2) or the first paragraph of Article 5-quater: in those cases, the mediation period may be extended once only, by three additional months.

The initial period begins from the date on which the request for mediation is lodged and, in the case referred to in paragraph 2, from the date of lodging of the order by which the court adopts the measures provided for in Article 5 (2) or the first paragraph of Article 5-quater, assigning the matter to a mediation body chosen by the parties.¹⁴

¹³ Previously, the initial period was four months.

¹⁴ Despite the corrective measures introduced by the ‘Cartabia Reform’ to regulate this area, the future may reveal other opportunities for further improvement of the legislation, based on what doctrine and practice indicate, such as, among others, the suggestions made by Pierluigi Mazzamuto, ‘La mediazione conciliativa secondo la Riforma Cartabia’, *GIURETA*, Università di Palermo, Palermo (Italy), 2024, Vol XXII, 331–381, <https://www.giureta.unipa.it/2024/14_Mazzamuto_DirPriv_2024.pdf> accessed 8 December 2025; Maria Vittoria Occorsio, *La decadenza*

III. 2. INCENTIVES FOR COMPANIES CHOOSING MEDIATION

The ‘Cartabia Reform’ and the recent ‘Cartabia Corrective Decree’ have significantly increased incentives for companies choosing mediation or are obliged to do so as a condition of admissibility in the event of a dispute, including greater flexibility in the procedure compared to previous rules.

The possibility of remote participation also removes geographical barriers, thus making access to mediation more attractive. Lower costs, compared to ordinary litigation, are also factors encouraging companies to choose mediation, even where mediation is not mandatory.

In this respect, voluntary mediation can be very useful and flexible, including for cross-border disputes referred to in Article 2, Directive 2008/52/EC of the European Parliament and Council of 21 May 2008.¹⁵ In such cases, the agreement annexed to the report shall be approved, at the request of a party, by decree of the President of the court of the place where the mediation body, with which the agreement was reached, has its seat, once it has been established that the rules of law and public policy have been complied with.

In all such cases, once approved, the agreement is enforceable for compulsory expropriation, enforcement in a specific form and registration of a judicial mortgage.

If, on the other hand, all the parties participating in the mediation are assisted by lawyers, the agreement which has been signed by the parties and by the lawyers themselves, including via electronic means, shall constitute an enforceable instrument for compulsory expropriation, enforcement by surrender and release, performance of obligations to act or refrain from acting, and registration of a judicial mortgage.

The agreement must be entered in full in the order for payment referred to in Article 480 (2) of the Code of Civil Procedure. The lawyer shall certify that the copy of the agreement sent electronically to the bailiff conforms to the original.

nella procedura di mediazione dopo la Riforma Cartabia; Riflessioni a margine della sentenza del Tribunale di Napoli, sez. IV, n. 8555, del 20.9.2023 e dei successivi orientamenti giurisprudenziali, in n. 2, in Mediores, Primiceri Ed., Padova, Italy, 2024, n. 2, 244 and subsequent pages (accessed 14 December 2025).

¹⁵ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. OJ L 136 on 24 May 2008, 3–8, <<https://eur-lex.europa.eu/eli/dir/2008/52/oj>> accessed 13 December 2025.

Article 17 of *D.Lgs. No 149 of 10 October 2022*¹⁶ also contains the rules on the tax system for mediation.¹⁷ It provides that all acts, documents and measures relating to the mediation procedure are exempt from stamp duty and from all charges, taxes or fees of any kind or nature. The record to which the conciliation agreement is annexed is exempt from registration duty up to a value of one hundred thousand euros, otherwise the tax is payable only in respect of the excess amount.

Tax incentives are certainly among the most important for businesses. We have already written about the tax reward advantages, including the possibility of exempting registration tax up to the threshold of EUR 100.000,00, which is payable only on the excess over EUR 100.000,00 and with the granting of tax credits of a variable amount, both for mediation costs, including lawyers' fees, and for cases settled through court-ordered mediation.

In this regard, it should be pointed out that, in the Italian tax system, the acts of the judicial authorities are subject to indirect taxation, through the so-called 'registration duty'. The procedures for the assessment and collection of this duty – as well as its preconditions – are laid down in Article 37, Presidential Decree No 131/86, the so-called 'Consolidated Text of the Registration Tax', which provides that such acts are subject to registration duty, pursuant to the first paragraph of that article.

The taxable amount of a judicial act is determined on the basis of the effects it actually produces, as stated in Article 43 (4) of Presidential Decree No 131/86, which also lays down the criteria for calculating the tax and to which we refer for further information.

The *D.M.* of 1 August 2023, issued by the Minister for Justice in agreement with the Minister for Economic Affairs and Finance, amended *D.Lgs. No 28/2010* with regard to tax incentives, both in the procedure and in the application process for recognition of the tax credit, as well as the determination, assessment and payment of the fee payable to the lawyer of the party admitted to legal aid. Tax credits shall be reduced by 50 % if the conciliation agreement is not reached.

¹⁶ It concerns 'Implementation of Law No 206 of 26 November 2021, delegating powers to the Government to improve the efficiency of civil proceedings and revise the rules governing alternative dispute resolution instruments and urgent measures to streamline proceedings concerning the rights of individuals and families, as well as enforcement proceedings'.

¹⁷ For further details, including with some academic statements, we refer to Valeria Botti, *Mediation of Civil Affairs in Italy – Second Part: Tax Benefits in the Fiscal Approach to Supporting Sustainability*, in Gajda, Pietras-Eichberger and Skawińska (eds), *Mediation as an Inclusive and Sustainable Method of Resolving Conflicts* (Peter Lang, Berlin, 2025, Chapter VIII).

Tax credits may be cumulated during the year for natural persons with a limit of EUR 600,00 per procedure and a total of EUR 2.400,00.

For legal persons – and this concerns the business community – the cumulative ceiling for one year is ten times higher and can reach up to EUR 24.000,00, offering significant savings by combining tax relief with faster procedures and lower participation costs.

Mediation bodies are also granted a tax credit, which corresponds to the fee due, but not payable by the party entitled to legal aid, up to a total annual maximum amount of EUR 24.000,00.

IV. THE FACTORS INCREASING INCLUSIVENESS OF MEDIATION IN ITALY

Mediation in Italy was designed not only in terms of greater sustainability in relation to judicial proceedings, with rules more flexible than they were before, but also with a more inclusive function, both for private citizens, first and foremost, and for businesses.

Its lower costs make civil and commercial mediation attractive and accessible even for matters not covered by the compulsory mediation procedure. They also allow those who do not have large economic resources – or those who want to save money and time – to gain access, while also benefiting from related tax benefits.

But inclusiveness is not a purely cost-dependent issue: the recent novelties introduced by the ‘Correctivo Cartabia Decree’ include the possibility of holding remote mediation meetings for the entire process: if one of the parties so requests, it is possible to participate in mediation through a remote audiovisual connection.

This provision significantly increases the inclusiveness of the procedure by allowing remote virtual ‘presence’ also to individuals and companies living or operating far from the mediator’s premises, or who cannot easily participate due to disability, health, or even competing business obligations or other impediments. In such cases, digital signatures on documents are permitted.

Extending State-funded legal aid to foreign nationals further increases the inclusiveness of mediation in Italy for private citizens.

Legal aid in Italy, as elsewhere, is subject to specific income thresholds. In order to prove income earned abroad, non-EU nationals or stateless persons must

submit a certificate from the competent consular authority confirming its accuracy. If this certificate cannot be provided, a substitute declaration must be submitted, in accordance with the minimum form and content requirements set out in Article 47 of Presidential Decree No 445 of 28 December 2000.

All the factors contributing to the inclusiveness of the conciliation procedure clearly reflect the principles set out in Recital 5 of the preamble to Directive 2008/52/EC, of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

V. POSSIBILITY OF ADOPTING THE ‘CARTABIA’ MODEL IN OTHER EUROPEAN COUNTRIES

Please note, *incidentally*, as in the case of cross-border mediation as referred to in Article 2 of Directive 2008/52/EC, of the European Parliament and Council of 21 May 2008, as with voluntary mediation, if the parties are not all assisted by lawyers (and therefore not excluded from this provision), the agreement annexed to the minutes must be approved, at the request of the party, by a decree of the President of the court in the jurisdiction where the mediation body is located. The court’s review, however, is limited to verifying formal legality and compliance with mandatory rules and public policy.

Beyond this international element common to both Italian and European procedure, a key question arises: ‘To what extent is the Italian model exportable to other European countries, and, if so, what corrective measures may be needed to adapt it to the specific legal system of individual member states?’.

The principle of access to justice is a fundamental pillar of the rule of law. At its meeting in Tampere on 15 and 16 October 1999, the European Council called on the Member States to establish out-of-court and alternative procedures to improve and facilitate access to justice.

Subsequently, in April 2002, the European Commission published a ‘Green Paper’ on alternative dispute resolution (ADR) in civil and commercial matters. The paper launched a broad consultation with Member States and stakeholders to explore possible actions to promote mediation and assess the status of ADR implementation in EU legal systems.

Hence, through the appropriate steps, Directive 2008/52/EC, EP and Council, 21 May 2008, ‘on certain aspects of mediation in civil and commercial matters’, was adopted.

The Italian model introduced in 2010 is influenced by this European approach and therefore, in our view, can serve as an important reference for other European countries, especially in the light of recent developments. As we have seen, the Italian model – as it is currently designed and implemented – becomes truly valuable for other European countries, through the rules laid down in *D.Lgs. No 28/2010*, as amended by subsequent reforms.

The Italian civil and commercial mediation system is now providing targeted corrective measures drawn from fifteen years of national experience in the field. The problems that had emerged over time have been identified, and important reforms have been introduced to enhance the efficiency and flexibility of the system.

The only critical note that can be highlighted concerns the considerable and recent increase in mediation fees.¹⁸ While this may discourage mediation in certain cases, it also encourages parties to take the process seriously and work towards a conciliation agreement, especially once an initial financial outlay has been made. Such a financial commitment can foster a greater sense of responsibility towards the mediation process.

VI. CONCLUSIONS

Parties, including companies, may voluntarily use civil mediation to resolve disputes that do not involve inalienable rights. In Italy, mediation is also mandatory in several legally defined cases. If parties fail to undertake mediation, the judge can raise this issue at the first hearing or *ex officio*. When required, the judge gives 15 days to initiate mediation through an authorised body and even during the proceedings, may refer the parties to a civil and commercial mediation.¹⁹

Mandatory mediation is a prerequisite for the admissibility of certain civil cases and may expand to cover more civil and commercial matters. *D.Lgs. No 69/2013*

¹⁸ For some concerns raised in this regard in a judicial case, see Anna Ferrari Aggradi, Franca Visonà, *La Mediazione obbligatoria: un aumento di costi davvero insostenibile?*, Primiceri Ed., Padua, Italy, 2023, 2, 146.

¹⁹ On this point, and also for comments on the Caratabia Reform, see, *ex multis*, Maurizio Maione, *Rapporti tra mediazione obbligatoria e processo civile alla luce della Riforma Cartabia*, in 'il-diritto-processuale-civile.it', 2023, 2, 458–463, <https://www.ildiritto-processuale-civile.it/wp-content/uploads/2023/05/2_2023_contributo-05.pdf> accessed 12 December 2025; Edoardo Borselli, *Mediazione e processo civile riformato: quando il giudice dispone l'invio?* in *Giustizia consensuale*, Editoriale Scientifica, Napoli (Italy), 2024, n. 2, 527–558.; G Matteucci *Mediazione civile e commerciale in Italia dopo la Riforma Cartabia*, Aracne Ed., Roma, 2024.

empowered judges to order mediation ‘having assessed the nature of the case, the state of the investigation and the behavior of the parties’, transforming what was once an invitation into a binding order. This power can be exercised up to the clarification of the conclusion of the case, both in the first and second instances.

What makes the Italian regulatory framework more current and interesting, also in terms of the sustainability and inclusiveness of the mediation tool for civil and commercial disputes, are the new rules, including those referred to in the *D.M.* No 150/2023.

Other important changes towards better efficiency, also thanks to telematics, have been recently approved by the so-called ‘Correttivo Cartabia’, the *D.Lgs.* No 164 of 31 October 2024 and, shortly after, *D.Lgs.* No 216 of 27 December 2024, which came into force in January 2025.

In this respect, the comparative study of the Italian ADR system, and of civil and commercial mediation in particular, is certainly of great interest to other national legal systems, including those in development (*de iura condita*): recent reforms are the result of past experience and the identification of issues and weaknesses in previous legislation, offering important corrective measures that are useful both in existing and developing legal systems (and thus both *de iure condita* and *de iure condendo*).

It is encouraging to observe how the statistics highlight a growing use of ADR also in Italy, as well as in other States.

Civil and commercial mediation, with its speed and flexibility – even superior to that of other ADR means — make the resolution of the dispute more sustainable, on the one hand generating balance in a judicial dispute which in order to be sustainable must be reduced in number, and on the other hand returning the solution directly to the parties, through an impartial third party, which is the mediator. Mediation is certainly an important tool for speeding up the time needed to resolve disputes and for reducing the judicial burden, which in Italy is very heavy: the number of civil trials pending as of 30 June 2022 was 2,881,886 units: almost one sentence out of two is reformed on appeal and many appeal sentences are then reformed in the Supreme Court.

The malfunctioning of the first instance courts (and the second instance courts are not much better) is one of the main causes of congestion in Italian courts: it causes significant damage to businesses and often discourages foreign investment in Italy.

The lower costs (but, as we have seen, they have risen in recent years) and greater tax breaks of civil and commercial mediation in Italy have also raised the level of concrete inclusiveness of mediation which today, after the 2022–2024 reforms, is

even more inclusive than before: this also taking into account how access to legal aid at state expense has been allowed even to the less well-off, both for mandatory mediation and for delegated mediation, through which the lawyer will be paid in the event of a positive outcome of the mediation, without starting a legal dispute.²⁰

Mandatory mediation can provide citizens and businesses with an opportunity to bypass the slowness and ineffectiveness of traditional litigation by settling disputes through a ‘win-win’ approach that leaves everyone somewhat satisfied. This generates peace and social cohesion, while preserving business relations with the company involved in the mediation.

However, it is legal practitioners who must first believe in this option, encouraging their clients to consider it, whether they are private citizens or companies.

It is, in our view, essential to foster a new legal culture in which the lawyer is seen not only as a defender within the traditional judicial system, but also as a professional skilled in out-of-court dispute resolution. Universities, within the scope of their academic autonomy, must offer students training that reflects current developments and innovations – particularly in civil and commercial mediation and the broader use of ADR mechanisms.

By drawing on Italy’s experience, Poland – along with other EU Member States – can strengthen its legal framework for mediation, promoting both economic efficiency and broader societal benefits in the resolution of disputes.

From a Polish perspective, several features of the Italian model are particularly valuable and potentially adaptable. These include the mandatory application of mediation across a wide range of civil and commercial cases, a system of tax incentives that encourages parties to pursue consensual solutions, and a well-developed institutional framework governing mediation bodies. Additionally, the structured approach to the training and accreditation of mediators offers a solid foundation for enhancing the quality and credibility of mediation practices.

Although a comprehensive exploration of these institutional and educational aspects falls outside the scope of this contribution, they provide a promising ground for reflection for future reforms. The adoption of these elements – in accordance with national legal traditions and procedural frameworks – could significantly enhance the credibility, accessibility and attractiveness of mediation in Poland and other EU jurisdictions.

²⁰ Italian Civil Court of Cassation, Section II, Ordinance of 25 March 2024, No 7974 (rv. 670573-01), in *CED Cassazione* (2024), accessed 6 June 2025.

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II. MISCELLANEA

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**THE JUST LAW AND ITS EVALUATION IN LEGAL
AND POLITICAL THOUGHT AND PRACTICE
IN PRE-CONSTITUTIONAL EUROPE
(UP TO THE 18TH CENTURY). GENERAL REMARKS**

Abstract

The question about a good, equitable and just law has been posed for centuries. It concerned the investigation of the essence of the law itself as well as the quest for a measure with which to evaluate the law, and finally, the indication of institutions to carry out such an evaluation and the determination of its possible consequences in the event of a negative outcome.

Today, in many countries, this is the domain of the judiciary, with constitutional norms being the criterion for evaluation. The adoption of such an arrangement is associated with the recognition of the supremacy of the constitution as a legal act.

Institutional forms of examining the constitutionality of statutes, as well as the compliance of the actions of the executive power with the provisions of statutes, did not develop on a larger scale until the end of the 19th century and grew out of the tradition of judicial review on the one hand, and the concept of the *Rechtsstaat* on the other. However, the road leading to the solutions adopted at that time was long, and it is worth tracing back. This article will present the main directions

of solutions starting from antiquity and ending at the end of the 18th century, when the doctrinal background for the political structures introduced from the 19th century onwards had already developed.

We describe the consequences of the Greek belief that the law is good by definition, Roman tradition that the law is the measure to solve the practical cases, the Middle Ages' dispute on the nature of the king's legislative power defined by two formulas from *Digesta*, '*princeps legibus solutus*' and '*princeps legibus alligatus est*'. Finally, we present the thought of Edward Coke, chief justice of the Westminster Courts, on the supremacy of the common law, particularly expressed in *Bohnam* case (1610), and the activity of French *parlements* (supreme courts), in the 16th–18th centuries as the roots of judicial review procedure and the *Rechtsstaat* concept.

KEYWORDS

customary law, statutes, legislative power, judicial review

SŁOWA KLUCZOWE

prawo zwyczajowe, ustawy, władza ustawodawcza, kontrola sądowa

INTRODUCTION

The question about a good, equitable and just law has been posed for centuries. It concerned both the investigation of the essence of the law itself and the identification of the constitutive features of a decent law, as well as the quest for a measure with which to evaluate the law, as well as the presentation of the boundaries that limit the legislative power, and finally the indication of individuals (or institutions) to carry out such an evaluation and the determination of its possible consequences in the event of a negative outcome.

Today, in many countries, this is the domain of the judiciary, with constitutional norms (including constitutional principles) being the criterion for evaluation. The adoption of such an arrangement is associated with the recognition of the supremacy of the constitution as a legal act. The examination of the constitu-

tionality of statutes is an element of the system standard described in the treaties founding the European Union and recalled in many EU documents.¹ In Poland, according to the Constitution, the body that should perform this type of tasks is primarily the Constitutional Tribunal, but – as part of the so-called dispersed control – they can also be carried out by common courts in the course of their day-to-day activities.

Institutional forms of examining the constitutionality of statutes, as well as the compliance of the actions of the executive power with the provisions of statutes, did not develop on a larger scale until the end of the 19th century and grew out of the tradition of judicial review on the one hand, and the concept of the *Rechtsstaat* on the other. However, the road leading to the solutions adopted at that time was long and it is worth tracing back. This article will present the main directions of solutions starting from antiquity and ending at the end of the 18th century, when the doctrinal background for the political structures introduced from the 19th century onwards had already developed.

The way of looking at the issue of evaluation of the law and the consequences of such an assessment has undergone multiple changes over the centuries. This resulted from the way the law itself was understood, and especially how its sources were perceived. At a time when customary law prevailed, the evaluation focused primarily on how it was enforced, although it was also important who ‘read’ customary law and whether they did that accurately enough (e.g., whether they did not alter its content). When customary law began to be supplemented on an increasing scale by statutory law, the evaluation of man-made law, usually also including the entities creating this law, gained in importance. In this way, the goals and intentions of the lawmaker (i.e., the king and possibly the bodies with whom the ruler made the law, but also – with regard to ancient times – the people who initiated the adoption of a new law) also became subject to evaluation. This inevitably meant the need to establish relatively objective criteria according to which such assessments would be made. And this was closely related to the way the functions and objectives of law were perceived. This is perfectly exemplified by ancient Greece and Rome.

¹ For instance, the European Commission’s 2014 communication reads that ‘[d]emocracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process’. Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

ANCIENT GREECE

The Greek *polis*, in particular Athens, was characterised by the perception of the good of the community as the goal of law.² The relationship between *themis* and *dikē* is of fundamental importance for understanding the way the law works and its possible evaluation. The Greeks understood *themis* as a general rule presumably derived from the gods and representing a common feeling of what is right.³ On the other hand, the word *dikē* meant the concrete application of this rule in the form of – as we would say today – a legal norm or a judiciary ruling. It is important to note that there was no hierarchical relationship of dependence between the two concepts.⁴ Over time, the concept of *nomos* emerged, initially encompassing ‘the abstract ideal of order, and that simply of custom observed in practice’,⁵ and then – already in what came to be called a ‘democratic *polis*’ – the law created by the *ecclesia* and binding on the inhabitants of Athens (or other cities where the legislative process had already developed, such as Sparta), but ensuing from the old custom and generally observed rules. This is why obeying and executing the law was considered the basic duty of a citizen. ‘[T]he Greeks [...], although free, are not free in everything: they have a master, namely the law [...]

– this is a statement by the king of Sparta, Demaratos, often quoted by Herodotus.⁶

It follows from the above remarks that for the ancient Greeks, the law had an inherently positive content. This is probably why they exercised special care to prevent the law from being changed, or to secure such a change with strict conditions to protect it against ill-considered action. The most extreme example is the procedure used by the Locrians living in the southern parts of the Apennine Peninsula: according to Demosthenes, anyone who came up with a proposal for

² This is the goal set for the law e.g., by Plato: ‘[...] just as we deny that laws are true laws unless they are enacted in the interest of the common weal of the whole state’, *Laws*, 715b. Many authors point out that in the Greek *polis*, the law was the basic bond between citizens in a community, cf, e.g., Christian Meier, *Powstanie polityczności u Greków*, Wyd. Teologia Polityczna, Warszawa 2012, 361; Konstanty Grzybowski, *Historia doktryn politycznych i prawnych. Od państwa niewolniczego do rewolucyj burżuazyjnych*, PWN, Warszawa 1967, 43.

³ As John W Jones wrote: ‘[...] so did *themis* take on the meaning of what was not so much expedient as morally incumbent upon gods and men alike. Thus, *themis* began to imply some wider principle of which it was at once the expression and application’, *The Law and Legal Theory of the Greeks*, Oxford 1956, 29–30, quoted from John M Kelly, *A Short History of Western Legal Theory*, Clarendon Press, Oxford 1992, 7.

⁴ As Rudolf Köstler wrote, ‘*Themis* is a law of the heavens, *dikē* the earthly law that imitates it’, *Die homerische Rechts- und Staatsordnung*, in Erich Berneker (ed), *Zur griechischen Rechtsgeschichte*, Darmstadt 1968, 180; quoted from Kelly *ibid* 27.

⁵ Jacqueline de Romilly, *La loi dans la pensée grecque des origines à Aristotele*, Paris 1977, 23.

⁶ Herodotus, *Histories*, 7.104, quoted from Kelly (n 3) 10.

a new law, which was then rejected, was doomed to die.⁷ In other *polis*, less drastic methods were used, but in general, the legislative process was fraught with numerous rigours. In Athens, for example, a change in the law took the form of a trial: the initiator of a change had to bring a kind of charge against the existing regulations and prove, while maintaining all formal requirements, his allegations (and thus the need for change), while he had to reckon with the fact that if he violated formalities or his proposal was found by the audience to be in breach of fundamental values, he could be accused of unworthy behaviour (which undermined his civic status). Over time, however, these formal, strict requirements were eroded and in the final period of democratic Athens (4th century BCE), the legislative process became much simpler and subject to political goals.

In the Athenian community, however, it was still believed that the durability of the law was a superior value and – in view of the increasing number of laws passed by various coteries – attempts were made to consolidate respect for the old law as part of the civic education of young Athenians. A good example of such efforts is the text of the oath of the Athenian ephebes. It was inscribed on a stele after the defeat of Athens in the Battle of Chaeronea (338 BCE), but it well reflects the earlier long tradition of fostering the civic attitudes of the citizens of Athens. The oath of the ephebes includes a commitment to obey the law, but it is by no means blind obedience: ‘I will obey whoever is in authority and submit to the established laws and all others which the people shall harmoniously enact. If anyone tries to overthrow the constitution or disobeys it, I will not permit him, but will come to its defence, single-handed or with the support of all’.⁸ As Marek Węcowski aptly notes, an ephebe ‘is obliged to critically assess the political reality. Politicians can act in a way that is unfavourable to the *polis*. They can also enact laws that are harmful to it and simply bad. In such a situation, it is the citizen, whether alone, individually or ‘with the support of all’, who has the sacred duty to resist them. This obligation becomes particularly strong when someone – and thus anyone, including the rulers – would try to overthrow the laws of the homeland’.⁹

A legal change of the law, i.e., recognition of the existing legal status as defective or insufficient, was possible by entrusting a specific person with the role of the lawmaker and vesting him with broad legislative powers. Such an office was to be entrusted to particularly respected and experienced individuals appointed for a fixed term of office, which was to prevent it from turning into tyranny. Such law-makers were, for example, Solon and Cleisthenes in Athens – both of whom introduced reforms that led to the creation of Athenian democracy. However,

⁷ Demosthenes, *Against Timocrates*, 139.

⁸ ‘The Athenian Ephebic Oath’, *The Classical Journal*, 1918, 13 (7), 499.

⁹ Marek Węcowski, *Tu jest Grecja. Antyk na nasze czasy*. Wyd. Iskry, Warszawa 2023, 90–91.

this was an extraordinary solution, resorted to in crisis situations where deeper changes were required. At the same time, however, the Greeks were aware of the fact that in specific cases, the modification of the existing law is sometimes desirable and justified by philosophical reasons. For example, it is possible, based on the principle of equity, to correct the law in an individual case and, for instance, with the consent of the parties involved, to hand over the resolution of the dispute to arbitrators (instead of judges strictly bound by law).¹⁰ According to Aristotle, this is not the creation of a separate basis for a legal decision but acting within the framework of restorative justice.¹¹

In general, as can be seen, there were no procedures in ancient Greece for reconciling the law with superior values, there were no procedures for invalidating the law, and at the same time, there was no shortage of views on what the law should be like¹² and when it could be ‘flexibly’ applied. This was accompanied by the belief that the law is good by definition, so any attempt to change it deserves a negative assessment, or at least procedural obstacles aimed at convincing the inhabitants of the *polis* of the real need to enact a new law. This was to be controlled primarily by citizens. However, it should be kept in mind that the definition of a citizen of the Greek *polis* presumed active, direct involvement for the common good, including active, almost daily participation in various bodies of the *polis*. This was clearly expressed by Pericles in his famous Funeral Oration, praising Athenians ‘[...] for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless’.¹³

ANCIENT ROME

The experience of ancient Rome has yielded two approaches to the issue of legal evaluation. On the one hand, there is an attempt to transpose the thoughts of the Stoics about the eternal, harmonious order of the cosmos into the realm of law and the search for constant, immutable and universally binding principles to which every law should be subordinated, and, on the other hand, treating law as a tool for solving current problems in a natural, i.e., reasonable, way and with

¹⁰ This is mentioned by Aristotle in *Rhetoric*, 1.13.19.

¹¹ Aristotle, *Nicomachean Ethics*, 5.10.5.

¹² ‘Good law must necessarily mean good order’, wrote Aristotle, *Politics*, 7.4.5.; ‘we deny that laws are true laws unless they are enacted in the interest of the common weal of the whole state’ – this, in turn, is the view quoted above from Plato, *Laws*, 715b.

¹³ Thucydides, *History of the Peloponnesian War*, translated by Richard Crawley, JM Dent & Sons, London 1910, 94.

reference to the principle of equity. Cicero's treatises were an example of the first approach. In his treaty *On the Laws*, Cicero wrote that 'the beginning of right should be drawn from law. For this is a force of nature; this is the mind and reason of the prudent man; this is the rule of right and wrong. [...] In fact, let us take the beginning of establishing right from the highest law, which was born before any law was written for generations in common or before a city was established at all'.¹⁴ In another text, Cicero characterised natural law as universal and unchangeable. As he wrote, 'nor will it be one law at Rome and a different one in Athens, nor otherwise tomorrow than it is today; but one and the same Law, eternal and unchangeable, will bind all peoples and all ages [...]'.¹⁵ For Cicero, natural law understood this way was to be the decisive criterion for assessing the legal nature of the man-made law. Consequently, he believed that the mere fact that a law was passed by a popular assembly, even with the approval of the senate, did not determine whether it was a just law; for its content cannot violate these eternal, higher principles. And he concluded that in the event of such a collision, an enacted rule does not deserve to be called law: 'But if rights were established by peoples' orders [...] there would be a right to rob, a right to commit adultery, a right to substitute false wills if those things were approved by the votes or resolutions of a multitude'.¹⁶ It should be noted that for Cicero it was no less important to realise the basic purpose of laws; in his opinion, 'laws have been invented for the health of citizens, the safety of cities, and the quiet and happy life of human beings'.¹⁷ Lawmakers should, therefore, always keep these objectives in mind.

Cicero, however, did not comment on what the formal consequences of finding that a particular decision of the legislature violates the eternal, natural rules and in whom such authority would be vested. The postulate of conformity of statutory law with the abstract formula of the law of nature was, therefore, in his case, the view of a philosopher who considers and defines the constitutive features of good law. As John M Kelly rightly notes, Cicero's views provided for the later, Christian world, a framework to which a more absolutist role for natural law could readily be fitted'.¹⁸ This will be discussed further below. However, Cicero was also an active politician, appearing in public and engaging as a defence attorney or prosecutor in court proceedings. In his speeches delivered in these roles, he did not contest the applicable law; on the contrary, he tried to show that many rules of substantive law derive from natural law, such as the right to self-defence or the

¹⁴ Cicero, *On the Laws*, in *The Republic and The Laws*, translated by David Fott, Cornell University Press, Ithaca and London 2014, Book I. 19, 136.

¹⁵ Lactantius, *Divinae institutiones*, 6.8, quoted from Kelly (n 3) 58.

¹⁶ Cicero (n 14) Book I. 43, 145.

¹⁷ Cicero (n 14) Book II. 11, 157.

¹⁸ Kelly (n 3) 59–60.

prohibition of cheating or harming others, which further strengthens the need to observe them. In his famous speech, ‘Pro Cluentio’, he even presents the view that the good of the state, which depends on the enforcement of laws, can sometimes justify accepting their dubious content: even if one were to admit that the formal distinction made by the law, between the status of a senator and persons of lower rank, is bad, ‘it is a far greater shame, in a state which rests upon law, to depart from law’.¹⁹

In republican Rome (and at the beginning of the Principate), however, the above-mentioned second approach was also possible, which could lead – in the event of a negative assessment of a specific norm – to a formal correction of the existing law. A good example of such a situation is the case of Verres (in which, by the way, Cicero played an important role). However, the discussion of this case should be preceded by two comments. First of all, it is necessary to recall the famous definition of the law *ius est ars boni et aequi* and recall – as Marek Kuryłowicz writes – that ‘*ars* was understood by the Romans [...] as a practical skill, as a kind of technique of applying law’.²⁰ Therefore, it was not a question of seeking a general definition of what is good or right but of resolving a specific case based on these categories. Ernst Levy explains that “‘natural’ was to them not only what followed from physical qualities of men and things, but also what, within the framework of that system, seemed to square with the normal and reasonable order of human interests and, for this reason, not in need of further evidence’.²¹ The decency of the law was, therefore, to be determined by the practice of its application. This is related to a second preliminary remark. In the Roman state, until the middle of the 2nd century CE, praetors played a fundamental role in the application of law. The office of praetor was established in 367 BCE and was second only to the office of a consul. The praetor, like all the officials in republican Rome, was elected for a term of one year. His special powers included ensuring the application of law by the Romans. This involved granting legal protection, i.e., determining whether the party submitting a petition to the praetor was entitled to an action in a specific case. The praetor did not decide the case himself, but his admission of the claim meant that the dispute was formally established and allowed the case to be referred to a private judge.²² An essential part of the praetor’s practice was an edict issued upon assumption of office, setting out how he would apply the law during his term. Usually, he repeated the provisions

¹⁹ Cicero, The Speech in Defence of Aulus Cluentus Habitus, LIII, in *The Speeches of Cicero*, translated by HG Hodge. Harvard University Press, Cambridge, MA 1927, 379.

²⁰ Marek Kuryłowicz, *Prawo rzymskie. Historia, tradycja, współczesność*, UMCS, Lublin 2003, 36.

²¹ Ernst Levy, *Natural Law in Roman Thought*, *Studia et Documenta Historiae Iuris*, 1949, 7.

²² Cf Jan Zabłocki, Anna Tarwacka, *Publiczne prawo rzymskie*, Wyd. Liber, Warszawa 2005, 51.

of his predecessor's edict to a large extent, but he could also – if he found this necessary – introduce his own arrangements. The praetor did not formally create law, but by applying the existing *ius civile*, he adapted it to changing needs. This relationship between *ius civile* and the effect of corrections made by successive praetors (referred to in Roman sources as *ius honorarium*) was described by Papinian in the well-known formula: '*ius praetorum est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia*'.²³ The praetor thus clarified *ius civile*, supplemented it, and sometimes even rectified it (relying on the principle of justice and equity).²⁴ It follows that the praetor, in considering a specific case, could effectively block the validity of a provision of civil law that he considered unjust (but could not repeal it), and his successor – in drafting his own edict – could take such a correction into account. In particular, the praetor could also disregard rules introduced by his predecessor when he considered them erroneous. This was the case with Verres, as mentioned above.

When taking over the office of praetor in 75 BCE, Verres introduced a significant amendment to the *lex Voconia* in his edict.²⁵ That law of 169 BCE imposed significant restrictions on the freedom of testation by wealthy Roman citizens holding significant property and included in the first class of census: they could not bequeath property to their daughters in their will (and the amount of possible legacies in their favour was significantly reduced).²⁶ In his edict, Verres extended the *lex Voconia* to all Roman citizens with a sufficiently large wealth, regardless of their census status and, moreover, he decided that this provision of the edict was to apply retroactively from the moment of the adoption of the *lex Voconia*. Verres' actions were corrupt: the change in the interpretation of the *lex Voconia*, set forth in the edict, was to enable the estate of Roman citizen Asellus to be taken over by a cousin of the deceased, with whom Verres had entered

²³ *Digesta*, 1.1.7.1.

²⁴ This practice of the praetor is confirmed by Gaius when discussing procedural objections in his *Institutions*: '*Saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari [...] Exceptiones autem alias in edicto praetor habet propositas, alis causa cognita accommodat. Quae omnes vel ex legibus, vel ex his, quae legis vicem optinent, substantiam capiunt, vel ex iurisdictione praetoris proditae sunt*' ('It often happens that someone is responsible under civil law, but it would be unfair to convict him in court proceedings [...] The praetor has some charges proposed in the edict and he accommodated others after having examined the case. All of them derive their substance either from statutes, or from what has the force of statutes, or have emerged from the jurisdiction of the praetor'), cf *Institutions*, IV, 116, 118.

²⁵ The Verres case involved many charges concerning the manner in which he exercised the office of governor of Sicily. This article deals with only one of the charges brought against him by Cicero in connection with holding the office of praetor.

²⁶ For more on *lex Voconia*, cf Dixon, 'Breaking the Law to Do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome', *Adelaide Law Review* 1985 Vol 9(4) and the literature listed there.

into an agreement. Asellus, who died in 75 BCE, bequeathed all his vast fortune to his daughter. Since he was not a citizen of Rome registered with the census, he was not subject to the restrictions provided for in the *lex Voconia* and his will was approved. Verres' edict, through its retroactive effect, was to lead to the annulment of the will, with the cousin of the deceased becoming the heir. In his accusatory speech, Cicero first pointed out to Verres the entire corrupt context of the case, but he also raised the issue of the effectiveness of the edict to the extent that it would exceed the time of Verres' holding the office of a praetor.²⁷ Verres, by giving his decision retroactive effect, entered, as it were, the time remit of his predecessor. The praetor's edict was valid only for one year, i.e., during the term of the praetor's office. In a way, Verres supplemented the edicts of his predecessors, i.e., he went beyond the scope of his jurisdiction.²⁸ Cicero, therefore, tried to demonstrate in his speech that Verres' edict, in so far as it referred to the *lex Voconia*, violated several basic principles and, therefore, could not be the basis for effective deprivation of the property of Asellus' daughter. According to Cicero, the crucial factor was the legal status in force at the time of Asellus' death: '*Heres erat filia. Faciebant omnia cum pupilla, legis aequitas, voluntas patris, edicta praetorum, consuetudo iuris quod erat tum cum Asellus est mortuus*' [His daughter was the heiress. Everything worked in her favour: the equitable rules of law, the will of her father, the edicts of the praetors, the legal custom prevailing at the time of Asellus' death].²⁹ In addition to the argument mentioned above, Cicero cites one more: namely, he points out that the practice followed by Verres' predecessors (who all accepted the provisions of the *lex Voconia*) became common and its change would require solid argumentation (which was lacking in the case of Verres).³⁰ Finally, which is of fundamental importance from the point of view of this study, the provisions of Verres' edict questioned by Cicero were not taken over by his successor, so they did not become part of what was called *edictum perpetuum*, i.e., provisions which, repeated by successive praetors, assumed the character of *ius honorarium* and were finally enshrined in the *edictum Salvianum* (c. 130 CE), a collection of praetors' revised edicts forming a closed compendium.

²⁷ *In Verrem*, 2.1.109, in Cicéron, Discours, Vol II, Société d'Édition 'Les Belles Lettres', Paris 1938.

²⁸ Witold Wołodkiewicz cites the Verres case as an example of breach of the *lex retro non agit* principle. While the principle itself in this form was unknown to the Romans, the Roman lawyers emphasised that in civil law, the law does not operate retroactively (*Lex retro non agit. Sformułowanie w polskiej doktrynie prawniczej*, *Zesz. Prawn. UKSW* 1 (2001), 108–109).

²⁹ *In Verrem*, 2.1.104.

³⁰ *Ibid.*, 2.1.114.

Therefore, it can be said that with regard to principles established by the praetor, in the republican times of Rome, there was a mechanism in place that allowed provisions which violated the rules of equity to be eliminated from the legal system. However, it is difficult to determine whether such a negative assessment, as a result of which a specific regulation was not included in the succeeding praetor's edict, allowed the validity of a legal transaction undertaken on the basis of the contested provision of the edict to be effectively challenged. On the contrary, Cicero's reasoning appeared to imply that the *ex tunc* annulment of such a rule would be a kind of interference in the edict of the previous praetor, and thus a violation of the principle that the praetor's edict was valid only for one year. Moreover, the next praetor did not have to explain why he had omitted some previous decisions of his predecessors in his edict: he simply did not include them in the edict. Therefore, the resolution would solely remain in the discretion of the court. Unfortunately, we do not know how Cicero's intervention in the interest of Asellus' daughter, deprived of inherited property, ended. Verres, faced with the number of accusations and the strength of Cicero's arguments, did not wait for the court decision and (on the advice of his lawyer) left Rome, which allowed him to save his fortune (he eventually settled in Massalia, i.e., today's Marseilles).

In the legacy of ancient Rome, another source of law can be found, and one of extreme importance for the European legal tradition. These are imperial constitutions, which, along with the development of the principate and its transformation into the dominate, became an independent source of law, gradually eliminating all the others (such as *leges* passed by popular assemblies, the Senate's *senatusconsulta* or praetor's edicts). Their force was contained in the formula written down by Ulpian: *quod principi placuit legis habet vigorem* [what pleases the emperor has the force of law].³¹ Thus, the will of the emperor began to be identified with the content of the law, and law itself (through the formula *princeps legibus solutus est*, meaning that the ruler was not bound by the law),³² once a domain managed and agreed by lawyers became an attribute of sovereign power, losing its original autonomy. In this context, the evaluation of the law assumed a special character, as it became at the same time an assessment of the manner in which power was exercised. For medieval and early modern Europe, in which the monarchical system, referring to imperial Rome, was established for good, it was of great importance.

³¹ *Digesta*, 1.4.1.

³² *Ibid*, 1.3.31.

MEDIEVAL EUROPE

In the medieval debate, there were two ways of legitimising royal power, which also translated into different ways of creating law. At the end of the Roman Empire, the concept of divine legitimacy of power was established, which was strengthened by the growing role of the Church (after the reign of Emperor Constantine the Great, 306–337 CE). This way of justifying all power, including the legislative power, became widespread in medieval Europe, and its external manifestation was the solemn coronation performed by the bishop. At the same time, however, there was a second way of justifying royal power, referring to the earlier Roman tradition of perceiving the people as the primary source of power. In the Middle Ages, the second part of the Ulpian formula quoted above was eagerly recalled, in which the legendary *lex regia* appeared, under which the people were to transfer their legislative powers to the princeps.³³ This approach gave rise to the contractarian concept of power, which assumed the participation of other entities (individuals or collegial bodies) in the lawmaking process. It should also be remembered that the feudal system, developed in a large part of Europe, usually meant the participation of vassals in the senior's decision-making process. Finally, it should be realised that from the 13th century onwards, the concept of the state as a common good was consolidated, which entailed the gradual involvement in activities concerning the state of social groups that had previously remained on the sidelines of public affairs (above all the Third Estate). This resulted in the estate monarchy with the participation (to a greater or lesser extent) of representations of the estates in the law-making process. All this was important in matters related to the evaluation of the law and the selection of tools used for this purpose.

However, it should be remembered that for a large part of the Middle Ages, customary law played a dominant role. It would gradually lose its importance, especially when the discovery of the Justinian Digests and the related reception of Roman law reminded European rulers of imperial legislative powers (and the economic development of Europe needed a legal framework that common law could not provide). But even in the 13th century, the statutes of Italian cities pro-

³³ *Utpote cum lex regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat* [But it was by the royal act, which was passed concerning his empire, that the people conferred upon him all empire and law-making power], *Digesta*, 1.4.1. No such royal statute was ever passed in Rome, but Ulpian evokes this legend to lend credence to the legislative role of the emperor, cf Marek Wąsowicz, *Prawo i obywatel. Rzecz o historyczno-prawnych korzeniach europejskiego standardu ustrojowego*, Wyd. Nauk. Scholar, Warszawa 2015, 31–32. On different interpretations of *lex regia*, cf Ernst Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology*, Princeton University Press, Princeton 1997, chap. IV: Law-Centered Kingship.

vided that ‘the law is a sacred sanction, but the custom is more sacred, and where custom speaks, all law is silent’.³⁴ The dominance of customary law meant that primarily the observance of the law was the subject of special attention, and this was expected of the ruler in the first place. Importantly, this expectation, arising from the exercise of customary law, will also be of significant importance in relation to statutory law.

The thesis about the primacy of customary law was opposed by the Church. It usually had a distant origin, often dating back to pagan times. Acceptance of the supreme character of customary law would, therefore, mean consent to the primacy of what was essentially pagan law, which was difficult to accept by the Church hierarchy (this is one of the reasons why regulations inconsistent with Christian doctrine were often omitted or corrected in writing down customary law).³⁵ The Fathers of the Church (such as Origen, Tertullian or St Augustine) believed that human rights deserve respect only if they are in accordance with God’s law. They perceived the Truth and Reason written in the Holy Scripture, especially in the 10 commandments as God’s law. This involved the introduction of a hierarchy of norms and the recognition that there was a higher order over the statutory law. The examination of the conformity of human rights with divine law would be the task of the clergy. Such a position obviously had a political dimension to it and was part of the great dispute between two universalisms, imperial and papal, which dominated the European scene in the twelfth and thirteenth centuries.

The proponents of the supremacy of imperial power tried – as did the Church – to question the primacy of customary law, and for this purpose they eagerly invoked the legislative powers of the Roman emperors, but at the same time they did not intend to accept the Church as an evaluator of statutory law. Initially, there was a belief that statutory law gave greater effectiveness to customary law, which meant that the emperor’s legislative activity should take the legal custom already in place as a starting point. This view resounded perfectly during the Congress of Roncaglia in 1158 in the speech of Emperor Frederick Barbarossa: *Sive ergo ius nostrum sive vestrum in scriptum redigatur, in eius constitutione considerandum est, ut sit honestum, iustum, possibile, necessarium, utile, loco temporisque conveniens* [When a law is reduced to writing, we must be sure that it is honorable, just, possible, necessary, useful and suited to the time and place].³⁶

³⁴ Jan Baszkiewicz, *Myśl polityczna wieków średnich*, Wyd. Poznań, Poznań 2009, 174.

³⁵ One example of such an operation is recalled by Karol Modzelewski, *Barbarzyńska Europa*, Wyd. Iskry, Warszawa 2004, 56–59.

³⁶ We know Frederick’s speech from Rahewin’s account, but its accuracy raises many doubts, cf Kenneth Pennington, *The Prince and the Law 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, University of California 1993, 10–11.

Respecting these principles is, according to Frederick, of fundamental importance, because if the law is made by the emperor, it cannot be judged by anyone and must be strictly applied (*quia cum leges institutae fuerint, non erit liberum iudicari de eis, sed oportebit iudicare secundum ipsas*).³⁷ Over time, when the statutory law began to introduce new legal solutions, previously absent in the customary law, this was accompanied by the development of a set of superior norms (such as ‘necessity’, ‘raison d’état’, ‘utility’), which made it permissible to depart from God’s law being higher in the hierarchical order of legal norms, and thus to question the controlling role of the Church in this respect. This approach took on a special dimension in the legal doctrine in Sicily during the reign of Frederick II Hohenstauff. In clear reference to the Ciceronic-Stoic argumentation (mentioned above), the thesis was developed that natural reason should manifest itself in law (as it was said, *ratio* is the mother of human law, and its father is the monarch), which resulted in the conclusion that the law is not God’s law, but a natural, higher order defined and followed by the ruler. Thus, the law created by the king is inherently good and equitable.³⁸ This was sometimes accompanied by the belief that all activity of the ruler deserved nothing but praise. Pierre Dubois, an author working in the entourage of King Philip IV of France, wrote that ‘no subject in his right mind should think that a monarch is capable of violating his duties’ (i.e., establish an equitable law).³⁹ For the sake of order, let us also note the position of Marsilius of Padua, according to which the validity of the law is not determined by its internal values (such as goodness, justice or rationality) but by external criteria, such as the effectiveness of power (i.e., the possibility of using coercion) and the law originating from a legitimate legislature. For Marsilius, the people were such a legitimate legislature, and the people – as he believed – did not issue bad laws, because the community always strives for equitable laws (this belief would later be expressed by many Enlightenment authors who were close to the concept of the sovereignty of the people, such as Jean-Jacques Rousseau). The above-mentioned strands, present in the doctrine and legal practice of the Middle Ages, result in a conviction, quite common in that era, that the nature (origin, legitimacy) of power presupposes that it cannot act reprehensibly, and in any case that its subjects do not have the opportunity to assess its legislative achievements: an equitable authority always makes an equitable law. As St Thomas wrote, ‘there is no man who can judge the deeds of a king [but at the same time] the sovereign is subject to the law by his own will’.⁴⁰

³⁷ Ibid, 19.

³⁸ Baszkiewicz (n 34) 179.

³⁹ Quoted from Baszkiewicz (n 34) 179.

⁴⁰ St Thomas, *Summa Theologica*, Vol 13 Treatise on Law, Q 96, Art 5.

In the Middle Ages, however, there was also another trend, according to which – even if we recognise the ruler’s full authority to make law – it is possible to evaluate the ruler’s actions from the point of view of the law established by him or his predecessors. This theme was present especially where other bodies were involved in the legislative process, and thus law-making was shared by the ruler with the representation of the estates.

The issue of the monarch being bound by his own law bothered ancient authors. Ulpian’s well-known maxim is *Princeps legibus solutus est* [The emperor is not bound by the established law]. However, many warned against a similar approach. Seneca reminded Nero that ‘Caesar is allowed to do everything, but that is why he is not allowed to do many things’, and in the treatise ‘On Clemency’ (*De Clementia*), he admonished him that he should behave as if he were bound by the laws he established. It is worth paying attention to this line of thought. The necessity of observing previously established laws (by oneself or by predecessors) was expressed in the formula of a moral imperative: this is what St Ambrose, Bishop of Milan, did (‘what you have prescribed for others, you have prescribed for yourself; the emperor issues laws that he ought to be first to preserve’.⁴¹), St Isidore of Seville (‘A ruler may require his subjects to obey the law, provided that he respects it’⁴²), or Charlemagne’s tutor Alcuin, who admonished him on his coronation as emperor in 800 that he was bound by the laws enacted by his Roman predecessors.⁴³ An interesting statutory source that raised the issue of compliance with the law was the *Digna vox* statute of 429 contained in the Justinian Code. It reads: ‘It is a statement worthy of the majesty of the ruler for the prince to profess himself bound by the laws [...] And truly it is greater for the imperial government to submit to the sovereignty of the laws’ [*Digna vox maiestate regnantis legis alligatum se principem profiteri [...] Et re vera maius imperio est submittere legibus principatum*].⁴⁴ As can be seen, also in this case, extra-legal arguments were invoked.⁴⁵

In medieval Europe, the view that the ruler is not completely free in his actions and is bound by the applicable law appeared first in England and took the form of the institution of the ‘Crown’. Initially, it included the sum of the king’s personal prerogatives, but from the 14th century it became a concept detached from the

⁴¹ ‘*Quod praescripsisti alii, praescripsisti et tibi; leges enim imperator fert quas primus ipse custodiat*’, St Ambrose, *Epistulae* 21.9., quoted from Pennington (n 36) 79.

⁴² *Sententiae*, 3.51, in Św Izidor z Sewilli, *Sentencje*, translated [into Polish] and edited by Tatian Krynicka, Wyd. WAM, Kraków 2012, 203.

⁴³ Kelly (n 3) 99–100.

⁴⁴ *Cod. Iustiniani*, 1.14(17).4; quoted from Pennington (n 36) 78.

⁴⁵ On the interpretation of the *Digna vox*, cf Pennington (n 36) *passim*.

person of the ruler, which was expressed in the new formula of the coronation oath, including the obligation to preserve and respect the rights of the Crown. Henry Bracton wrote as early as the 13th century: ‘The king should not himself be subject to man, but should be subject to God and the law’ (*Rex non debet esse sub homine, sed sub Deo et sub lege.*)⁴⁶ A similar view is to be found in a French 13th century anonymous treaty, a compilation of customary law of the Orleans district, canon law and royal ordonnances (*Li Livres de Jostice et de Plet*): ‘Kings are not above the law, but the law is above the rulers’,⁴⁷ and also in the statements of Italian post-glossators: ‘It is right and worthy for the king to live according to the laws’ (Saxoferrato),⁴⁸ or ‘The prince should live according to the laws because his authority depends on the law’ (Baldus de Ubaldis).⁴⁹ In the centuries that followed, the belief that power is subordinated to law can be found almost across entire Europe. It was put rightly by Andrzej Frycz Modrzewski: ‘It would therefore be necessary for both kings and all officials to recognise the law over themselves, in which they would find protection against the passions of the heart and have a norm according to which they would govern themselves and the people’.⁵⁰ Another good example can be found in the provisions of the Spanish *Nueva recopilación* (1567) set of laws, where the king was reminded that he was limited by existing legal procedures and obligations vested, e.g., by way of privileges. This regulation was expressed by a rather common practice of ignoring royal decisions, contrary to customary law or privileges granted, in line with the formula *obedézcase, pero no se cumpla* [obey but not comply].⁵¹

It should be clearly emphasised, however, that these claims of the king being bound by law (*Princeps legibus alligatus est.*) were primarily about applying the law promulgated by the ruler himself (or his predecessors) in the practice of ruling, i.e., within the remit of his *gubernaculum*.⁵² If the sphere of *gubernaculum* is referred to the activities of the executive power in the constitutional era (including, in addition to individual decisions, also the creation of executive legal acts), then the medieval restrictions on the royal power can be perceived as

⁴⁶ *De legibus et consuetudinibus Angliae*, 3.9.3. Quoted from Kelly (n 3) 154.

⁴⁷ Cf Baszkiewicz (n 34) 189.

⁴⁸ Bartolus de Saxoferrato, *Lectura super Codice*, Venice 1476, quoted in Latin by Pennington (n 36) 87: *Fateor quod ipse est solutus legibus, tamen equum et Dignum est quod legibus uiuat.*

⁴⁹ Baldus de Ubaldis, *Lectura super Codice*, Venice 1474, quoted from Pennington (n 36) 214.

⁵⁰ *De Republica emendanda*, in *Dziela wszystkie*, Vol I, Warszawa 1953, 301.

⁵¹ Francis Fukuyama, *Historia ładu politycznego. Od czasów przedludzkich do rewolucji francuskiej*, Wyd. Rebis, Poznań 2012, 408.

⁵² For more on this topic, cf Jan Baszkiewicz, Andrzej Wójtowicz, ‘Z zagadnień ideologii ustawodawczej wieków średnich’, *Czasopismo Prawno-Historyczne*, Vol XXVI 1974 (1), 31.

the beginnings of the concept of binding the actions of the executive power by statutes, characteristic of the 19th century formula of the state of law.⁵³

The postulate of the ruler's compliance with the law took on particular significance where it was based on contract theory. Its origins can be traced back to the legendary royal law (*lex regia*), which Ulpian mentions in his well-known formula *quod principi placuit*.⁵⁴ It is important to note that in the contracts of power between the ruler and representatives of the estates or the most influential bodies of the kingdom (e.g., barons), the issue of making law or defining mutual participation in its enactment was usually of high importance. At the same time, it should be recalled that the resulting dualism in law-making (decisions of state assemblies – royal decisions) did not automatically mean that the decisions of the collegiate body were superior (in the sense in which today a statute is superior to a regulation of the executive power). Therefore, the proponents of contract theory were all the more interested in making the king feel bound by the law adopted with the participation of representatives of the estates and not changing it with his decisions. For example, in England, relatively quickly, laws adopted under the King-in-Parliament formula began to be given special legal force, imposing on the king the obligation to observe this law in his actions, including the legal acts issued. The Act of Proclamations, passed in 1539 (i.e., during the reign of Henry VIII Tudor), clearly stated that royal proclamations – while having the force of statutes – must be in accordance with the common law of England and earlier acts of Parliament. It is particularly important here to refer to common law as a certain binding standard. The content of common law was decided by the courts, which meant that judges adjudicating in specific cases would be able to express their opinion on the effectiveness of the laws. This would result in a famous ruling, which will be discussed further below.⁵⁵

In general, as can be seen, in medieval Europe, the belief prevailed that the ruler was not completely free in his legislative power and was bound by certain higher rules in this respect. Their nature and origin, however, are of a very diverse nature: from being bound by God's law, self-restraint in the name of moral requirements, believing that power is rational and aware of the necessary limitations, to believing that the law established by the ruler or his predecessors binds him, in particular

⁵³ For more on this topic, cf Wąsowicz (n 33) 218–220.

⁵⁴ Cf footnote 33 above.

⁵⁵ The Act of Proclamations provided that royal proclamations 'shall be observed as though they were made by act of parliament, but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life [...]'. Putting Historic British Law Online, <<https://statutes.org.uk/site/the-statutes/sixteenth-century/1539-31-henry-8-c-8-proclamation-by-the-crown/>>.

when entities other than the ruler are involved in its creation, jointly caring for the good of the Crown.

However, the question that inevitably arose was one of a possible sanction in the event of a violation of such restrictions, its nature and the persons who would be entitled to apply such a sanction. Bracton, who – let us recall – believed that the king was *sub lege*, claimed, for example, that in the event of a violation of the law, the ruler can only be reminded of the obligation to obey it. ‘Let it be enough for him as a punishment to await God’s vengeance’, he wrote, adding, ‘there is only the possibility of begging him to correct or rectify his deed’.⁵⁶ Such a position was quite common. It was represented, for example, by St Thomas, who emphasised that the king is not subject to the coercion of laws, but in the case of breaking them, he exposes himself to eternal damnation. However, the formula of moral binding of the ruler by law gave rise to the temptation to react on an ongoing basis to cases of violation of God’s commandments by rulers. The Church felt particularly empowered to take such actions, as it had various tools for disciplining ‘sinful’ monarchs, including public penance or excommunication.⁵⁷ However, the effectiveness of such actions was limited, although in several cases the announced excommunication entailed serious political consequences, as in the case of Emperor Henry IV in his conflict with Pope Gregory VII or King John Lackland of England, who was forced by the barons to sign the Magna Carta. However, it is necessary to distinguish between the general assessment of the rule of a ruler and the evaluation of a specific legal act issued by him. In both of the above-mentioned cases, it was about expressing disapproval of the policy pursued by the ruler concerned.

It is also worth looking at the right to resist, i.e., the right of the king’s subjects (usually only some) to renounce obedience to him, written in a document approved by the ruler. Such documents were, for example, the English Magna Carta Libertatum of 1215 (Article 61), or the Hungarian Golden Bull of Andrew II of 1222 (Article 31), and later also the Polish Henrician Articles of 1573 (*de non oboedientia* article). It should be noted, however, that the right to resist was less about sanctioning a reprehensible behaviour of the ruler, and above all about defending the rights or privileges obtained against the despotic actions of the

⁵⁶ Baszkiewicz (n 34) 190.

⁵⁷ Regardless of the general thesis of the supremacy of spiritual power over secular power, expressed emphatically by Gregory VII in the document *Dictatus Papae* or by Innocent III, in such cases the biblical example of high priest Samuel was often referred to, through whom God conveyed his will to take away Saul’s rule over the kingdom of Israel because of the violation of God’s commands.

monarch.⁵⁸ The origins of the right to resist should be sought in the senior's failure to perform his duties under the feudal contract: in such a case, the vassal could renounce obedience to his senior. As we read in the *Sachsenspiegel*, 'The vassal must fully resist the lawlessness of his king and judge and help to protect them from lawlessness in every way [...] And then he does not act against his faithfulness'.⁵⁹ Over time, with the gradual strengthening of estate consciousness and the emergence of group privileges, this individual right assumed the character of a right vested in a specific group of people. This is the case with the Magna Carta Libertatum, or the Hungarian Golden Bull mentioned above, in which magnates formed a privileged group. Article 61 of the Magna Carta (incidentally, willingly omitted by Henry III – ruling after John the Landless – in subsequent editions of the Charter) was used as the basis for the abdication of Edward II in 1327. It is worth noting that among the numerous accusations made against the king, there were also those of making laws contrary to human rights: it was about the statute pushed through Parliament in 1322, which made the ruler's actions independent of Parliament and about the granting of permissions to rule on behalf of the king.

As can be seen, the law created by the ruler could be evaluated by various bodies at the end of the Middle Ages. At the same time, they had – depending on the nature of these bodies – various means at their disposal. Most often, however, the evaluation concerned the policy pursued by the ruler in general and the accusations raised against the law created by him were only a part of the list of grievances. It is characteristic that there are basically no judges among those who evaluate the monarch's legal output. This does not mean, however, that the problem of assessing the applicable law did not arise in resolving specific cases. St Thomas wrote: 'In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them'.⁶⁰ But at the same time, he clearly pointed out that 'if the written law contains anything contrary to the natural right, it is unjust and has no binding force. [...] such documents are to be called, not laws, but rather corruptions of law [...] and consequently judgment should not be

⁵⁸ As noted, e.g., by Baszkiewicz (n 34) 194.

⁵⁹ Ibid 195. A similar statement by the author of the *Schwabenspiegel* was as follows: 'We should serve our lords for they protect us; if they do not protect us, justice does not oblige us to serve them', quoted from Susan Reynolds, *Fiefs and Vassals. The Medieval Evidence Reinterpreted*, Oxford: Clarendon Press, 1994, 37.

⁶⁰ St Thomas explains this by the need not only for the ruler himself but also for his officials, including judges, to be bound by law – let us recall that in continental Europe, the judiciary remained closely linked to royal power until the Enlightenment (the exception was England, where judges managed to gain an independent status relatively early), St Thomas Aquinas, *The Summa Theologica*, Second Part, Justice, Q 60, Art 5, Burn Oetes & Washbourne Ltd., London 1929, translated by Fathers of the English Dominican Province, 153.

delivered according to them'. And he further added that 'Laws that are rightly established, fail in some cases, when, if they were observed, they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view'.⁶¹

It is worth noting that, in fact, this was the spirit in which the Roman praetor took action, who – as mentioned above, not being able to change the letter of the civil law, derived from the Laws of the Twelve Tables – corrected them in specific cases, referring to the principle of equity. It is also necessary to pay attention to a certain convergence of St Thomas's reasoning with Cicero's way of thinking. Let us recall that the Roman philosopher denied the status of law to the resolutions of popular assemblies when they violated the eternal, immutable and universal law of nature.⁶² St Thomas wrote about natural law as a criterion for the evaluation of a just (equitable) law, explaining at the same time that law has its source in natural reason, which follows God's eternal law. Thus, he clearly referred to the Stoic idea of the eternal and universal law of nature.⁶³ But, importantly, the postulate that unjust law should not be the basis for decisions and that in special cases reference should be made to the principle of equity and use it to correct the binding letter of the law, is presented by St Thomas not when discussing the principles to be followed by rulers in creating and observing the law, but in the part of his reflections devoted to the judiciary power, i.e., the application of law by judges.

A continuation of this approach, i.e., the involvement of the court or judges in the process of evaluating the law that would be applicable in deciding a specific case, can be found in the practice of English case law of the 17th century and in the activity of French parlements, i.e., supreme courts. In both of these cases, we are dealing with a kind of summary of views and theories present in legal doctrine since antiquity: the law is subject to evaluation of its content, and this

⁶¹ St Thomas, *ibid.* It is worth noting that in his description of good law, St Thomas referred to the guidelines laid down in the work of St Isidore of Seville, *Etymologiae*, Book V, 'On Laws and Chronology': 'a law should be honest, just, applicable, in accordance with nature, in accordance with national custom, appropriate to place and time, necessary, useful, clear (so that no one is mistaken by its vague argument), and also issued not for private benefit, but for the benefit of the community of citizens', Antoni Dębiński, 'Wiedza o prawie w ujęciu Izydora z Sewilli', *Studia Prawnicze KUL* 2022, 1(89), 132 [a law should be '*honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporisque conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem in captionem contineat, nullo privato commodo, sed pro communi civium utilitate conscripta*']. Cf Grzegorz Maroń, 'Wzorzec prawa w Etymologii św. Izydora z Sewilli jako przyczynek do rozważań nad cechami dobrego prawa', *Zeszyty Naukowe Uniwersytetu Rzeszowskiego, Seria Prawnicza* 2009 (8).

⁶² Cicero, *On the Laws*, cf footnote 16 above.

⁶³ Cf Kelly (n 3) 143.

evaluation is made using the criterion of superior legal order and the principles of justice. What changes, however, is the party making the evaluation (the judge) and, consequently, its effects.

BONHAM'S CASE

In England, Edward Coke was the person who contributed significantly to the promotion of this new approach. Coke (1552–1634), as Chief Justice of the Court of Common Pleas, and then the Court of King's Bench, and subsequently – after his dismissal from his post as judge by James I – as one of the leaders of the opposition in the House of Commons and the author of several important acts, including in particular the *Petition of Right* of 1628, was a consistent advocate of the principle of supremacy of common law.⁶⁴ In his view, it meant not only the superior nature of common law over other systems of law (such as equity or church law), but above all, it set the limits of royal power and was a guarantee of the rights and freedoms of the subjects.⁶⁵ Coke's claim of the supremacy of common law was expressed, among other things, in an opinion he drew up in 1611 on the legality of a royal proclamation prohibiting the construction of new houses in London without appropriate permission. Coke (consulting his position with the Chief Justices of the Court of King's Bench and the Court of Exchequer) stated in his opinion that the source of law in England is common law, alongside statutes and custom, and the king may not change them by proclamation, in particular, he must not supplement them with new prohibited acts or prohibit those that common law allows. And he recalled that 'The King has no prerogative but that which the law of the land allows him'.⁶⁶

Coke, however, went even further in his belief in the supremacy of common law and presumed that it was also above the acts of Parliament. A spectacular manifestation of this position was Bonham's case, decided in 1610. Thomas Bonham was a Cambridge physician who also practised medicine in London, but without

⁶⁴ For more on Coke's views, cf Andrzej Bryk, *The Origins of Constitutional Government. Higher Law and the Sources of Judicial Review*, Wyd. Uniw. Jagiell., Kraków 1999, Chapters VII–IX.

⁶⁵ This was expressed, among others, in the idea of the 'ancient constitution', which Coke set out in his commentary on the Magna Carta, which is laid down in the Second Part of his *Institutes of the Laws of England*.

⁶⁶ Dariusz Stolicki, *Recepcja orzecznictwa sir Edwarda Coke'a w brytyjskim i amerykańskim prawie konstytucyjnym – analiza porównawcza*, in Robert Kłósowicz and others (eds), *Konstytucjonalizm, doktryny, partie polityczne: księga dedykowana Profesorowi Andrzejowi Ziębie*, Wyd. Uniw. Jagiell., Kraków 2016, 697–698.

the permission of the College of Physicians, which, according to Henry VIII's privilege of 1518, confirmed by the Acts of Parliament of 1523 and 1553, had the right to grant such licences. The Act of Parliament also granted the College the power to impose fines on persons acting without such a licence, and in the event of refusal to pay the fine imposed – to punish them with arrest. Such measures were taken by the College against Bonham. Bonham, however, appealed to the Court of Common Pleas, accusing the College of trespass against his person and property. The court chaired by Coke stated in its decision that the Act of Parliament, which formed the basis of the powers of the College of Physicians, infringed the principles of common law, since the power to impose fines and imprisonment under common law was vested only in the royal courts, so that the College of Physicians, which is not a court, could not be vested with that power. Moreover, the fine imposed by the College was intended (in half) to contribute to its finances, which meant that the Board would have a direct financial interest in the case under consideration, and this – in the opinion of the Court of Common Pleas – would violate the principle of *nemo iudex in causa sua*. In the statement of reasons (case report), Coke wrote: 'It appears in our books that in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void'.⁶⁷ It should be recalled that judges in England interpreted the acts of Parliament quite freely and, trying to find in them the proper content (the spirit of the law), they did not attach undue importance to the letter of the law. It can be said that in this way, they sought to reconstruct the proper intentions of the lawmaker. This was well expressed by Edmund Plowden (1518–1585), author of the Commentaries (Reports), in his 1574 opinion: 'It is not the words of the law but the internal sense of it that makes the law [...] and it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive'.⁶⁸ This meant that judges of all courts (not only the Court of Chancery) should follow the principle of equity when applying the acts of Parliament. In a particular case, this could even mean assuming that a Parliament official had misspelt the true intentions of the Houses and that only the court interpreted them correctly. Coke's view, however, was radical: he believed that a court could declare an act of Parliament invalid if it were incompatible with common law and refuse to apply it (rather than merely reinterpret it).

⁶⁷ John H Baker, *An Introduction to English Legal History*, Butterworths, London 1979, 182.

⁶⁸ Note to *Eyston v Studde*, cf Baker *ibid* 181.

Coke's position was rather isolated and the vast majority of English lawyers of his time did not share this position. They believed that in the event of a fundamental contradiction between the content of the Act and the principles of common law, only the Parliament – as the creator of the law – can make an appropriate correction.⁶⁹ This view was later clarified by William Blackstone in his *Commentaries on the Laws of England*, who wrote that vesting the courts with the power to question legislation would be 'to set the judicial power above that of the legislature, which would be subversive of all government'.⁷⁰ This critical position was undoubtedly reinforced by the Glorious Revolution of 1688, which reaffirmed the principle of parliamentary sovereignty.⁷¹ But as late as 1701, Coke's judgment was quoted approvingly (e.g., in *City of London v Wood*, John Holt, Chief Justice of the Court of King's Bench, wrote that Coke's view was a 'true saying').⁷²

Coke's view, on the other hand, gained many supporters in the English colonies in America, which tried to emphasise their distinctiveness and demanded participation in the decision-making process (including legislative decisions) together with the authorities in London, affecting the status of the colonies and the legal situation of their inhabitants. Thus, Coke's argument that a particular act of Parliament can be challenged on the grounds that it violates the principles of common law seemed very attractive. For example, in 1765 the Massachusetts Assembly spoke out against the Stamp Act, passed by Parliament in London, accusing it of being 'against Magna Charta and the natural rights of Englishmen, and therefore, according to the lord Coke, null and void'.⁷³ James Otis, a lawyer and active activist for the independence of the English colonies, expressed a similar opinion in 1764: 'Should an act of parliament be against any of his natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void: and so it would be adjudged by the parliament itself, when convinced of their mistake'.⁷⁴ This way of thinking contributed to the fact that the judicial review procedure was established in the English colonies, and

⁶⁹ As Lord Chancellor Ellesmere wrote in response to Coke's opinion, 'acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges', quoted from Baker *ibid* 182.

⁷⁰ William Blackstone, *Commentaries on the Laws of England*, Vol I, 90.

⁷¹ Cf Henry J Abraham, *Judicial Process. An Introductory Analysis of the Courts of the United States, England and France*, Oxford University Press, New York 1980, 322.

⁷² Raoul Berger, *Doctor Bonham's Case: Statutory Constitution or Constitutional Theory?*, University of Pennsylvania Law Review, 117 (4), 1969, 523. Earlier, in 1695, in *King v Earl of Banbury*, Justice Holt noted, it was the judge's task 'to construe acts of Parliament and adjudge them to be void', Bryk (n 64) 220.

⁷³ Catherine D Bowen, *The Lion and the Throne*, Hamish Hamilton, London 1957, 172.

⁷⁴ James M Beck, *The Constitution of the United States*, Whitefish, MA: Kessinger Publishing, 2010, 17–18.

later in the independent states, subsequently referred to in the famous Supreme Court ruling of 1803 in *Marbury v Madison*. It is not without reason that the New York State Bar Association stated in 1915 that ‘The American Revolution was a lawyers’ revolution to enforce Lord Coke’s theory of the invalidity of Acts of Parliament in derogation of the common rights’.⁷⁵

ACTIVITY OF FRENCH *PARLEMENTS*

The activity of French *parlements* (i.e., courts) in exercising control over statutory law had the opposite effect. It contributed (paradoxically!) to the formation in the constitutional era of the doctrine of the supremacy of the statute as an expression of the will of the sovereign. In the 19th century, this resulted in the concept of a ‘state ruled by law’, under which the executive power was obliged to act only on the basis and within the scope specified by law (which in many European countries was subject to the control of administrative courts), with a simultaneous reservation (sometimes made expressly, as in the Prussian constitution of 1850) that judges could not assess the compliance of laws with the constitution.

First of all, it should be noted that the French *parlements*, as supreme courts, operated in a different political environment than in England. 17th and 18th-century France was (until 1789) an absolute monarchy. The only legislator was therefore the king, who also acted as the supreme judge. Judges sitting in the so-called royal delegated courts performed their tasks under the authority of the monarch and were subordinated to him (and the king could summon any case at any stage and decide on it). However, the *parlement* was an institution originating from the medieval royal council. Thus, in accordance with feudal customs, it was composed of direct royal vassals, princes of the blood, and a number of *parlement* councillors, usually university law graduates or legal practitioners. Over time, *parlement* councillors became irremovable, but the office of the councillor of *parlement* was in the group of saleable offices in the 17th century, which meant that one could become a councillor of *parlement* either by inheritance or by buying the office. In either case, this provided certain guarantees of irremovability and was of great importance when the *parlements* found themselves in opposition to the royal authority. Initially, there was only one such court – on the Parisian Island of la Cité. Then, with the centralisation of the French state and the annexation of more territories, the number of *parlements* gradually increased. In the mid-18th

⁷⁵ New York State Bar Association, *Report of the Committee on the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law*, Government Printing Office, Washington, 7.

century, there were already 16 of them. Importantly, their formal status was the same, so they all performed the functions of the supreme court (each for its own region), and all enjoyed the same powers (although the *Parlement* of Paris was undoubtedly the most renowned).

One of the important activities performed by the *parlement* was the registration of royal edicts, *ordonnances* and *lettres de patente*, i.e., the ruler's legislative acts.⁷⁶ Registration was initially formal and technical: in the absence of an official central register of royal *ordonnances*, it was necessary for the court to record legal acts in order to provide an open and unambiguous basis for judicial decisions issued by the court within its territorial jurisdiction. Each *parlement* therefore kept its own register of royal *ordonnances*. Over time, however, the practice of referring the *ordonnance* back to the king, called remonstrance, developed so that the ruler could make necessary corrections. Initially, such an operation was initiated by the king himself, who asked the *parlement* for an opinion or advice on the content of the legal act submitted. Later, however, the *parlement* began to make such an assessment without the ruler's request and returned the legal act back to the king when it decided on its own initiative that it needed to be changed. Since the rulers did not respond to such cases of arbitrary remonstrances, after some time the practice began to be recognised as the *parlement's* right. The refusal to register and the referral of an *ordonnance* back to the king meant that such a royal act could not be applied within the jurisdiction of the *parlement* concerned (i.e., it was not effective). The *Parlement* of Paris played a crucial role in this regard, because – apart from its location in the capital – its geographical jurisdiction covered a significant part of the country's territory.

The refusal to register an *ordonnance* was not final, as the king retained the possibility of forcing the councillors of the *parlement* to register a legal act. To this end, in the first place, he sent the so-called *lettres de jussion*, demanding registration, and if this measure turned out to be ineffective, he arranged for the so-called *lit de justice*, i.e., he went to the *parlement* in person and dictated his will directly to the assembled councillors. However, both measures were quite troublesome, and rulers used them as a last resort, having previously tried to negotiate the content of controversial regulations in *parlements*. An additional problem was also the fact that in the 17th century, there were already nearly 10 *parlements*, so forcing registration by the *lit de justice* would require many interventions (although *parlements* could differ in the assessment of the content of the *ordonnances*). One example of such problems was the registration of the Edict of Nantes by Henry IV. The *Parlement* of Paris refused to register it in 1599, and its members, summoned

⁷⁶ For more on *ordonnances* issued by French rulers, cf Anna Klimaszewska, 'Ordonanse królewskie we Francji', *Czasopismo Prawno-Historyczne*, 2017, 69(2).

by the king to the Louvre, forced the monarch to make several amendments and only then registered the edict. The other *parlements* did not do so until 1600 (with the *parlement* in Aix after *lettres de jussion*, and the *parlement* in Rennes after two such letters had been served), while the *parlement* in Normandy delayed its registration until 1609.⁷⁷ A worse fate befell the *ordonnance* of 1629, which was an attempt to bring together the decisions made during the sessions of the Estates General in 1614 and the assemblies of notables in 1617 and 1626. *Parlements* subjected it to a severe scrutiny and demanded so many changes that, consequently, this meant the rejection of the most important provisions.⁷⁸ Interestingly, however, for a long time the rulers did not question the right of *parlements* to register *ordonnances* or to issue remonstrances; they only believed that the *parlements* were doing this task poorly and usurped an authority they did not possess. This was largely due to the origin of the *parlements*, which – as mentioned above – emerged from the royal council, and thus constituted a kind of extension of royal power. The right of remonstrance was connected with the traditional obligation to give advice to the king: the successive *ordonnances* of 1318, 1320 and 1344, governing the organisation of the *Parlement* of Paris, clearly emphasised this.⁷⁹ It is also worth recalling that the *Parlement* of Paris played an important, stabilising role during the reign of Charles VI: in the face of rival nobles, it was perceived as a kind of anchor of the state.⁸⁰ This is perhaps why Cardinal Richelieu, the First Minister of King Louis XIII, wrote in his memoirs that '*l'autorité du parlement en beaucoup d'occasions importantes est nécessaire à la maintenance de l'Etat*'.⁸¹ In the 16th century and in the early 17th century, there was often an argument that the registration of *ordonnances* was an activity strengthening the king's power, because it weakened critical voices against the monarch's decisions. Such an opinion was voiced, for example, by Claude de Seyssel, chancellor to Louis XII (later bishop of Marseilles). He believed that although the king's power is unquestionable, the ruler is only human and can be wrong: the registration of the *ordonnance* by an independent court means that the king's decision is in accordance with religion, the principles of justice and the existing law, and thus alleviates possible fears of the recipients of the law.⁸²

⁷⁷ Joël Cornette, *L'affirmation de l'Etat absolu (1492–1652)*, Hachette Supérieure, Paris 2012.

⁷⁸ Klimaszewska (n 76) 51.

⁷⁹ Matthieu Bertozzo, *Le 3 novembre 1790. La mise au pas des juges sous la Revolution: de la vacance indéterminée à l'abolition des Parlements d'Ancien Régime*, Revue générale du droit, 2015, No 22827.

⁸⁰ Michel de Waele, 'Une question de confiance? Le parlement de Paris et Henri IV, 1589–1599', Thèse de doctorat, Mc Gill University, Montreal 1995, 26–27.

⁸¹ *Mémoires du cardinal Richelieu*, Paris 1907–1931, Vol 5, 236.

⁸² de Waele (n 80) 53–54. In his primary work (*Le monarchie de France*, published in France in 1519), Seyssel developed the concept of three restraints, which limited the royal power. One of

The point of reference for possible remonstrances of the *parlement* was, in the first place, citing earlier royal edicts, already registered, and therefore correct and respected.⁸³ However, references to the medieval concept of the state as a kind of sum of various corporations can also be noticed in the activities of *parlements*:⁸⁴ in this view, the state is an organic community consisting of smaller communities, each operating on the basis of customs and privileges. This meant, according to the *parlements*, that the king's arbitrary power did not extend to the area of powers previously obtained by his subjects.⁸⁵

At the end of Louis XIII's reign, however, tensions between *parlements* (especially the *Parlement* of Paris) and the monarch began to surface. In 1641, Louis XIII even considered trying to limit their right of remonstrance, as evidenced by a statement on the occasion of one of the *lit de justice*: 'You are established to settle disputes between master Peter and master John [...] If you continue with your actions, I'll trim your claws so badly that it hurts you'.⁸⁶ However, it was not until Louis XIV took concrete action. First (in the 1667 *Ordonnance* on Civil Procedure), he limited the time allowed for returning an *ordonnance* to the king to 8 days, and then in 1673 he permitted the remonstrance to be executed only after the *ordonnance* had been registered, which deprived the *parlements* of any real influence on the content of royal legal acts.

After the death of Louis XIV in 1715, however, the *parlements* regained their original powers (this was the price they demanded from the regent, Philippe II, Duke of Orléans, for refusing to register Louis XIV's will in favour of the Duke of Maine – the registration of the king's will was the traditional authority of the *Parlement* of Paris), and began to use them in an increasingly open manner in opposition to Louis XV. At the end of his long reign, Louis XV (1715–1774) finally made another attempt to limit the role of *parlements*. First, during the famous *lit de justice* of 1766, he reminded the councillors of the *Parlement* of

them would be the *parlement* judges, whose opinion the monarch should hear, cf Bogdan Szlachta, *Konstytucjonalizm czy absolutyzm. Szkice z francuskiej myśli politycznej XVI wieku*, Księg. Akademicka, Kraków 2005, 133.

⁸³ This is a fairly common position in the literature of the time, e.g., Charondas le Caron, *Loys, Pandectes ou Digestes du droit français*, Paris 1596; Poisson de la Bordinière, *Traité de la majesté royale en France*, Paris 1597; La Roche Flavin, *Treize livres des parlements de France*, Bordeaux 1617.

⁸⁴ E.g., as James of Viterbo wrote: '*regnum continet congregationes plurimas ad invitum ordinatas*', Jacob of Viterbo, *De regimine christiana*, 1302, quoted from Joseph Canning *Ideas of Power in the Middle Ages, 1296–1417*, Cambridge University Press 2011, 39, footnote 74.

⁸⁵ Szlachta (n 82) 132. Szlachta also recalls the 1579 treatise *Vindiciae contra tyrannos*, in which the role of judges was emphasised: 'all matters relating to the community must be approved by the *parlement*', (n 82) 424.

⁸⁶ Marek Kinstler, Marian Ptak (eds), *Powszechna historia państwa i prawa. Wybór tekstów źródłowych*, Wyd. UWr., Wrocław 1987, 33.

Paris that sovereign power rests only in the person of the king: 'All public order comes from me, and the rights and interests of the nation, which some dare to make a body separate from the monarch, inevitably rest in my hands and in my hands alone'.⁸⁷ This was to make the councillors aware that all the powers of the *parlement* (including the right of remonstrance) arise solely from the will of the ruler. Then, in the face of further resistance from *parlements*, in 1770, Louis XV, with the help of Chancellor René Maupeou, limited the powers of *parlements*, divided the *Parlement* of Paris into several institutions, abolished the hereditary nature of the office of councillor of *parlement*, and stripped the fiercest protesters of office.⁸⁸ But that attempt also failed. Immediately after Louis XVI (1774–1792) took power, Chancellor Maupeou lost his position, and the reform of *parlements* was revoked. As a result, the years of Louis XVI's reign until the convocation of the Estates General in 1789 were filled with constant disputes with the *parlements*, which – by refusing to register royal *ordonnances* – blocked the necessary political reforms, especially those relating to taxation.

The Estates General, later transformed into the Constituent Assembly, quickly dealt with the problem of the administration of justice and the organisation of the judiciary. One of the key topics was the continued existence of the *parlements*. Their powers, which allowed them to quite effectively oppose the will of the king as a sovereign, were incompatible with the concept of the sovereignty of the people, which became the basic assumption of the political system, and which was related to the creation of law. As a result, the activity of *parlements* was first suspended, and then by a decision of 30 September 1790 provincial *parlements* were abolished, and on 14 October 1790 – the *Parlement* of Paris. At the same time, a deep reform of the judiciary was carried out, introducing the election of judges and limiting their powers in the interpretation of laws.⁸⁹

This was accompanied by the reasoning, referring to Montesquieu's theory, which assumed a strict separation of the judicial power from other powers. In the French constitutional doctrine, this meant the absolute supremacy of a statute as an expression of the will of the sovereign and – until the times of the Fifth Republic

⁸⁷ Ibid 35.

⁸⁸ For more on *lit de justice* 1766 and Maupeou's reform, cf Julian Swann, 'Un monarque qui veut «régner par les lois»: le Parlement de Paris et le roi dans la France de Louis XV', *Revue d'histoire politique*, 2011 (15), 44–58.

⁸⁹ The institution of the so-called legislative recourse was introduced, under which in the event of interpretative doubts, a judge was obliged to request the legislature for an appropriate interpretation of the law; this was a reference to the institution of *référé* associated with absolutism, according to which it was the monarch's sole discretion to explain his will, cf Yvan-Louis Hufteu, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, Paris 1965, 10.

– lack of any possibility of examining the content of statutes for compliance with the Constitution.⁹⁰

CONCLUDING REMARKS

The end of the 18th century lent a new dimension to the discussion on the substantive and procedural assessment of the decency of the law. This happened for several reasons. Firstly, the idea of the constitution emerged, which was understood not only as a document defining the system of the state and expressing its philosophical concept but also as a legal act having the character of supreme law.⁹¹

Secondly, the end of the 18th century brought the consolidation of the concept of substantive rights, whereby every human being is endowed with certain natural rights, which are not granted to them by the authorities as a privilege, but with which they come into the world, and the public authority should guarantee those rights to them.⁹²

Thirdly, in the late 18th and early 19th centuries, the law began to interfere with the lives of individuals to a much greater extent than before. As Alexis de Tocqueville wrote, the public administration under the Bourbon monarchy ‘constantly helped, transformed, permitted [...] in a thousand ways, it already exerted an influence not

⁹⁰ Except for two cases from the times of the Second Republic, when the Court of Cassation rejected a statute on the grounds that it was unconstitutional, cf François Saint-Bonnet, ‘Le contrôle a posteriori: les parlements de l’Ancien Régime et la neutralisation de la loi’, *Cahiers du Conseil Constitutionnel*, 2010 (28).

⁹¹ This was expressed, for example, by the Supremacy Clause contained in Article VI of the United States Constitution. The supreme legal character of the constitution was also expressed in special procedures for its adoption and amendment, different from those for ordinary legislation, cf Hubert Izdebski, ‘Konstytucja Trzeciego Maja wśród konstytucji swojego wieku’, *Państwo i Prawo* 1991 (5), 7. As the constitution combined the features of a legal act and those of a document setting forth certain philosophical views (such as indicating the sources of state power and determining the relationship between the citizen and the state) meant that at the same time the constitution became ‘an interpretative directive for itself, but also (perhaps above all) for ordinary legislation’, cf Wąsowicz (n 33) 20.

⁹² These rights were listed in special documents, most often solemn acts passed by constituent or legislative assemblies. The most famous document of this kind was the French Declaration of the Rights of Man and of the Citizen of 1789, but a similar solution can be found, for example, in the Virginia Bill of Rights of 1776 (and in similar declarations of other states, such as Massachusetts, Rhode Island and Connecticut). The original version of the U.S. Constitution did not contain a catalogue of fundamental civil rights, but very quickly (within 3 years) the first 10 amendments to the Constitution were passed, forming a kind of Bill of Rights.

only on the general management of state affairs but also on the fate of families, on the private life of every human being'.⁹³

All this meant that the contact of the individual, endowed with substantive rights, with the regulations and activities of state institutions became more and more intense. Thus, the scale of potential collisions between the particular interests of a citizen or groups of citizens and the legislative invention of and the decisions of the state administration was growing at a rapid pace. Therefore, it became necessary to find a remedy that would allow a balance to be maintained between the substantive rights of the individual and the policy of the state.

The answers to this challenge would be the judicial review procedure and the concept of the *Rechtsstaat*, developed over the centuries of evolution outlined above.

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⁹³ Alexis de Tocqueville, *Dawny ustrój i rewolucja*, Wyd. Znak, Warszawa-Kraków 1994, 22–23.

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AUDIOVISUAL WORK AND TELEVISION FORMAT IN THE LIGHT OF COPYRIGHT LAW

Abstract

A format that is limited to the general concept of television programmes, being only a specific idea of them, does not enjoy copyright protection. On the other hand, the form of such a concept, already developed into an appropriate form, composed of creative elements that make it up and individualize it, will be subject to copyright from the moment it is established. Such an arrangement may also be made in a television programme based on the format. A television programme created on the basis of the format-work will constitute an audiovisual work within the meaning of copyright law. If such a format is a work of joint authorship, the authors of works contributing to the format established in this programme will also generally be co-authors of the audiovisual work. A format-work and an audiovisual work created on its basis are legally separate objects of protection. Therefore, the acquisition by the producer of the rights to both works also occurs separately.

KEYWORDS

format, broadcast, audiovisual work, copyright protection, copyright

SŁOWA KLUCZOWE

format, audycja, utwór audiowizualny, ochrona prawnoautorska, prawo autorskie

I. INTRODUCTION

The concept of an audiovisual work has not been defined in the Copyright Act.¹ The basic concept here is a cinematographic film, from which other types of similar productions have evolved.² Article 1(2)(9) of the Copyright Law clearly states that the subject of copyright is ‘audiovisual works, including film works’, thus indicating that a film work is only one of the subtypes of an audiovisual work. The Act on financial support for audiovisual production of 9 November 2018 also refers to a film work.³ In the meaning of Article 2(8) of the said Act, an audiovisual work is ‘a work consisting of a series of successive images with or without sound, recorded on a medium enabling multiple reproductions, creating the impression of movement and constituting an original whole expressing the action or content in an individual form, made in the form of a feature film, documentary or animated film or a feature, documentary or animated series, regardless of the field of exploitation referred to in the provisions of the Act of 4 February 1994’.

The cited provision, although it contains universal features of an audiovisual work, basically repeats the premises defining the notion of ‘film’ contained in Article 4(1), sentence 1 of the Cinematography Act of 30 June 2005,⁴ whereby it defines the discussed notion for the purposes of determining the terms, conditions and procedures for granting and accounting of financial support constituting public aid in accordance with Article 107(1) of the Treaty on the Functioning of the European Union.⁵ In order to clarify the concept of an audiovisual work within the meaning of copyright law, it is necessary to refer to the opinions developed in the literature and case law.

¹ The Act of 4 February 1994 – Copyright and Related Rights, consolidated text, Official Journal of the Republic of Poland 2023, item 217, hereinafter: the Copyright Law.

² See Małgorzata Świąteczak in Wojciech Machała, Rafał M Sarbiński (eds), *Prawo autorskie i prawa pokrewne. Komentarz*, Warsaw 2019, 1054.

³ Consolidated text Official Journal of the Republic of Poland 2021, item 198.

⁴ Consolidated text Official Journal of the Republic of Poland 2023, item 130. According to Art 4 section 1 sentence 1 of the Cinematography Act, ‘A film is a work of any length, including a documentary or animated work, consisting of a series of consecutive images with or without sound, recorded on any medium that allows for multiple playback, evoking the impression of movement and making up an original whole, expressing the action (content) in an individual form, and moreover, with the exception of documentary and animated works, intended to be screened in the cinema as the first field of exploitation within the meaning of the provisions on copyright and related rights’.

⁵ See Article 1(1) and (2) of the Act on Financial Support for Audiovisual Production.

However, many more doubts are raised by the issue of the television format and its copyright protection, which is controversial in the subject literature (both in Polish and foreign science). The very determination of this concept for the purposes of conducting legal analyses presents a number of problems, which results from the fact that it was created by the media production industry.⁶

In Polish literature, the term proposed by Paweł Podrecki and Elżbieta Traple is often cited, according to which this notion includes ‘serial broadcasts, always based on the same ideological and structural scheme, including the so-called reality-show. These programs are commonly called formats, because they are implemented in a certain frame, always the same structure, with established main conceptual assumptions and then developed individually in individual episodes’.⁷

The relationship between the television format and the audiovisual production based on it seems obvious – since the former can be the basis for the creation of the latter. However, this relationship is not reduced to a simple dependence – an audiovisual work and its script.

The author of the script for an audiovisual work is treated as a co-author of the audiovisual work (Article 69 of the Copyright Law), and the effect of his work is a contribution to the multi-layered whole that the audiovisual work constitutes. The format, on the other hand, is not such an element. It is an effect of intellectual activity separate from the audiovisual work, and its possible copyright protection is considered separately from the audiovisual work that was created on its basis.

However, the relationship between the two objects in question allows certain conclusions to be drawn with regard to important issues relating to the protection of the format in the light of copyright law. These are the issues to which the following considerations will refer.

II. DEFINITION OF THE CONCEPTS IN QUESTION

1. AUDIOVISUAL WORK

As Małgorzata Świętczak rightly emphasizes,⁸ ‘a common feature of the terms “audiovisual work” appearing in the literature is the inevitable reference to the

⁶ See Zbigniew Pinkalski, *Prawna ochrona formatów telewizyjnych*, Warsaw 2015, 19.

⁷ Paweł Podrecki, Elżbieta Traple, ‘Wybrane prawne aspekty tzw. formatów telewizyjnych’, ZNUJ PWiOWI, 2002/80, 173.

⁸ Świętczak (n 2) 1056.

variously understood “creating the impression of movement”. It should also be borne in mind that the reason for the separate regulation of specific issues relating to ‘audiovisual works’ is not that this type of work is perceived by sight, or even that that perception is based on the creation of the illusion of movement, but mainly that the method of production in order to produce such an impression is highly complicated and requires various types of – already typified – inputs of both creative and non-creative nature, from various fields of human activity, and these contributions merge into one specific whole.

According to Jan Błeszyński, Maria Błeszyńska-Przybylska and Michał Błeszyński, ‘As a result of the process of creation of an audiovisual work, a separate work is created, constituting a uniform and multi-layered whole suitable for separate exploitation. Its characteristic feature is that individual contribution works, successively created for the purposes of audiovisual production or previously created works used for the purposes of this production, are used in whole or in part in the original form or in the form of elaborations and constitute an audiovisual work as a result of their creative synchronisation into an artistic whole.⁹ Those authors rightly point out that ‘an audiovisual work is a separate work from the contributing works’.¹⁰

The case law has pointed out that the concept of an audiovisual work undoubtedly includes various categories of copyright-protected works, created by using various and time-changing techniques, but such that can be specified and divided into subgroups.¹¹ The basic and common feature of all of them – in accordance with the approach developed in the case law and accepted by the Constitutional Tribunal in its judgment of 24 May 2006 – is that they constitute a manifestation of creative activity of an individual nature, expressed by means of a series of successive images, with or without sound, recorded on any medium enabling multiple reproduction, creating the impression of movement.¹² As for the prevailing opinion on the necessity of recording an audiovisual work (which is supposed to result from its specificity), it should be added, however, that different positions

⁹ Jan Błeszyński, Maria Błeszyńska-Przybylska, Michał Błeszyński, ‘Status prawny utworów wykorzystanych w utworach audiowizualnych. Uwagi do wyroku Sądu Apelacyjnego w Warszawie z 17.08.2017 r., I ACa 837/16’ in Krystyna Szczepanowska-Kozłowska, Ireneusz Matusiak, Łukasz Żelechowski (eds), *Opus auctorem laudat. Księga jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej*, Warsaw 2019, 57.

¹⁰ Ibid.

¹¹ The resolution of the Supreme Court of Poland of 15 March 2018, III CZP 105/17, OSNC 2019, No 2, item 16.

¹² The judgment of the Constitutional Tribunal of 24 May 2006, K 5/05, OTK-A 2006, No 5, item 59. See further Katarzyna Górecka, ‘Pojęcie utworu audiowizualnego w ustawie o prawie autorskim i prawach pokrewnych’, *Przegląd Sądowy* No 7–8/1997, 108.

are also represented. In particular, it is noted that in the process of broadcasting, creative contributions are combined in such a way that an ‘establishment’ is made. It is also important that for a television viewer who receives a series of moving images (and thus the work manifests itself in its final form), it does not matter at all whether or not it has been previously recorded.¹³ The author of this study supports the view expressed by Świętczak¹⁴ that ‘Although in practice audiovisual works are usually recorded, it seems that the need to protect the rights of authors of unregistered works would require the assumption that in such situations the criterion is sufficient – in accordance with general principles – the mere establishment of the work, which occurs at the latest at the time of its manifestation (in this case, broadcasting). In reality, however, in the process of their creation audiovisual works are usually transferred to external media’ and thus recorded.¹⁵

‘In this approach, an audiovisual work will include all types of film (cinematographic) or television works (if they meet the criteria of Article 1(1) of the Copyright Law), music videos, advertising films, popular science, scientific or instructional films, but also, for example, computer-animated films or other similar productions that create virtual reality, audiovisual performances’.¹⁶ The case law rightly emphasised that the very wording of Article 1(2)(9) of the Copyright Law clearly indicates that in the current legal status an audiovisual work must be defined more broadly than a ‘classic’ film. It was also pointed out that the offer in the field of television sports, news, current affairs or agricultural programmes also includes audiovisual works, and even that ‘in the vast majority of cases a television programme by its very nature, includes audiovisual works’.¹⁷

2. TELEVISION FORMAT

Clarifying the definition of the television format proposed by them, Podrecki and Traple add that ‘A format is a repetitive “schedule” or structure consisting in a combination of various features on the basis of which a series of television

¹³ Jerzy Szczotka, ‘Utwory audiowizualne – stan oczekiwania na nowelizację prawa autorskiego’, *Przegląd Sądowy* 2009/1, 33. See further Świętczak (n 2) 1058 and the literature indicated therein.

¹⁴ Świętczak (n 2) 1059.

¹⁵ See Wojciech Machała, *Utwór. Przedmiot prawa autorskiego*, Warsaw 2013, 185.

¹⁶ Świętczak (n 2) 1061; The author draws attention to a broader review made by Piotr Ślęzak, ‘Pojęcie utworu audiowizualnego’ in Krzysztof Lewandowski (ed), *Utwór audiowizualny. Zakres pojęcia i ochrony prawnej*, Poznań 2011, 26.

¹⁷ The judgment of the Court of Appeal in Gdańsk of 20 November 2012, I ACa 176/10, Legalis No 1025262.

or radio programs can be produced. In general, the television format is a certain scheme that has to be filled with content depending on the country, audience requirements and other factors'.¹⁸

Zbigniew Pinkalski puts a similar view in his monograph on the legal protection of television formats: 'Generally, a television format is understood as a specific framework of a television program, on the basis of which it is possible to create a series of programs',¹⁹ and in the long run, regional versions of the program. The format is therefore a set of main, repetitive features and elements of a television broadcast. Depending on the type of broadcast to which the format relates, the set of elements will obviously be different. And so, in the case of a TV series, typical elements will be the profiles and characterological features of the characters, the structure of a single episode and the setting, while in the case of, e.g., a reality show, the format will determine among others the number of participants, the rules for their selection and elimination, the role of the host, the possibilities of interaction with the audience (TV viewers) etc. (...). In principle, it can be considered that television formats are intended to define and describe the formula of a program by creating a framework for subsequent episodes of a series, which are filled with content at the stage of realizing a series of programs based on the format. Not all of the features described in the format will have the same significance for the entire program or will affect its uniqueness in the same way. The originality and quality of each individual element may vary, but the expectations of producers of television formats are, to a minimum extent, relevant to the will to protect individual features of the program. It is much more important for these entities to protect the format as a whole, i.e., the conglomerate of the above-mentioned elements. With this in mind, the individual elements must correspond with each other and mutually connect and supplement each other. Basically, it is the format as a whole that has a measurable value in business transactions and the realities of the media market. However, this does not change the fact that the protection of the format as a whole may be exercised by seeking protection with respect to its individual fragments. Questioning infringements of rights to individual elements

¹⁸ Podrecki, *Traple* (n 7) 173.

¹⁹ In footnote 9 to the monograph cited here, the author explains that 'Article 1(1)(b) of Directive 2010/13/EU of the European Parliament and of the Council on audiovisual media services (OJ L 95, 15 April 2010) A programme in the context of this study should be understood as 'a sequence of moving images with or without sound, constituting a separate whole in the layout or catalogue of programmes prepared by the media service provider and having a form and content comparable to the form and content of television broadcasting. Examples of broadcasts are: feature films, broadcasts of sporting events, comedy series, documentaries, children's broadcasts, and films and television series'.

of the format will, in principle, be able to constitute a form of indirect protection of the entire format, and thus will expand the sphere of legal protection'.²⁰

The position expressed above on the protection of the television format by seeking protection of its individual fragments is particularly important, due to the fact that in relation to this 'product' it is justified to argue that the very concept and structure of the program should be put into the category of an idea that is not subject to copyright (cf Article 1(2)(1) of the Copyright Law). The point is, however, that this leads to a break with the concept of protection of the format itself in the sense indicated above, in favour of considering it in the context of the protection of an audiovisual work (which, after all, may also consist of elements that are not works and are not subject to copyright protection). However, it should be borne in mind that the implementation of a specific television format may lead to the creation of an audiovisual programme²¹ (a series of such programmes), which, however, does not have to be an audiovisual work. The prerequisite for copyright protection is always the fulfilment of the conditions indicated in Article 1(1) of the Copyright Law. Neither the amount of labour input nor its nature is important for stating that the product of this labour has the feature of individuality.

First, the creative nature of an author's work can be determined primarily on the basis of an assessment of the features that his or her work inheres in comparison to other intellectual products (reverse inference, i.e., adjudicating on the creative nature of an intellectual product based on the specific features of its creation is based on criteria that are intersubjectively unverifiable and, therefore, useless in legal assessments). Secondly, characteristics of the process of creating an intellectual product are not sufficient to distinguish it from other results of intellectual work, because they do not indicate its specificity (individualized form) in relation to known, previously produced intellectual products. Based on assessments that justify the granting of copyright protection, not all

²⁰ Pinkalski (n 6) 19–20.

²¹ I understand the term 'audiovisual broadcast' in the meaning given to it by Article 4(2) of the Broadcasting Act of 29 December 1992 (Consolidated text Official Journal of the Republic of Poland 2022, item 1722, as amended). According to this provision, it is 'a sequence of moving images with or without sound, constituting a separate whole in a programme or catalogue of programmes made available to the public as part of an on-demand audiovisual media service created by the media service provider, hereinafter referred to as the catalogue'. On the other hand, according to Article 4(1) of the said Act, a media service is a service in the form of a programme or an on-demand audiovisual media service, for which editorial responsibility is borne by its provider and the primary purpose or the basic purpose of its separable part is to provide programmes to the general public through telecommunications networks for information, entertainment or educational purposes; A commercial message is also a media service.

self-produced intellectual products enjoy such protection, but only those of them that show sufficiently significant differences in comparison with previously produced intellectual products.²²

Only the way of expressing may be protected (discoveries, ideas, procedures, methods and principles of operation and mathematical concepts are not protected – Article 1(2)(1) of the Copyright Law). In this sense, copyright protects only the form of the work,²³ although, of course, this form cannot be identified with the manner in which the work is recorded.²⁴ In the judgment of the Supreme Court of 5 March 1971,²⁵ it has been assumed that the emergence of copyright is not determined by the degree of value of the work developed, because even small studies may be subject to copyright protection, as long as they are characterized by an element of the author's work. Nevertheless, in subsequent jurisprudence, it was assumed that when assessing the occurrence of the prerequisites under Article 1(1) of the Copyright Law, the type of work should also be taken into account.²⁶ In the literature, it is therefore rightly pointed out that the television format, understood as 'a serial programme based on the same ideological and structural scheme',²⁷ will usually not be an audiovisual work.²⁸ 'Therefore, the format should also be treated rather as a ready-made concept of implementation (an "idea" is purchased, a project with documentation), but it is something different than the specific broadcast made on its basis. Whether it will be subject to copyright protection as an audiovisual work (and not, for example, as an artistic performance) depends on the degree of autonomy and creative freedom of the producers of a given programme; as usual, the qualification of such cases is possible only a *casu ad casum*'.²⁹

²² The judgment of the Court of Appeal in Cracow of 29 October 1997, I ACa 477/97, LEX No 533708.

²³ See Stefan Buczkowski, 'Założenia i rozwój historyczny ochrony prawnej twórczości technicznej', *Annales Universitatis Mariae Curie-Skłodowska. Sectio G* 1975, Vol XXII, 16. See further judgments of the Supreme Court of Poland: of 24 November 1978, I CR 185/78, LEX No 8151; of 8 February 1978, II CR 515/77, OSPiKA 1979, No 3, item 52.

²⁴ The judgment of the Supreme Court of Poland of 14 October 2021, IV CSKP 44/21, OSNC-ZD 2023, No 1, item 4.

²⁵ I CR 593/70, OSNC 1971, No 12, item 212.

²⁶ Judgments of the Supreme Court of Poland: of 27 February 2009, V CSK 337/08, LEX No 488738; of 6 March 2014, V CSK 202/13, LEX No 1486990.

²⁷ Ślęzak (n 16) 32.

²⁸ See Świątczak (n 2) 1062.

²⁹ *Ibid.*

III. LEGAL NATURE OF THE FORMAT AND THE CYCLICAL PROGRAMME CREATED ON ITS BASIS

In light of the foregoing considerations, two fundamental questions need to be answered. Firstly, whether the television format of the programme (series of programmes) was created as a result of a specific intellectual process and, if so, what was its legal nature, and secondly, whether the cyclical audiovisual programme produced on its basis is an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law?

In answer to the first question, it seems reasonable to assume (in the light of the above-mentioned terms) that in order to create a television format, it is necessary at least that in the process of shaping the original idea of creating a specific cyclical programme, a concept of a programme is created, within which each of its episodes will be based on the same ideological and structural scheme, implemented in a certain framework, structure, with established main conceptual assumptions.³⁰ Such an approach allows, in particular, to recognize the existence of formats of broadcasts of an informational and journalistic nature, which often defy such a ban assessment.

The problem, however, is the reference to the ability of such a work to receive copyright protection. The essence of this problem is the distinction between an unprotected idea and its form of expression. Protection can only be granted to the way of expression, i.e., the individual form in which the idea has been 'clothed'. No idea in itself, detached from its 'concretization' or 'fulfillment', will be subject to protection.³¹ 'An idea, even if it is completely new, original and has a huge economic value, is not protected by copyright'.³²

Therefore, there should be no doubt that the very idea of a cyclical programme, presenting its general concept, cannot be the subject of copyright, as it is only an idea within the meaning of Article 1(2)(1) sentence 2 of the Copyright Law. Referring, for example, to a series of broadcasts of an informational and journalistic nature, it cannot be concluded that the assumption that it will consist of conversations between the host and the guests invited by him to the program constitutes 'a manifestation of creative activity of an individual nature'. Of course, the fact is that the creation of a general concept is always the result of a certain intellectual process, which in itself, under certain conditions, can be a manifestation of the

³⁰ See Podrecki, *Traple* (n 7) 173.

³¹ See Agnieszka J Schoen, 'Poszukiwanie prawnej ochrony tzw. formatów telewizyjnych na gruncie prawa autorskiego oraz prawa zwalczania nieuczciwej konkurencji', *ZNUJ PPWI* 2007/98, 97.

³² See Podrecki, *Traple* (n 7) 174.

creative activity of the creator of the concept. However, as it is rightly emphasized in the case law, ‘the mere manifestation of creative activity is not a sufficient condition for qualifying a specific work as the subject of copyright, because it is necessary that the work is also characterized by individuality. (...) A work within the meaning of copyright law is always a manifestation (result) of certain activities, and not a creative process of the author that may lead to the creation of a work in the future’.³³ With regard to the general idea of the broadcast series, it is necessary to indicate what exactly its individualism, otherness, innovation or originality would be about, what it would contain and what it would specifically consist of. It is difficult to see uniqueness, innovation and individuality in the concept of broadcasts based on conversations with invited guests on current social or political issues, which is a typical and repetitive pattern of this type of current public affairs broadcasts. In this context, it can also be added that literature has noticed that from the negative point of view, a work cannot be banal, typical, routine, standard.³⁴ In the case law, it has been emphasized that ‘only a description of a future work that may hypothetically arise cannot be considered a work. Such a description could at most be considered a concept or an idea, not subject to protection due to the content of Article 1(2)(1) of the Copyright Law. (...) Such a description is also not a work “expressed in words” within the meaning of Article 1(2)(1) of the Copyright Law’.³⁵

A separate reference should be made to a situation in which the general concept of a series of programmes becomes more detailed as it develops. This is when the possibility of presenting the author’s creative choices as to the shape of such a format is activated.³⁶ And as noted in the case law, the premise of individuality of a work is met when shaping the form and/or content of the work, its author used the space of freedom in the selection and arrangement of the components of the work. Making protection dependent on the presence of an individuality feature in a work does not mean that this feature should manifest itself to a certain degree of its intensity. Moreover, in the case of a minimum degree of individuality, it is possible to qualify a work revealing this feature as a subject of copyright.³⁷ ‘Creative activity of an individual nature should also be considered the product of

³³ The judgment of the Court of Appeal in Warsaw of 12 April 2017, I ACa 173/16, *Legalis*.

³⁴ Marian Kępiński, Aurelia Nowicka, glosa do uchwały składu siedmiu sędziów NSA z 12 października 1998 r., *OSP* 1999, No 9, item 162.

³⁵ The judgment of the Court of Appeal in Poznań of 12 December 2009, I ACa 893/09, *LEX* No 628228; see further the judgment of the Court of Appeal in Katowice of 9 October 2012, V ACa 175/12, *Legalis*, and the judgment of the Court of Appeal in Warsaw of 15 September 1995, I ACr 620/95, *Legalis*.

³⁶ Schoen (n 31) 105.

³⁷ The judgment of the Court of Appeal in Cracow of 29 October 1997, I ACa 477/97, *LEX* nr 533708.

the intellectual process of a human being, which was created as a result of compilation using publicly available data, provided that their selection, segregation, and way of presentation have the hallmarks of originality'.³⁸

Taking the above into account, it should be assumed, following Agnieszka J Schoen, that 'although the idea for a television program itself is not subject to copyright protection, its creative development, detailing, shaping (elaboration), and thus the development of an identifiable form of expression, separate from the underlying idea – the format taking on a form of at least a concrete project, description (the so-called treatment), script of a series of programs to be created, insofar as it is characterized by originality and individuality, it is the subject of copyright – a protected work'.³⁹ The cited author points to formats 'in the sense of a detailed concept, a meticulously presented description, a plan, a specific scheme of a series of television programs along with additional elements characteristic of the entire series, such as scenography, music, graphics (including the program's logo), choreography, constant "catchphrases", the so-called jingles, etc.'.⁴⁰ In such situations, we would be dealing with such an advanced concretization of the idea that arguments of its abstract nature would cease to be justified.⁴¹

A television format developed in such an elaborate and extensive form as mentioned above may already constitute a work protected by copyright. Its overall formation, including individual elements, can take place as a result of the cooperation of a team of people. The format of the programme, developed in this way by a team of cooperating people, compiled from its constituent elements, will form a single work, constituting an intellectually homogeneous whole, being 'an individual set of creative values, separate from the values of individual components'.⁴² The nature of cooperation between the people involved in the creation of the format, in particular as part of joint arrangements, may support the assumption that the format was created as a result of the joint creative work of the authors of its individual components, and thus may lead to the creation of a work of co-authorship.

Answering the second of the above questions, I believe that the production of a cyclical programme on the basis of a format enjoying copyright protection will

³⁸ The judgment of the Supreme Court of Poland of 25 January 2006, I CK 281/05, OSNC 2006, No 11, item 186.

³⁹ Schoen (n 31) 102.

⁴⁰ Ibid, 105.

⁴¹ See Damian Flisak in 'Komentarz do wybranych przepisów ustawy o prawie autorskim i prawach pokrewnych', LEX/el. 2018, Article 1, thesis No 24.

⁴² Ryszard Markiewicz, 'Dzieło literackie i jego twórca w polskim prawie autorskim', Rozprawy Habilitacyjne Uniwersytetu Jagiellońskiego, Kraków 1984, 176.

lead to the creation of an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law. The realization of creative elements of an individual nature contained in the format will result in their reflection in the audiovisual work in this way. In this context, attention should be paid to the fact that the format itself is not always externalized as a whole, taking into account the combination of all its constituent elements, in the form of a uniform and self-contained 'framing' that allows it to be communicated in its full form to other persons besides the creator. In particular, it does not have to be put in a uniform written study describing in detail all the elements that make it up (which consequently would lead to the creation of a specific work of a literary nature). Its establishment as a whole may take place within the framework of an audiovisual work. If we consider a given television format to be a work, then the audiovisual programme produced on its basis, which is also a form of establishing this format, will constitute an audiovisual work.

It should even be added here that in European jurisprudence and in literature, including Polish literature, there is a view that copyright protection of a format may apply not so much to the format itself as to a programme based on it. 'In fact, by declaring the theoretical possibility of obtaining copyright protection for a format, we grant protection to specific independent works that are part of a larger whole, or to programs that have already been developed according to the scheme'.⁴³

At the end of this section of the study, it should be emphasized that an audiovisual work can only be a particular programme (episode) of a cycle, and not a series of episodes as a whole.⁴⁴ The issue of copyright in a series of programmes must, therefore, be considered separately for each individual episode of the series. In the case where individual programmes of a series are broadcast live (which may apply in particular to those implementing the format of public affairs and news programmes), it should be assumed that a specific audiovisual work (episode of a series) is established by its broadcasting (broadcast in a television programme).⁴⁵ In the process of broadcasting, creative contributions are combined in such a way that the audiovisual work is 'established'.

⁴³ Podrecki, Traple (n 7) 174.

⁴⁴ See Shoen (n 31) 127.

⁴⁵ See Maria Poźniak-Niedzielska, Adrian Niewęglowski, 'Pomysł jako przejaw twórczości w świetle prawa autorskiego' in Andrzej Matlak, Sybilla Stanisławska-Kloc (eds), *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi*, Warsaw 2013, 841.

IV. ACQUISITION OF ECONOMIC RIGHTS TO THE CO-AUTHORED FORMAT AND THE CYCLICAL PROGRAMME PRODUCED ON ITS BASIS BY THE PRODUCER

1. RIGHTS TO FORMAT

According to what has been said above, the format of a cyclical broadcast may have the character of a co-authored work. It may also be established in the audiovisual work itself produced on its basis (from the moment of establishing, provided that the above-mentioned premises are met, allowing it to be considered a manifestation of creative activity of an individual nature, the format becomes the subject of copyright – Article 1(1) of the Copyright Law).

Pursuant to Article 9(1) of the Copyright Law. ‘Co-authors are entitled to copyright jointly’, whereby according to paragraph 5 of this article, ‘The provisions of the Civil Code on co-ownership in fractional parts shall apply accordingly to the economic copyrights of co-authors’.⁴⁶ Therefore, Article 198 of the Civil Code will apply to the issue discussed here, according to which each of the entitled persons (co-authors) may dispose of a share in the right without the consent of the other co-authors.⁴⁷ Thus, the producer acquires the rights to the format to the extent that the co-authors have granted to him on the basis of agreements binding him with them. These agreements may concern either the transfer of the economic copyright to a share in a co-authored work (Article 41(1)(1) of the Copyright Law) or the granting of a license to use such a share (Article 41(2) of the Copyright Law). It should be noted that pursuant to Article 65 of the Copyright Law, ‘In the absence of an express decision on the transfer of the right, it is considered that the creator has granted a license’. ‘The word “explicit” used in the provision should be understood as unambiguous and clear. The regulation of Article 65 of the Copyright Law (...) contains an interpretative norm adopted in the interest of the author. It results in a situation where ambiguities in the contract regarding the transfer of copyright lead to statutory conversion. An agreement that does not contain an express provision on the transfer of rights is converted into a license contract’.⁴⁸ Pursuant to Article 67(2) of the Copyright Law, the license may be exclusive or non-exclusive. An exclusive license agreement must be made in

⁴⁶ The Act of 23 April 1964, consolidated text Official Journal of the Republic of Poland 2024, item 1061, hereinafter: the Civil Code.

⁴⁷ See Barbara Błońska in Wojciech Machała, Rafał M Sarbiński (eds), *Prawo autorskie i prawa pokrewne. Komentarz*, Warsaw 2019, 337.

⁴⁸ Adrian Niewęglowski, *Ustalenie statusu logotypu w świetle prawa autorskiego. Przeniesienie autorskich praw majątkowych a problem spółki cywilnej*. Glosa do wyroku s. apel. z dnia 16 grudnia 2020 r., V AGa 652/18, OSP 2022, No 5, 41.

writing or else it will be void (Article 67(5) of the Copyright Law). The same requirement applies to an agreement on the transfer of copyrights (Article 53 of the Copyright Law). Failure to comply with the written form of the agreement may, therefore, at most lead to the granting of a non-exclusive license to use the creative contribution to the format.

A producer may also acquire copyrights to a format under Article 12(1) of the Copyright Law, i.e., as part of the so-called employee creativity (if the creators of this format created it as a result of the performance of duties under the employment relationship between them and the producer).

2. RIGHTS TO CYCLICAL BROADCASTING

A cyclical audiovisual broadcast created as a result of the implementation of a format which is the subject of copyright will constitute an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law. As noted by the Court of Appeal in Warsaw,⁴⁹ an audiovisual work is a work of co-authorship, as referred to in Article 9 of the Copyright Law. It is, therefore, one integral whole, not a collection of contribution works, and at the same time it is something more than a simple sum of the works that make it up. The opposite position stating that, in addition to the author's economic rights to the audiovisual work as a whole, the authors of contribution works are entitled to parallel rights to individual works included in the audiovisual work is unfounded. It does not seem that the legislator's intention was to regulate economic copyrights in such a way that the rights to an audiovisual work are duplicated. Such consequences would be achieved if it were assumed that, in addition to the right to an audiovisual work as an integral whole, there is a set of rights to contribution works exploited as part of an audiovisual work, and the exploitation of an audiovisual work means the simultaneous exploitation of each of the contribution works.

On the other hand, pursuant to Article 69 of the Copyright Law, 'Co-authors of an audiovisual work are people who have made a creative contribution to its creation, in particular: the director, the cinematographer, the author of the adaptation of a literary work, the author of musical or verbal-musical works created for the audiovisual work, and the author of the script'. Therefore, only a person who has contributed to the process of creating such a work can aspire to be a co-author of an audiovisual work, and not to the preceding stages, which means that authors of

⁴⁹ Judgment of 7 February 2014, I ACa 452/13, Legalis No 1062393.

the so-called prior works should be excluded from the group of co-authors.⁵⁰ Of course, a format whose realization is a cyclical broadcast, which is an audiovisual work, cannot be considered a prior work. Nor will an audiovisual work implementing a format be an adaptation of the format (i.e., a work dependent on the format, although it seems that such cases could occur under certain circumstances).

A special situation that, in my opinion, is worth considering here is the possibility of shaping the format within the framework of a series of audiovisual broadcasts produced on its basis. A certain general idea of a series of broadcasts can be developed (expanded, diversified) in the course of their implementation, filling the original scheme with new content and elements. These contents and elements can give the expanded scheme a creative character of an individual feature. Such a process would ultimately create a certain format of broadcasts, which as a work would be established as a defined whole in the produced (or broadcast – for example, in the case of a ‘live’ news and current public affairs broadcast) series of broadcasts. The model (format) of the programme created in this way would constitute a work separate from the audiovisual works establishing it and created on its basis. Each episode of the series would constitute a separate audiovisual work and the television format ultimately developed in the way indicated above would constitute a single work (although often, if not mostly, co-authored). This issue is important in view of the fact that the producer acquires the rights to both categories of works, as the rights to both would have to be acquired separately.

The situation described here could, in my opinion, have another important consequence. Namely, in the course of the creation of the format established in the programmes created on its basis, the authors of the creative elements of such a format would usually have a creative influence on the creation of the individual character of the television programmes themselves. Since the applicable law does not provide grounds for assuming that, in relation to an audiovisual work, the premises of co-authorship should be understood in a different or specific way,⁵¹ the authors of these elements of the format would also become co-authors of the programme as an audiovisual work. This, of course, does not exclude the existence of other co-authors of the broadcast-work, provided that there is cooperation between them and the co-authors of the format in the production of a specific programme of the series (e.g., the image operator). If there was no such cooperation, and an element having the character of work would be included in a specific audiovisual

⁵⁰ Judgment of the Court of Appeal in Warsaw of 2 November 2015, VI ACa 543/14, LEX No 1994430. See further Krzysztof Lewandowski, ‘Utwór audiowizualny. Zakres pojęcia i ochrony prawnej’, Poznan 2011, 65; Monika Czajkowska – Dąbrowska in Janusz Barta (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Cracow 2005, 528.

⁵¹ Jan Błęszyński, ‘Reemisja w świetle art. 21(1) Prawa autorskiego’, PUG 2009, No 11, 6–20.

broadcast, then we would be dealing not with co-authorship, but with a combination of works (Article 10 of the Copyright Law). 'An audiovisual work may be mixed, hybrid and, depending on the factual circumstances, it may be dominated by elements of co-creation (separable and inseparable), features of a collective work, or manifestations of combined works, collections of works, elaborations or inspirations, and it is not justified to consider the construction of an audiovisual work on a horizontal plane (which dominates in the case of co-creation), because due to its multi-threading and spread over time of the creation of an audiovisual work, its structure is vertical in nature, where the idea of creating a work, which is not protected by copyright, is at the basis of the emerging legal relations'.⁵²

Pursuant to Article 70(1) of the Copyright Law, 'The producer of an audiovisual work shall be presumed to acquire, by virtue of a contract for the creation of a work or an agreement for the use of an existing work, exclusive economic rights to exploit those works within the framework of the audiovisual work as a whole'. Thus, 'the rights to use the contribution works in an audiovisual work are used by the audiovisual producer to the extent that they were acquired from the original rightholders. This applies both to works commissioned for the purposes of an audiovisual production, as well as to those created without connection with that production, but only used in the audiovisual work, as well as to contributions of a co-authored nature, regardless of their ability for independent exploitation'.⁵³ Until the possible refutation of the presumption under Article 70(1) of the Copyright Law, therefore, it should be assumed that it is the producer, and not the authors of individual contribution works, who is entitled to exploit the audiovisual work as a whole.⁵⁴

Incidentally, it is also worth noting that it follows from the legal presumption mentioned above that the acquisition of economic rights to the exploitation of an audiovisual work is related to the very fact of concluding a contract for the creation of a work. Therefore, the failure of the parties to make the contract for the creation of the work in writing does not constitute a circumstance excluding the possibility of the existence of rights to exploit the work obtained as a result of the order by the ordering party. As indicated above, in the light of copyright law, the requirement of written form is a prerequisite for the effective and valid conclusion of an agreement concerning the transfer of copyright (Article 53 of the Copyright Law) and the granting of an exclusive license (Article 67(5) of the

⁵² Dorota Sokołowska, 'O właściwościach utworu audiowizualnego "jako całości"', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, Year LXXXII, 2020, No 4.

⁵³ Błęszyński (n 51) 6–20.

⁵⁴ See the judgment of the Court of Appeal in Gdańsk of 20 November 2012, I ACa 176/10, *Legalis* No 1025262.

Copyright Law). However, it does not include a non-exclusive license. Therefore, the parties' declaration of intent in the case of a non-exclusive license agreement may be made in any way expressing their will in a sufficient way, in accordance with the general rule arising from Article 60 of the Civil Code.⁵⁵ The conclusion of an oral agreement for the creation of a contribution work to an audiovisual work allows us to assume the existence of an implied authorisation of the author of that work to exploit it as part of the audiovisual work as a whole. 'A license agreement is a binding agreement. Its subject is the licensor's authorization to the licensee to use the work. The conclusion of this agreement creates an obligation on the side of the licensor to endure the use of the work by the licensee to the extent covered by the license. Therefore, this use takes place with the consent of the rightholder and thus does not constitute an infringement of his copyrights'.⁵⁶

According to Article 66 of the Copyright Law a license agreement entitles you to use the work for a period of five years in the territory of the country in which you have your registered seat, unless otherwise provided in the agreement. After this period, the right obtained under the license agreement expires.

V. SUMMARY

The above considerations lead to several important conclusions regarding the legal status of the television format and the consequences that may arise from the relationship between it and the cyclical program created on its basis.

First, there should be no doubt that a format may be subject to copyright. This does not apply, of course, to the initial, general concept itself, because, as a mere idea/concept, it is not subject to copyright protection. On the other hand, the form of such a concept, already developed into an appropriate form, composed of the creative elements making it up and individualizing it, will constitute a work within the meaning of Article 1(1) of the Copyright Law.

Secondly, the format may be determined as a work in a programme based on it, which may occur in particular in the case of a public affairs and information programmes (including those broadcast 'live').

Thirdly, a television programme created on the basis of a format which is a work within the meaning of copyright law will be an audiovisual work referred to in Article 1(2)(9) of the Copyright Law.

⁵⁵ See the judgment of the Court of Appeal in Warsaw of 20 June 2018, V ACa 18/17, Legalis.

⁵⁶ Judgment of the Court of Appeal in Warsaw of 14 October 2016, VI ACa 1001/15, LEX No 2157764.

Fourthly, in the case of a format-work which is a piece of co-authorship, the authors of works contributing to the format established in the television programme created on its basis will also usually also be co-authors of the audiovisual work, which will be the programme.

Fifthly, the format-work and the audiovisual work created on its basis are legally separate objects of protection. Therefore, the acquisition by the producer of the rights to both works takes place separately, also in a situation where the authors of the works contributed to the format are co-authors of the audiovisual work as well. It is only with regard to an audiovisual work that the presumption under Article 70(1) of the Copyright Law applies.

Finally, it should be added that the format must be specified to such an extent that it constitutes a recognizable element of the work created on its basis. 'In relation to a series of television broadcasts, recognition can be manifested in the fact that each episode has identical graphics, set design, music, which gives all episodes a common character. However, it should be noted that the above-mentioned elements are independent works and as such are subject to protection. (...) The assumption that only the concretization of a format can be protected means that the consideration of copyright protection in relation to formats requires a comparison not between the concept and the program, but between two completed programs. This means that as long as individual episodes do not take over elements belonging to the form from another program and are based only on the same idea, there is no copyright protection'.⁵⁷ Typical for such an understanding is the decision of the Amsterdam District Court of 7 June 2000, in which the court held that the selection of individual elements constituting the whole of a repetitive scheme is sufficiently original and elaborate to be the subject of copyright. Nevertheless, the detailed comparison between the programs, made by the court, showed that the characteristic, protected elements from the first program were not taken over together with their form of expression, so there was no infringement of copyright.⁵⁸

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⁵⁷ Podrecki, Traple (n 7) 178.

⁵⁸ Cf Castaway/John de Mol (*Survive v Big Brother*), Mediaforum 2000, No 7/8, 260–263 (quoted in Podrecki, Traple (n 7) 178).

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FEES AS AN INSTRUMENT FOR THE REGULATION AND PROTECTION OF WATER RESOURCES IN A COMPARATIVE APPROACH ON THE EXAMPLE OF POLAND AND FRANCE

Abstract

This article analyses selected fees related to water resources, distinguishing between their regulatory and protective nature.

The analysis in question was carried out on the example of the regulations of Polish and French law, so that the comparative perspective applied would allow for presenting the analysed issues in a much broader context than just the national one.

The methodology used by the author is related to the functional approach of the comparative method, the historical-descriptive and dogmatic method. The comparative perspective provides an advantage over studies limited to the national scope only, as it allows for the formulation of an answer to the research question of whether, despite functioning within the framework of EU regulations, Polish and French law differ in the way they regulate the matter in question. Consequently, the authors of this article have indicated certain

specific French solutions that could also be taken into account by the Polish legislator in order to increase the efficiency of environmental fees collected and ensure water resources protection, which are both important elements of environmental law.

KEYWORDS

French law, Polish law, tax law, environmental law, water resources, fees

SŁOWA KLUCZOWE

prawo francuskie, prawo polskie, prawo podatkowe, prawo ochrony środowiska, zasoby wodne, opłaty

1. INTRODUCTION

Utilising a comparative approach, this study examines the various fees imposed by environmental authorities, focusing on France and Poland as case studies. The fees in question were selected based on two principal factors: that they apply to water resources and, at the same time, they follow a regulatory-protective paradigm. It may also be noted that French theory employs the terms *régulation* (regulation/control) and *réglementation* (regulation) interchangeably, whereby they are construed as actions of a normative nature undertaken to control a given process or economic practice.¹ The choice of countries for this comparative analysis stems from earlier research performed in the doctrine, which focused on the historical links between Polish and French law.²

The study not only highlights the differences between the Polish and French legal systems, but in addition, as it presents the translations of the wording or constructions from French law, this publication may be a valuable resource not only for practitioners and legal theorists but also for persons who use French daily, especially in specialised legal translations.

It may be noted that the comparative method is crucial for this work since it made it possible to examine environmental fees in an aspect broader than just the domestic one.³ However, this method does not rely on uniform principles or uni-

¹ Marie-Anne Frison-Roche, 'Définition du droit de la régulation économique' in Frison-Roche (ed), *Droit et économie de la régulation* (Presses de Sciences Po, 2004) 7.

² Elżbieta Zębek, Michał Mariański, 'Opłaty związane z zanieczyszczeniem wód we Francji i w Polsce. Analiza porównawcza' (2025) 3(56), *Prawo i Więź* 154.

³ Mariola Lemonnier, 'Prawo publiczne a prawo prywatne. Uwagi prawnoporównawcze na podstawie prawa francuskiego' (2016) 100 *Studia Prawno-Ekonomiczne* 77.

versal rules, being adapted each time to the specific requirements of a particular research area.⁴ This study does also assume an interdisciplinary scope since the regulation of water resource fees is explored by scholars both from the standpoint of tax law and environmental law.⁵ This is also reflected in the specialisation of these authors, who represent the science of financial law and environmental law simultaneously.

As regards the legislation concerning water protection fees, it is noteworthy that – by way of exception – they are regulated in French law in the Environmental Code (French: *Code de l'environnement*). This is unique because, in principle, most of the substantive tax law is governed in France under another piece of legislation, i.e., the General Tax Code (French: *Code Général des Impôts*).⁶ The Environmental Code – the most relevant from the standpoint of this study – consists of two parts: the legislative part (French: *partie législative*), spanning Article L110 to L713-9, and the regulatory part (French: *partie réglementaire*), with Article R121-1 to R714-2. The provisions of the legislative part are passed in the traditional legislative procedure, while the regulatory provisions are adopted by virtue of decrees of the Council of Ministers and the French Supreme Administrative Court (*Conseil d'Etat*).⁷ The aforementioned legislative part is further divided into seven books, of which Book II is the object of interest in this paper.⁸ Title I of that Book contains Chapter III, which covers the administrative and financial structures⁹ as well as provides for the so-called environmental water fees. Significantly, these fees – divided into as many as six types – are collected by a single specialised body, i.e., Water Agencies. This institution, originally called *Agence de l'Eau*, is a public administrative establishment which participates in the management of water in an administrative basin district, the limits of which correspond to a large hydrographic basin. As in France we have six basin districts,¹⁰ there are six Water Agencies corresponding to them.¹¹ The fees in question

⁴ Roman Tokarczyk, *Komparatystyka prawnicza* (1st edition Wolters Kluwer, 2008) 24.

⁵ Piotr Korzeniowski, 'Koncepcja Normatywna przeciwdziałania Zanieczyszczeniom' (2015) 1 Przegląd Prawa Ochrony Środowiska 23.

⁶ Michał Mariański, 'Formy innych fakultatywnych podatków gminnych w świetle regulacji francuskiego Generalnego kodeksu podatków' (2022) 55 Studia Prawnoustrojowe 225.

⁷ Anna Klimaszewska and others, 'Spółka z ograniczoną odpowiedzialnością (société à responsabilité limitée) we francuskim kodeksie handlowym' (1st edition Wydawnictwo UWM 2017) 32.

⁸ Fr. Livre II : Milieux physiques (Articles L210-1 à L241-2).

⁹ Fr. Chapitre III : Structures administratives et financières (Articles L213-1 à L213-22).

¹⁰ The six bassins districts are: Adour-Garonne, Artois-Picardie, Loire-Bretagne, Rhin-Meuse, Rhône Méditerranée Corse, Seine-Normandie.

¹¹ See more in Michał Mariański, Richard Bartes, 'Legal protection of surface waters in France', in Jarosław Dobkowski and others (eds), *Legal protection of inland waters in selected EU countries* (Routledge 2025).

that were collected by every Water Agency till 2025 included: a water pollution fee (French: *redevances pour pollution de l'eau*), a fee for modernization of water collection networks (French: *redevances pour modernisation des réseaux de collecte*), a fee for diffused pollution (French: *redevances pour pollutions diffuses*), a fee for abstraction from water resources (French: *redevances pour prélèvement sur la ressource en eau*), a fee for water storage during periods of low water (French: *redevance pour stockage d'eau en période d'étiage*) and a fee for the protection of the aquatic environment (French: *redevance pour protection du milieu aquatique*). What is important to emphasise, is that, as a result of the reform from February 2025,¹² two fees, one for domestic pollution and one for the modernization of collection networks, disappeared and were replaced by three new fees: one on water consumption, two on performance (of drinking water networks and collective sanitation systems) in order to reduce the contribution of the most efficient distribution networks.

In Polish law, the so-called environmental water fees¹³ are also regulated essentially in a single legal act and collected by one authority. The pertinent statute is the Water Law Act of 20 July 2017 (WLA), or more precisely, the Chapter entitled Economic Instruments in Water Management.¹⁴ In this study, fees for water-related services will be analysed. The agency that collects the fees is the State Water Holding Polish Waters (*PGW WP*). Polish law provides for a similar number of fees as in French law, with a total of seven levies, including: (a) a fee for the abstraction of ground- and surface water, (b) a fee for the sewage introduced into water or the soil, (c) a fee for the collection of rainwater or snowmelt, (d) a fee for the abstraction of ground- and surface water for the purposes of fishing farms, (e) a fee for the sewage from fishing farms introduced into water or the soil, (f) a fee for the extraction of materials from surface water and (g) a fee for the reduction of natural terrain retention.

Given the matter studied here, water pollution fees were excluded from the analysis as they were already presented in detail in a separate study, also in reference to the Polish and French system.¹⁵

¹² Fr. LOI n° 2025-127 du 14 février 2025 de finances pour 2025, JORF (Journal of Laws) n°0039 du 15 février 2025.

¹³ Michał Ptak, 'Opłaty i podatki ekologiczne w krajach Unii Europejskiej' (2010) 127 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* 82.

¹⁴ Journal of Laws of 2024, items 1087, 1089, 1473.

¹⁵ Elżbieta Zębek, Michał Mariański, 'Opłaty związane z zanieczyszczeniem wód we Francji i w Polsce. Analiza porównawcza' (2025) 3 *Prawo i Wiąż* 153.

2. FEES COLLECTED UNDER THE WATER LAW IN POLAND

The institution of fees for water services in the EU was introduced in the Water Framework Directive No 2000/60/EC¹⁶ in Article 9, the provisions of which were implemented in Poland in the 2017 Water Law Act (Polish: *Prawo wodne*). At the outset, it is worth noting that Articles 35 and 267 of this act are fundamental as far as the regulation of fees and their regulatory-protective function is concerned since, as part of the economic instruments involved in water management, Articles 268(1) and 269(1) WLA detail water service fees (Polish: *opłaty za usługi wodne*). As observed in the previous section, water pollution fees are discussed in a separate study, which is why this publication examines four main fee types: (1) fees for ground- and surface water abstraction; (2) fees for abstraction of ground- and surface water for fish farms; (3) fees for extraction of materials from surface water and (4) fees for reduction of natural terrain retention.¹⁷ Hence, a detailed description of the other charges may be found in another study by the authors referred to above. The fee for water services, with the exception of the fee for the reduction of natural terrain retention, is set by the competent Catchment Board of the PGW WP (Polish: *Zarząd Zlewni Państwowe Gospodarstwo Wodne Wody Polskie*) (Articles 271(1), 272(17) and 272(22) WLA). Fees for water services are calculated according to the principles set out in the Water Law Act, taking into account the upper¹⁸ and unit rates. Unit fee rates are detailed in the Regulation of the Council of Ministers of 26 October 2023 on the unit fee rates for water services.¹⁹

The first of the regulatory-protective fees is the fee for the abstraction of ground- and surface water (Polish: *opłaty za pobór wód podziemnych i powierzchniowych*). This type of fee is a form of environmental tax included in the group of taxes on natural resources.²⁰ This fee can be charged in fixed and variable forms. The amount of the fixed fee for both ground- and surface water intake is determined based on the product of the unit fee rate, time and the maximum amount of water (m³/s) that may be abstracted under a water permit or integrated permit (Articles 271(2) and (3) WLA). On the other hand, the amount of the water abstraction fee

¹⁶ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22 December 2000, 1–73).

¹⁷ See also: Lucyna Osuch-Chacińska, 'Wprowadzanie ścieków i wody do wód lub do ziemi oraz opłaty za te usługi wodne' (LEX 2018).

¹⁸ Upper unit fee rates for water services are set out in Arts 274 and 275 WLA.

¹⁹ Journal of Laws of 2023, item 2471.

²⁰ Jerzy Śleszyński, 'Podatki środowiskowe i podział na grupy podatków według metodyki Eurostatu' (2014) *Optimum. Studia Ekonomiczne* 69, 55–56.

for hydropower plants is calculated based on the amount of electricity produced at the hydropower facility using the abstracted water (with return flow),²¹ while in the case of heat pumps on the amount of thermal energy produced or taken up by the system using water that has been abstracted, used and then discharged into the waters or the same aquifer in the same volume and unimpaired quality.²² The unit rate of the fixed fee for groundwater abstraction is PLN 500 per day per 1 m³/s and, for surface water, PLN 250 per day per 1 m³/s for the maximum water intake specified in the water permit or integrated permit (§ 2 and 3 of the 2023 Regulation). This differentiation in the rate of the charge, which is double for groundwater abstraction, demonstrates the rationing function of the charge, especially for such valuable water resources, which are described as non-renewable. In this way, the legislator aims to limit the abstraction of these waters and to use them sparingly, thus protecting them in terms of quantity and quality.²³

On the other hand, the amount of the variable fee for water abstraction depends on the amount and type of water abstracted, as well as its purpose. This fee is determined as the product of the unit fee rate and the volume of ground- or surface water abstracted (m³), including water abstracted for the purpose of carrying out the municipality's tasks of collective water supply for human consumption (Article 272 (1) and (2) WLA). In the case of water abstraction for the purposes of hydropower plants, the variable fee is determined as the sum of the products of the unit fee rate and the amount of electricity produced at the hydropower facility (in MWh) and the fee rate and the volume of ground- or surface water which is withdrawn without return flow for technological purposes (m³) and does not directly serve to produce electricity (Article 272(3) WLA). In the case of the abstraction of water used for the cooling circuits of a power plant or thermal power station, the amount of the variable charge is determined by multiplying the unit charge rate (m³) by the difference between the amount of water abstracted for these purposes and the amount of water discharged (Article 272(4) WLA). The unit rates of the variable fee for water abstraction vary per water type and the purpose of water, and are listed in § 5(1) of the 2023 Regulation. However, in the case of water abstraction for the purposes of carrying out the municipality's tasks of collective water supply for human consumption, the upper unit rate of the variable fee varies based on the volume of withdrawn water, with PLN 0.068 per 1 m³ of groundwater

²¹ Non-returnable water means water that has been withdrawn, used, and subsequently discharged in the same quantity and of unimpaired quality, and for non-returnable withdrawal of process water not directly intended for the production of electricity (Art 270(4) WLA).

²² Exceptions include change of water temperature and technological water not directly intended for heating or cooling purposes (Art 270 (2) and (4a)).

²³ Elżbieta Zębek, *Instrumenty administracyjno-prawne i ekonomiczne w ochronie środowiska*, (1st edition Wydawnictwo UWM 2017) 153.

and PLN 0.040 per 1 m³ of surface water § 5(1)(41,42) of the 2023 Regulation. In addition, variable fees vary depending on the treatment method. In the case of commercial water abstraction, the fee is calculated based on the maximum water abstraction specified in the water permit or integrated permit. This is particularly important for the energy industry due to the amount of water consumed in energy processes, especially in electricity or heat generation. Therefore, the technology used is crucial, as it influences the amount of water lost in the heating cycle and optimises cooling processes. This can be a form of incentive for the sector to improve water-saving technologies.²⁴

The second of the regulatory-protective fees is charged for the abstraction of ground- and surface water for the purposes of breeding and rearing fish and other aquatic organisms (Polish: *opłaty za pobór wód podziemnych i wód powierzchniowych na potrzeby chowu i hodowli ryb oraz innych organizmów wodnych*), as set out in Article 275 WLA. In the case of non-consumptive abstraction of groundwater for such purposes, the fee depends on the maximum amount of water that may be abstracted in line with the water permit. The amount of such fee is calculated as the product of the unit fee rate, time and the maximum volume of groundwater that may be abstracted under the water permit or integrated permit. In a situation where the maximum volume of groundwater that may be withdrawn exceeds 0.05 m³/s, the rate of such fee is calculated as the sum of the above product, the product of the unit fee rate and the volume of abstracted groundwater (Articles 275(8)(1) and 275(9) WLA). The unit rates of this fee are specified in § 12(1) of the 2023 Regulation, being contingent on the maximum volume of abstracted groundwater water, calculated quarterly, i.e., PLN 100 at 0.02 m³/s, PLN 125 for volumes between 0.02 and 0.05 m³/s, and PLN 125 for volumes above 0.05 m³/s, as well as PLN 50 for each additional 0.01 m³/s of abstracted water. In the case of surface water abstraction, these rates are PLN 100 for a volume of 0.2 m³/s; PLN 125 for 0.2 to 0.5 m³/s; PLN 125 for a maximum possible volume of 0.5 m³/s and PLN 50 for each subsequent 0.1 m³/s of abstracted water (§12(2)).

Yet another regulatory-protective fee is levied for extracting stone, gravel, sand and other materials from surface waters – including internal maritime waters, together with the internal waters of the Gulf of Gdańsk as well as the waters of the territorial sea – as well as for harvesting plants from waters or the shore (Polish: *opłata za wydobywanie z wód powierzchniowych, w tym z morskich wód wewnętrznych wraz z wodami wewnętrznymi Zatoki Gdańskiej oraz wód morza terytorialnego, kamienia, żwiru, piasku oraz innych materiałów, a także za wycinanie roślin z wód lub brzegu*). The fee is determined based on the product of the

²⁴ Monika Bogdał, Nina Kuśnierkiewicz, ‘Zmiany w prawie wodnym. Nowe opłaty za pobór wód dla branży energetycznej’ (2017) *Energetyka Ciepła i Zawodowa* 6, 8–10.

unit fee rate and the quantity of extracted raw material, i.e., stone, gravel or sand and other materials (Mg), as well as harvested reed or wicker (m³) (Article 272(9) WLA). The unit fee rate is specified in § 11 of the 2023 Regulation, and depends on the type of extracted material, i.e., PLN 0.40 for 1 Mg of extracted stone, PLN 0.25 for gravel or sand, PLN 0.30 for other materials, and PLN 5.35 for 1 m³ of harvested reed or wicker.

Finally, the fourth fee is charged for the reduction of natural terrain retention, which applies to a property with an area of more than 3,500 m² where one carries out works or construction that permanently involve the soil and decreases retention by making more than 70% of the area of such property biologically inactive (Polish: *opłata za zmniejszenie naturalnej retencji terenowej na skutek wykonywania na nieruchomości o powierzchni powyżej 3500 m² robót lub obiektów budowlanych trwale związanych z gruntem, mających wpływ na zmniejszenie tej retencji przez wyłączenie więcej niż 70% powierzchni nieruchomości z powierzchni biologicznie czynnej*).²⁵ Thus, the amount of the fee is calculated as the product of the unit fee rate for the size of the biologically active area thus lost (m²) and time (years) (Article 272(8) WLA). The unit rate of such a fee is specified in § 9 of the 2023 Regulation and varies in view of the capacity of water retention facilities or lack thereof. In the case of water retention from sealed surfaces that permanently involve the soil without any facilities, the fee rate is PLN 0.50 per 1 m² per year, while where such facilities exist and have a capacity of up to 10% of the annual runoff from sealed surfaces permanently involving the soil, it amounts to PLN 0.30, PLN 0.15 at a capacity of 10% – 30%, and PLN 0.05 at a capacity exceeding 30%. Thus, this fee may be compensation for maintaining a state of permanently reduced retention potential in a property with a large area, which is definitely detrimental to water management.²⁶

3. FEES COLLECTED BY THE WATER AGENCIES IN FRANCE

As already mentioned in the Introduction, this analysis omits the water pollution fee (French: *redevances pour pollution de l'eau*) provided for in Article L213-10-1

²⁵ In areas which are not covered by open or closed sewer systems, the fee depends on the size of the sealed area (built-up area excluded from the biologically active area) and the use of retention compensation (Art 270(7) WLA).

²⁶ Anna Ostrowska, 'Opłata za zmniejszenie naturalnej retencji terenowej nieruchomości (opłata retencyjna) jako instrument zarządzania zasobami wodnymi' (2024) *Studia Prawnoustrojowe* 66, 371.

to L213-10-4 of the French Environmental Code, as it has been discussed in detail in a separate study.²⁷ In this case, as a result of the reform from February 2025²⁸ this fee was modified by the French legislator as part of a greater reform of public and local finances.

It is also worth noting that, according to Article L213-8-1 of the French Environmental Code (*Code de l'environnement*; hereafter CDL), the authority that collects those fees in France, which was already mentioned in the introduction of this paper, i.e., the Water Agency, operates in each river basin or group of river basins. In order to carry out its tasks, the agency gathers the financial resources, particularly through fees collected under Articles L213-10-1 to L213-10-12.

The first of the regulatory-protective fees to be examined here is a levy that till 2025, was related to the modernisation of water collection networks (French: *redevances pour modernisation des réseaux de collecte*). But after the already mentioned reform, from February 2025, the way of regulating this fee was changed in order to divide it into two sub-fees related to the performance of drinking water networks and for the performance of collective sanitation systems (French: *Redevances pour la performance des réseaux d'eau potable et pour la performance des systèmes d'assainissement collectif*). As in the version in force before the reform, this type of fees is regulated in detail by the provisions of Articles L213-10-5 to L213-10-7 CDL. The presented reform is a result of the discussion in the French doctrine related to the need to adapt the social and financial contributions to the current economic changes.²⁹

Thus, in line with Articles L213-10-5, municipalities or their public institutions responsible for the distribution of drinking water, as referred to in Article L2224-7-1 of the General Code of Local Authorities, are subject to the drinking water network performance fee. The chargeable event occurs at the end of the calendar year in which the water distributed was billed to persons subscribing to the drinking water service. The basis for the fee is the volume of water billed during the calendar year referred to persons subscribing to the drinking water service,

²⁷ Elżbieta Zębek, Michał Mariański, 'Opłaty związane z zanieczyszczeniem wód we Francji i w Polsce. Analiza porównawcza' (2025) 1 *Prawo i Więź* (in print).

²⁸ Fr. LOI n° 2025-127 du 14 février 2025 de finances pour 2025, JORF (Journal of Laws) n°0039 du 15 février 2025.

²⁹ Marie Tsanga Tabi, 'La tarification sociale de l'eau au regard des droits humains : vers une stratégie de service essentiel ?' (2024) 41(2), *Politiques & management public*, 189; Monica Cardillo, Frantz Mynard, L'eau et l'impôt sur l'eau : regards croisés entre droit français et histoire du droit colonial in Éric De Mari and Dominique Taurisson-Mouret (eds), *Fiscalité contre nature : L'impact environnemental de la norme en milieu contraint IV Exemples de droit colonial et analogies contemporaines* (ediSens 2020) 131.

pursuant to Article L 2224-12-1 of the General Code of Local Authorities. When this billing does not include a term proportional to the volume of water distributed and in the absence of metering of the water distributed, the basis is calculated according to a fixed amount per inhabitant, that is, between 50 and 70 cubic meters per inhabitant, which is determined by order of the Minister responsible for the environment.

According to point IV of Article L213-10-5, the amount of the fee is composed of three different factors. First is the assessment base related to the volume of water billed during the calendar year. Second is the rate determined by the water agency, under the conditions set out in Article L 213-9-1, up to a limit of one euro per cubic meter. Third is the overall modulation coefficient that is defined by the French legislator and composed of the performance coefficient and the asset management coefficient. What is important is that for each taxpayer, the value of these coefficients is set by the relevant water agency. In point V of the present article, it is also specified that amounts relating to post-meter leaks for drinking water service subscribers are subject to a tax reduction.³⁰

The actual version of Article L213-10-6 regulated the second type of fee that replaced the fee modernisation of water collection networks (French: *redevances pour modernisation des réseaux de collecte*). Namely, municipalities or their public institutions responsible for wastewater treatment are subject to the performance fee for collective sanitation systems. This fee does not apply to collective sanitation systems whose gross organic pollution load is less than 20 population equivalents, within the meaning of Article 2(6) of Council Directive 91/271/EEC of 21 May 1991 concerning urban wastewater treatment. According to point II of Article L213-10-6, this chargeable event occurs at the end of the calendar year during which the water discharged into the public wastewater collection systems was billed. Moreover, the basis for the fee is the volume of water taken into account for calculating the sanitation fee referred to in Article L2224-12-2 of the General Code of Local Authorities, when billed to users of the collective sanitation service during the calendar year. When collective sanitation fees are not calculated on the basis of volume, the basis for the fee for the performance of collective sanitation systems is calculated according to a fixed rate per capita, that is also between 50 and 70 cubic meters per inhabitant per year.

Like the previous one, the amount of the fee is composed of three different factors. It is worth noting that the difference in the fee related to the performance of drinking water networks is related to the fact that the overall modulation

³⁰ The conditions for the application of the aforementioned articles are set out in the decrees of the French Supreme Administrative Court (French: *Conseil d'Etat*).

coefficient has different components. The parts are: self-monitoring coefficient, regulatory compliance coefficient, and efficiency coefficient. What is more, for each taxpayer, the value of these coefficients is determined by the relevant water agency based on the declared data, self-monitoring validation, and regulatory compliance.³¹

Finally, Article L213-10-7, which is common for the two above-mentioned sub-fees related to the performance of drinking water networks and for the performance of collective sanitation systems, states that the conditions for the application of the aforementioned articles are set out in the decrees of the French Supreme Administrative Court (French: *Conseil d'Etat*). Also, in this article, it is stated that water agencies set the rates for the drinking water network performance fee and the collective sanitation system performance fee so that their projected revenue does not exceed 50% of the projected revenue from the drinking water consumption fee provided for in Article L 213-10-4. When the revenue generated by these fees exceeds this threshold, the water agency adjusts the rates for the drinking water network performance fee, the collective sanitation system performance fee, or the drinking water consumption fee accordingly.

Another regulatory-protective instrument is the fee for diffuse pollution (French: *redevances pour pollutions diffuses*), regulated under Article L213-10-8 CDL. Following the 2020 amendment,³² the fee applies to persons – except those engaged in professional activities exempted under Article L254-1 or L254-6 of the Rural and Marine Fisheries Code – who purchase a plant protection product within the meaning of Articles 1 and 2 of Regulation (EC) No 1107/2009 or seeds coated with such products, or have seed treated using these products. The fee is based on the weight of the substances contained in the products listed above, which is further enumerated in six points. Point one refers to substances in the hazard class provided for in Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006. Point two invokes the substances classified, due to their acute toxicity, into categories 1, 2 or 3 or, due to their specific toxicity to certain target organs, into category 1, as a result of a single or repeated exposure, or due to their effects on breastfeeding or through breastfeeding, into the hazard classes provided for in the aforementioned Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16

³¹ Amounts relating to post-meter leaks for drinking water service subscribers are subject to a tax reduction.

³² Fr. loi n° 2020-1721 du 29 décembre 2020 de finances pour 2021, JORF (Journal of Laws) n°0315 du 30 décembre 2020.

December 2008. Point three concerns the substances classified into category 1 due to acute aquatic toxicity or, due to chronic aquatic toxicity, into category 1 or 2, in the hazard classes provided for in the Regulation of the European Parliament and of the Council (EC) No 1272/2008 of 16 December 2008. Point four applies to substances which, due to their chronic aquatic toxicity, belong to category 3 or 4 in the hazard class provided for in Regulation No 1272/2008. Point five covers the substances which do not meet the criteria of Sections 3.6 and 3.7 of Annex II to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC but are still marketed. Finally, point six refers to the substances whose substitution is approached within the meaning of Article 24 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009. Depending on which of the above groups a given substance is classified into, the rate of the fee expressed in EUR/kg is determined in accordance with the table indicated by the legislator. The rate ranges from EUR 0.9 per kilogram for the fourth group up to EUR 9 per kilogram for the first group of substances.³³ According to Section IV, Article L213-10-8 CDL, the event that gives rise to the fee is either the purchase of products or treated seeds for a fee or free of charge, or ordering seed treatment from a service provider and the purchase of products or treated seeds, whether for a fee or free of charge. Furthermore, in their invoices, the distributors of plant protection products are required to show the amount of the fee that they have paid for the distributed product, with the exception of the products distributed with the label 'authorised use in gardens'. The registers provided for in Article L 254-3-1 and Article L 254-6 of the Rural and Marine Fisheries Code also list the elements required to calculate the base of the fee and, where applicable, the invoice recipients and the corresponding amounts of the license fees. Such registers are made available to water agencies and administrative authorities. In this case as well, the decrees of the French Supreme Administrative Court determine the conditions in which the aforementioned articles are to be applied.

The third form of levy is the water resource abstraction fee (French: *redevances pour prélèvement sur la ressource en eau*), provided for in Article L213-10-9 CDL. In Section I, the Article states that any person whose activities result in the abstraction of water resources is subject to this fee. Subsequently, Section II cites a catalogue of exemptions consisting of seven items, including: samples taken at sea; dewatering of mines that have ceased to operate, and samples necessary

³³ At the same time, if a substance belongs to several categories listed in Sections 1–4, the applicable fee rate is the one charged for the highest of the aforementioned categories to which the substance belongs. Likewise, if a substance belongs to several categories listed in Sections 5 and 6, the applicable fee rate is the one charged for the highest of the above categories.

in the performance of underground works;³⁴ abstraction relating to aquaculture; sampling associated with geothermal energy; sampling outside the low season for works aimed at replenishing the natural environment; withdrawal related to frost protection of perennial crops; and up to a maximum of 5,000 m³ per fountain, where such consumption is intended solely for the water supply of historic fountains located in mountainous areas.³⁵ This fee, in accordance with Section II of Article L213-10-9, is calculated based on the volume of water withdrawn during the year, whereby if a person has a well used for water supply, they are obligated to install a water metering device.³⁶ In addition, the water agency establishes the volume thresholds below which the fee is not due. These volumes may not exceed 10,000 cubic meters per year for withdrawals from category 1 resources and 7,000 cubic meters per year for withdrawals from category 2 resources. In order to determine the rate of the fee, water resources in each river basin are classified as category 1 if they are located outside the water distribution zones defined under Article L211-2 CDL, or as category 2 for other resources. The rate of the fee is set by the water agency in euro cents per cubic meter, within the statutory ceilings, depending on the different purposes of intake.³⁷ In addition to the extent of double the maximum price stipulated in that article, public territorial bodies referred to in Article L213-12 may request the water agency to develop a plan for the management of the water resources in which they are involved. An interesting provision is also formulated in Section VI of the Article in question, as it sanctions certain special methods for calculating the fee. Such special arrangements may be applied, in particular, to abstraction intended for several uses, where the fee may be calculated proportionately to the volumes withdrawn for each use. Another example is when an intake is intended to feed a canal, and the fee may be calculated on the volume of water from that intake minus the volumes taken from the canal. The final special case is abstraction for the purpose of operating a hydroelectric system.³⁸ Here as well, detailed conditions for the application of the regulations cited above are decreed by the *Conseil d'Etat*.

³⁴ Including samples taken during dewatering, which is carried out to keep buildings or structures dry or to lower the water table in accordance with an administrative ordinance.

³⁵ Such fountains are considered historic when their construction dates before 1950.

³⁶ If the taxpayer does not meter the samples, the fee is determined on a fixed volume, calculated taking into account the proven nature or impossibility of measurement and the volumes characteristic of the activity, established on the basis of general measurement campaigns or tests based on representative samples.

³⁷ Thus, the rates for irrigation are 3.6 (Cat.1) and 7.2, respectively; for gravity irrigation, 0.5 and 1; for potable water supply, 7.2 and 14.4; for industrial cooling, 0.5 and 1; for canal supply, 0.03 and 0.06; and for other economic use, 5.4 and 10.8, respectively.

³⁸ In this case, the fee may be determined by comparing the annual volume of turbine water in cubic meters and the total gross discharge from the system, expressed in meters.

The fourth regulatory-protective instrument is the fee for the storage of water during periods of low water (French: *redevance pour stockage d'eau en période d'étiage*), regulated in Article L213-10-10 CDL. This fee applies to any person who owns a storage tank with a capacity of more than 1,000,000 cubic meters, which holds the entirety or part of the volume flowing into a watercourse during periods of low water. The fee is based on the volume of water stored during the low period. This volume is equal to the difference between the volume stored at the end of the period and the volume stored at the beginning of the period. The base of the fee does not include the volume stored during floods at intervals exceeding five years and removed from storage within thirty days from the date when the maximum flood level is reached. The water agency determines the low period for each basin in accordance with the flow regime of watercourses. The rate of this licence fee is set by the water agency at EUR 0.01 per cubic meter, while the decrees of the French Supreme Administrative Court (*Conseil d'Etat*) detail the conditions for the application of Article L213-10-10 CDL.

Finally, the fifth regulatory-protective fee is charged to protect the aquatic environment (French: *redevance pour protection du milieu aquatique*), and is regulated in Article L213-10-12 CDL. This levy, after the reform from February 2025, was renamed to hunting fee and fee for the protection of the aquatic environment (French: *Redevances cynégétique et pour protection du milieu aquatique*). This contribution is collected by structures designated by the French lawmaker, such as departmental or interdepartmental federations of approved fishing and aquatic conservation associations, approved associations of amateur fishermen using gear and nets, the Grande Brière Mottière union committee, and approved professional freshwater fishing associations. The fee is set annually by the water agency, within the following limits: 10 EUR per adult fishing for a year; 4 EUR per person fishing for seven consecutive days; 1 EUR per person per day of fishing; an annual additional fee of EUR 20 per person fishing for eel, salmon and sea trout fry. All the activities to which the fees apply should be carried out within the framework of the structures listed in the first paragraph of said Article.

4. CONCLUSIONS

The above comparative analysis of fees introduced in France and Poland as a means of regulating and protecting water resources has demonstrated many similarities and innovative solutions that legislators may take into consideration with prospective applications in mind.

It is important to note that both quantitative and qualitative analyses reveal many similarities. Polish law provides for four types of fees, while French law has previously introduced five, and finally, after the 2025 reform, six contributions. The scope of these fees largely overlaps and pertains to similar activities, despite the fact that some charges were excluded from the scope of this article. But it is worth noting that in France, water abstraction relating to aquaculture is exempted from the water resource abstraction fee, while in Poland, there is a charge for the abstraction of water for fishing farms. In Poland, fees are charged for the abstraction of ground- and surface water, including for the needs of fish farms, the extraction of materials from surface waters and the reduction of natural terrain retention. In France, on the other hand, fees are exacted for the modernisation of water collection networks, intake from water resources, water storage during periods of low water or the protection of the aquatic environment. Thus, in both legal systems, the fees have both a regulatory and protective function since their amounts are determined by the quantities used, which undoubtedly also affects the quality of such waters, and they also directly involve the protection of aquatic ecosystems. Thus, a user of the environment has a choice between implementing conservation and protection measures or paying higher charges. In order for charges to fulfil their function of encouraging companies to invest in water protection, their rates should be set at such a level that the reduction in the amount of charges paid by the company in connection with the implementation of projects that reduce the use of resources, in this case water and its pollution, is equal to or greater than the cost of operating such a project. Therefore, only a sufficiently high level of charges will ensure the fulfilment of their incentive function.³⁹ The water abstraction charge should, therefore, be seen as a tax on the natural resource used rather than an environmental charge for the service received. This is not obvious because this type of charge is counted as a charge for water services. However, this is in line with the environmental strategy of economical and rational use of water resources (especially water of the highest quality), even if some water resources may be considered as renewable.⁴⁰

In addition, water resource-related fees are governed under a single legal act in both countries, i.e., by the French Environmental Code and the Polish Water Law, respectively. The analysed fees remain in line with the superior principle of rectifying environmental damage, according to which it is the polluter who pays for the damage caused. Moreover, such fees act as an incentive, encouraging the use of technologies that have the least possible negative impact on the environment.

³⁹ Rafał Miłaszewski, Ewa Rauba, 'Określanie opłat za usługi wodne zgodnie z wymaganiami Ramowej Dyrektywy Wodnej Unii Europejskiej' (2010) *Ekonomia i Środowisko* No 2, 68.

⁴⁰ Jerzy Śleszyński, 'Podatki środowiskowe i podział na grupy podatków według metodyki Eurostatu', 63.

Another feature that Polish and French law share is that the collection of the fees is entrusted to a single body, i.e., the State Water Holding Polish Waters and the Water Agency, respectively.⁴¹

The above similarities notwithstanding, French law demonstrates much greater flexibility in the adopted regulations, which manifests in two main aspects. Thus, despite functioning within the framework of EU regulations, Polish and French law have some differences in the way they regulate the matter in question. The first is that the Water Agencies are statutorily given fairly significant discretion when setting the final rates of fees, which, in certain cases, allows this body to deviate from the general rules laid down by the legislator, for instance, with regard to charging fees for the extraction from water resources. Second, in contrast to Polish law, French legislation makes it possible for numerous details relating to the collection of fees to be specified in the course of the practical application of the law. Namely, should the need arise to clarify the regulations concerning any of the fees, statutory competence to issue pertinent decrees has been granted to the French Supreme Administrative Court (French: *Conseil d'Etat*). This solution is particularly compelling because it highlights the significance of case law within a legal system while also drawing parallels to the principles found in precedent and common law. In this respect, the French judiciary, which witnesses constant change, notably in the financial branch,⁴² exemplifies the paradigm of support and cooperation between the executive and the judiciary.⁴³ The primary goal of such cooperation is to make regulations more practical.⁴⁴ The example of this action in the French system may be the reform from February 2025, where some previous fees (for domestic pollution and one for the modernisation of collection networks) were replaced by three new fees: on water consumption, related to the performance of drinking water networks and a third related to the performance of collective sanitation systems. This reform was one of the elements of broader changes in French law, related to the constant need to adapt the existing regulations to current social and technological progress.⁴⁵

⁴¹ Mariusz Rogulski, 'System opłat za korzystanie ze środowiska w Polsce' (2014) 39 *Ekonomia* 125.

⁴² Michał Mariański, 'Institutional changes in the French financial judiciary' (2024) 103 *Studia Iuridica*, 102.

⁴³ Stanisław Bożyk, 'Wspomaganie parlamentu przez Trybunał Obrachunkowy we Francji. Aktualne problemy reform konstytucyjnych', (1st edition Temida 2, 2013), 337.

⁴⁴ Michał Mariański, 'Wybrane problemy jednostek samorządu terytorialnego związane ze stosowaniem prawa finansowego w realizowanej polityce finansowej we Francji', (2024) 6 *Finanse Komunalne* 24.

⁴⁵ Émilie Moysan, 'La tarification sociale de l'eau. Dans L'eau dans tous ses états : Enjeux politiques, juridiques et économiques' (2024). 110 Presses universitaires de Grenoble 100; Franck Blettery,

Moreover, thanks to translations of phrases, institutions and constructions of French law, this publication may be used not only by practitioners and legal theorists but also by persons who use French daily. Here, special attention should be drawn to the role of the French *Conseil d'Etat*,⁴⁶ also in the domain of financial law and tax law, as its prerogatives differ significantly from its Polish counterpart, the Supreme Administrative Court.⁴⁷

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⁴⁶ Bernard Beignier, Roger Perrot, Yves Strickler, *Institutions juridictionnelles*, (LGDJ 2024) 202.

⁴⁷ Marcin Kamiński, 'The Administrative Judiciary Reforms in Poland' (2022) 98 *Acta Universitatis Lodziensis. Folia Iuridica*, 171.

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